

George Latimer
County Executive

Department of Law

John M. Nonna
County Attorney

February 15, 2022

Westchester County Board of Legislators
800 Michaelian Office Building
148 Martine Avenue
White Plains, NY 10601

Re: An Act authorizing (i) the County Attorney to compromise the County's claim to be reimbursed for health care expenditures and wage benefits paid to or on behalf of a County employee from a settlement against a third-party tortfeasor; and (ii) the County Attorney and the Commissioner of Finance to compromise the County's liability to pay a reduced lump sum in lieu of future payments

Dear Honorable Members of the Board:

Attached for your consideration is an Act which, if approved, would authorize (i) the County Attorney to compromise the County's claim to be reimbursed for health care expenditures and wage benefits paid to or on behalf of "J.V.," a former County employee who was injured in the line of duty, from a settlement against a third-party tortfeasor (the "Third-Party Action Piece"); and (ii) the County Attorney and the Commissioner of Finance to compromise the County's liability to pay a reduced lump sum in lieu of future payments owed to J.V. (the "Future Liability Settlement Piece"). Consistent with prior practice in similar cases, I have deleted the name of the employee to protect the individual's privacy. The name, of course, will be disclosed to the Board of Legislators if that is desired.

Because this legislation involves two distinct pieces—the Third-Party Action Piece and the Future Liability Settlement Piece—this proposed legislation addresses these pieces in sequence.

Third-Party Action Piece

Statutory Background

When an individual is injured in the course of his or her employment, the County's self-insured Workers' Compensation program, administered by Triad Group, LLC, provides medical and lost wage benefits in accordance with NYS Workers' Compensation Law. If the individual is injured as a result of some alleged tortious act or omission of a third party, the County pays for the immediate health care for the insured, subject to the right to be reimbursed if the insured recovers in a settlement with or legal action against a third party. The employee is entitled to compensation and medical benefits under the NYS Workers' Compensation Law. Section 29 of the NYS Workers' Compensation Law entitles the County to a lien against the proceeds of any recovery



from the third party liable for the injury, after the deduction of the reasonable and necessary expenditures—including attorney’s fees incurred in effecting such recovery—to the extent of the amount of compensation and medical benefits awarded or provided under NYS Workers’ Compensation Law.

Relevant Background

On February 17, 2017, J.V., a police officer in the Westchester County Department of Public Safety (the “Department”), slipped on ice in the driveway of 21 New Castle Drive, Mount Kisco, NY (the “Subject Property”). As a result of the fall, he injured his back, neck, and left wrist in the fall. J.V. never returned to work following his injury, and he retired from service on February 9, 2021.

J.V. filed a claim for his injury with the NYS Workers’ Compensation Board, which was uncontroverted. On a parallel track to his Workers’ Compensation claim, J.V. retained counsel for a personal injury action against those responsible for maintaining the Subject Property, including Wells Fargo Bank, N.A. (“Wells Fargo”), Select Portfolio Servicing, Inc. (“SPS”), and Home Loan Services, Inc. d/b/a First Franklin Mortgage Loan Trust (“HLS”). J.V.’s counsel is James V. Galvin, Esq., of BONACIC AND MCMAHON, LLP. Wells Fargo and SPS are both represented by Lawrence Jay Buchman, Esq. of PILLINGER, MILLER & TARALLO, LLP. HLS is represented by Jason Robert Lipkin, Esq. of WINSTON & STRAWN LLP.

Prior Settlement

On or about May 1, 2021, J.V. agreed in principle to settle his personal injury claim with *HLS only* for five thousand and 00/100 dollars (\$5,000.00), pending the consent of the County. In connection with the proposed settlement, J.V.’s counsel notified this Office that if the settlement were approved, he would place the settlement funds in escrow pending full resolution of this matter. According to J.V.’s counsel, until the matter is fully resolved, there will be no disbursements or accounting of attorney’s fees, costs, and disbursements.

On June 28, 2021, the Westchester County Board of Legislators passed Act No. 117-2021, which, among other things:

- (i) authorized J.V. to settle his third party action against one of the three defendants therein for five thousand and 00/100 dollars (\$5,000.00); and
- (ii) deferred reimbursement of the County’s lien on such settlement proceeds pending resolution of the third party action as against the remaining defendants.

