THIRD AMENDMENT TO
ON-AIRPORT RENTAL CAR OPERATIONS AGREEMENT AND LEASE
BETWEEN
THE CITY OF SAN JOSE
AND
DTG OPERATIONS, INC.

This THIRD AMENDMENT TO ON-AIRPORT RENTAL CAR OPERATIONS AGREEMENT AND LEASE is entered into this _____ day of _____ 2011, by the CITY OF SAN JOSE, a municipal corporation of the State of California ("City"), DTG OPERATIONS, INC., an Oklahoma corporation authorized to do business in California ("Tenant").

RECITALS

WHEREAS, on February 19, 2008, City and Tenant entered into an agreement entitled "On-Airport Rental Car Operations Agreement and Lease Between the City of San Jose and DTG Operations, Inc." ("Agreement") for Tenant's non-exclusive privilege of conducting an on-airport rental car concession operation at the City's Consolidated Rental Car Facility ("CRCF") to be constructed at the Norman Y. Mineta San Jose International Airport ("Airport"); and

WHEREAS, on April 21, 2008, City and Tenant entered into a First Amendment to the Agreement to include a Rent Stabilization Fund, a Director's CRCF Project Reserve Fund, revise the term of the agreement, revise the CRCF Improvements, revise the Customer Service Building Improvements and amend the Living Wage Provisions; and

WHEREAS, on April 13, 2010 City and Tenant entered into a Second Amendment to the Agreement to add provisions regarding the Solar Facility constructed by City on the roof of the CRCF to generate electricity for the CRCF, for City's undertaking the removal from the Current Premises of all improvements constructed by Tenant and all On-Airport Companies (the "Demolition Project"), and to include Demolition Project Costs as an element of Facility Rent; and

WHEREAS, City and Tenant desire to further amend the amended Agreement to revise **Exhibit D**, "Tenant's Premises", retroactive to July 1, 2010 and to establish the Commencement Date as July 1, 2010; and

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WHEREAS, the parties desire to further amend the amended Agreement to provide for appraisal adjustments to the Ground Rent during any extended term of the Agreement and to revise the rate of interest for City's performance of Tenant's obligations under **Section 14.3** of the Agreement;

NOW, THEREFORE, the parties agree to amend the amended Agreement as follows:

SECTION 1. **Section 1.11, "Commencement Date", of Section 1 "DEFINITIONS"** is amended to read as follows:

"**1.11 Commencement Date**
Commencement Date means July 1, 2010."

SECTION 2. **Section 5.2.2.2, "Appraisal Adjustment Date"**, of **Section 5 "CONSIDERATION FOR AGREEMENT"** is amended to read as follows:

"**5.2.2.2 Appraisal Adjustment Date**

a. Effective on July 1 during the sixth Lease Year, Ground Rent shall be adjusted based upon the fair market value of the Property in accordance with an appraisal of the Property as set forth below. In the event that the parties agree to extend the term as provided in **Section 2.1.1** above, Ground Rent shall be adjusted based on the fair market value of the Property effective July 1 of the first and sixth year of each 10 year extension of Term, in accordance with an appraisal of the Property as set forth below (each such July 1 shall be referred to herein as an "Appraisal Adjustment Date").

b. In no event shall the Adjusted Ground Rent set pursuant to this **Section 5.2.2.2** be less than the Adjusted Ground Rent as of the Commencement Date.

c. Not later than one hundred eighty (180) days before the Appraisal Adjustment Date, the City shall select an independent qualified real estate appraiser, who shall be a member of a nationally or state recognized appraisal organization, who shall be certified by the State of California to conduct appraisals, and who shall have had at least five (5) years experience conducting appraisals of airport properties, to determine the then fair market value of the Property. Once the fair market value of the Property has been determined by the appraiser, Adjusted Ground Rent shall then be set at an amount equal to ten percent (10%) of the fair market value of the Property as established by the appraiser. City shall notify Tenant and the other On-Airport Companies of the Adjusted Ground Rent for the sixth (6th) Agreement Year as determined by the appraisal, no later than one hundred twenty (120) days prior to the Appraisal Adjustment Date.

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d. If the On-Airport Companies are in disagreement with City's appraisal, then no later than fifteen (15) days from the date of receipt of City's appraisal, the Committee formed pursuant to **Section 1.10** of this Agreement, shall notify City in writing of its disagreement. Within ninety (90) days before the Appraisal Adjustment Date, the Committee and City each shall select an independent qualified real estate appraiser who shall be a member of a nationally or state recognized appraisal organization, who shall be certified by the State of California to conduct appraisals, and who shall have had at least five (5) years experience conducting appraisals of airport properties. Each party shall give written notice to the other on or before the ninetieth (90th) day prior to the Appraisal Adjustment Date of the name and qualifications of its appraiser. If either party fails to timely select its appraiser, the fair market value for the Property shall be determined by the appraiser who has been timely selected and of whom timely notice has been given to the other party.

e. The properly selected appraisers, each within sixty (60) days following their selection, shall conduct an appraisal of the Property to establish the current fair market value as if said Property were fee simple absolute and were vacant and were available for sale for the uses then permitted under existing zoning. The cost of each appraisal shall be borne by the party selecting that appraiser. A copy of each appraisal shall be delivered to the Committee and to City not later than sixty (60) days before the Appraisal Adjustment Date. Any appraisal not delivered within the time period set out above shall be disregarded.

