

To: Airport Authority

From: Steve Tackes, Airport Counsel

Date: 03-12-2023

Re: Airport Counsel Briefing for Meeting of Wednesday, March 15, 2023

1. FOR DISCUSSION AND POSSIBLE ACTION: REVIEW AND APPROVE REQUEST FROM CARSON TAHOE EXECUTIVE, LLC TO (1) CONSTRUCT A BULK FUEL FACILITY ON THEIR LEASE PARCEL (APN 005-011-83), (2) TO UTILIZE A FUEL TRUCK AS A TEMPORARY FUEL FACILITY WHILE OBTAINING PERMITS AND CONSTRUCTION OF A PERMANENT FUEL FACILITY (TRUCK-TO-TRUCK) (3) ESTABLISH A FUEL FLOWAGE RATE AND (4) IF NECESSARY AMEND THE LEASE TO ALLOW FUEL TRANSFERS FROM THE TEMPORARY FUEL TRUCK/FACILITY; DETERMINE CONDITIONS AND COMPLIANCES.

Staff Summary: Carson City Municipal Code Title 19.02.020.340 requires Airport Authority approval for any improvement at the airport that requires a permit from the City. Carson Tahoe Executive is seeking approval for the development of a Bulk Fuel Facility, so they can pursue the necessary permits from all applicable regulatory authorities. All permits must be obtained for construction within 120 days and construction must be completed within 2 years of approval, additional time may be requested for unavoidable delays out of the control of Carson Tahoe Executive. The Approval of the Carson City Airport Authority is still subject to all applicable federal, state, and local regulations and does not take precedent over any other regulatory authority. The truck-to-truck operation as a temporary fuel facility is a proposal for a temporary approval directly tied to the construction of the fuel facility. If the tenant fails to construct the fuel farm in the approved time Final frame, the temporary truck-to-truck fuel facility approval will be revoked. The fuel flowage fee proposed is the one established in the airport fee schedule effective July 2021 at \$0.05 per gallon. The lease permits sales of fuel from a fuel facility and may need to be amended if the truck-to-truck transfer is approved.

There are 4 items to the request as follows. I will be addressing the legal and liability issues.

1. Request for approval of the bulk fuel facility they are proposing for their leasehold.
2. Truck to Truck transfer/used of fuel truck as temporary fuel facility
3. Establish fuel flow rate.
4. Lease provisions as to use of truck as temporary fuel facility

1. Bulk Fuel Facility and 3. Fuel flow rate.

The CTE lease allows the tenant to construct a fuel facility and provide line services, including fueling.

Tenant may construct, upon Landlord approval and other applicable governmental approvals, a fuel storage facility for Tenant's own use and sale to the public. For all fuel so stored, Tenant shall pay Landlord a fuel flowage fee to be negotiated. [Lease p. 8]

Tenant is specifically permitted but not required to offer the following services:

...6. Line service, including fueling, ... [Lease p. 7]

C. To the extent that Tenant elects to sell fuel pursuant to Paragraph 8 of this Lease, Landlord and Tenant will negotiate a fuel flowage fee per gallon as and for the right to sell fuel on the premise, in such location as mutually agreed upon between Landlord and Tenant, such fees to be paid at the time of each delivery of fuel to Tenant's fuel storage facility.

Ergo, CTE had the right under the lease to construct a fuel facility, and the present application is for CCAA approval of the fuel facility CTE proposes.

CTE has provided engineering plans for the fuel facility, surveyed drawings of its location, and brochures from the equipment manufacturers, which taken together give the CCAA the information as to the fuel facility itself. Additionally, CTE has provided a list of fire and safety regulations that they have identified as applying to the facility. These were requested by Staff, not because the CCAA enforces the fire code, but rather so that the CCAA has a sense of what approvals are needed from fire and safety agencies that do specify and enforce the fire codes. This also assists the CCAA in knowing what compliances will be needed, e.g. copies of Carson City Fire Department and Fire Marshall approvals. CTE has summarized the regulation topics and directs the CCAA to their Exhibits as the means of compliance. The summaries give general information, not the specifics, so it is difficult to see how the various exhibits (drawings, engineering plans, etc) show the compliance. That said, the information is sufficient to give the CCAA a general idea of the applicable codes and an adequate description of the approvals (or denials) that will come from the agencies who do enforce those codes.