Instant Settlement

On or about August 19, 2021, J.V. agreed in principle to settle the remainder of his personal injury claim for four hundred twenty-five thousand and 00/100 dollars (\$425,000.00), pending the consent of the County. Including the prior settlement of \$5,000.00, the total settlement in this matter is four hundred thirty thousand and 00/100 dollars (\$430,000.00).

In connection with the proposed settlement, J.V.’s counsel notified this Office that his costs and disbursements in this matter total one thousand two hundred eighty-five and 35/100 dollars (\$1,285.35) and that his fee totals one hundred forty-two thousand nine hundred three and 45/100 dollars (\$142,903.45).

The County's Lien on the Settlement Proceeds

Between the date of the accident and the date of the proposed settlement, the County expended medical benefits pursuant to the NYS Workers' Compensation Law ("WCL") to or on J.V.'s behalf in the amount of sixty-six thousand six hundred seventy-five and 49/100 dollars (\$66,675.49) and paid indemnity (lost wage) benefits in the amount of one hundred seventy-nine thousand eighty-seven and 10/100 dollars (\$179,087.10)—bringing the County's total expenditures in this matter to two hundred forty-five thousand seven hundred sixty-two and 59/100 dollars (\$245,762.59).

Based upon a review of the facts and circumstances of this matter, this Office seeks the authority to compromise the County's claim for reimbursement by reducing its lien by 33.54%, equaling a dollar reduction of eighty-two thousand four hundred twenty-eight thousand and 77/100 dollars (\$82,428.77). The County would thereafter accept in satisfaction of its present lien a total of one hundred sixty-three thousand three hundred thirty-three and 82/100 dollars (\$163,333.82). After the County is reimbursed and counsel fees are paid, J.V. would recover one hundred twenty-two thousand four hundred seventy-seven and 38/100 dollars (\$122,477.38).

Visual Summary

For the reader's convenience, a chart of the aforementioned figures appears below:

Worker's Compensation Amounts	
Medical Expenses	\$ 66,675.49
Indemnity (Lost Wage) Payments	\$ 179,087.10
Worker's Comp, TOTAL	\$ 245,762.59

Litigation Amounts	
Third-Party Settlement (Gross Amt)	\$ 430,000.00
Disbursements	\$ 1,285.35
Attorney's Fees	\$ 142,903.45
Cost of Litigation (COL)	\$ 144,188.80
Net Proceeds of Third-Party Settlement	\$ 285,811.20
Percentage COL	33.54%
Carrier's COL	\$ 82,428.77
Carrier's Net Lien	\$ 163,333.82
Claimant's Net Recovery	\$ 122,477.38

Future Liability Settlement Piece

Statutory Background

Pursuant to Section 32 of the New York State Workers' Compensation Law, the County is permitted to reduce the liability for ongoing benefits by paying a lump sum to the employee. When a County employee suffers a work-related injury, he or she qualifies for Workers' Compensation benefits. Once the Workers' Compensation Board issues a permanency finding, the County is obligated to make continuing payments. Pursuant to Section 32 of the New York State Workers' Compensation Law, the County is permitted to reduce its liability for ongoing benefits by paying the employee a reduced lump sum. As a result of this lump sum, future payments are eliminated and the County realizes substantial savings.

In the past, the Department of Finance, in its role as administrator of the County's Workers' Compensation Program, has negotiated, with the cooperation of the County Attorney's Office, lump-sum settlements with the attorneys for injured employees. Such settlements have been and remain subject to final approval in the interest of justice by the New York State Workers' Compensation Board.

This settlement is based upon the following criteria:

1. The degree of disability;
2. The claimant's estimated life expectancy; and
3. The settlement amount proposed by the claimant's attorney.

Past Expense

As set forth above in the Third-Party Action Piece, the County has expended on this matter medical payments totaling sixty-six thousand six hundred seventy-five and 49/100 dollars (\$66,675.49) and indemnity (lost wage) benefits in the amount of one hundred seventy-nine thousand eighty-seven and 10/100 dollars (\$179,087.10)—bringing the County's total expenditures in this matter to two hundred forty-five thousand seven hundred sixty-two and 59/100 dollars (\$245,762.59).

For the reader's convenience, a chart of these figures appears immediately below:

Expenses to Date			
	Indemnity	Medical	Total
WCB Case No. G1792812	\$ 179,087.10	\$ 66,675.49	\$ 245,762.59

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Future Exposure

Any PPD award would include two parts: an indemnity part and a medical part.