f. If the higher appraisal of the fair market value of the Property exceeds the value in the lower appraisal by ten percent (10%) or less of the lower appraisal, then the two fair market values for the Property contained in the two appraisals shall be added together and divided by two to establish the fair market value of the Property. If only one of the two appraisals is timely delivered, then the fair market value set out in the one timely delivered appraisal shall establish the fair market value of the Property. If the higher appraisal of the fair market value of the Property is more than ten percent (10%) higher than the lower appraisal, then the fair market value of the Property shall be determined as set out below.

g. If the fair market value of the Property is not determined pursuant to **Section 5.2.2.2.f** above, then within ten (10) days after Director's receipt of the last appraisal, Director shall call the two appraisers together in order that a fair market value can be established. If the two appraisers agree upon a fair market value of the Property, the annual Ground Rent for the Property shall then be adjusted to equal ten percent (10%) of the fair market value based upon the appraised value so established. The Adjusted Ground Rent shall be effective as and from the applicable Appraisal Adjustment Date until the next Percentage Increase Adjustment Date.

h. If two appraisers are timely selected pursuant to **Section 5.2.2.2.d** and the higher appraisal is not within ten percent (10%) of the lower appraisal (as described in **Section 5.2.2.2.f** above) and the two appraisers fail to reach agreement as to the fair market value within ten (10) days after they commence fair market value discussions as provided in **Section 5.2.2.2.g**. above, the two appraisers shall themselves select a third, independent real estate appraiser, who shall have the same qualifications as required above. If City's and the Committee's appraisers cannot agree upon a third appraiser within twenty (20)

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days of their having delivered their appraisals, then each of the two appraisers shall write down the names of three appraisers qualified for the purpose of determining the fair market value of the Property. If any name appears on both lists, that appraiser shall be the third appraiser. Otherwise, each appraiser shall deliver to the other its list of three names and each appraiser shall eliminate one name that appears on the list prepared by the other appraiser (leaving two names on each list). If the two appraisers still cannot agree on one appraiser, then each appraiser then shall eliminate one additional name from the list of the other appraiser (so that only one name remains on each list). If the two appraisers still cannot agree on one appraiser, then each of the names shall be written on identical pieces of paper, the papers shall be identically folded and the Director shall select one folded paper. The name of the appraiser on the folded paper shall be the third appraiser. The costs of the third appraiser shall be borne equally by City and the Committee, as shall any other expenses, if any, of the costs of selecting a third appraiser. The third appraiser shall appraise the Property as if the Property were fee simple absolute and were vacant and were available for sale for the uses then permitted under existing zoning, and shall submit said appraisal to City and the Committee within sixty (60) days of such appraiser's selection.

i. The three appraisers shall then, within thirty (30) days of the submission of the third appraisal, meet and attempt to agree upon the then fair market value of the Property as if the Property were fee simple absolute and were vacant and were available for sale for the uses then permitted under existing zoning. A decision joined in by a majority of the appraisers shall be final.

j. If a majority of the three appraisers cannot agree upon a fair market value pursuant to Section **5.2.2.2.i** above, then they shall so notify City and the Committee, and the fair market value of the Property shall then be established as follows:

k. If the low appraisal and/or the high appraisal is/are more than ten percent (10%) lower or higher than the middle appraiser, then the low and/or the high appraisal shall be disregarded. If only one appraisal is disregarded, the remaining two (2) appraisals shall be added together and their total divided by two (2); the resulting quotient shall then be the fair market value of the Property.

i. If both the low appraisal and the high appraisal are disregarded as stated in this subparagraph (i), the middle appraisal shall then be the fair market value of the Property.

l. Once the fair market value of the Property has been determined, Adjusted Ground Rent shall then be adjusted to an amount equal to ten percent (10%) of the fair market value of the Property as established by this **Section 5.2.2.2**. The Adjusted Ground Rent shall be effective as and from the Appraisal Adjustment Date, and until the next following Percentage Increase Adjustment Date, at which time the Adjusted Ground Rent shall be subject to increase pursuant to **Section 5.2.2.1** above.

m. The time periods for calculating the Adjusted Ground Rent by appraisal may be extended by mutual written agreement between Director and the Committee,

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provided that any Adjusted Ground Rent shall be effective as and from the then applicable Appraisal Adjustment Date. Upon determination of the Adjusted Ground Rent, underpayments, if any, shall be immediately paid to City."

SECTION 3. **Section 14.3, "City Performance"**, of **Section 14 "WAIVER"** is amended to read as follows:

"14.3 City Performance
In the event of any breach of this Agreement by Tenant, City may (but shall have no obligation to), after first giving Tenant five (5) days' written notice, cure any breach in the payment of money or performance of any act required under this Agreement, but without obligation of City to make such payment or perform such act and without waiving any right of City or relieving Tenant from any obligation under this Agreement. If in so doing, City is required or elects to pay any money or do any act which will require the payment of any money or the incurrence of any cost or expense, Tenant covenants and agrees to reimburse City the sum or sums of money so paid or incurred by City together with interest at the rate of one and one half percent (1 ½ %) plus costs and damages, as part of the Concession Fee or other fees and charges, within ten (10) days of the first day of the calendar month following City's incurrence or payment of same. The failure to timely pay the same shall constitute an Event of Default."