The tanks proposed are double wall tanks that are specified to meet current fire and environmental standards. The containment area appears to be designed to provide protection of the tanks from potential collision of aircraft or vehicles, and importantly, to contain spills or leakage from the tanks.

The survey documents show the fuel facility within the boundaries of the leasehold.

In terms of the legal and liability review, it appears the project meets the requirements of the lease and is within the lease boundaries. From a legal review standpoint, the proposal is sufficient for approval. I recommend that the approval include the following compliances, in addition to any proposed by the Airport Manager.

1. That copies of permits from other agencies be provided to the Airport Manager.
2. That approvals from the relevant fire officials be obtained and provided to the Airport Manager prior to operation of the facility.
3. That environmental approvals from the relevant agencies be provided to the Airport Manager prior to operation of the facility.

Item 3 as to the fuel flow rate is a necessary component of Item 1 and is best addressed here. The applicant proposes a fuel flow rate of \$0.05 per gallon. Per the terms of the lease cited above (and all other leases), it is charged on fuel delivered to the fuel facility. While the lease speaks to the rate being “negotiated”, there is little to negotiate since the

\$0.05 rate is the current rate on the airport charged to the other fuel providers. The parity of charges is fair and non-discriminatory, the latter being a standard administered by the CCAA and required by its FAA Grant Assurances (Assurance 22c- each FBO must be subject to the same rates, fees, and charges). Thus, the rate is appropriate to be charged to CTE and approval is recommended.

Item 2 Truck to Truck transfer/used of fuel truck as temporary fuel facility, and Item 4 Lease provisions as to use of truck as temporary fuel facility

In addition to the fuel facility address in Items 2 and 4, the applicant proposes to place a tanker truck trailer in a temporary containment area so that the applicant can begin to sell fuel prior to construction and completion of the fuel facility described in Items 1 and 3.

The description of location is shown on the exhibits to the west of the fuel facility. The materials are shown in the brochures and are generally a set of temporary berms/L brackets with a sheet material for containment of leaks and spills. The description also includes portable siphon/pump and filter equipment.

Having reviewed the proposal and supporting exhibits, review of the lease and researched legal standard, there are 4 basic reasons that the truck to truck transfer and temporary use are not recommended from a legal and liability standpoint.

1. ***Discriminatory Treatment (economic discrimination).*** The CCAA should not act in a discriminatory fashion. This is based on fundamental principles of fairness, on not having government favoring one competitor over another, and the Assurances given to the FAA in the many grants received for the Airport. All other fuel facilities were required to make the investment in the fuel facility prior to sales of fuel. It is not just the superior safety of the fuel facility over a parked tank trailer, but also the investment required of the FBO. Based on historical documents this was required of Carson Tahoe Aviation for the first fuel island on the Airport (operated by a predecessor of CTE's leasehold; located in front of the Terminal building). This was required of El Aero on the fuel facility built on their leasehold on the north side of the Airport. This was required of Eagle Valley Fuel (Melsheimer-Weaver-Graber) on the self-service island built on the west side of Taxiway B in the center of the Airport. This was also required of the replacement to that self service fuel island when it was relocated across Taxiway B (now owned by Mountain West). None of these operators were permitted to sell fuel without first constructing a permanent fuel facility. None of these operators were allowed to sell fuel from temporary truck trailers. Sales via the use of a semi-trailer instead of a fuel facility is far less expensive (and less safe) than a fuel facility. Allowing one now would unfairly discriminate against the other provider(s) of fuel on the airport. It would allow a new competitor the ability to engage in predatory pricing (i.e. the artificial use of below cost pricing to run competitors out of the marketplace and then later take advantage of monopoly pricing). While this is tempered somewhat by fuel price

competition from nearby airports, and we would hope that an upstanding company such as CTE would not engage in that behavior, it nevertheless creates a fundamental imbalance that undercuts fair competition.

