

32081

February 6, 2013

TO: Honorable Board of Acquisition and Contract

FROM: Jay T. Pisco, P.E.
Commissioner of Public Works and Transportation

Mary J. Mahon
Director of Real Estate

SUBJECT: Authority to enter into an agreement among the County of Westchester, Westchester Airport Associates L.P. and the County of Westchester Industrial Development Agency which will settle pending claims related to parking operations at Westchester County Airport.
(Agreement No. 13-903)

Authority of your Honorable Board is sought for an agreement (the "Settlement Agreement") among the County of Westchester (the "County"), Westchester Airport Associates L.P. ("WAA"), and the County of Westchester Industrial Development Agency (the "Agency") which will settle pending claims of the County and WAA related to parking operations at Westchester County Airport (the "Airport").

By way of background it should be noted that the County and WAA entered into an Agreement of Lease dated October 19, 1993, (the "Ground Lease") of certain property located at the Airport in connection with WAA's construction and operation of a parking garage thereon for a thirty (30) year term ending August 1, 2024. WAA thereafter assigned its interest in the Ground Lease to the Agency pursuant to the terms of an Assignment dated February 1, 1994 (the "Assignment"). The Agency subsequently entered into a Sublease and Assignment Agreement dated February 1, 1994 (the "Sublease"). The Ground Lease was thereafter amended by a First Amendment dated August 11, 1994 (the "First Amendment"), a Second Amendment dated May 23, 2001 (the "Second Amendment"), and a Third Amendment dated April 8, 2003.

On or about December 3, 2008 the County and WAA entered into a separate five (5) year license agreement for the operation of a 60,000 square foot Emergency Overflow Parking Lot (the "Overflow Parking Lot license"). The County also opened a certain cell phone waiting area (the "Cell Phone Lot") at the Airport in October 2007, without WAA's approval, which WAA maintains was required pursuant to the Ground Lease. The County maintains that WAA's approval was not required, as Cell Phone Lot is a waiting area, not a parking area. Additionally, the County created a website and erected certain illuminated signs at the Airport discouraging parking at the Airport, which WAA claims is in contravention of the Ground Lease and the County maintains was not in contravention of the Ground Lease and was for public safety purposes due to illegal roadside parking occurring during high Airport use periods.

Disputes have arisen over the payment of Excess Rent owed by WAA under the Ground Lease and the payment of fees owed under the Overflow Parking Lot license, as well as WAA's failure to timely file certified annual revenue reports required under section 2.2 of the Ground Lease and monthly detailed statements of revenue and expenses under section 4.1 of the Overflow Parking Lot license. It should be noted that during the recent settlement discussions, WAA provided overdue annual revenue reports for the Ground Lease and certain revenue information for the overflow lot. WAA has alleged that the opening of and operation of the Cell Phone Lot, the erection of the aforesaid signs, and the creation of the Airport website discouraging parking, are in violation of the terms of the Ground Lease and have caused WAA damages.

Pursuant to the terms of the proposed Settlement Agreement, all of the parties would mutually release each other from any claims related to public parking at the Airport through and including July 31, 2012. Specifically, as a compromise of the claim by the County for unpaid Excess Rent and the unpaid County share of revenue and WAA's unpaid costs and expenses under the Overflow Parking Lot license, and the settlement of all claims by WAA against the County for all damages and lost income that may have been caused by any action or failure to act by the County, WAA will pay the County the sum of \$10,416.67 (the "Monthly Payment") each month through July 2024, provided that the Monthly Payment will be adjusted annually by the change in the Consumer Price Index New York-Northern New Jersey-Long Island CPI-U (the "Index") over the prior year, but only to the extent the Index exceeds 3% per annum.

The Settlement Agreement will also provide that, subject to the necessary approval of the Federal Aviation Administration pursuant to 49 CFR §23.75, the parties will amend the Overflow Parking Lot license to, among other things, include the Cell Phone Lot as part of the Licensed Premises, charge for waiting in the Cell Phone Lot longer than 30 minutes, provide that all income earned from the Cell Phone Lot will be split 50/50 between WAA and the County, and extend the current five (5) year term of the Overflow Parking Lot license to a new expiration date of August 1, 2024, concurrent with the expiration date of the Ground Lease. A separate resolution is being presented to your Honorable Board to authorize the license agreement.

Under the proposed Settlement Agreement, the County will also permit WAA to erect an electric LED sign on the main Airport entrance road before the entrance to the Overflow Parking Lot and the Cell Phone Lot, clearly designating the entrance to the Overflow Parking Lot and the Cell Phone Lot, and providing real time information regarding the main garage capacity so that the public is informed of parking availability at the main garage prior to reaching the Airport terminal building.

WAA will remain responsible for all Excess Rent that may become due pursuant to the Ground Lease and fees due under the Overflow Parking Lot license after July 31, 2012.

