



**GRAND TRAVERSE COUNTY
ADMINISTRATION OFFICE
BOARD OF COMMISSIONERS**

400 BOARDMAN AVENUE, SUITE 305
TRAVERSE CITY, MI 49684-2577

ADMINISTRATION 231-922-4780
BOARD OF COMMISSIONERS 231-922-4797

**Grand Traverse County
Review of Governance Model
Questions/Comments from Commissioners and Responses
Submitted January 31, 2020**

As part of its due diligence to review the governance model of the Cherry Capital Airport, Grand Traverse County held three public sessions to solicit comments and feedback from the public, and will be publishing the comments, a summary of them, and responses in a separate report. In addition to feedback from the public, County Commissioners were asked to present questions they have to the Administrator and those questions would be answered at a meeting in January of 2020. Below are the questions and comments from Commissioners that were reviewed and answers provided.

Q1. What are the actual terms of our current lease agreement with the Airport?

RESPONSE: The Joint Operating Agreement was amended in November of 1998 and terminates on February 17, 2049 and the Lease Agreement terminates on September 30, 2040.

The amended agreement has 13 sections:

1. Re-establishment; Authority

This Agreement amends the original Agreement Creating the Northwestern Regional Airport Commission dated October 4, 1971, executed by the City of Traverse City, the County of Grand Traverse, and the County of Leelanau. Pursuant to Chapter 7 of the Michigan Aeronautics Code, Section 134 (MCL 259.134), Grand Traverse and Leelanau Counties hereby continue the existence of the Northwestern Regional Airport Commission ("NRAC") for the purpose of acquiring, establishing, constructing, enlarging, improving, maintaining, equipping, operating, and regulating the Cherry Capital Airport landing fields, and other aeronautical facilities and property incidental to its operation, and conducting all operations with authority and limitations as- otherwise provided for in said Act. The NRAC may lease space, area, or improvements and grant concessions for aeronautical purposes, or purposes incidental to the operation of the Airport, all of which are subject to the provisions of the Michigan statute referenced herein.

2. Principal Officers; Representation; Term of Office; and Fiscal Year

The Northwestern Regional Airport Commission shall consist of seven (7) members appointed by each of the governing bodies signatory to this agreement as follows: Five (5) by the County Commission of Grand Traverse and two (2) by the County Commission of Leelanau. Each member shall be appointed for a three (3) year term and shall be eligible for reappointment.



3. Annual Meetings; Officers

An annual meeting shall be held at the first meeting in January at which time the Commission shall select officers, as hereafter provided, for the coming year. The terms of office for the officers shall be one (1) year. The Commission shall select from their members a Chairman, a Vice-Chairman, a Secretary and a Treasurer.

4. By-Laws

The Commission shall provide by its By-Laws the time and place of regular meetings of the Commission and for special meetings that may from time to time be necessary. Special meetings shall be at the call of the Chairman, or on application of any three (3) members of the Commission. Notice thereof shall be given in accordance with the Michigan Open Meetings Act, MCL 15.251, et. seq. and as amended. The By-Laws may provide for other matters not inconsistent herewith to promulgate the intent of this agreement and to provide for the effective administration of the airport facilities.

5. Employment of Personnel

The Commission shall hire an Airport Director, to be selected on the basis of fitness and ability to perform the work required and who has training and actual experience in the administration of airports. The Airport Director currently serving at the time of the execution of this Agreement, shall continue in service without interruption. The Commission may also create such other positions as may from time to time be recommended by the Airport Director. The Airport Director shall attend all meetings of the Commission and shall be responsible to the Commission for the proper and effective operation and management of the airport facilities, and shall serve at the pleasure of the Commission.

6. Expansion of Commission

Additional governmental entities may be permitted to participate herein subject to approval of the governmental bodies of the existing participants and subject to agreement to assume a representative share of the costs and expense of operation and debt retirement, if any, together with such other conditions as may be imposed by the existing participants.

7. Operating Budget; Apportionment of Costs; Profits

A. Budget. NRAC shall prepare an annual operating budget for the Airport prior to December 31st of the year prior to the budget year referenced. In the event that the NRAC proposes an annual operating budget recommending allocations to its budget from Grand Traverse and Leelanau Counties, such a request for allocations shall be submitted from the NRAC to the Counties prior to September 1st of the year prior to the year in which the budget applies, unless said time period is otherwise extended in writing by each County. Each County shall approve or deny the requested allocation of the NRAC within sixty (60) days of its receipt. If either County fixes its contribution at less than the amount requested by the NRAC, the contribution of the other County shall be decreased proportionately, unless that County shall decide to pay a larger portion of the total contribution than is required by this Agreement. The

expenditure allowances as finally adjusted and as approved by the NRAC shall control the year's spending program.

B. Costs. In consideration of the direct and indirect benefits received by Grand Traverse and Leelanau Counties from the existence of an Airport in the community, the Counties hereby pledge and agree to share all of the airport costs for operating, maintaining, improving, expanding, administering and financing the said airport that are not covered by airport revenues on the following basis:

85% - Grand Traverse County
15% - Leelanau County

Contribution payments necessary to meet the terms of this Agreement shall be made by the Counties to NRAC in two equal payments of fifty (50%) percent each on/or before March tenth (10th) and September tenth (10th) for each fiscal year.

