

Memorandum

To: Doug Bartosh; City Manager; Marianne Jiménez, City Clerk

CC: File

From: Bob Oliphant, Volunteer¹

Date: 4/24/2008

Re: Cottonwood Airpark; **Part II, Relationship of City of Cottonwood to sub lessees located at Cottonwood Airpark**

Purpose of this memo

This memorandum is intended to focus on the relationship between the City of Cottonwood and the sub lessees at the Cottonwood Airpark. It will not cover hangar leases or FBO operations, which will be considered in a later memo.

As you observed from reading Memo 1 of the analysis of the situation at Cottonwood Airpark, the original individuals with whom the City set up a contract in 1983 have vanished as have the responsibilities of the major entities operated by those persons, i.e., Cottonwood Airpark, Inc. and its successors: Cottonwood Airpark 1, LC and Cottonwood Airpark L.C. (CALC).



¹ Robert Oliphant is a volunteer for the City of Cottonwood. No part of this memorandum should be constructed as containing legal advice of any kind. All legal issues and any legal questions must be asked of the City Attorney.

Early efforts by Cottonwood Airpark, Inc. to develop Cottonwood Airpark

Although the Yavapai County Recorder's Office records show the creation of a variety of corporations, general partnerships, and limited partnerships from 1983 to 2007, the individuals involved in these fictional business entities remain essentially the same: Jack Seitz, William Malloy, C.W. Waddoups, Jr., and William Fulkerson. In later years Jim Backus and his family will become familiar players. One lawyer, Robert Erven Brown, began his involvement in drafting various documents in 1983 and continued into the late 1990s. The Flagstaff law firm of Mangum, Wall, Stoops and Warden, P.L.L.C. appears prominently for the City of Cottonwood.

Undated documents found in the Cottonwood City files indicate that an initial decision was made by Seitz and his partners to develop a small parcel of land on the East side of the Airpark, which consisted of a little over eight (8) acres.² Today, this particular parcel is fully developed with an estimated 2009 County Assessor's valuation of \$1,078,110.³

Creating a variety of corporations and partnerships; giving new entities land lease options

The parties involved in the early development of the property appeared enamored with setting up different legal entities to accomplish their development goals – either corporations or partnerships. For example, almost immediately (March 1984), Jack Seitz and William Fulkerson set up a general partnership they named "FMW."⁴ They had their lawyers draft documents showing that the first corporation, Cottonwood Airport, Inc. (CAP) granted to their newly created corporation, FMW, an option to sublease all or any part of the Cottonwood Airpark property.

1984—FMW pays CAP for its new option rights

Between March 15, 1984 and December 31, 1984, the newly created general partnership, FMW, paid for the construction of certain "To the Site Improvements" in accordance with a "Water Line Agreement" and made certain other improvements to the property.⁵

In return for granting FMW this option, FMW acquired rights to certain partially completed "Improvements".⁶ FMW also agreed to pay for "To the Site improvements" according to a water line agreement.

When CAP transferred the option to FMW, FMW paid CAP \$19,000.⁷ FMW also assumed CAP debts totaling \$24,099.63.⁸

² Exhibit #1, undated sketch of parcel of land on Cottonwood Airpark consisting of approximately 8.25 acres and showing lot numbers and phases of development

³ Exhibit #2, Yavapai County, AZ –Parcel summary of Parcel 406-08-002H

⁴ Exhibit #3, OPTION TO SUBLEASE DATED January 1, 1985.

⁵ Exhibit #3, OPTION TO SUBLEASE DATED January 1, 1985.

⁶ The March 15, grant to FMW is discussed in Exhibit #4, a document effective January 1, 1985.

⁷ Exhibit #3, page 2 -- Option to sublease and purchase agreement).

⁸ Exhibit #6, page 1 (bottom line) (Option to sublease and purchase agreement).

1984 Progress Report

On March 27, 1984 Jack Seitz reported to the Cottonwood City Council that all utilities would be in that part of the parcel referred to as the business park.⁹ This is apparently the parcel of land of about 8 acres located to the East of the airport and discussed during the opening paragraphs of this memo.

1985 – FMW Transfers certain option rights to FMWS: LOTS 105 & 106 & 117 acres of land

In January 1, 1985, the parties created another general partnership named “FMWS.” Following the creation of FMWS, FMW decided to make a “capital contribution” to FMWS¹⁰ by transferring all its rights to the “Improvements” and “To the Site Improvements.”¹¹ The persons involved in this transfer are: C.W. Waddoups, and Jack Seitz.¹² This transfer apparently involved LOTS 105 and 106, about 2.4137 acres of land.¹³

The second transfer, involved approximately 117 acres of land,¹⁴ and was also effective January 1, 1985.

June 1986 – FMWS EXERCISES OPTION TO LOT 104

In June, 1986 FMWS exercised an option on LOT 104.¹⁵ Note that the sub rent is set at \$1.00 per year.¹⁶ Also note that only certain provisions of the Master Lease were incorporated into the sub lease document.

