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January 12, 2024

To: County Board of Supervisors
Fr: Carlos Pabellón, Corporation Counsel
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Re: Airport Joint Use Agreement, 23-RES-168

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The purpose of this memo is to provide an update on the status of the Airport Joint Use Agreement that is currently being considered by the County Board for approval. As further explained below, Airport administration, following our advice, determined that engaging the National Guard with further written requests for modifications would be futile, and would potentially undermine the County's legal position in the future.

On December 21, 2023, the Board considered 23-Res-168. The resolution sought the Board's approval to execute the Airport Joint Use Agreement ("AJUA") between the County and the National Guard. During debate, a motion to postpone was made and ultimately approved. The impetus for the motion was to provide time for our office to offer further language modifications to the National Guard related to the indemnification language set forth in Section 8(b) of the AJUA. The requested modifications were to propose language that would state that the indemnification in 8(b) would only apply to non-military crashes where AFFF is used, and language that would explicitly state that the indemnification provisions would only apply prospectively.

It is important to note that the Board's request to make changes to the AJUA was not the first time that such a request was made. During committee consideration, a number of Supervisors had also requested modifications to the AJUA. Although Airport administration had been advised by our office that the authority to negotiate contracts was an exclusively executive function, they nevertheless reached out to National Guard representatives to determine if further changes could be made. These requests were ultimately rejected, and National Guard representatives repeated that they were not interested in negotiating other terms.

After the meeting on December 21, 2023, Airport administration and our office discussed the Board's most recent request. Based upon our advice, Airport administration ultimately decided not to authorize the written submission of additional language to the National Guard. Our advice was based upon the following.

First, it is our opinion that edits to the AJUA that seek to limit the indemnification language of Section 8(b) to non-military crashes where AFFF is used is unnecessary. The indemnification clause already states that it indemnifies for claims arising from services "to civil aircraft" and "to the County." That language limits the scope of the clause to consequences flowing from service to the County. This interpretation is wholly consistent with the limited purpose and scope of the AJUA, for the Guard to pay the County for "substantial use" of its airport facilities and share responsibilities for maintenance of those facilities. Recall that under federal law, the Guard has the right to use the Airport, free of charge, and does not require an AJUA to do so. The AJUA is the means for the Guard to pay the County for its "substantial use," a term defined by statute. Nothing more. The Guard is paying for that substantial use by providing in-kind services, specifically crash and firefighting services.

Second, the Guard has been firm in stating that the indemnification clause is not negotiable. Given that, we stand to gain nothing by seeking further negotiation and instead risk eroding the County's interests. At present, the Guard's attorney and a 115th Fighter Wing representative have assured County staff through emails that the clause is intended to indemnify for services provided to civil aircraft and the Airport. They have also made clear that the AJUA has nothing to do with the Guard's remediation of past hazardous substance releases at the Airport, which is being addressed in accordance with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). If we were to ask for language making those points more explicit in the indemnification clause, it is certain that their response will be the same: the clause is not negotiable. However, the record would then show that the Guard denied a request to clarify that the clause is prospective and excludes military aircraft incidents. Questions surrounding the reasons behind the Guard's denial could complicate the interpretation of Section 8(b) of the AJUA if a dispute were to arise.

Importantly, in the event of a dispute, the purpose of the AJUA would be the first and primary point a court would rely on to interpret the indemnification clause. To determine the meaning of any disputed term in a contract, a court is obligated to interpret the language in the context of the agreement as a whole, including its purpose. This is part of the analysis to decide whether disputed language is ambiguous. A court should not find language ambiguous based on a suggested interpretation that is inconsistent with the agreement's purpose. A claim that the indemnity clause means that the County must pay for remediation of all PFAS impacts at the Airport, including those resulting from the Guard's military activities, would be entirely inconsistent with the purpose. It would require finding that the County agreed to take responsibility for the Guard's PFAS impacts, in addition to its own, in an agreement designed to make the County whole. It would not be reasonable, indeed would be unconscionable (another standard courts apply), to conclude that the County agreed to assume such additional responsibility in that context. Supporting this analysis is the fact that courts disfavor interpretation of indemnity clauses that protect a party from their own liability.

Given the above-noted analysis, it is highly improbable that a court would consider any interpretation that claims the indemnity clause transfers to the County obligation for all PFAS remediation or other effects from military operations consistent with the AJUA's purpose. Nonetheless, assuming for the sake of argument, that such a claim were made and a court agreed there was a reasonable basis to find ambiguity, the next step of the legal analysis would be to look at extrinsic evidence, which would include the Guard's representations that are consistent with the County's reasonable interpretation.

Some County Board Supervisors have expressed concerns that section 12e of the proposed AJUA would foreclose the County from relying on the Guard's representations. Rest assured, in the context of a contract interpretation analysis, such an argument would fail. Section 12e, which effectively states that the written contract constitutes the full agreement of the parties, is an integration clause. It protects against claims that the parties bargained for more or different terms than those set forth in the contract. Its application is separate from analysis of a term found to be ambiguous, which includes review of extrinsic evidence. Instead, based on the analysis above demonstrating the limited purpose of the AJUA, the 12e clause further strengthens the County's position that the indemnity clause is limited to protecting against risks arising from provision of firefighting services to the County, not more.

Please feel free to contact our office with any questions.