

INDEMNITY, HOLD HARMLESS, AND DEFENSE AGREEMENT

This Indemnity, Hold Harmless and Defense Agreement (“Agreement”) is made and entered into this ____ day of _____, 2013, by and between the El Dorado Local Agency Formation Commission (“LAFCO”) and the County of El Dorado, a political subdivision of the State of California (“County”).

RECITALS

A. Since the 1960s there has been some form of local agency formation commission existing in El Dorado County. Prior to the enactment of the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (“Cortese-Knox-Hertzberg”), the administrative support of this commission existed as part of the County, with designated County employees assigned to support the commission.

B. The enactment of Cortese-Knox-Hertzberg amended previous laws governing local agency formation commissions by, among other things, allowing the administration of such commissions to exist independently of county governments.

C. Subsequent to the enactment of Cortese-Knox-Hertzberg, in January 29, 2002, LAFCO’s administration became independent of the County, with the employees working on LAFCO matters becoming employees of LAFCO rather than of the County. LAFCO has remained independent ever since.

D. Notwithstanding LAFCO’s independence from the County, LAFCO employees have continued to be included in the County’s contract with the California Public Employees Retirement System (“CalPERS”), through the execution of a Memorandum of Understanding, effective February 2005.

E. LAFCO is in the process of entering into its own, separate contract with CalPERS, removing LAFCO employees from the County contract.

F. After receiving verbal direction from Jeralyn Barnette, Analyst with CalPERS, LAFCO ceased making contributions to CalPERS on behalf of its employees in September 16, 2011. The basis for this direction is Section 401(a) of the Internal Revenue Code which provides, in relevant part, that “[a] trust created or organized in the United States and forming part of a . . . pension . . . plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section” The CalPERS pension plan is a Section 401(a) qualified plan and, therefore, is bound by this requirement. Thus, since LAFCO does not ~~have~~ currently have a contract with CalPERS, the qualified status of the CalPERS pension plan would be jeopardized if it continued to accept contributions from LAFCO after CalPERS discovered that LAFCO became an independent agency.

G. In spite of the preceding, LAFCO was informed by a CalPERS representative, Eva Hwang, that a temporary exception was authorized which would permit LAFCO employees to be reported under the County's contract from September 16, 2011 to the effective date of LAFCO's CalPERS contract. This exception was granted due to CalPERS' expectation that LAFCO's contract with CalPERS is imminent and is conditioned on the County agreeing, in writing, to report LAFCO employees under its contract.

H. LAFCO and the County wish to enter into this Agreement in order to provide for LAFCO to defend, indemnify, and hold harmless the County against liability arising out of certain aspects of the transition of LAFCO employees from the County CalPERS contract to a new LAFCO-specific contract, as set forth herein.

I. This Agreement is further entered into to identify the responsibilities of both LAFCO and the County in the event that LAFCO fails to obtain a CalPERS contract and CalPERS instructs the County to reverse service credit and compensation reported on behalf of LAFCO employees.

AGREEMENT

1. LAFCO's obligation to defend, indemnify and hold harmless.

LAFCO and the County mutually agree as follows:

To the maximum extent allowed by law, LAFCO shall, at its own expense and with counsel of its choosing, defend, indemnify, and hold the County, its officials, officers, employees and agents free and harmless from any and all suits, claims, and damages, to the extent arising out of or incident to either of the following:

A. LAFCO not having made or reported contributions to CalPERS on behalf of LAFCO employees, during the period of time between September 16, 2011 and the date upon which LAFCO resumes making payments to CalPERS, either through the County or as part of a standalone LAFCO contract with CalPERS.

B. Any additional payments required to be made to CalPERS by the County for retirement benefits accrued by LAFCO employees for service from the date of LAFCO's administrative independence from the County, which date shall be January 29, 2002 for purposes of this Agreement notwithstanding CalPERS position that said date is February 15, 2005, to the present.