1989 Comprehensive Plan

Draft documents on file with the City of Cottonwood show that a comprehensive plan for developing all 140 plus acres of the land surrounding the airport proper was created in 1989. Among its features, was a planned subdivision of the west section of Cottonwood Airpark consisting of about 64 acres into a series of lots with hangars and a taxiway to the main airport runway. For reasons not explained in any documents I could find, the plan for the west side of the Cottonwood Airpark development was never begun.

January 1989 – 7 to 8 acres fully improved – progress report

At a meeting of the Cottonwood City Council in January 1989, Jack Seitz reviewed the progress that had taken place during the first 5 years of the Ground Lease. He stated that 7 to 8 acres had

⁹ Minutes, Special meeting of Cottonwood City Council, March 27, 1984.

¹⁰ Exhibit #4, Option to sublease with effective date January 1, 1985.

¹¹ Exhibit #4, Option to sublease with effective date January 1, 1985.

¹² Exhibit #4.

¹³ Exhibit #4, p. 5.

¹⁴ Exhibit #5, Option to sublease with effective date January 1, 1985, second to last page of Exhibit which reads: “Area of parcel less Exceptions A, B, C and D = 117.0806 Acres more or less.”

¹⁵ Exhibit #6.

¹⁶ Exhibit #6.

been fully improved with rent being paid to the city for those acres plus the remaining unimproved acres at the unimproved ground rent amount. He observed that it had been extremely difficult to convince people to build on the leased land.

Seitz and his partners had not fully complied with the provisions of the Master lease, which required that 15 gross acres be developed and improved by 1989. The Council extended the rent agreement so that CAP only had to pay for the actual improved ground.¹⁷

December 19, 1989 – Discussion in re taxes on property

The minutes of the December 19, 1989 Council meeting reflect a discussion regarding the status of the sub lessees of the property. The question was asked: “Does the fact that Cottonwood has entered into an agreement with CAP exempt CAP and those to whom it sub leases property from federal, state, and county taxes?” No answer to the question appears in the minutes.¹⁸

December 15, 1992 – City gets .77 of an acre returned

A review of the Council minutes from November 17, 1992 (Fifth Amendment to the Master lease) and December 15, 1992 indicate that CAP released .77 of an acres from the provisions of the Master lease. The reason for the release was to return the land to the City as it intended to construct an airport terminal building on the property.¹⁹

CAP agreed to give back the lease provisions on condition that the City give CAP certain land development credit (it was required to meet certain land development every five years). In response, the City gave CAP credit, which brought, in theory, the total number of acres developed by CAP as of 1992 to 22.1 acres.²⁰

September 7, 1993 – CAP relieved of responsibilities for Fixed Base Operation

According to Council minutes from its September 7, 1993 session,²¹ CAP wanted to be relieved of its responsibilities for the Fixed Base Operation (FBO). An agreement was given to the Council for consideration that removed any responsibility on the part of CAP for the FBO was approved.

December 1993 – February 1994: City decides to purchase Hangar and T-Shade facility from FMWS

CAP and FMWS through CAP owned two structures on the airport proper as a part of the Airpark. One structure is referred to as T-shade and allows planes to park out of the sun. The

¹⁷ Exhibit #9, portion of minutes of January 3, 1989 Regular Meeting of the Cottonwood City Council/

¹⁸ City Council Minutes, December 191989.

¹⁹ City Council Minutes, December 15, 1992.

²⁰ City Council Minutes, December 15, 1992.

²¹ Exhibit #10, portion of minutes of September 7, 1993 meeting

other structure was a building hangar used for maintenance.²² The City wanted to purchase both of these structures. The asking price for the hangar was apparently \$70,000.²³

March 31, 1994-- Sale of T-Shelter and Hangar

On or about March 31, 1994, FMWS sold all of its rights, title and interest in the hangar located on the airport to the City of Cottonwood. It also sold all of its rights, title and interest in an associated T-shelter to the City of Cottonwood. Sale of the T-shelter was done pursuant to a Agreement for Sale of Commercial Structure, dated March 31, 1994. The sale of the hangar was done pursuant to a separate "Agreement For Sale of Commercial Building" dated March 31, 1994. (See Sixth Amendment to the Master Lease.)²⁴

The City paid about \$70,000 to FMWS for the hangar and about \$55,000 for the T-shelter.

May 17, 1994 - City gets 30 acres returned - gives CAP \$24,000

According to Council minutes from its May 17, 1994 meeting, there was included in the original Master lease about thirty (30) acres that is restricted to airport related uses. By the 6th amendment to the Master lease, the thirty (30) acres was removed from the Master lease and returned to the City of Cottonwood.