The FAA Grant Assurances state:

22. Economic Nondiscrimination.

a. It will make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport.

If the CCAA were to allow for the provision of fuel on the Airport without the cost of or requirements given to the other providers, that would be a prima facie case of unjust discrimination. As with all Grant Assurances, a finding by the FAA of a violation is a basis for denial of current and future funding. Given the important role of FAA funding to the Airport, that is a risk that the CCAA must be aware of and avoid violation.

2. *Proposal extends beyond leasehold; conflicting information.*

In the site plan for the temporary containment area, the Applicant shows use of the area which is not part of the leasehold area to the south of the containment area and proposing installation of aggregate base material. (see last drawing prior to the Bramco Construction document; also shown in the earlier hand drawn exhibit). Even beyond the modification and use of that area, the orientation of the proposed containment area would require use of that off-lease area to comply with the specification requirements of the L-bracket containment which state that vehicles must enter and exit the containment by going “straight in and straight out. Do not try to enter the berm on an angle.” (Interstate Products brochure on L bracket containment) It is unclear if the semi tractor and fuel trailer could comply with those requirements on the project as proposed. However, even if they could, it would necessitate off lease areas.

3. *Liability.* A large part of any legal review is the liability risk of any proposed operation. Here, the proximity to vehicle movement and to College Parkway introduce liability issues that are addressed with a double-wall fuel facility that meets specifications for resilience to blunt force but not with a single walled tanker trailer that does not meet those standards. Research shows that the standards for fuel facilities are such that a vehicle or aircraft collision into it would neither cause the tank to rupture, nor an explosion of the tank contents. The frequent fires and explosions of fuel tankers on the highways graphically demonstrate the far greater risk of damage. The proposed location is also adjacent to a parking lot, introducing the risk of damage from that direction. The Airport is also not a stranger to vandalism. The potential for damage is significant, whether it is a vehicle, aircraft or even a projectile. The liability of the proposed location and operation of the truck to truck transfer warrants a separate consideration of rejection of the proposal.

4. *Lease terms.* The lease permits the construction of and use of a fuel storage facility. It does not provide for storage or sales of fuel from something other than a fuel storage facility. One suggestion that was made is to call the tanker trailer a “temporary” fuel storage facility for purposes of meeting the language of the lease. If such were done, then all of the fire and safety criteria of a fuel storage facility would apply. Without delving into the fire authority’s world, it is clear from the portions of the IFC that were cited, that a fuel tanker trailer does not meet the criteria of a fuel storage facility.

As to Item 4, the applicant requests that if the lease cannot be interpreted to allow the truck-to-truck transfers, then they request the lease be amended to allow for it. As stated previously, there are legal and liability reasons for not approving the truck-to-truck/ temporary facility, so I do not recommend amending the lease to allow it. If however, the CCAA votes to allow the truck-to-truck/ temporary facility, then the lease should first be amended to accommodate whatever action the CCAA takes in that regard.

Recommended Motions:

I move to approve the bulk fuel facility CTE as set forth in their engineered plans and exhibits with a compliance requirement:

1. That copies of permits from other agencies be provided to the Airport Manager.
2. That approvals from the relevant fire officials be obtained and provided to the Airport Manager prior to operation of the facility.
3. That environmental approvals from the relevant agencies be provided to the Airport Manager prior to operation of the facility.
4. Such other permits, approvals or information recommended by the Airport Manager.

I move to approve the fuel flow rate of \$0.05/gallon for all fuel delivered to the CTE bulk fuel facility.

I move to reject the proposal for truck-to-truck transfers and the use of a fuel tanker trailer as a temporary fuel facility.

As I don’t see any reason to amend the lease, I don’t have language for a proposed motion for that. As with all matters, once the CCAA indicates the action to be taken, I can assist with recommended language to achieve that action.