The foregoing obligations shall not apply to any suits, claims, and damages not arising out of items A and/or B above, including but not limited to: (i) payments required in connection with benefits owed to County employees for all service both prior to and on or after January 29, 2002, and (ii) increases in costs incurred by the County in connection with its CalPERS obligations to County employees. For purposes of this paragraph, any employee who may have been assigned to work on LAFCO matters prior to January 29, 2002 shall be deemed to have been a County employee, rather than a LAFCO employee.

2. Rights and Obligations if LAFCO Fails to Establish a CalPERS Contract.

It is the mutual expectation of both LAFCO and the County that LAFCO will be successful in securing its own CalPERS Contract. However, in the event that LAFCO fails to establish a CalPERS contract and the County is thereafter directed by CalPERS to, and does in fact, reverse out service credit and compensation reported on behalf of LAFCO employees, it is the expectation of both parties that the aggregate employee and employer contributions paid for the period subject to the foregoing adjustment, as adjusted for any investment gains or interest (“Overpaid Contributions”), will be refunded to LAFCO. In the event that said Overpaid Contributions are refunded to the County, the County agrees to turn the Overpaid Contributions over to LAFCO.

In the event that CalPERS uses any portion of these Overpaid Contributions to offset future County contributions to CalPERS rather than refunding them to LAFCO, the County agrees to either: (a) challenge the proposed action by CalPERS and secure a refund of the entire amount of the Overpaid Contributions; or (b) pay to LAFCO an amount equal to the portion of the Overpaid Contributions applied to offset future County contributions.

LAFCO agrees to cooperate with the County in securing a refund of the Overpaid Contributions from CalPERS.

3. General Provisions.

A. Governing Law. This Agreement shall be governed by and construed with the laws of the State of California. Any action to interpret or enforce this Agreement shall be brought and maintained exclusively in the courts of and for El Dorado County. No such action may be instituted by either party until they have met and conferred over any disputed issues.

B. Severance. Any provision of this Agreement which proves to be invalid or illegal shall in no way affect, impair or invalidate any other provisions of this Agreement, and such other provisions shall remain in full force and effect.

C. Entire Agreement; Amendment. This Agreement contains the entire agreement of the parties with respect to the subject matter hereof, and supersedes all prior negotiations, understandings or agreements. This Agreement may only be modified in writing signed by both parties. This Agreement shall be interpreted as if jointly prepared by the parties. No presumption shall arise from the identity of the drafter.

D. Authority. Each party warrants to each other that the individual signing this Agreement on behalf of such party is fully authorized to bind such party and agrees to be bound by this Agreement as of the effective date of this Agreement.

E. No Third Party Rights. This Agreement has been created exclusively for the benefit of the signatory parties and no rights are created in any third party by entry into this Agreement.

F. Notices. All notices permitted or required under this Agreement shall be deemed made when delivered to the applicable party's representative as provided in this Agreement. Additionally, such notices may be given to the respective parties at the following address, or at such other address as the respective parties may provide in writing for this purpose:

COUNTY:

Chief Administrative Office
County of El Dorado
330 Fair Lane
Placerville, CA 95667

LAFCO:

Executive Officer
El Dorado Local Agency Formation Commission
550 Main St., Suite E
Placerville CA 95667

Such notice shall be deemed made when personally delivered or when mailed, forty-eight (48) hours after deposit in the U.S. Mail, first class postage prepaid, return receipt requested and addressed to the party at its applicable address.

[The rest of this page has been left intentionally blank. Signatures follow on the next page]

IN WITNESS WHEREOF, the parties hereto have executed this Indemnity, Hold Harmless and Defense Agreement on the dates set forth below.

COUNTY OF EL DORADO

Ron Briggs, Chairman, Board of Supervisors

Date: _____

ATTEST:

James S. Mitrisin, Clerk of the Board

By: _____
Deputy Clerk

APPROVED AS TO FORM AND CONTENT:

By: _____
County Counsel

**EL DORADO LOCAL AGENCY
FORMATION COMMISSION**

Don Mette, Chair

Date: _____

ATTEST:

APPROVED AS TO FORM AND CONTENT:

BEST BEST & KRIEGER LLP

By: _____

By: _____
General Counsel