C. Profits. Any net proceeds over and above costs, expenses and reserves relating to the operation and capital improvements of the Airport may be, but are not required to be, distributed to the participating governmental entities on the same percentage basis as set forth above or as this percentage basis may change from time to time, it being understood that it is the express intent of the parties that reasonable operating, replacement, and improvement reserves shall be established and funded. Any net proceeds to be returned to said governmental entities must be approved by the NRAC and the Counties as being consistent with guidelines for the disposition of any surplus funds established by federal and state authorities with jurisdiction over operations at the Cherry Capital Airport.

8. Conveyance of Airport Property

Grand Traverse and Leelanau Counties expressly represents that they have title to the real property on which the Airport is situated, and shall forthwith lease for the sum of one (\$1.00) dollar, for public airport purposes, all such property of the Airport to NRAC, it being expressly understood that such lease shall incorporate all of the provisions pertaining to certain rights, licenses, privileges, responsibilities, and grants from the United States Department of Transportation, Federal Aviation Administration and the Michigan Aeronautics Commission.

9. Term

With the effective date of this Agreement, the term of the prior agreement dated October 4, 1971 shall be completed. This Agreement shall then be in full force and effect for a term of fifty (50) years from the date hereof and thereafter for like terms unless and until terminated by not less than one (1) year notice from either County to the other County. Powers of the NRAC under this Agreement, notwithstanding termination hereof, shall continue to the extent necessary to maintain and operate the Airport until disposition of the property acquired or operated upon under this Agreement as provided in Section X.

10. Disposition of Property and Termination

As soon as is practicable after termination of this Agreement, the County Commissions of Grand Traverse County and Leelanau County shall dispose of all property acquired or operated upon under the Agreement, including surplus funds, in any manner in which they shall then agree. If no agreement as to disposition is reached within six (6) months after termination, an advisory board shall be appointed to recommend disposition of the airport property. This board shall consist of

five (5) representatives appointed by Grand Traverse County, and two (2) representatives appointed by Leelanau County.

11. Agency Relationship

Pursuant to Chapter 7, Section 135 of the Michigan Aeronautics Code (MCL 259.135), the Counties hereby appoint the Northwestern Regional Airport Commission as their agent for applying for, accepting, receiving, receipting for, and disbursing funds which may be (or have been) granted to the Northwestern Regional Airport Commission and the Counties for the benefit of property, if any, in which the Counties retain an interest and which has been, and is used currently, for airport purposes. This Agency Agreement shall apply to those funds received as a grant from the United States Department of Transportation, Federal Aviation Administration, under the Federal Airport Improvement Program for the Development of Public Airports. The Counties further recognize that the Northwestern Regional Airport Commission may enter into agency agreements with the Michigan Department of Transportation for the administration of specific projects in which grant monies as outlined above may be received for airport development.

12. Entire Agreement

The parties acknowledge that an agreement amending and replacing the Lease of May 1, 1972, was negotiated and executed of even date herein and, in conjunction with the terms of this Agreement, incorporates all of the agreements between the parties.

13. Notices

All notices required or permitted to be given under this Agreement shall be in writing and shall be given by United States Mail or by the United States Express Mail, or other established express delivery service, postage or delivery charge prepaid, return receipt requested, and addressed to the persons and addresses as designated below.

There are 20 sections in the Agreement Amending and Replacing Lease of May 1, 1972:

1. Grant and Premises

Subject to the terms set forth below, the Counties hereby commit to NRAC the premises (including real property, easements, avigation easements, and all appurtenances thereto) known as the Cherry Capital Airport, located in the City of Traverse City, County of Grand Traverse, State of Michigan, as identified by the legal description set forth in Exhibit 5, attached hereto (and Exhibit A as referenced in Paragraph C above) and incorporated herein by reference (the "Premises"). To the extent that real property is added to or removed from the legal description referenced herein, the parties agree that all of the real property interests owned by the counties as dedicated for airport purposes shall be controlled under the terms of this Agreement.

FURTHER, NRAC shall have the privilege of occupying and using as the controlling management, maintenance, and operating entity for the term of this Agreement, and for the use and benefit of the public, the Premises, subject to the rules and regulations governing such airport issued by the federal and state aeronautical agencies and the local governing authority it being expressly understood that this privilege covers the entire period of the Agreement.

2. Term

The term of this Agreement shall be for a period of 50 years, commencing retroactively to October 1, 1990, and continuing through the 30th day of September, 2040, with options to renew for like terms for so long as the Premises are used for public airport purposes, unless said term shall be sooner terminated as hereinafter provided upon the terms, covenants, and conditions hereinafter contained.

3. Rental

NRAC agrees to pay the sum of one (\$1 .00) dollar to the Counties, in consideration for the use of the Premises as provided herein.

4. Purpose for which premises are to be used

The Premises leased are to be used by NRAC for the following purposes only, and for no other purposes whatsoever unless agreed to in writing by the Counties:

- a) To carry on the operations of the airport in the interest of the public and the air-transportation needs of the general population of the area served by the airport may be required;*
- b) To encourage the use of the airport by the general public;*
- c) To develop and arrange for the continued and best use of the Premises, including the updating of land use master plans, construction of facilities, and the protection of the navigation approach corridors to the Airport, all of which shall be in the public's-best interest; and*
- d) To charge fair, reasonable, and non-discriminatory prices for each unit of sale, service or lease rentals, provided that the NRAC may be allowed to make reasonable and non-discriminatory discounts, rebates, and other similar types of price reductions to volume purchasers .*

No portion of the Premises shall be used for a purpose which may interfere with the proper use, maintenance, and future development of the airport or which may be objectionable to the Michigan Aeronautics Commission or the Federal Aviation Administration.

