

Second Order Amending Order of Commissioner of Finance

Relating to Use and Sale of State Bond Financed Property

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IT IS HEREBY ORDERED by the Commissioner of Minnesota Management and Budget of the State of Minnesota (f/k/a Commissioner of Finance of the State of Minnesota) that the Commissioner's Order entitled "Order of Commissioner of Finance Relating to Use and Sale of State Bond Financed Property" dated July 14, 1994, as subsequently amended by the Commissioner's Order entitled "Order Amending Order of Commissioner of Finance Relating to Use and Sale of State Bond Financed Property" dated July 20, 2005, be further amended to read as follows:

Section 1. Authorization and Purpose.

1.01. **Authorization.** This Order is adopted pursuant to the Act for the purpose of establishing requirements to be complied with by Public Officers and Agencies regarding GO Grants and relating to the use or sale of State Bond Financed Property.

1.02. **Purpose.** The purpose of this Order is to ensure that the proceeds of State General Obligation Bonds are used solely for the purposes delineated in the corresponding Bonding Legislation, and that the interest to be paid on such bonds is and will continue to be (whenever possible) exempt from federal income taxation. Essentially, State General Obligation Bonds can be issued only to finance the acquisition and betterment of publicly owned land, buildings or betterments to be used to conduct governmental programs of the State and its instrumentalities and political subdivisions. Where State General Obligation Bonds are to be issued to finance property that is to be leased, managed, operated or otherwise used by a Non-Public Party, or where State Bond Financed Property is to be sold to a Non-Public Party, questions may arise as to the legality and tax-exempt status of the State General Obligation Bonds. Accordingly, the requirements set forth herein are to be complied with by a Public Officer or Agency as to any GO Grant it receives, its operation of any State Bond Financed Property, its entering into lease, management or other similar contracts relating to the use of State Bond

Financed Property, and in its sale of State Bond Financed Property in order to ensure the legality and tax-exempt status of the State General Obligation Bonds.

Section 2. **Definitions.** For purposes of this Order the terms defined in this Section shall have the meanings given to them in this Section.

2.01. “**Act**” means Minnesota Statutes, Section 16A.695, as such may be amended, modified or otherwise restated.

2.02. “**Bonding Legislation**” means the legislation that authorizes the issuance of the State General Obligation Bonds and the making of the GO Grant, or creates a program under which a GO Grant is made.

2.03. “**Code**” means the Internal Revenue Code of 1986, as amended from time to time, and all treasury regulations, revenue procedures and revenue rulings issued pursuant thereto.

2.04. “**Commissioner**” means the Commissioner of Minnesota Management and Budget of the State of Minnesota, or his or her designated representative.

2.05. “**Counterparty**” means any entity with which a Public Officer or Agency contracts under a Use Contract.

2.06. “**Fair Market Value**” means the price that would be paid by a willing and qualified buyer to a willing and qualified seller as determined by an appraisal of the property that assumes that all liens and encumbrances on the property being sold that negatively affect the value of such property will be paid and released, or the bid price by a purchaser under a public bid procedure after reasonable public notice that assumes that all liens and encumbrances on the property being sold that negatively affect the value of such property will be paid and released.

2.07. “**GO Grant**” means a grant or loan funded with the proceeds of State General Obligation Bonds.

2.08. “**Non-Public Party**” means a private person or entity.

2.09. “**Order**” means this Second Order Amending Order of Commissioner of Finance Relating to Use and Sale of State Bond Financed Property.

2.10. “**Public Officer or Agency**” means an entity specifically identified in the Bonding Legislation or selected through a program administered by the State as the recipient of the GO Grant, which must be a state officer or agency, the University of Minnesota, the Minnesota Historical Society, and any county, home rule charter or statutory city, school district, special purpose district, or any other public entity, or any officer or employee thereof. It does not and may not include the United States or any agency or instrumentality of the United States.

2.11. “**State**” means the State of Minnesota.

2.12. “**State Bond Financed Property**” means ownership of an interest, as described in Section 3.03, in property acquired or bettered in whole or in part with the proceeds of State General Obligation Bonds.

