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Special District Alternate

James M. Underwood
General Counsel

Kathy Bull
Manager

Agenda Item: 8.a.

Meeting Date: August 5, 2021

From: Executive Officer George Williamson & Jim Underwood, LAFCO Counsel

Subject: Indemnification Language Revisions – Voluntary Agreement

BACKGROUND

Shasta LAFCo requires that applicants indemnify LAFCO, using the following language in application form:

The undersigned, as Applicant (agency and/or property owner), **agrees to indemnify, save harmless, and reimburse** LAFCO for all reasonable expenses and attorney fees in connection with the defense of LAFCO and for any damages, penalties, fines or other costs imposed upon or incurred by LAFCO should LAFCO be named as a party in any litigation or administrative proceeding in connection with the application, whether the application is maintained or withdrawn. Applicant further agrees that LAFCO shall have the right to appoint its own counsel to defend it and conduct its own defense in the matter it deems in its best interest, and that LAFCO's taking such actions shall not limit Applicant's obligations to indemnify and reimburse defense costs or relieve Applicant of such obligations.

Most other LAFCOs require this or similar language, including San Luis Obispo LAFCo. The San Luis Obispo LAFCo was sued over their indemnification agreement. A San Luis Obispo Court of Appeal rejected the idea that the SLO LAFCo indemnification agreement was an enforceable contract because LAFCo made it mandatory for application processing in a situation where LAFCo was mandated to process the application in any event. So LAFCo was not truly offering anything it had discretion to deny so there was no quid pro quo. This decision has been appealed, however the CA Supreme Court has refused to take the case and the court decision stands unless the legislature can correct it.

DISCUSSION

In response, several LAFCOs have opted for a voluntary agreement. With the voluntary contract, there is a true quid pro quo. LAFCo must process an application but it does not have to defend a lawsuit challenging its decision. So with a voluntary indemnification agreement, LAFCo agrees to give the applicant more right to participate in the decision whether to defend the LAFCo decision in exchange for the applicant agreeing to indemnify. Note however, that the agreement does not require LAFCo to defend. LAFCo always retains the ultimate legislative discretion as to how to handle the case. However the applicant is given the right to participate in the decision-making process, giving them a much higher ability to influence LAFCo's decision.

Also with the voluntary agreement, LAFCo effectively has two opportunities to get the applicant to sign it. The first opportunity is at time of application. At that time, many applicants may believe they will never have their approval challenged so they don't sign it. However, if their approval is challenged later, LAFCo can go to them again with the agreement. *NOTE: discussion above provided by Scott Browne, Legal Counsel to several LAFCo's*

RECOMMENDATION

Staff recommends the Executive Committee approve the attached voluntary indemnification Agreement language and place this matter on the August 5 Commission Agenda.

Exhibit A: Voluntary Indemnification Language

999 Mission De Oro Drive, Suite 106, Redding, CA 96003

Phone: 530.242.1112

exec@shasta.lafco.ca.gov

Voluntary Indemnification Agreement
(Approved _____, 2021 as a component of all applications)

LAFCo may not condition acceptance of an application upon requiring the Applicant to indemnify LAFCo. However, LAFCo has complete discretion whether to defend any lawsuit that is filed to challenge its decisions. With its limited budget, LAFCO will usually be reluctant to allocate resources to defend challenged decisions. If the Applicant desires to assure that LAFCo will consult with Applicant before determining how to proceed on a legal challenge and increase the likelihood that LAFCo will defend its decision on Applicant's proposal, Applicant may enter into the following voluntary contractual agreement to indemnify LAFCO in the event of legal challenge:

1. FOR VALUABLE CONSIDERATION, receipt of which is hereby acknowledged. The Applicant shall defend, indemnify and hold harmless, LAFCO, it's agents, officers, attorneys, and employees from any claim, action, or proceeding brought by a third party, the purpose of which is to attack, set aside, void, or annul LAFCO's decision with respect to Applicant's proposal or any required findings or determinations under CEQA made as part of that decision. This indemnification obligation shall include, but not be limited to, damages, costs, expenses, attorney's fees, or expert witness fees that may be asserted by any person or entity other than the applicant, arising out of or in connection with LAFCO's approval of the Applicant's proposal, whether or not there is concurrent, passive, or active negligence on the part of LAFCo, its agents, officers, attorneys, employees and contractors/consultants.
2. Applicant agrees that LAFCO shall have the right to appoint its own counsel to defend it and conduct its own defense in the manner it deems in its best interest subject to the provisions of this agreement, and that such actions shall not relieve or limit Applicant's obligations to indemnify and reimburse defense costs.
3. In exchange for such indemnity, LAFCO agrees to the following:
 - a. To immediately notify the Applicant of any litigation or administrative proceeding with respect to the Applicant's application in which LAFCO is named as a party.
 - b. In the event that the Applicant is not joined in the action or proceeding, LAFCO agrees to support a motion by the Applicant to intervene in the action or proceeding.
 - c. To consult with Applicant before making any decision whether to defend the legal challenge. If Applicant desires to defend the case and confirms in writing its commitment to reimburse LAFCO for its defense costs and provides a deposit for such costs as LAFCO shall reasonably determine, LAFCO will proceed to defend unless it has reasonable cause not to do so. If a determination is made to defend the action, LAFCO counsel will consult and reasonably cooperate with Applicant's counsel in the defense of the action. LAFCO shall not enter into any settlement of all or a part of the action without consulting with Applicant.

APPLICANT:

I/We have reviewed the Voluntary Indemnification Agreement and choose not to sign.

I/We have reviewed and agree to the Voluntary Indemnification Agreement as presented above.

Date: _____

By: _____
Project Proponent Authorized Signer

Shasta LAFCO:

Date: _____

By: George Williamson, LAFCo Executive Officer