5. Maintenance of Premises

NRAC agrees that it will, during the continuance of this Agreement, keep said premises and improvements subsequently erected in good repair and in a neat and attractive appearance, and shall be responsible for all maintenance of the facilities that shall be required to meet the daily operation of the airport.

6. Insurance

NRAC agrees to keep and maintain insurance against loss by fire, hail, and windstorm, public liability and property damage with such company or companies as the Counties shall approve. In the event of loss by fire, hail, or windstorm; the proceeds from such insurance shall be used by NRAC to repair or replace such buildings, appurtenances, and improvements to the same condition as existed prior to such loss. In addition, NRAC and its agents agree to obtain proper Worker's Compensation Insurance for its employees, and as to all insurance required as hereinafter stated, NRAC shall give sufficient evidence in

writing that each and every coverage has been procured and is currently in effect and force to the end that the Counties will be saved harmless from any claims, suits, or processes of any nature whatsoever arising out of or from NRAC's operations at such airport.

7. Laws and Regulations

NRAC shall, at its own cost and expense, comply with all of the requirements of all laws and regulations, municipal, state and federal, now in force, or which may come into force (e.g., Americans with Disabilities Act and the Michigan Handicappers Civil Rights Act), pertaining to the Premises, and the use and occupancy of the Premises, such that if any improvements or other alterations are required to be made in order to comply with such laws and regulations, NRAC shall timely do so at its own cost and expense. Specifically, NRAC agrees to comply with all the requirements, terms, and provisions mandated by the United States Department of Transportation, Federal Aviation Administration, under the Federal Airport Improvement Program for the development of public airports, which requirements are incorporated by reference, together with any requirements, terms, and provisions mandated by the Michigan Aeronautics Commission.

8. Conditions upon use of the premises

- a) NRAC agrees that it will not consent to any unlawful use of the Premises, nor permit any such unlawful use thereof.*
- b) All provisions of this Agreement shall be subordinate to the rights of the United States of America to lease the Premises or any part thereof during time of war or national emergency, for military or naval use, and any provision of any lease to the United States of America shall be suspended thereby.*

9. Improvements

NRAC may arrange for the financing of improvements by placing a mortgage to secure loans for such improvements to be constructed by NRAC. Further, NRAC shall notify the Counties, in writing, of the name and address of the mortgagee and of the terms of the mortgage loan at least ten (10) days prior to the placement thereof. Said mortgage shall be subject to all terms of this Agreement. Any notice of default in the terms of the Agreement served by the Counties on NRAC shall also be served upon the mortgagee and any default of the mortgagor, notice of same shall be given to the Counties, and the Counties shall have same rights as the mortgagor to correct the same.

10. Assignment and Subletting

NRAC shall not assign or transfer this Agreement, except as herein provided without the written consent and approval of the Counties, provided, however, that the Counties will not unreasonably withhold such consent. The NRAC shall assume responsibility for all contracts and leases currently in effect which encumber the premises, and shall further assume responsibility for any renewals of said contracts or leases which may be required for the orderly operation of the Cherry Capital Airport. Notwithstanding anything to the contrary implied herein, the NRAC may lease space, area, or improvements and grant concessions for aeronautical purposes or purposes incidental to the operation of the Airport, subject to the provisions of Chapter 7 of the Michigan Aeronautics Code, Section 134 (MCL 259.134).

11. Notices

All notices required or permitted to be given under this Agreement shall be in writing and shall be given by United States Mail or by the United States Express Mail, or other established express delivery service, postage or delivery charge prepaid, return receipt requested, and addressed to the persons and addresses as designated below: (the rest was clipped the remainder for space)

12. Default and Termination

- a) *If NRAC shall default in the performance or compliance with any of the agreements, terms covenants, or conditions in this Agreement for a period of thirty (30) days after notice from the Counties to NRAC specifying the items in default, or in the case of a default on a contingency which cannot with due diligence be cured within the thirty (30) day period, and NRAC fails to proceed within the thirty (30) day period to cure the same and thereafter to proceed with the curing of such default with due diligence (it being the intention of the parties in connection with a default not susceptible of being cured with due diligence within the thirty (30) day period that the time within which to cure such default shall be extended for such period of time as may be reasonably necessary, exercising all due diligence, to complete the same), then, and in such event, the Counties (or either of them) at any time thereafter may give written notice to NRAC in the manner and as provided for in the Amended Joint Operating Agreement for the Northwestern Regional Airport Commission executed of even date, specifying such event constituting a default and stating that said Agreement and the term of said Agreement shall expire and terminate as provided for in said, Agreement; and all rights of NRAC under said Agreement shall expire and terminate as provided for in said Agreement.*
- b) *Should the Counties (or either of them) default in the performance of any covenant of term of this Agreement, and such default continue for thirty (30) days after receipt by the Counties of written notice thereof from NRAC (except if the Counties (or either of them) shall, within said period of time, commence and diligently proceed to cure said default), NRAC may:*
 1. *Pursue all rights and remedies provided -at law or in equity under the terms of this Agreement); and/or(*
 2. *Specifically enforce such obligation or institute other appropriate legal action.*
- c) *The parties acknowledge that an Amended Joint Operating Agreement for the Northwestern Regional Airport Commission was negotiated and executed of even date herein and, in conjunction with the terms of this Agreement, incorporates all of the agreements between the parties. In the event that the Amended Joint Operating Agreement referenced herein shall be amended or terminated in such a way as to relieve or remove the authority of the Northwestern Regional Airport Commission to direct public air services on the premises, this Agreement shall be considered terminated as of the effective date of any such amendment of the Amended Joint Operating Agreement, and. The responsibilities of all parties shall be accepted equally by Grand Traverse County and Leelanau County.*

13 No Waiver

The failure of either party to enforce any covenant or condition of this Agreement shall not be deemed a waiver of the right of either party to enforce each and every covenant and condition of this Agreement. No provision of this Agreement shall be deemed to have been waived unless such waiver is in writing and signed by both parties.