Indemnity Part

Future Award

As of the date of this legislation, WCB has yet to issue an award regarding J.V.'s disability. As a result, the County is under no current direction to continue payments. However, both J.V.'s doctor and an Independent Medical Examiner (the "IME") who examined J.V. at the County's direction agree that J.V. is permanently partially disabled.

It is the opinion of Triad Group, LLC ("Triad")—*i.e.*, the third-party administrator for the County's workers' compensation plan—that should the County decline to settle, a PPD award is a certainty.

Future Award's Duration

Triad has determined that if an award were to issue, it would likely be for the maximum possible period given the date of injury: 400 weeks (*see* L 2007, ch 6, §§ 4, 82 [a] [codified at Workers Compensation Law § 15 [3] [w]). That award would be further enlarged by the lag in time before the award could be issued, estimated by Triad to be 6 months (*i.e.*, 26 weeks)—a period of time that would be added to the award. Additionally, because J.V. retired approximately one year ago (on February 9, 2021) and because J.V. has not received job-injury benefits during that period of time, the award would be further enlarged by an additional 52 weeks. The total exposure of the probable award would therefore be 478 weeks.

For the reader's convenience, a chart of this subtotal appears immediately below.

Indemnity Exposure Calculation	
Max Capped Exposure (in Weeks)	
Probable Award Amount	400 weeks
Lookback Period (<i>i.e.</i> , date of retirement (02/09/21) to today (02/10/22))	52 weeks
Lag Period (<i>i.e.</i> , today (02/10/22) to estimated award date (08/10/22))	26 weeks
TOTAL	478 weeks

Future Award's Rate

Triad has also estimated that J.V. would be entitled to the maximum weekly rate of indemnity, which is \$864.32 per week.

Authorized Offset ("Holiday")

As set forth above in the Third-Party Action Piece, J.V. is expected to receive a net recovery of one hundred twenty-two thousand four hundred seventy-seven and 38/100 dollars (\$ 122,477.38). Under decisional law, the County is entitled to offset future medical and indemnity payments owed to J.V. (the "Holiday") by an amount equal to that net recovery less a "litigation fee" equal to the claimant's net recovery multiplied by the previously determined percentage cost of litigation (*i.e.*, \$122,477.38 x 33.54% or \$41,078.91) (*see Burns v Varriale*, 9 NY3d 207 [2007]). Here, the Holiday totals eighty-one thousand three hundred ninety-eight and 47/100 dollars (\$ 81,398.47).

For the reader's convenience, a chart of this subtotal appears immediately below.

Holiday Calculation	
Net Recovery in Third-Party Action	\$ 122,477.38
Percentage Cost of Litigation ("COL")	33.54%
COL on Future Benefits	\$ 41,078.91
Holiday	\$ 81,398.47

Estimated Exposure (Not Reduced to Net Present Value)

The total exposure in this matter—not reduced to net present value—equals the max capped exposure period (*i.e.*, 478 weeks) multiplied by the estimated weekly rate of indemnity (*i.e.*, \$ 864.32) less the Holiday (*i.e.*, \$ 81,398.47). That amount totals three hundred thirty-one thousand seven hundred forty-six and 49/100 dollars (\$ 331,746.49).

For the reader's convenience, a chart of this subtotal appears immediately below.

Estimated Exposure (Not Reduced to Net Present Value)	
Max Capped Exposure Period	478 weeks
Weekly Rate of Indemnity	\$ 864.32
Holiday	\$ 81,398.47
TOTAL	\$ 331,746.49

Estimated Exposure (Reduced to Net Present Value)

Reducing that amount to net present value using (i) a discount rate equal to 2.021% (*i.e.*, the 10-year Treasury note rate as of February 10, 2022); and (ii) an estimated award date of August 10, 2022 results in total estimated exposure of two hundred ninety-seven thousand eight hundred fifty-one and 44/100 dollars (\$ 297,851.44).

For the reader's convenience, a chart of this subtotal appears immediately below.

Estimated Exposure (Reduced to Net Present Value)	
Estimated Exposure (Not Reduced)	\$ 331,746.49
Discount Rate	2.021%
Award Date (Estimated)	8/10/2022
NET PRESENT VALUE	\$ 297,851.44

Medical Part

As in all PPD awards irrespective of the date of injury, the medical piece would run for the remainder of J.V.'s life.¹ After consulting the Centers for Medicare & Medicaid Services, a federal agency within the U.S. Department of Health and Human Services ("CMS"), Triad has set the reserve for medical expenses in this matter at eighteen thousand eight hundred thirty-five and 00/100 dollars (\$18,835.00).