SECTION 4. **Revised Exhibit D, "TENANT'S PREMISES**," is replaced with **Second Revised Exhibit D,** attached and incorporated into this Third Amendment.

SECTION 5. **Exhibit E, "FOOTPRINT OF AIRPORT LAND UPON WHICH CRCF IS CONSTRUCTED**," is replaced with **Revised Exhibit E,** attached and incorporated into this Third Amendment.

SECTION 6. All of the terms and conditions of the amended Agreement not modified by this Third Amendment shall remain in full force and effect.

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WITNESS THE EXECUTION HEREOF on the day and year first written above.

"CITY"

APPROVED AS TO FORM:

CITY OF SAN JOSE, a municipal corporation

_____
KEVIN FISHER
Senior Deputy City Attorney

By_____
DENNIS D. HAWKINS, CMC
City Clerk

"TENANT"

DTG OPERATIONS, INC., an Oklahoma corporation

By_____

Name_____

Title _____

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SECOND REVISED EXHIBIT D
TENANT'S PREMISES

Each On-Airport Company is represented on Exhibit D as follows:

A The Hertz Corporation
B Avis Budget Car Rental, LLC
C EAN, LLC
D DTG Operations, Inc.
E Fox Rent A Car, Inc.
F Future Small Market Share Company

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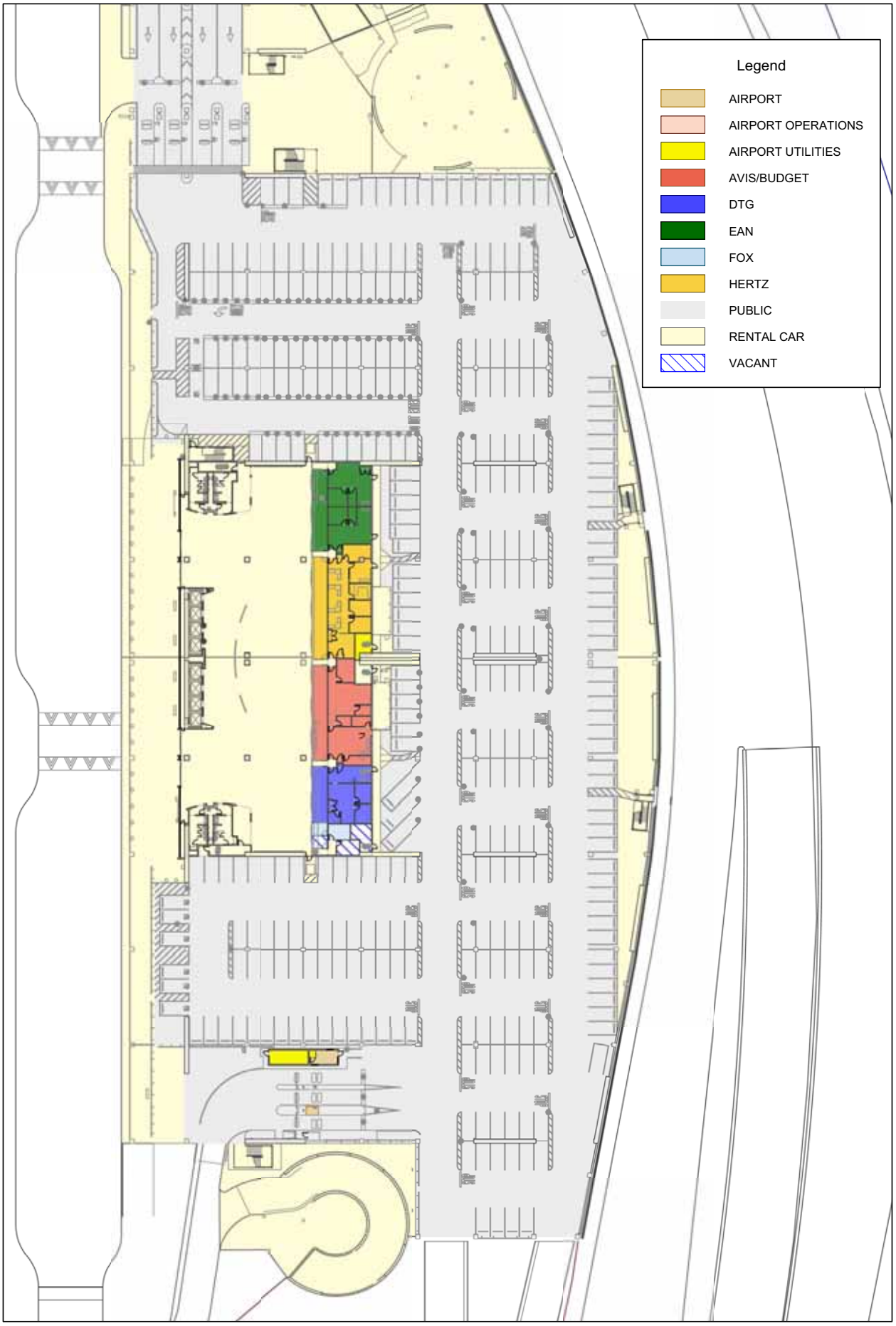

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NORMAN Y. MINETA SAN JOSE INTERNATIONAL