Section 158.11(5) of the Charter requires Board of Legislators approval in order to compromise, settle or adjust any rights, claims, demands or causes of action in favor of or against the County. The Board of Legislators adopted Act No. 2012-85 on December 10, 2012 authorizing the County to enter into the Settlement Agreement

The goals of this agreement include resolving longstanding disputes between the parties; serving the general health, safety and welfare of the public by providing designated and safe areas to park vehicles and providing shuttle bus transportation to the Terminal; and generating revenue from County-owned facilities. Airport Administration will oversee the agreement and monthly invoices will be sent to WAA for payment.

This agreement is in the best interest of the County and the traveling public. Therefore, we recommend approval of the annexed resolution.

RESOLUTION

Upon a communication from the Commissioner of Public Works and Transportation and the Director of Real Estate, be it hereby

RESOLVED, that the County of Westchester (the “County”) is hereby authorized to enter into an agreement (the “Settlement Agreement”) with Westchester Airport Associates L.P. (“WAA”), and the County of Westchester Industrial Development Agency (the “Agency”) in substantially the same form as attached hereto, to settle pending claims of the County and WAA related to operations at Westchester County Airport; and be it further

RESOLVED, that the County Executive or his authorized designee is hereby authorized to execute all instruments necessary to implement this resolution.

Agreement No. 13-903

Account to be Charged/credited

Fund	Dept	Major Program, Program & Phase Or Unit	Object/ Sub Object	Trust Account	Dollars
161	44	4110	9096-01		(\$2,732,883.00)
161	44	4110	9096-01		\$125,000.04 2013
161	44	4110	9096-01		\$125,000.04 2014
161	44	4110	9096-01		\$125,000.04 2015
161	44	4110	9096-01		\$125,000.04 2016
161	44	4110	9096-01		\$125,000.04 2017
161	44	4110	9096-01		\$125,000.04 2018
161	44	4110	9096-01		\$125,000.04 2019
161	44	4110	9096-01		\$125,000.04 2020
161	44	4110	9096-01		\$125,000.04 2021
161	44	4110	9096-01		\$125,000.04 2022
161	44	4110	9096-01		\$125,000.04 2023
161	44	4110	9096-01		\$125,000.04 2024

Budget Funding Year(s)
(must match resolution)

2013-2024

Start Date 08/01/2012

End Date 07/31/2024

Funding Source

Tax Dollars _____

State Aid _____

Federal Aid _____

(\$1,232,883.00)
(must match resolution)

Other Airport Special Revenue Fund

SETTLEMENT AGREEMENT made this ____ day of ____, 2013 by and between:

THE COUNTY OF WESTCHESTER, a municipal corporation of the State of New York, having an office and place of business in the Michaelian Office Building, 148 Martine Avenue, White Plains, New York, 10601 (hereinafter referred to as the “County”)

and

COUNTY OF WESTCHESTER INDUSTRIAL DEVELOPMENT AGENCY, a corporate governmental agency constituting a public benefit corporation of the State of New York, having an office at 148 Martine Avenue, White Plains, New York, 10601 (hereinafter referred to as the “Agency”)

and

WESTCHESTER AIRPORT ASSOCIATES L.P., a Delaware limited partnership qualified to do business in the State of New York, having an office at 115 Stevens Avenue, Valhalla, New York 10595 (hereinafter referred to as the “Tenant”)

WHEREAS, the County and Tenant entered into an Agreement of Lease dated October 19, 1993, (the “Ground Lease”) of certain property located at the Westchester County Airport in connection with the Tenant’s construction and operation of a Parking Facility thereon; and

WHEREAS, the Tenant thereafter assigned its interest in the Ground Lease to the Agency pursuant to the terms of an Assignment dated February 1, 1994 (the “Assignment”); and

WHEREAS, the Agency thereafter entered into a Sublease and Assignment Agreement, dated February 1, 1994 (the “Sublease”); and

WHEREAS, the Ground Lease was thereafter amended by a First Amendment of Ground Lease dated August 11, 1994 (the “First Amendment”) to revise the property description as set forth in Exhibit “A” of the Ground Lease; and

WHEREAS, the Ground Lease was thereafter amended by a Second Amendment of Ground Lease, dated May 23, 2001 (the “Second Amendment”); and

WHEREAS, the Ground Lease was thereafter amended by a Third Amendment of Ground Lease, dated April 8, 2003; and

WHEREAS, on or about December 3, 2008 the County and the Tenant entered into a separate five year license agreement for the operation of a 60,000 square foot Emergency Overflow Parking Lot (the “Overflow Parking Lot license”); and

WHEREAS, the County has created a website containing content which Tenant maintains discourages travelers using the Airport from using the Parking Garage and the County maintains was for public safety purposes due to illegal roadside parking occurring during high Airport use periods; and

WHEREAS, the County opened a certain cell phone waiting area (the “Cell Phone Lot”) at the Westchester County Airport in October 2007, without approval by Tenant, which Tenant maintains was required pursuant to the Ground Lease and the County maintains was not, as it is not a parking area, but a waiting area; and

WHEREAS, the County has erected certain illuminated signs at the Westchester County Airport discouraging parking at the Airport, which Tenant claims is in contravention of the Ground Lease and the County maintains was not in contravention of the Ground Lease and was for public safety purposes due to illegal roadside parking occurring during high Airport use periods; and