For the reader's convenience, a chart of these figures appears immediately below.

Medical Exposure Calculation	
	Reserve
County Exposure	\$ 18,835.00

Proposed Settlement

The proposed settlement also includes two parts.

Indemnity Part

The proposed settlement's indemnity piece is a one-time payout of one hundred sixty-three thousand three hundred thirty-three and 82/100 dollars (\$ 163,333.82). As compared to the net present value of the indemnity reserve (*i.e.*, \$ 297,851.44), the proposed payout would save the County one hundred thirty-four thousand five hundred seventeen and 62/100 dollars (\$ 134,517.62).

For the reader's convenience, a chart of these figures appears immediately below.

Projected Savings	
	Indemnity
County Exposure	\$ 297,851.44
Proposed Settlement	\$ 163,333.82
Potential Savings	\$ 134,517.62

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¹ Note, of course, that medical liability is limited to treatment of the subject injury.

Medical Part

The proposed settlement’s medical piece involves a Workers’ Compensation Medicare Set-Aside Arrangement (the “MSA”). If the MSA—which CMS has already pre-approved—is authorized, the County will (i) deposit seed money into an interest-bearing account maintained by J.V., which J.V. could draw from to pay future Medicare-covered, reimbursable medical treatment costs, and (ii) purchase an annuity, the payments from which will be deposited into J.V.’s interest-bearing account yearly for twenty years (*see* 42 USC § 1395y [b] [Medicaid Secondary Payer Statute]).

The proposed seed money payment is two thousand five hundred eighty-three and 00/100 dollars (\$ 2,583.00), and the proposed annuity will cost the County sixteen thousand two hundred fifty-two and 00/100 dollars (\$ 16,252.00), for a total structured settlement payment of eighteen thousand eight hundred thirty-five and 00/100 dollars (\$ 18,835.00). As a result of the proposed annuity’s anticipated yield, the total benefit of the MSA to J.V. is estimated to be twenty-six thousand seven hundred forty-six and 00/100 dollars (\$ 26,746.00).

For the reader’s convenience, a chart of these figures appears immediately below.

Proposed WCMSA			
	Cost	Guaranteed Yield	Expected Payments Over Lifetime
Seed Money	\$ 2,583.00	\$ 2,583.00	\$ 2,583.00
Annuity	\$ 16,252.00	\$ -	\$ 24,163.00
Structured Settlement Totals	\$ 18,835.00	\$ 2,583.00	\$ 26,746.00

Proposed Settlement’s Estimated Savings

The County’s total obligation under the proposed settlement—including both the indemnity payout and MSA—is one hundred eighty-two thousand one hundred sixty-eight and 82/100 dollars (\$ 182,168.82). If the County were to accept the proposed settlement, the potential savings to the County would total one hundred thirty-four thousand five hundred seventeen and 62/100 dollars (\$ 134,517.62).

For the reader’s convenience, a chart of the summary figures appears below:

Projected Savings			
	Indemnity	Medical	Total
County Exposure	\$ 297,851.44	\$ 18,835.00	\$ 316,686.44
Proposed Settlement	\$ 163,333.82	\$ 18,835.00	\$ 182,168.82
Potential Savings	\$ 134,517.62	\$ -	\$ 134,517.62

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Conclusion

If the County were to accept the proposed settlement of the third-party action (*i.e.*, the Third Party Action Piece), the County would recover proceeds totaling one hundred sixty-three thousand three hundred thirty-three and 82/100 dollars (\$ 163,333.82). If the County were to accept the proposed settlement of future liability (*i.e.*, the Future Liability Settlement Piece), the County would pay out an amount totaling one hundred eighty-two thousand one hundred sixty-eight and 82/100 dollars (\$182,168.82). Viewing these two approvals in concert, the net expense to the County would be eighteen thousand eight hundred thirty-five and 00/100 dollars (\$18,835.00).