2.13. “**State General Obligation Bonds**” mean general obligation bonds of the State that are authorized by the legislature to be issued under Article XI, Section 5, clause (a) of the Minnesota Constitution, or any bonds issued to refund those bonds, the proceeds of which are used to fund a GO Grant.

2.14. “**Use Contract**” - means a lease, management contract or other similar contract relating to State Bond Financed Property, between a Public Officer or Agency that owns or has jurisdiction over the property and another entity as a Counterparty under such lease, management contract or other similar contract.

Section 3. **Application.** This Order shall apply only as provided in this Section, and the provisions of Sections 4 through 7 are subject to the provisions of this Section.

3.01. **In General.** This Order applies to transactions involving State Bond Financed Property, regardless of when acquired or bettered, unless otherwise provided by law, or unless such application would impair a contract entered into pursuant to law, which contract was in effect on May 17, 1994.

3.02. **Operation of the State Bond Financed Property.** State Bond Financed Property must be operated by the Public Officer or Agency for the governmental program or purpose for which the GO Grant is made. If a Public Officer or Agency has specific statutory authority, then it may contract with another entity to have such entity operate the required governmental program in the State Bond Financed Property.

3.03. **Ownership Interest.** A Public Officer or Agency that is the recipient of a GO Grant must have a qualifying ownership interest in the State Bond Financed Property, which may be in the form of fee ownership, or a lessee’s or grantee’s interest in a qualifying long term lease or easement. A qualifying long term lease or easement must (i) create the functional equivalency of fee ownership for the length of its term, and (ii) be for a term that is equal to or greater than 125% of the useful life of the property that is the subject thereof, or such other period of time specifically authorized by a Minnesota statute, rule or session law. The Public Officer or Agency must be the lessee or grantee under the qualifying long-term lease or easement.

3.04. **Term.** State Bond Financed Property shall be subject to the Act and this Order for a time period equal to 125% of the useful life of the State Bond Financed Property or until such property is sold in accordance with Section 5, and thereafter such property shall no longer be State Bond Financed Property.

Section 4. **Requirements for Use Contracts.**

4.01. **Statutory Authorization.**

(a) A Use Contract can be entered into only where authorized by state law other than the Act; the Act itself does not authorize, but only regulates, such contracts.

(b) A Use Contract must comply with the substantive and procedural provisions of the state law authorizing it, the Act, and the requirements of this Order.

4.02. **Requirements for Use Contracts.** Use Contracts must fully comply with all of the following requirements.

(a) A Use Contract must be entered into for the express purpose of carrying out a governmental program established by law or authorized by law and established by official action of the contracting Public Officer or Agency. The governmental program, its purpose, and the statutory authority for the governmental program must be specifically set forth in the Use Contract.

(b) The term of a Use Contract, including all renewal terms that are solely at the option of the Counterparty, shall be substantially less than the useful life of the property to which it relates. Ordinarily a Use Contract term not exceeding 50% of the useful life of the property to which it relates will be considered to be for a period substantially less than the useful life of such property. A Use Contract may allow renewal beyond the end of the original (or any previous renewal) term during the last six (6) months of an existing term, upon determination by the Public Officer or Agency by official action that such renewal is necessary or desirable to continue to carry out the governmental program to be operated under the Use Contract and that the Public Officer or Agency wants the Counterparty to continue in the Use Contract. Under extraordinary circumstances the Commissioner may, at its sole option and discretion, authorize a renewal prior to the last six (6) months of an existing term upon compliance with all other requirements.

(c) A Use Contract must provide for program oversight by the Public Officer or Agency. This requirement will be deemed to have been satisfied if the Use Contract requires the Counterparty to provide to the Public Officer or Agency an initial program implementation plan and, at least annually, a program evaluation report and a program budget showing program revenues and expenses.

(d) A Use Contract must allow for termination by the Public Officer or Agency in the event of default by the Counterparty or in the event the governmental program is terminated or changed, and may provide for notice of default for a specified period which is reasonable under the circumstances prior to termination.