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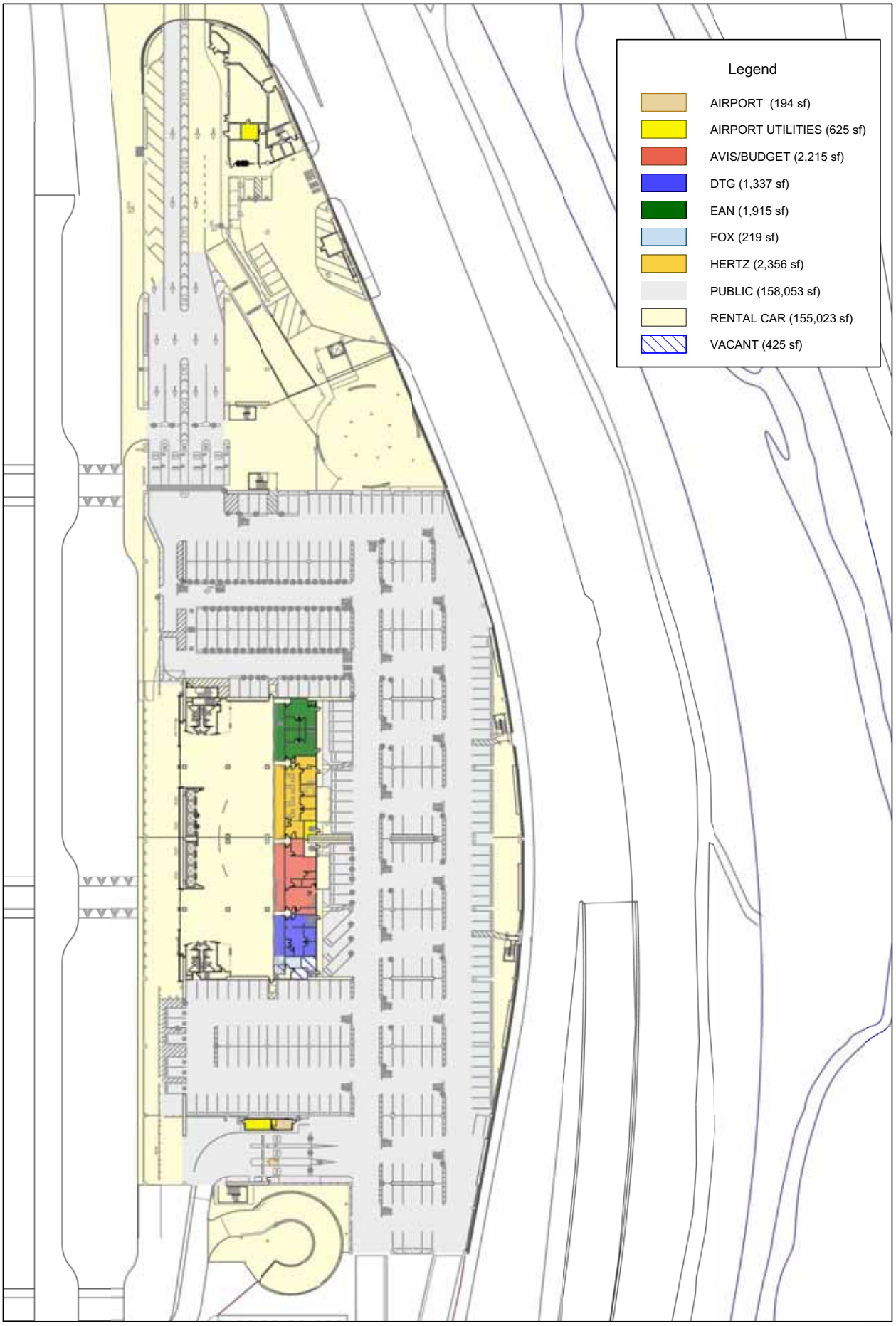
SECOND REVISED EXHIBIT D



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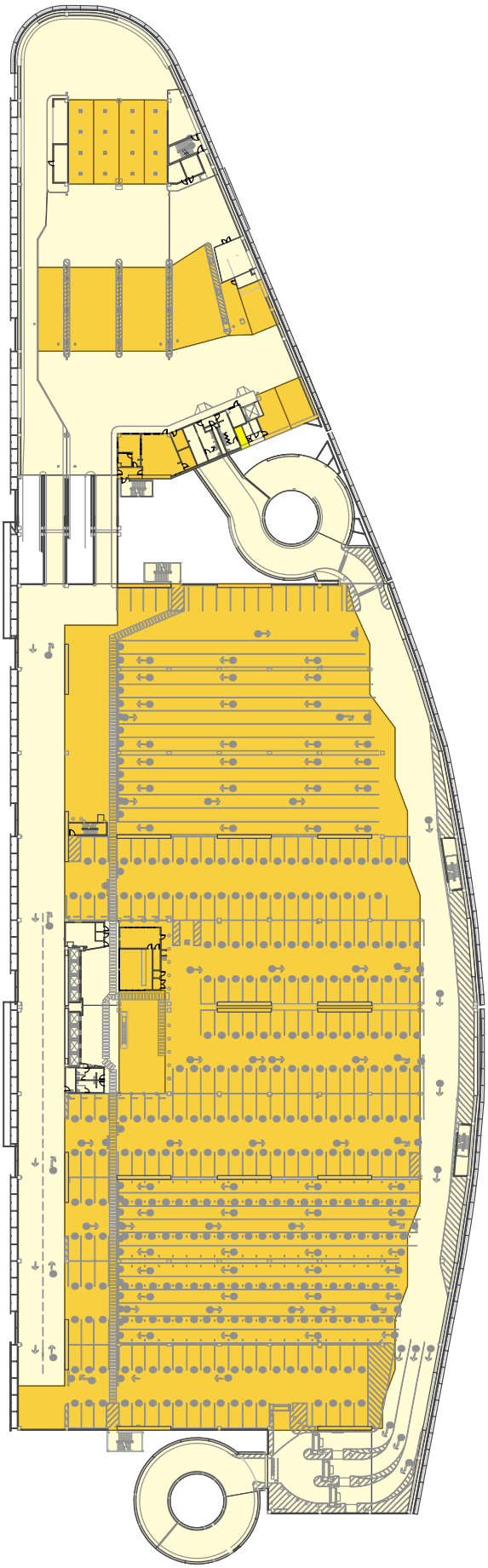