14 Successors and Assigns

The covenants, conditions and agreements contained in this Agreement shall bind and inure to the benefit of the parties and their respective distributees, successors, and, except as otherwise provided in this Agreement, their assigns.

15 Quiet Enjoyment

The Counties covenant and warrant to NRAC that the Counties have good and marketable title to the Premises, and the Premises are suitable and available for the purpose intended by NRAC under this Agreement. The Counties covenant with NRAC that upon NRAC's observing and performing all the terms, covenants, and conditions on NRAC's part to be performed and observed, NRAC may peaceably and quietly enjoy the Premises.

16 Entire Agreement

Except as provided in paragraph 12(c) herein, this Agreement contains and fully integrates the entire agreement between the parties, and it shall not be modified in any manner except by an instrument in writing executed by the parties. If any term or provision of this Agreement or the application of the Agreement to any person or circumstances shall, to any extent, be invalid or unenforceable, the remainder of this Agreement, or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected, and each remaining term and provision of this Agreement shall be valid and be enforced to the fullest extent permitted by law.

17 Construction

This Agreement shall be governed by and construed under the laws (statute and common) by the State of Michigan. Paragraph headings are for convenience only. In no event shall any such title or caption be deemed to be part of this Agreement or interpretive of any of its language or intent. No provision of this Agreement is to be interpreted for or against any party because that party or that party's legal representative drafted this Agreement or any of its provisions. Words of any gender in this Agreement shall be held to include any other gender and words in the singular number shall be held to include the plural when the sense requires. Time is of the essence of this Agreement, and all the provisions relating to timely performance shall be strictly construed.

18 Corporate Authority

The Counties and NRAC each has, by proper corporate action, as necessary, authorized the execution of this Agreement. This Agreement does not violate any provisions of NRAC's Articles of Incorporation or Bylaws or any other agreement, loan commitment, or other contract by which either the Counties or NRAC is legally bound.

19 Counterparts

This Agreement may be executed in one (1) or more counterparts, and by each party hereto and separate counterparts, each of which when executed shall be deemed to be an original, but all of which together shall constitute one in the same agreement.

20 Amendments and Agreements

This Agreement may be amended at any time upon written agreement of the Counties and NRAC. No amendment shall be effective unless it shall be in writing and executed by both parties.

Q2. What specific public interest protections could we build into any future legal agreements around Eminent Domain and zoning decisions in the event the Counties vote to allow the Airport to move to an authority governance model?

RESPONSE: Currently, the Airport relies on the Counties to exercise Eminent Domain, if required. Such a procedure would have the benefit of both the Authority and the Counties to be in alignment in regard to the exercise of eminent domain. As we create the Articles of Incorporation each County will have the opportunity to address Eminent Domain which could include, County concurrence before the Airport acquires property using Eminent Domain in connection with an Airport project and/or allow for the Airport to acquire property through the condemnation (eminent domain) process only if deemed necessary for an airport improvement project, or when the FAA directs the Airport to acquire property for safety reasons.

State law provides an airport with exclusive control of uses that are “aeronautical uses,” and thus aeronautical uses are exempt from a local unit of government’s zoning regulations. Aeronautical uses are such uses required for the operation of an aircraft or which contributes to or is required for the safety of aircraft operations. Examples include aircraft fuel storage and sale, and aircraft storage or maintenance. Local zoning applies to non-aeronautical uses. An example of a non-aeronautical use is Costco. For a more detailed explanation of the law related to aeronautical uses and zoning please see the attached opinion memo prepared by Traverse City Attorney Lauren Tribble-Laucht.

Currently, zoning control and representation for the non-aeronautical uses at the Airport is limited to the City of Traverse City. There is no representation with respect to these zoning issues for the adjacent townships or the Airport. If an Authority is created the Authority has control over aeronautical and non-aeronautical uses within the airport property boundaries. Through the creation of the Articles of Incorporation zoning could be addressed by requiring the Airport to address regulation of non-aeronautical development on Airport property with representation from the municipalities surrounding the Airport, such as East Bay Township, Garfield Township, and the City of Traverse City. These provisions would need to be consistent with State and Federal laws.

Q3. What specific pros and cons are there to the taxpayers of Grand Traverse County by moving to an Airport Authority governance model?

RESPONSE: In terms of finances and taxes, Grand Traverse County taxpayers would not be affected as the Airport is funded based upon Airport user fees and Federal Airport Improvement Grants. However, there are multiple other advantages for the region, including enhanced economic impact as a result of

improved Airport operations and revenue. Please see the information within Attachment 1 which includes a list of pros and cons for the Airport Authority model.

Q4. Should the County consider retaining independent legal counsel to help us navigate a shift to an Authority, again in the interest of protecting the public interest in matters as sensitive as commercial development, clear cutting of publicly owned property, use of Eminent Domain, etc.?