(e) A Use Contract must require the Counterparty to pay all costs of operation and maintenance of the property to which it relates, unless the Public Officer or Agency is authorized and agrees to pay such costs pursuant to state law. A Use Contract need not require the Counterparty to pay to the Public Officer or Agency any compensation for use of the property to which it relates unless required by a state law other than the Act or by the Commissioner.

(f) A percentage of all moneys received by a Public Officer or Agency pursuant to a Use Contract in excess of the amount needed and authorized to be used to pay operating costs of the property to which it relates, or to pay the principal, interest, redemption premiums, and other expenses when due on debt related to such property other than State General Obligation Bonds, must be paid to the Commissioner by the Public Officer or Agency. Such percentage shall be determined by the Commissioner and, absent circumstances which would indicate a different method, will be determined by dividing the total principal amount of all GO Grants issued with respect to such property by the total principal amount of all public debt financing incurred with respect to such property by the Public Officer or Agency (other than debt issued by the Public

Officer or Agency for which it has no financial liability), without regard to the amount of GO Grants outstanding at any time.

4.03. Approval by Commissioner.

(a) No Public Officer or Agency shall enter into a Use Contract, or the renewal or amendment of an existing Use Contract, without the prior written approval of the Commissioner.

(b) Proposed Use Contracts, renewals and amendments of a Use Contract, and the related information described below, should be submitted to the Commissioner not less than 60 days before their proposed date of execution. Such related information should include, if not evident from the Use Contract: (i) the state law authorizing the Public Officer or Agency to enter into the Use Contract, (ii) the name, address, nature, financial condition, and reason for selection of the Counterparty, (iii) the initial or current program implementation plan and budget (except in cases of leases of excess property), and (iv) other information deemed relevant by the Public Officer or Agency. The Commissioner will endeavor to provide approvals or comments requiring any changes needed within a reasonable period after receipt of the proposed Use Contract and the related information, but failure to approve or provide comments on a proposed Use Contract shall not constitute approval.

4.04. Tax Considerations. The Public Officer or Agency shall, upon direction by the Commissioner, take, and/or require the Counterparty to take, such actions and furnish such documents to the Commissioner as the Commissioner determines to be necessary to ensure that the interest to be paid on the State General Obligation Bonds issued to finance the property to which the Use Contract relates is exempt from federal income taxation. Such actions may include either: (i) compliance with procedures intended to classify the State General Obligation Bonds as a “qualified bond” within the meaning of Section 141(e) of the Code; or (ii) changing the nature and/or terms of the Use Contract so that it complies with the Code.

Section 5. Guidelines and Procedures for Sale of Bond Financed Property.

5.01. Authorization of Sales.

(a) State Bond Financed Property can be sold or transferred only where authorized by state law; the Act itself does not authorize, but only regulates, such transactions.

(b) A sale or transfer of State Bond Financed Property must comply with substantive and procedural provisions of the state law authorizing it, the Act, and the requirements of this Order.

5.02. Requirements for Sales. State Bond Financed Property may only be sold or transferred in accordance with the following provisions.

(a) Except as provided in subparagraphs (b) and (d) of this Section 5.02, no Public Officer or Agency shall sell or transfer any interest in State Bond Financed Property unless the Public Officer or Agency first determines by official action that the property is no longer useable or needed to carry out the governmental program for which

it was acquired, constructed, or bettered, and the sale is made for Fair Market Value and approved by the Commissioner.

(b) The acquisition of State Bond Financed Property by a lender in satisfaction of a debt, either by foreclosure sale or acceptance of a deed in lieu of foreclosure or by enforcement of a security interest, is not a sale; but a subsequent sale by the lender is subject to the Act and this Order and must be made as authorized by law and for Fair Market Value. While held by the lender the State Bond Financed Property shall not be operated in a manner inconsistent with the governmental program established with respect to the property. The lender shall exercise its best efforts to sell the State Bond Financed Property to a third party as soon as feasible following acquisition of marketable title to such property.