For the reader's convenience, a chart of the summary figures appears below:

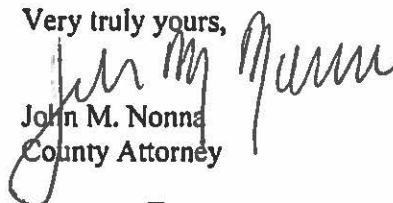
Total Transaction	
Third-Party Action Piece	\$ 163,333.82
Future Liability Settlement Piece	\$ (182,168.82)
Total	\$ (18,835.00)

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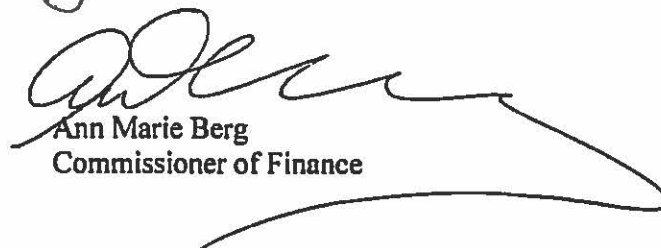
Based upon the foregoing, (i) the County Attorney requests authority from this Board pursuant to Section 158.11 of the Westchester County Charter to compromise the County's right to be reimbursed for health care and wage benefits paid to or on behalf of J.V. from his recovery against a third-party tortfeasor, and (ii) the County Attorney and the Commissioner of Finance together request authority to compromise the liability of the County by contributing \$182,168.82 toward a lump-sum settlement to J.V. in full satisfaction of the County's indemnity and medical obligation in this matter.

We therefore recommend the accompanying Act

Very truly yours,



John M. Nonna
County Attorney



Ann Marie Berg
Commissioner of Finance

JMN/AMB/stc

BOARD OF LEGISLATORS
COUNTY OF WESTCHESTER

Your Committee is in receipt of a proposed Act which, if approved, would authorize (i) the County Attorney to compromise the County's claim to be reimbursed for health care expenditures and wage benefits paid to or on behalf of "J.V.," a former County employee who was injured in the line of duty, from a settlement against a third-party tortfeasor (the "Third-Party Action Piece"); and (ii) the County Attorney and the Commissioner of Finance to compromise the County's liability to pay a reduced lump sum in lieu of future payments owed to J.V. (the "Future Liability Settlement Piece"). Consistent with prior practice in similar cases, I have deleted the name of the employee to protect the individual's privacy. The name, of course, will be disclosed to the Board of Legislators if that is desired.

The Third-Party Action Piece

On February 17, 2017, J.V., a police officer in the Westchester County Department of Public Safety (the "Department"), slipped on ice in the driveway of 21 New Castle Drive, Mount Kisco, NY (the "Subject Property"). As a result of the fall, he injured his back, neck, and left wrist in the fall. J.V. never returned to work following his injury, and he retired from service on February 9, 2021.

Shortly after the fall, J.V. filed a claim for his injury with the NYS Workers' Compensation Board, which was not controverted. On a parallel track to his Workers' Compensation claim, J.V. commenced a personal injury action against three parties allegedly responsible for maintaining the Subject Property.

On June 28, 2021, the Westchester County Board of Legislators passed Act No. 117-2021, which, among other things: (i) authorized J.V. to settle his third party action against one of the three defendants for five thousand and 00/100 dollars (\$5,000.00); and (ii) deferred reimbursement

of the County's lien on such settlement proceeds pending resolution of the third party action as against the remaining defendants.

Recently, J.V. agreed in principle to settle his personal injury claim with the remaining defendants for four hundred twenty-five thousand and 00/100 dollars (\$425,000.00), pending the consent of the County.

The total proposed settlement in this matter is now four hundred thirty thousand and 00/100 dollars (\$430,000.00). In connection with the proposed settlement, J.V.'s counsel notified this Office that his costs and disbursements in this matter total one thousand two hundred eighty-five and 35/100 dollars (\$1,285.35) and that his fee totals one hundred forty-two thousand nine hundred three and 45/100 dollars (\$142,903.45).

Between the date of the accident and the date of the proposed settlement, the County expended medical benefits pursuant to the NYS Workers' Compensation Law ("WCL") to or on J.V.'s behalf in the amount of sixty-six thousand six hundred seventy-five and 49/100 dollars (\$66,675.49) and paid indemnity (lost wage) benefits in the amount of one hundred seventy-nine thousand eighty-seven and 10/100 dollars (\$179,087.10)—bringing the County's total expenditure in this matter to two hundred forty-five thousand seven hundred sixty-two and 59/100 dollars (\$245,762.59).

Based upon a review of the facts and circumstances of this matter, this Office seeks the authority to compromise the County's claim for reimbursement by reducing its lien by 33.54%, equaling a dollar reduction of eighty-two thousand four hundred twenty-eight thousand and 77/100 dollars (\$82,428.77). The County would thereafter accept in satisfaction of its present lien a total of one hundred sixty-three thousand three hundred thirty-three and 82/100 dollars (\$163,333.82).