RESPONSE: Perhaps. Grand Traverse County legal counsel in combination with the Leelanau County legal counsel and the Northwestern Regional Airport Commission legal counsel have the professional skills needed to perform the legal reviews necessary for a government transition independently and in the best interest of their respective constituencies. I have spoken with Mr. Tholen and he believes that he has the ability to review the documents involved in any transition however he does not have history with the laws surrounding aviation. That said, if the County Board feels it necessary to retain outside counsel, this can be done.

Q5. What is the scope of Grand Traverse County's current authority over the taxpayer-owned Airport property?

RESPONSE: Grand Traverse County and Leelanau County are equal owners of the Airport property. The Airport property is subject to State and Federal laws, which includes Federal Grant Obligations. Many of the Federal Grant Obligations protect the Airport and identify what the Airport owners and Airport Sponsor are allowed to do with the property. The Counties, through the operating agreement, granted to the NRAC, control over the operation of the Airport including the ability to lease property on the Airport.

Under the Act the NRAC is currently formed under, the NRAC may exercise, on behalf of the Counties, all of the powers as granted by the Act. MCL 259.134(c). Further, the Act provides that where two or more political subdivisions operate an airport, they must create a Board or Commission that shall be in charge of all of the activities on the airport necessary to run an airport. MCL 259.134(b). Exceptions to the broad grant of authority to the NRAC include the exercise of Eminent Domain, the power to tax for airport purposes, the power to incur debt, and acquire property in the name of the counties.

Q6. What can we do, and what can we not do, as Grand Traverse County to that property?

RESPONSE: Grand Traverse County and Leelanau County as joint owners can use the Airport property as an airport. The Counties cannot use the property for any other purpose without the consent of the FAA. The type of consent and the conditions for such consent would vary depending on the specific ask. For example, if the County wants a portion of the Airport to be used for a soccer field, this use would need to be evaluated to determine whether it would be compatible with Airport use at the proposed location. Additionally, the County (or another organization) would have to pay the Airport fair market value for this use if it is allowed – this is an FAA requirement. Or if the County wanted to construct a County office building on the property, again it would have to be evaluated for compatibility and fair market value would need to be paid by the counties for the land area used.

Q7. How does zoning currently apply to the Airport's various uses of the land including subletting and commercial builds? What would change in the event the Airport governance model takes the zoning process "in house"?

RESPONSE: Under the current governance model, the Airport has control over all Airport property for aeronautical related facilities. Traverse City has zoning control over non-aeronautical related development at the Airport.

Under a Regional Airport Authority, the Authority would have both aeronautical and non-aeronautical zoning control over property that is part of the airport, which includes airport facilities defined in the Act as both aeronautical and non-aeronautical development, subject to State and Federal legislation. MCL 259.143(3) and MCL 259.138(2)(b)(iii).

Please also see Question Q2 and its response above.

Q8/COMMENT: In discussions with you (Nathan Alger) about this issue last week, we seemed to understand the Airport's responsibility on following City zoning differently. If I understood you correctly, you believe the Airport even under current status quo governance and agreements, didn't have to follow City zoning on the Costco development but did so to "be a good neighbor" (I believe that was your phrase). Did I understand that right?

RESPONSE: Please see the responses to Q2 and Q7 above.

Q9. When the report says the existing agreement is "outdated" what exactly does that mean? We use many old documents in American government. Our U.S. Constitution founding document, for instance, is quite old, but most people still stand by it. So what *needs* changing?

RESPONSE: The term "outdated" refers to the lack of compliance with current state and federal law. The existing agreements have multiple deficiencies that do not comply with state and federal law as outlined in the Airport Governance Advisory Committee Report. Examples:

- Term of the agreement
- Lack of dispute resolution between the Counties or the Airport Commission
- Historical property transactions
- Distribution of profits, which is a violation of FAA policy
- City zoning requirement for all uses
- Reversion of Airport property within deed

Please see the information within Attachment 2 for a complete list.

Q10./COMMENT: Can the Airport Director be an elected position? This feels somewhat outlandish, but I ask this because I believe strongly in the principle of authority and responsibility being vested in the same party and a mechanism for holding that party accountable. Vesting an appointed leader appointed by a board which is in turn appointed by multiple counties with Authority powers seems to violate that principle. There isn't an effective means to hold that person accountable for the impact his decisions have on the community. We commissioners are then responsible for the community decisions, but the airport director can be making decisions that directly impact the community, and the Board of Commissioners would lack the authority over those decisions.

RESPONSE: There is no authority under Michigan law to create an elected Airport Director. Airport Director positions are not elected positions under any airport governance model provided by current Michigan legislation.

Q11. How will the advisory board be appointed?

RESPONSE: NOTE: An “advisory” board or council is a separate entity from the Authority’s Board Members. This answer addresses the appointment of the Authority’s Board Members, not a potential or optional advisory board/council/committee:

Members to the Authority’s Board would be appointed by both Grand Traverse County and Leelanau County. The Articles of Incorporation would address specific appointment allotments, membership composition, terms of service, and any Board member qualifications above what is required by the Regional Airport Authority Act. Within these parameters, it is assumed the County would follow its normal/current application and appointments process.

Q12. What powers will the advisory board have, if any?