(c) When all of the net proceeds of sale of any State Bond Financed Property have been applied as provided in Section 5.04, then the Act and this Order will no longer apply to such property, and such property will no longer be considered to be State Bond Financed Property.

(d) State Bond Financed Property may be transferred by a Public Officer or Agency to another public entity for a nominal consideration where authorized by state law, if the transferor Public Officer or Agency determines by official action that the State Bond Financed Property to be transferred is no longer useable or needed to carry out the governmental program for which it was acquired or constructed and the transferee public entity determines by official action that the property is needed or useful for a governmental program of the transferee authorized in such state law, it is willing and able to operate such governmental program on or in such property, the official action is filed with the Commissioner, and the transferee public entity acknowledges and agrees that the operation and sale of the property by transferee is subject to the provisions of the Act and this Order.

(e) The provisions contained in Minnesota Statutes, Section 15.16 shall control over any inconsistent provisions contained in this Section 5.02. So much of the moneys transferred to a state department or agency as a result of the transfer of control of State Bond Financed Property as is necessary to pay and redeem or defease outstanding State General Obligation Bonds issued to finance the acquisition or betterment of the property, shall be transferred to the state bond fund and used for this purpose.

5.03. Approval by Commissioner.

(a) No Public Officer or Agency shall enter into a contract for the sale of State Bond Financed Property or any amendment thereto affecting the sale price without the written approval of the Commissioner.

(b) Proposed sale contracts and amendments, and the related information described below, should be submitted to the Commissioner not less than 60 days before their planned date of execution. Such related information should include, if not evident from the sale contract: (i) a specific reference to the state law that authorizes the sale, (ii) the name, address and nature, if known, of the purchaser, (iii) the proposed method of sale, (iv) the sale price and how it was determined, (v) any appraisal upon which the sale price is based, and (vi) other information deemed relevant by the Public Officer or

Agency. The Commissioner will endeavor to provide approvals or comments regarding any needed changes within a reasonable period after receipt of the proposed sale contract and the related information, but failure to approve or provide comments on a proposed sale contract shall not constitute approval.

5.04. Distribution of Sale Proceeds. The proceeds of a sale of State Bond Financed Property shall be distributed as follows if any State General Obligation Bonds remain outstanding or if all of the State General Obligation Bonds have been repaid or redeemed:

(a) If the State Bond Financed Property that is sold was acquired or bettered solely with the proceeds of State General Obligation Bonds, then all of the net proceeds of such sale shall be paid to the Commissioner.

(b) If the State Bond Financed Property that is sold was acquired or bettered partly with proceeds of State General Obligation Bonds and partly with other money, then the net proceeds of such sale shall be used: (i) first, to pay to the Commissioner an amount equal to that portion of any GO Grants relating to the State Bond Financed Property that have not already been repaid to the Commissioner; (ii) second, to pay in full any outstanding public or private debt incurred to acquire or better the State Bond Financed Property that was consented to in writing by the Commissioner; (iii) third, to reimburse public and private entities for their interest in the State Bond Financed Property and all betterments made thereto other than betterments paid for with proceeds of debt repaid under subparagraph (b)(ii) of this Section 5.04, and (iv) the remaining portion of such net proceeds shall be divided between or among and paid to the interested public and private parties, including the State, which provided money for such acquisition or betterment (other than any private lender already paid in full), in proportion to the amounts of money provided by them for such purpose.

Section 6. Matching Funds and Full Funding Requirement.

6.01. Full Funding of the Project. Notwithstanding any match requirements imposed by the Bonding Legislation, the Public Officer or Agency must establish to the Commissioner that in addition to the GO Grant it has available, or sufficient funds have been committed, to fully pay for the project as required by Minn. Stat. Sec. 16A.502.

6.02. Use of Loans and Letters of Credit. The proceeds of a loan or a letter of credit may be used to meet any matching or full funding requirement as long as any lien to secure repayment thereof acknowledges the existence of and is subordinate to the Public Officer's or Agency's interest in the State Bond Financed Property and the provisions contained in the grant or loan agreement referred to in Section 7.01.