After the County is reimbursed and counsel fees are paid, J.V. would recover one hundred twenty-two thousand four hundred seventy-seven and 38/100 dollars (\$122,477.38).

The Future Liability Settlement Piece

Pursuant to Section 32 of the New York State Workers' Compensation Law, the County is permitted to reduce the liability for ongoing benefits by paying a lump sum to the employee. When a County employee suffers a work-related injury, he or she qualifies for Workers' Compensation benefits. Once the Workers' Compensation Board issues a permanency finding, the County is obligated to make continuing payments. Pursuant to Section 32 of the New York State Workers' Compensation Law, the County is permitted to reduce its liability for ongoing benefits by paying the employee a reduced lump sum. As a result of this lump sum, future payments are eliminated and the County realizes substantial savings.

The Department of Finance, in its role as administrator of the County's Workers' Compensation Program, has negotiated, with the cooperation of the County Attorney's Office, lump-sum settlements with the attorneys for injured employees. Such settlements have been and remain subject to final approval in the interest of justice by the New York State Workers' Compensation Board.

Employee:	J.V.
Department:	Public Safety
Date of Injury:	February 17, 2017
Injuries:	Back, neck, and left wrist
Lump-Sum Settlement (Medical & Indemnity):	\$ 182,168.82

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Your Committee has carefully considered the matter and recommends (i) authorizing the County Attorney, pursuant to Section 158.11 of the Westchester County Charter, to compromise the County's right to be reimbursed for health care and wage benefits paid to or on behalf of J.V. from the settlement of his legal action against a third-party tortfeasor; and (ii) authorizing the County Attorney and the Commissioner of Finance to compromise the County's liability for J.V.'s future Workers' Compensation benefits by paying a lump sum.

An affirmative vote of a majority of the Board is required to pass this legislation.

Dated: White Plains, New York
February __, 2022

ACT NO. 2022

AN ACT authorizing the County Attorney to compromise the County's claim to be reimbursed for health care expenditures and wage benefits paid to or on behalf of a County employee from a settlement against a third-party tortfeasor and authorizing the County Attorney and the Commissioner of Finance to compromise the County's liability to pay a reduced lump sum in lieu of future payments

BE IT ENACTED by the Board of Legislators of the County of Westchester as follows:

1. The County of Westchester is hereby authorized to compromise its right to be reimbursed for health care and wage benefits paid or owing to or on behalf of a County employee, identified as "J.V.," from a settlement of his legal action against a third party. The County's reimbursement is \$163,333.82, representing a 33.54% reduction of its lien, with full reservation of the County's right to set off J.V.'s net recovery against any future compensation in accordance with the provisions of New York State Workers' Compensation Law.

2. The County Attorney and the Commissioner of Finance are hereby authorized to compromise the County's right to pay Workers' Compensation benefits to J.V. by contributing \$ 182,168.82 towards a lump-sum settlement, thereby reducing the County's liability for ongoing benefits to and/or for the benefit of the employee.

3. The County Attorney or his designee and the Commissioner of Finance or her designee are hereby authorized to execute and deliver all documents and take such actions as the County Attorney and/or the Commissioner of Finance deem necessary or desirable to accomplish the purposes hereof

4. This Act shall take effect immediately.

FISCAL IMPACT STATEMENT

SUBJECT: Settlement of Workers Comp Lien (J.V.)

NO FISCAL IMPACT PROJECTED

OPERATING BUDGET IMPACT

(To be completed by operating department and reviewed by Budget Department)

A) GENERAL FUND AIRPORT SPECIAL REVENUE FUND (Districts)

B) EXPENSES AND REVENUES

Total Current Year Cost \$ 182,169

Total Current Year Revenue \$ 163,334

Source of Funds (check one): Current Appropriations

Transfer of Existing Appropriations

Additional Appropriations

Other (explain)

Identify Accounts: 613-57-0017-4280

Potential Related Operating Budget Expenses:

Annual Amount \$ _____

Describe: _____

Potential Related Revenues:

Annual Amount \$ _____

Describe: _____

Anticipated Savings to County and/or Impact on Department Operations:

Current Year: _____

Next Four years: _____

Prepared by: Michael Dunn

Title: Budget Analyst

Department: Budget

Reviewed By: _____

Budget Department

If you need more space, please attach additional sheets.