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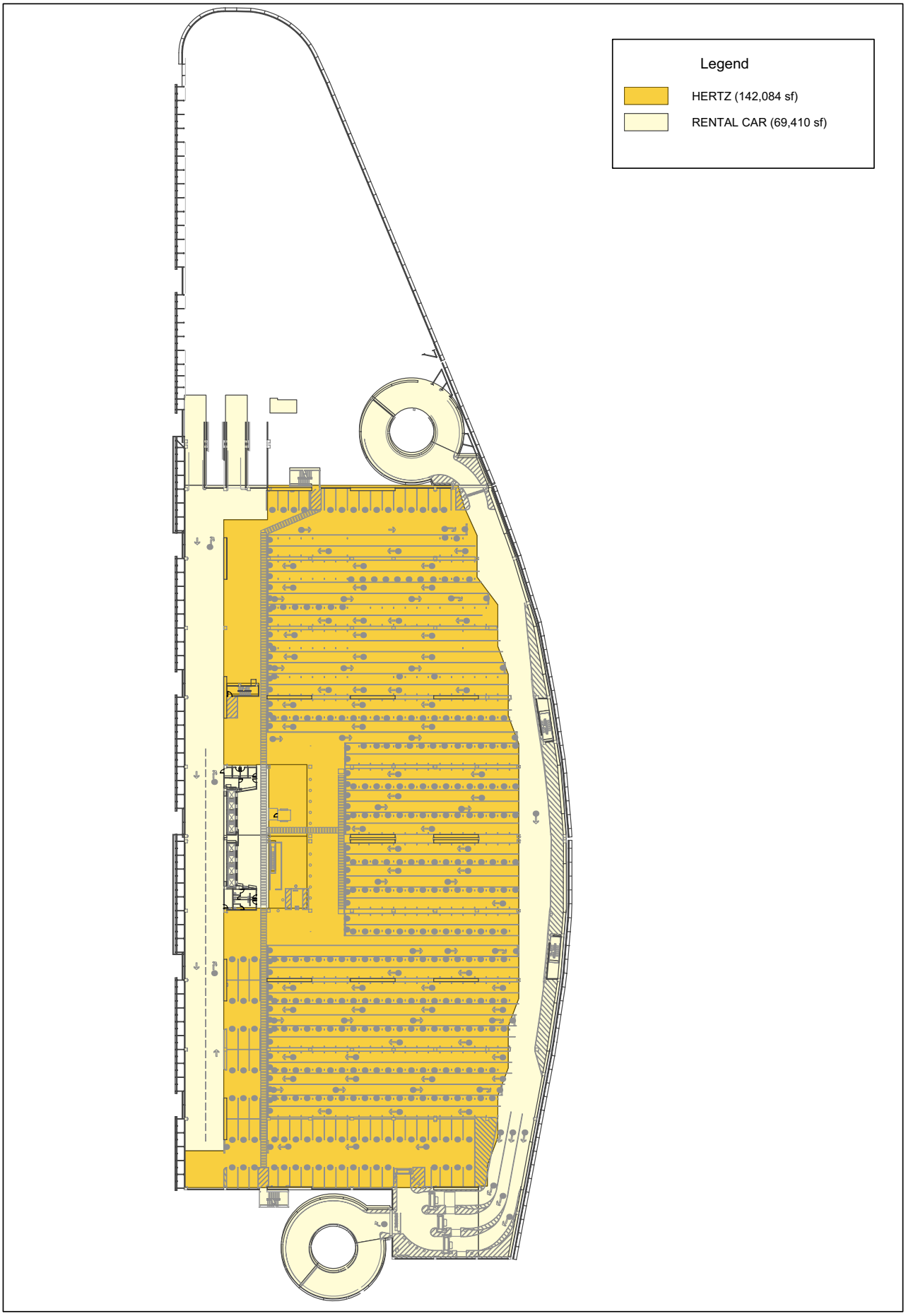