WHEREAS, disputes have arisen over the payment of Excess Rent owed by Tenant under the Lease and the Tenant’s payment of fees under Overflow Parking Lot license and Tenant’s failure to timely file certified annual revenue reports required under section 2.2 of the Lease and monthly detailed statements of revenue and expenses under section 4.1 of the Overflow Parking Lot license; and

WHEREAS, Tenant has alleged that the opening of and operation of the Cell Phone Lot, the erection of the aforesaid signs, and the creation of the Airport website discouraging parking, are in violation of the terms of the Ground Lease and has caused Tenant damages; and

WHEREAS, the Landlord, the Tenant and the Agency desire to settle and resolve all issues and disputes presently existing between them without resorting to litigation;

NOW, THEREFORE, in consideration of the premises and covenants herein, the parties agree as follows:

1. All initially capitalized terms shall have the meaning ascribed to them in the Ground Lease.
2. The County will permit Tenant to erect an electric LED sign on the main Airport entrance road before the entrance to the Overflow Parking Lot and the Cell Phone Lot, clearly designating the entrance to the Overflow Parking Lot and the Cell Phone Lot, as well as providing real time information regarding the main garage capacity so that the public is informed of parking availability at the main garage prior to reaching the main terminal. Tenant shall erect such sign at its sole cost and expense and shall be responsible to provide and pay for electrical service to the sign and for all operating and maintenance costs of the sign. The Tenant shall maintain the sign in good condition and good working order. The Tenant shall remove the sign at the termination or expiration of Lease at its sole cost and expense. The County shall approve the exact location, design and size of the sign and such approval shall not be unreasonably withheld. The County will provide fixed signs, clearly designating the Cell Phone Lot, as well as the Overflow Parking Lot.

Subject to the necessary approval of the Federal Aviation Administration (FAA) pursuant to 49 CFR §23.75, the parties agree to amend the Overflow Parking Lot license to, among other things, include the Cell Phone Lot in the Licensed Premises, charge for waiting in the Cell Phone Lot for over 30 minutes, provided that all income earned from the Cell Phone Lot shall be split 50/50 between Tenant and the County, and extend the current five year term to a new expiration date of August 24, 2024, concurrent with the expiration date of the current garage lease. A copy of the proposed amended license agreement is annexed hereto and made a part hereof. The Tenant agrees to provide all necessary assistance and cooperation in the County's pursuit of FAA approval of the amended license, including but not limited to agreeing to any amendments required by the FAA to attain such approval.

3. As a compromise of the claim by the County for unpaid Excess Rent and the unpaid County share of revenue and Tenant's unpaid costs and expenses under the Overflow Parking Lot license, and the settlement of all claims by Tenant against the County for all damages and lost income that may have been caused by any action or failure to act by the County, its elected officials, employees, contractors or persons under their direction and control, including, but not limited to, any and all claims for any amounts claimed by Tenant to be due to Tenant as a result of the operation of the Cell Phone Lot from the date it was opened to the public until July 31, 2012 and in consideration of the agreements contained herein, Tenant agrees to pay to the County the sum of \$10,416.67 (the "Monthly Payment") on August 10, 2012 and the like sum of \$10,416.67 on the tenth (10th) day of each month thereafter, through and including July 10, 2024, provided that the Monthly Payment shall be adjusted annually on the anniversary of the Effective Date by the change in the Consumer Price Index New York-Northern New Jersey-Long Island CPI-U (the "Index") over the prior year, but only to the extent the Index exceeds 3% per annum.
4. The parties agree that the Monthly Payment includes an assumed 3% per annum increase in the Index. The Monthly Payment will not decrease if the Index does not increase by at least 3% per annum but will increase in the event, and to the extent, the Index increases by more than 3% in any year.
5. The parties agree that the compromise of claims set forth in this Agreement includes the satisfaction of any and all Excess Rent owed pursuant to Section 2.4 of the Ground Lease and any and all claims that the County has against Tenant under sections 3.1, 3.2 and 3.3 of the Overflow Parking Lot license, through and including July 31, 2012. Tenant shall be responsible for all excess rent that may become due pursuant to Section 2.4 of the Ground Lease and to resume payment of all its fees to the County under sections 3.1, 3.2 and 3.3 of the Overflow Parking Lot license after July 31, 2012 through August 1, 2024.
6. This Settlement Agreement shall not be enforceable until signed by all parties and approved by the Office of the County Attorney.

[Signature Page Follows]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement in triplicate.

THE COUNTY OF WESTCHESTER

By: _____
Robert P. Astorino, County Executive

COUNTY OF WESTCHESTER INDUSTRIAL
DEVELOPMENT AGENCY

By: _____
(Name and Title)

WESTCHESTER AIRPORT ASSOCIATES, L.P.

By: _____
Louis R. Cappelli, President
Airport Parking Associates, General Partner
WAA, L.P.

Approved by the Board of Legislators of the County of Westchester by Act No. 2012-85 on December 10, 2012.

Approved by the Board of Acquisition and Contract of the County of Westchester on _____, 2013.

Approved to as to form and
manner of execution

County Attorney
County of Westchester