RESPONSE: In Michigan, the powers of the Authority Board are contained in the Regional Airport Authority Act, P.A. 95 of 2015, (“the Act”) and would also be enumerated within the Articles of Incorporation as allowed by Michigan legislation under the Act. Section 143 of the Act specifically lists the various powers of the Authority. Here is a summary of some of the powers listed in Section 143:

1. Sue or be sued in any court in Michigan, or file suit in Federal Court
2. Plan, expand, improve, repair and operate an airport
3. Assume all responsibilities that are contained an agreement between the local government and State of Michigan or the FAA related to grants for the airport
4. Exclusive responsibility to study and plan for any improvements, enhancements or expansions that affect the airport
5. Responsibility for the development of all aspects of the airport and airport facilities
6. Participate in economic development
7. Apply for, accept and be responsible for all grants from the FAA or other federal agencies
8. Adopt reasonable rules and regulations enforceable in a court of law for the orderly, safe, secure and sanitary use of airport facilities, and establish civil and criminal violations of such rules and regulations
9. Appoint airport law enforcement officers, guards, or police officers who are authorized to act as peace officers and have the authority to prevent crime and investigate violations of the rules and regulations issued by the Authority

Q13. How will the Airport Director be appointed or removed?

RESPONSE: The Airport Director would be hired by the Airport Authority Board, the same as a Commission. The Airport Director would be an “at will” employee of the Authority and serve at the pleasure of the Board. Terms for the removal of an Airport Director are typically identified within the Airport Director employment agreement established by the Board and agreed to by both parties at the time of hire.

Q14. Will the Airport have the authority to issue debt without the approval of elected officials or the voters through a referendum? What will the process be?

RESPONSE: Under the Act, an Authority may issue self-liquidating bonds, borrow money, and issue municipal securities. The Counties may also choose to provide their full faith and credit to an Authority. This would need to be approved by the Counties. The Articles of Incorporation could provide additional language regarding the need for County approval prior to the Airport incurring any indebtedness regardless of whether the full faith and credit of the Counties are used.

Q15. How will the Airport be empowered to buy and sell land? Will it be able to buy and sell land with or without oversight or approval by anyone outside of the Airport Director and Advisory Board?

RESPONSE: In general, the Act permits an Authority to buy and sell land on its own. However, the Articles of Incorporation could be written with some limitations on the ability of the Authority to buy and sell land. For instance, the Articles of Incorporation could require that the Authority seek County approval before entering into leases in excess of a certain defined period for non-aeronautical tenants.

Attachment 1.

Advantages and Disadvantages to Commission and Authority Models

Each form of governance model is capable of operating an airport. Different governance models, however, can be better suited to meet specific goals of airport stakeholders related to the efficiency and effectiveness of airport operations. Selection of any governance model should take into consideration the advantages and disadvantages associated with a model specific to the airport and its strategic goals, as well as the community and region it serves.

The characteristics associated with governance models are based upon legislation, agreements, and policies that an airport is held to. The collective documents direct the operation of an airport including board appointments, provided powers, decision making abilities, and liabilities.

MCL 259.126-136 (Commission) and MCL 259.137-149 (Regional Authority) are used as a basis for comparison as the primary options considered by the AGAC for the operation of TVC.

One of the recognized benefits of an Authority vs. dual-County oversight, is that the Authority structure helps minimize political lobbying and influence over policy outcomes. This is because authorities, in general, are able to make policy decisions based on the best interests of the Airport and the community it serves. All discussions and debates on policy matters are conducted in regularly scheduled and publicly open forums held at the Authority's singular governing body (i.e., in this case, these forums would be held at the Airport). By having all decisions made by a single body via regularly scheduled and publicly open meetings, local residents will have continued if not improved input and influence regarding Airport decisions made by the singular Authority governing body.

A breakdown of the advantages and disadvantages of the Commission and Authority models is provided below. Tables 1 and 2 reflect the advantages and disadvantages from the Airport's perspective. Tables 3 and 4 reflect the advantages and disadvantages from the Counties' perspective. Please note that various stakeholders could interpret advantages and disadvantages differently.

Table 1. Commission Advantages & Disadvantages — Airport's Perspective

Airport: Commission Advantages	Airport: Commission Disadvantages
<ul style="list-style-type: none"> – Liability shared with Counties – Legal/professional services can be supplied by Counties – Can more easily rely on Counties for financial support – Political connections and support – Provides direct oversight and accountability by Counties 	<ul style="list-style-type: none"> – Cannot buy and sell property on its own – Cannot enter leases past term of Operating Agreement – No direct control of Airport zoning for non-aeronautical uses – Political influence – Less efficient – Sponsors have other priorities besides the Airport's best interests – Legislation & Agreements not as clear –

Table 2. Authority Advantages & Disadvantages — Airport's Perspective

Airport: Authority Advantages	Airport: Authority Disadvantages
<ul style="list-style-type: none"> – Airport business focus – Zoning control – Buy & sell property – Clear legislation – Regional requirement – Efficient & effective actions – Reduces political influence & conflicts of interest – Industry best practices – Criteria of expertise for Board members – No more than 45% of elected officials on Board – More transparent, more public accountability 	<ul style="list-style-type: none"> – Liability held by Authority – Cannot impose a millage – Financial & operational support from Counties is harder to gain – Political connections and support