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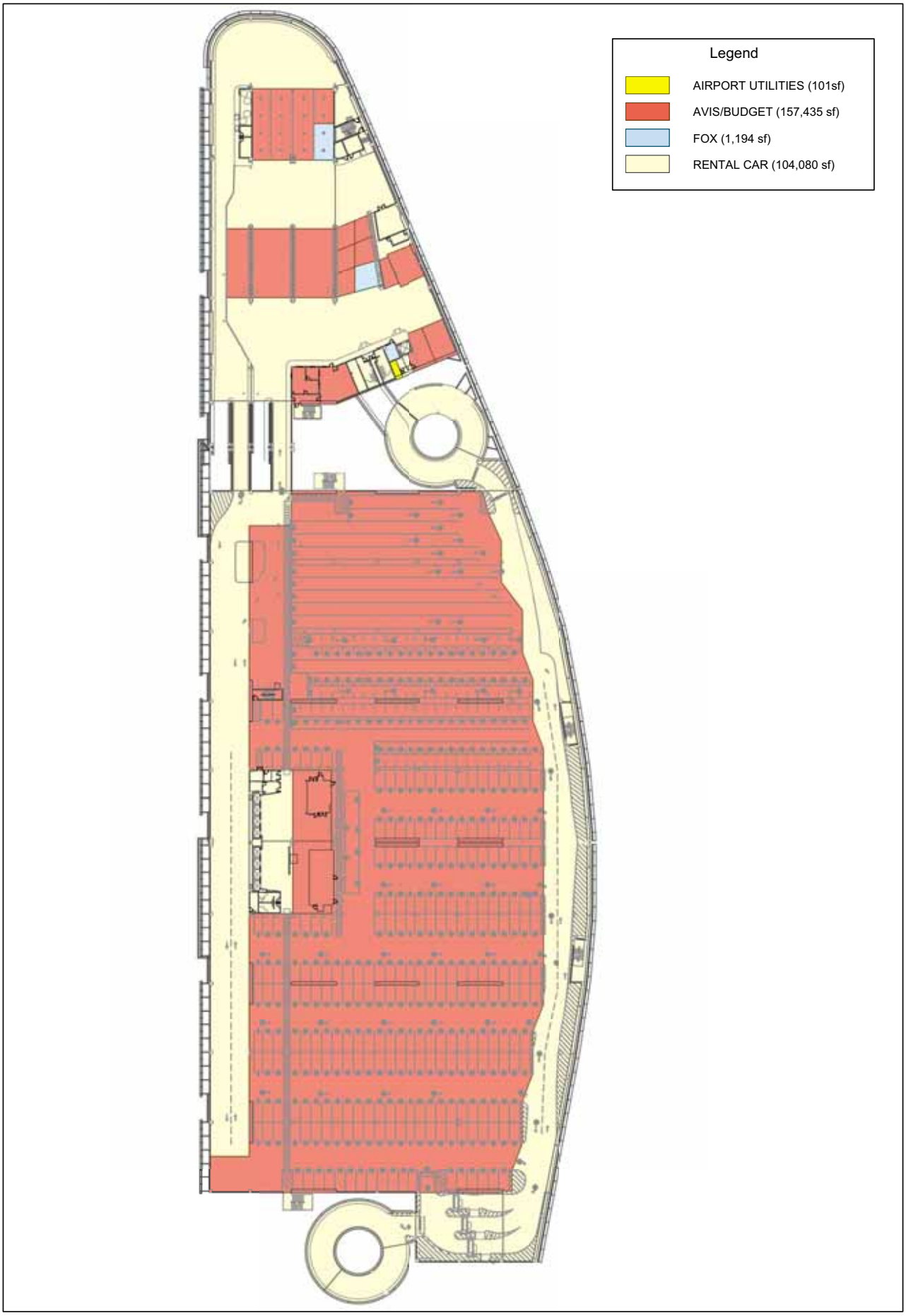