6.03. Cost Savings. If the full amount of the GO Grant and any matching funds imposed by and contained in the Bonding Legislation are not needed, then, unless language in the Bonding Legislation indicates otherwise, the GO Grant shall be reduced by the amount not needed.

Section 7. Grant and Loan Agreements; Title Records.

7.01. Grant and Loan Agreements. Every state officer or agency to which proceeds of State General Obligation Bonds are appropriated to fund a GO Grant to a Public Officer or Agency shall enter into a grant or loan agreement with respect to such

proceeds whereby the Public Officer or Agency acknowledges that the operation, use, sale and transfer of the State Bond Financed Property are subject to the provisions of the Act and this Order, and that such property shall not be used or operated in any manner that would cause the interest on the State General Obligation Bonds to be or become subject to federal income taxation, due to their classification as “private activity bonds” within the meaning of Section 141 of the Code, or as “arbitrage bonds” within the meaning of Section 148 of the Code, or for any other reason.

7.02. **Title Records.** Every Public Officer or Agency that expends any portion of a GO Grant to acquire or better real property shall, not later than 30 days after the first such expenditure or as soon thereafter as practical, cause to be recorded in the official real estate title records maintained by the county recorder for the county or counties in which such property is located, a declaration or other appropriate instrument in the form or substantially the same form attached hereto as Exhibit 1. Upon full compliance with the provisions of this Order and when appropriate, upon request, the Commissioner shall execute and deliver to the party requesting it, a written release evidencing the release of the subject property from the provisions of the Act and this Order.

Section 8. Amendments; Publication; Effective Date.

8.01. **Amendments.** The Commissioner retains the right to amend this Order at any time as necessary to accomplish the purposes of the Act.

8.02. **Publication.** The Commissioner intends to publish this Order and any amendments thereto in such manner and at such times as are likely to provide access to its contents by all affected persons, but the Order or any amendment shall be effective upon its issuance without regard to its publication.

8.03. **Effective Date.** This Order is effective as of its date of execution set forth below.

Executed March 9, 2010

Tom J. Hanson

Tom J. Hanson, Commissioner
Minnesota Management and Budget

Exhibit I

**State of Minnesota
General Obligation Bond Financed Property
DECLARATION**

The undersigned has the following interest in the real property located in the County of _____, State of Minnesota that is legally described in **Exhibit A** attached and all facilities situated thereon (collectively, the “Restricted Property”):

(Check the appropriate box.)

- a fee simple title,
- a lease, or
- an easement,

and as owner of such fee title, lease or easement, does hereby declare that such interest in the Restricted Property is made subject to the following restrictions and encumbrances:

- A. The Restricted Property is bond financed property within the meaning of Minn. Stat. Sec. 16A.695 that exists as of the effective date of the grant agreement identified in paragraph B below, is subject to the encumbrance created and requirements imposed by such statutory provision, and cannot be sold, mortgaged, encumbered or otherwise disposed of without the approval of the Commissioner of Minnesota Management and Budget, or its successor, which approval must be evidenced by a written statement signed by said commissioner and attached to the deed, mortgage, encumbrance or instrument used to sell or otherwise dispose of the Restricted Property; and
- B. The Restricted Property is subject to all of the terms, conditions, provisions, and limitations contained in that certain _____ [Insert title of the general obligation grant agreement] between _____ and _____, dated _____, ____ (the “G.O. Grant Agreement”).

The Restricted Property shall remain subject to this State of Minnesota General Obligation Bond Financed Declaration for as long as the G.O. Grant Agreement is in force and effect, at which time it shall be released therefrom by way of a written release in recordable form signed by both the Commissioner of _____ [Insert the name of the State Entity that provided the grant] and the Commissioner of Minnesota Management and Budget, or their successors, and such written release is recorded in the real estate records relating to the Restricted Property. This Declaration may not be terminated, amended, or in any way modified without the specific written consent of the Commissioner of Minnesota Management and Budget, or his or her successor.

(SIGNATURE BLOCK, ACKNOWLEDGMENTS, AND STATEMENT AS TO WHOM IT WAS DRAFTED BY.)