Table 3. Commission Advantages & Disadvantages — Counties' Perspective

Counties: Commission Advantages	Counties: Commission Disadvantages
<ul style="list-style-type: none"> – Political connections and support – Counties approve buying and selling of land – Counties' priorities can be reflected more easily – Control over some long-term lease agreements past Operating Agreement – Counties' have more influence over airport activities. 	<ul style="list-style-type: none"> – Airport liability shared with Counties – Legal/professional services can be supplied by Counties – Airport can more easily rely on Counties for financial support – No direct control of Airport zoning – Legislation & Agreements not as clear

Table 4. Authority Advantages & Disadvantages — Counties' Perspective

Counties: Authority Advantages	Counties: Authority Disadvantages
<ul style="list-style-type: none"> – Liability held by Authority – Cannot impose a millage – Airport business focus – Zoning control – Not required to provide airport financial & operational support from Counties – Clear legislation – Industry best practices – Criteria of expertise for Board members – Reduces the potential of political influence – More transparent, more public accountability 	<ul style="list-style-type: none"> – Buying & selling of property is more autonomous for Airport – Eminent domain concerns – Regional requirement – May reduce Counties' control over decision making and long-term agreements – Limitation of 45% of elected officials serving on Board

Attachment 2.

Current Agreement Deficiencies

Terms

The term ending dates of the Joint Operating Agreement and the Lease Agreement are different. The Joint Operating Agreement terminates on February 17, 2049 and the Lease Agreement terminates on September 30, 2040. A difference between the term ending dates provides confusion for developing agreements with tenants and other Airport users and the required processes. The Lease Agreement's ending term year of 2040 also limits the ability of NRAC to effectively approve new tenant agreements using normal agreement terms (i.e., typically 20 years or more). This subsequently limits the NRAC's ability to operate the Airport without potentially getting additional approvals from both Counties and therefore creating an inefficient process.

Dispute Resolution

The current agreement(s) contain provisions for the cost-sharing of financial liabilities that may exceed offsetting Airport revenue (i.e., 85% Grand Traverse County; 15% Leelanau County). However, the agreements do not contain processes for resolving disputes including means and methods for 1) getting both Counties to accept liability of the proposed dispute and associated financial payment; or 2) for any non-financial related disputes between the parties that may occur.

Property

Grand Traverse County and Leelanau County are equal owners of the property that is leased to NRAC and have a direct interest in ensuring that all property identified within the Exhibit A property map maintains good title. A recent review of the Airport's Exhibit A property map has found matters related to the historical property transactions that will need to be addressed through coordination with the two Counties.

Board Membership

The Joint Operating Agreement does not require minimum qualifications for individuals to serve on the Board. It also does not provide an agreed-upon methodology for appointing or removing members of the Board.

Profits

The Joint Operating Agreement calls for the distribution of Airport profits to the two Counties. This is in violation of FAA policy as profits are required to be reinvested into the Airport to help offset user fees.

Zoning

The Property Transfer Agreement between the Counties and the City states that the Counties agree that the Airport property is subject to the City of Traverse City zoning ordinance. This provision conflicts with State law. See *Capital Region Airport Auth v Charter Twp of DeWitt*, 236 Mich App 576, 601 NW2d 141 (1999) (airports are exempt from local zoning regulations as applied to aeronautical uses). Moreover, this provision could impact the ability of NRAC to meet the Federal grant obligations.

Deed

Certain provisions of the Deed do not comply with FAA requirements. For example, under the Deed, if the property were not to be used for public airport purposes, the property would transfer to the City. This is in error. The Property should actually revert to the two Counties, thus allowing for their

retention for the continued operation of an airport pursuant to Federal and State law or final disposal. Other provisions, such as the blanket easement, are inconsistent with FAA policy.

Memorandum

The City of Traverse City



TO: Mayor and City Commissioners
COPY: Martin A. Colburn, City Manager
FROM: Lauren Tribble-Laucht, City Attorney *LL*
DATE: April 5, 2019
SUBJECT: Airport Tree Cutting

*Confidentiality & Privilege Reserved
by City Commission
4/8/19. [Signature]*

~~ATTORNEY-CLIENT COMMUNICATION~~ ~~PRIVILEGED AND CONFIDENTIAL~~

The question has been posed how the City's zoning ordinance applies to the Cherry Capital Airport with regard to the recent tree removal that has occurred on airport property along South Airport Road. The short answer is that the Airport is exempt from the City's zoning ordinance when it is carrying out an "aeronautical purpose." The basis of this answer can be found in the Michigan Court of Appeals case *Capital Region Airport Auth. v. Charter Twp. of DeWitt*, 236 Mich. App. 576 (1999). Aeronautical activity that would be considered an aeronautical purpose is defined as any activity which involves, makes possible, or is required for the operation of an aircraft, or which contributes to or is required for the safety of such operations; i.e., air taxi and charter operations, aircraft storage, sale of aviation fuel, etc.). FAA Airport Compliance Manual — Order 5190.6B.

In *Dewitt* the airport brought suit against the township, claiming it was exempt from the township's zoning ordinance because it wanted to develop a business park on airport grounds. The Circuit Court held that the airport was not subject to the township's zoning regulations, and the township appealed.