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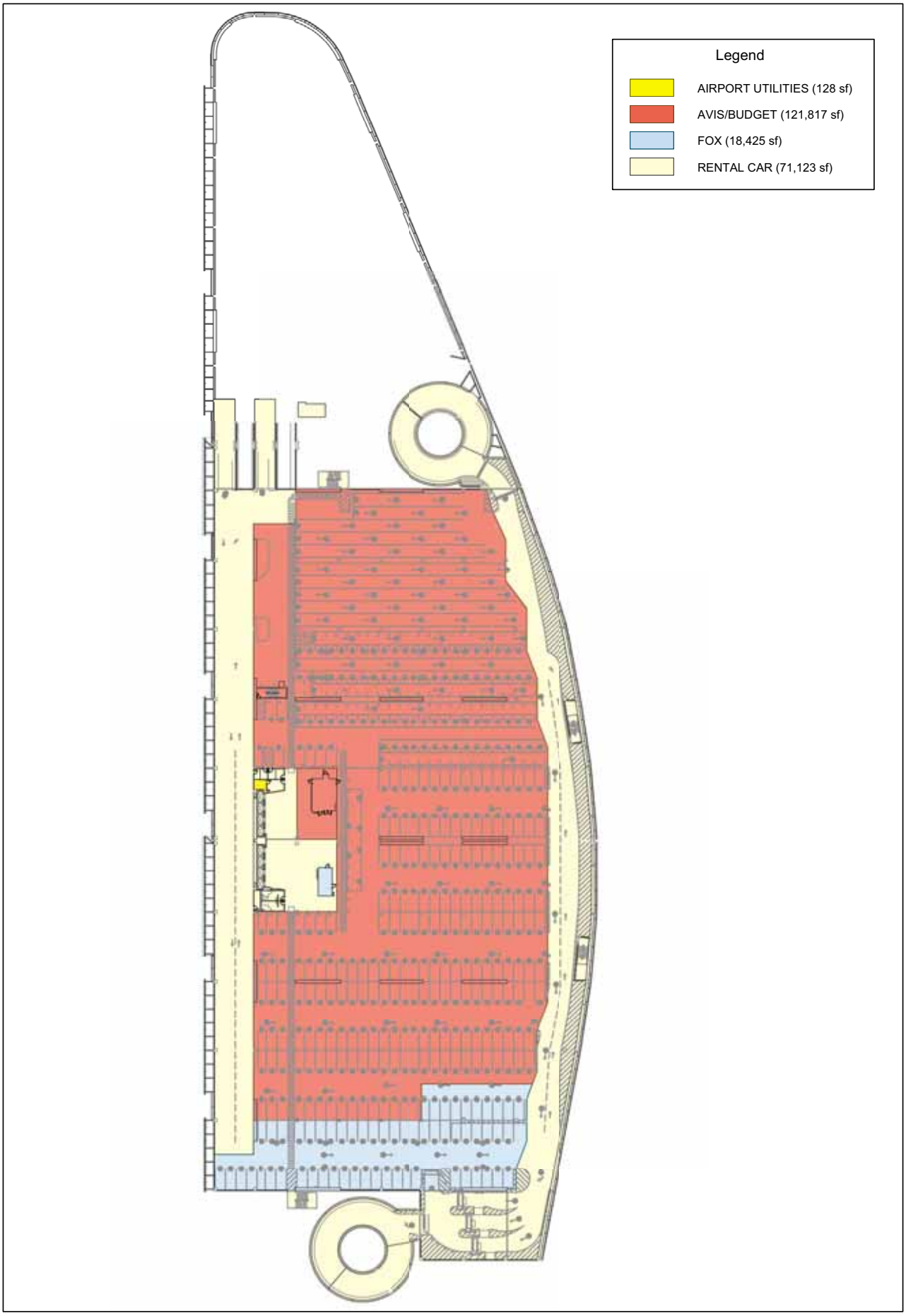

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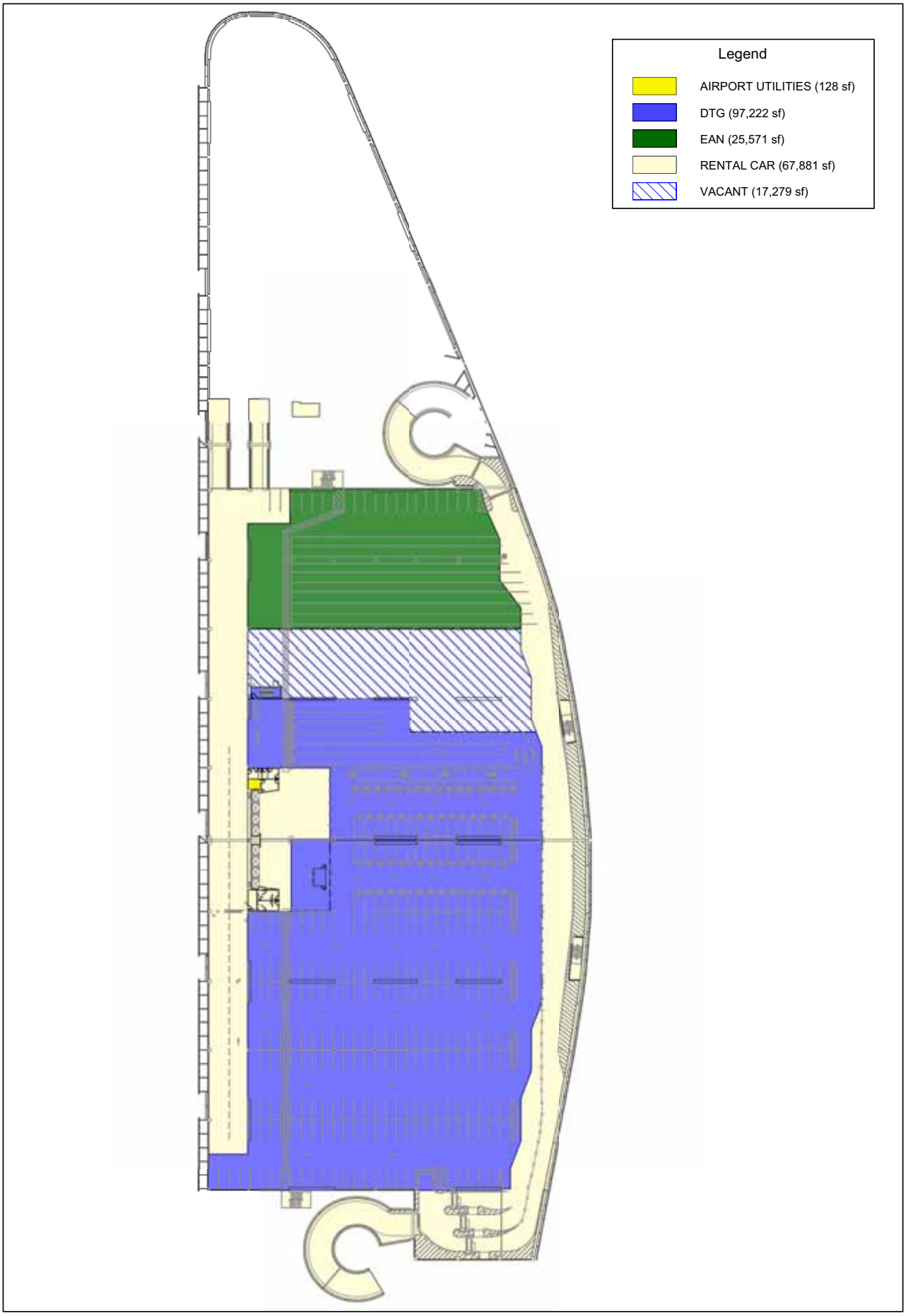

