



**GRAND TRAVERSE COUNTY
ADMINISTRATION OFFICE
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**Grand Traverse County
Review of Governance Model
Questions/Comments from Commissioners and Responses
Submitted January 20, 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. Section 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. Section 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.

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. Section 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. Section 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. Section 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. Section 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.

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).

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.

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

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

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 waived
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

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.