The airport argued that it had exclusive jurisdiction over airport lands under the Airport Authorities Act, MCL 259.801 et seq. The court noted that the Act grants to the airport all the authority previously held by the Michigan Aeronautics Commission pursuant to the Aeronautics Code, and the Community Airport Act. The court then went on to analyze the language of the Aeronautics Code and determined that the stated purpose of the act is to "further the public interest and aeronautical progress ... by cooperating in effecting a *uniformity of the laws* relating to the development and *regulation of aeronautics* in the several states," which shows an intent for the agency to cooperate with other states in developing uniform aeronautical regulations in order to promote aeronautical progress for the public good. This goal would be thwarted if the agency's *aeronautical* activities were subject to local land-use ordinances. This would hamper uniformity not only from airport to airport, but also within an individual airport where, as in *Dewitt*, the airport grounds were in more than one municipality. The court discussed the intent of the Aeronautical Code was to keep aeronautical supervision at the *state* level. The language indicates that when the Legislature enacted the Aeronautics Code, it did not intend to merely enable the agency to operate airports. Rather, this language expresses a legislative intent to charge the agency with the

responsibility of promoting *aeronautical activities* for the public good, and to confer on the agency all the power necessary to perform this function. This legislative goal would be substantially undermined if the agency's authority over aeronautics were subordinated to a local government's land-use regulations. The court found that the township had not attempted to regulate any of the airport's *aeronautical activities*.

In other words, while the Aeronautics Code, conferred exclusive authority over *aeronautical* operations at the airport, it made no mention of the agency's authority over *non-aeronautical* activities conducted on airport grounds. Therefore, the court concluded because the airport was empowered to undertake both aeronautical and non-aeronautical activities for airport purposes, but found no statutory language indicating that the airport would have exclusive jurisdiction over non-aeronautical activities. The Court's review of the zoning act (then the Township Zoning Act) further supported the conclusion that the airport had exclusive authority over aeronautical functions, but not over non-aeronautical functions.

Accordingly, the court concluded that the township and the airport shared *coextensive authority* over non-aeronautical development of the land at the airport. The court did not determine whether the proposed use was aeronautical in nature and therefore exempt from the zoning ordinance. The case was remanded to the trial court to make a determination whether those uses proposed were aeronautical or non-aeronautical. See *Capital Region Airport Auth. v. Charter Twp. of DeWitt*, 236 Mich. App. 576, 589-95, 601 N.W.2d 141, 147-50 (1999).

Therefore, the relevant question under *Dewitt* is whether the activity (tree cutting) was for an aeronautical purpose. The Cherry Capital Airport has indicated that the trees were removed for the purposes of mitigating wildlife hazards. This is consistent with the grant assurances, which require them to do so. Paragraph 20 of the grant assurances provides:

20. Hazard Removal and Mitigation. It [the airport] will take appropriate action to assure that such terminal airspace as is required to protect instrument and visual operations to the airport (including established minimum flight altitudes) will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards.

The airport has completed a Wildlife Hazard Assessment as well as Wildlife Hazard Management Plan, which both indicate the airport should thin or remove trees in order to mitigate the hazard of the animals in proximity to the airport. Theoretically a challenge could be brought arguing that these activities do not qualify as an aeronautical purpose. However, given the documentation regarding the wildlife hazard status it is very unlikely such an argument would prevail. In other words, I expect that the activity would be found to be consistent with the definition of aeronautical activity or purpose because it contributes to the safety of operation of aircraft and is also consistent with the grant requirements indicated above. If you would like to discuss this possibility further I would suggest a future closed session to be scheduled, as discussing the strengths and weaknesses of that position in open session would be detrimental to the argument if it were to be made.

Further, there is a distinction between an "aeronautical purpose" and an "airport purpose." "Airport purposes" have been defined broadly to include any business or activity not inconsistent with the needs of aviation, that has been approved by the Secretary [of Transportation]." *Kerpen v. Metropolitan Washington Airports Authority*, 260 F.Supp. 3d 567, US District Court, E.D. Virginia, (2017). The FAA Airport Compliance Manual – Order 5190.6B provides that the FAA obligates the public agency recipient to use the revenues generated by the non-aeronautical use of the property for the operation, maintenance, or development of the airport when a conveyance of revenue-production property is permitted. Consequently, if the property conveyed has been determined to be used for revenue-production purposes, the airport must use the revenue generated for airport purposes. If the property is not used for aeronautical purposes, the property must be used to generate revenue for the benefit of the airport consistent with the FAA's Policy and Procedures Concerning the Use of Airport Revenue, 64 Fed. Reg. 7696, February 16, 1999. In other words, if airport property is used for a non-aeronautical purpose it will be required by the FAA to be used for an airport purpose and an airport purpose includes use that generates revenue for the general benefit of the airport, such as the Costco.

The FAA must approve the use of airport property for non-aeronautical purposes before such use is allowed. This is the process that the Airport went through in 2016 to release the aeronautical use obligations on airport property (63.04 acres). The result of this process was the FAA allowed use of this airport property for non-aeronautical purposes so that it may be leased for compatible commercial development to generate airport revenue. This non-aeronautical use of revenue generation is still considered an airport purpose. This is also consistent with the federal grant assurances, which bind the Airport. Paragraph 31 of the grant assurances provides:

31. Disposal of Land.

c. Land shall be considered to be needed for airport purposes under this assurance if ... (2) the revenue from interim uses of such land contributes to the financial self-sufficiency of the airport.

In summary, the Cherry Capital Airport is exempt from the City's zoning ordinance when it is undertaking activity that is for an aeronautical purpose. For non-aeronautical airport purposes the City and Cherry Capital Airport have coextensive authority over land development. As an aside, a regulation enacted under a non-zoning authority that conflicted with the ability of the airport to carry out aeronautical purposes would likely fail under a preemption analysis for many of the same reasons discussed above.

I hope this information is helpful. Please let me know if you have questions. Thank you.