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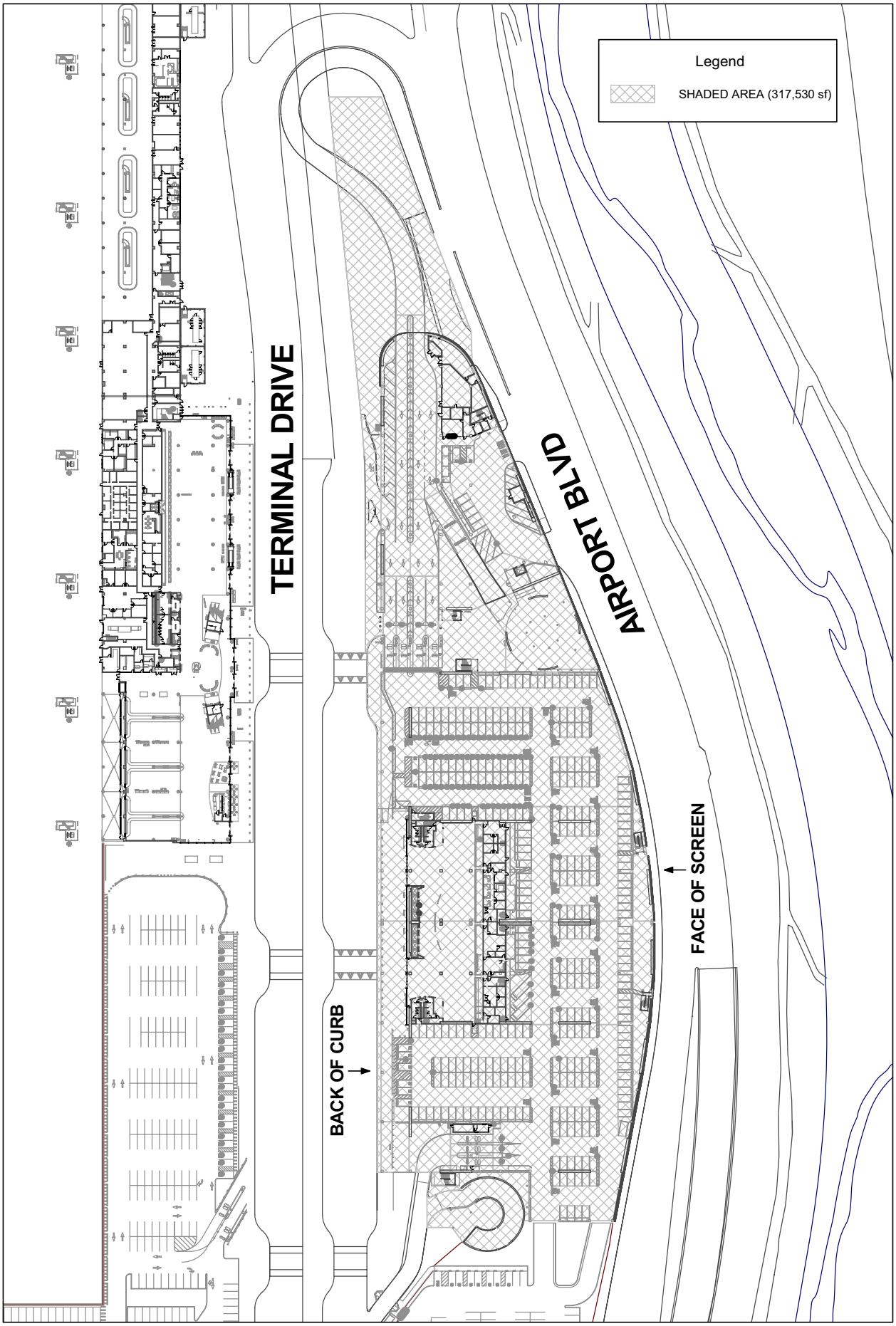
REVISED EXHIBIT E



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NORMAN Y. MINETA SAN JOSE INTERNATIONAL

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RD:KWF:SBM
10/7/11

CORPORATE SECRETARY CERTIFICATE

This certificate shall be executed by the secretary or assistant secretary of the corporation.

I, _____ certify that I
Name of Secretary or Assistant Secretary

am the ☐Secretary or ☐ Assistant Secretary of the corporation named in the attached agreement; that _____
Name of Person that Signed Agreement

signed the agreement on behalf of the corporation as the _____
Title of Person that Signed the Agreement

of the corporation; and that the agreement was duly signed for and in behalf of the corporation by authority of its Board of Directors, and is within the scope of its corporate powers.

_____
Signature of Secretary or Assistant Secretary

_____
Corporate Seal

_____
Date

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