In return for returning the thirty (30) acres, CAP received ten (10) acres credit against the development time table and \$8,000 per year for three years credit against its next lease payments.²⁵

July 5, 1994 Sixth Amendment to Lease

In 1994 Seltz and his associates apparently decided to consolidate their Airpark partnerships and corporations into one limited partnership. They began by creating a Limited Liability corporation and named it Cottonwood Airpark, 1 L.C. In Exhibit #11,²⁶ the new tenant is named as Cottonwood Airpark, L.C. The purpose of the amendment was to substitute Cottonwood Airpark L.C. as the Tenant in place of Cottonwood Airpark, Inc. and to release Cottonwood Airpark, Inc. from all obligations and liabilities under the lease.²⁷

July 1994 CAP assigns all of its rights to Cottonwood Airpark 1, L.C., a Limited Liability Corporation

In a document filed August 18, 1994, effective July 19, 1994, CAP Quit Claimed to Cottonwood Airpark 1, L.C., (which becomes Cottonwood Airpark, L.C.) all of its right, title and interest, if any, in the real property, the improvements on the real property, and as "Tenant"

²² City Council Minutes, December 21, 1993.

²³ City Council Minutes, December 21, 1993; February 1, 1994; February 15, 1994.

²⁴ Exhibit #8, p. 4, paragraph "7."

²⁵ City Council Minutes, May 17, 1994.

²⁶ Exhibit #11.

²⁷ Exhibit #11.

under the ground lease which CAP had signed with the City of Cottonwood.²⁸ At this point, CAP no longer played any role as a legal entity.

July 1994 FMW and FMWS Termination of option rights, assignment of other rights to Cottonwood Airpark L.C.

In a document filed August 8, 1994, which became effective July 18, 1994, FMW and FMWS transferred all of the rights possessed by them to Cottonwood Airpark 1, L.C.²⁹ The stated purpose of this transfer was to form and capitalize Cottonwood Airpark I, L.C., a new limited liability company.³⁰ Aside from some minor confusion created over whether the limited liability company was Cottonwood Airpark 1, L.C. or Cottonwood Airpark, L.C. (CALC), the document provides some insight into the activities of FMWS:

FMWS had sub-subleased 2.41 acres of property to General Semi Conductor Industries, Inc. on or about July, 1985.

FMWS had sub-subleased LOT 104 to Gayle and Deanna Toomey and J.W. Gonzales, dba Smelter City Iron Works, Ltd (the "Smelter City Lease" on or about February 1, 1986.

FMWS had sub-subleased LOT 107 and the north half of LOT 108 (about 2.97 acres) to Waste Management of Arizona on or about April 27, 1988.³¹

July 1994, correction to Sixth Amendment and Assignment of Lease

In an apparent effort to make clear the transfer of all rights from CAP to CALC, a correction to the initial lease was drafted and filed August 24, 1994. The amended document states that it is effective July 5, 1994 and makes the new tenant Cottonwood Airpark, L.C., (CALC) an Arizona limited liability corporation.³²

In all documents following July, 1994, the only direct references are to Cottonwood Airpark, L.C. (CALC). There is an occasional indirect reference to Cottonwood Airpark 1, L.C.

September 1997, Square D sells buildings it constructed to Robert and Carol Flynn – LOTS 105 & 106

Lots 105 and 106 had initially been leased by General Semiconductor Industries from the now defunct FMWS. The Square D company is the successor to GSI. Square D constructed some buildings on the property and in this transaction is selling the buildings to Robert and Carol Flynn. As a part of the transaction, the Flynn's are seeking an assignment and transfer of all rights possessed by CALC under its ground lease with the City of Cottonwood.³³

²⁸ Exhibit #7.

²⁹ Exhibit #8, document filed August 19, 1994.

³⁰ Exhibit #8, paragraph I.

³¹ Exhibit #8.

³² Exhibit #11.

³³ Exhibit #12.

1998 Transfer of Lease Agreement from CALC to David and Sheila Mongini

David and Sheila Mongini were purchasing the old Waste Management building located in Cottonwood Airpark in 1998. They said they would be using it to maintain and park all their equipment as well as for covered R.V. parking and storage. The City Council agreed to transfer the lease agreement from Cottonwood Airpark to David and Shila Mongini.³⁴ A bill of sale was subsequently executed.³⁵

1998 CALC Transfers its rights in LOTS 101 and 102 to Jack Seitz and Family

In a document effective July 1, 1998, CALC transferred all of its rights in lots 101 and 102 to Jack Seitz, his wife Shirley, and their family³⁶ and S&S Verde properties.³⁷

2001 Review of transfers and obligations – City has no CAP umbrella

At the July 17, 2001 City Council meeting, an extended discussion ensued regarding the status of various sub leases at the Airpark. It was observed that there were several properties where the sub tenant had a direct relationship with the City because the City had “essentially bought out the position in the lease from Cottonwood Airpark, L.C.”³⁸

Lot 101 and most of lot 102 had a direct lease between the City and S & S Verde Properties.

Lot 103 and a small portion of lot 102 was occupied by S & S Verde properties. A proposed transfer of rights from CALC to S & S was approved by the Council, which resulted in a direct lease between the City and S & S Verde properties.

Lot 104 remained as a Cottonwood Airpark, L.C. (CALC) lot.

Lot 105 and Lot 106 had a direct lease between the city and Robert Flynn.

Lot 107 and lot 108 had a direct lease between the city and Mongini.

2003 Backus Family Investments – South ½ of Lot 108 and lots 109 through 118 – New development timetable created for Backus

In a document effective March 17, 2003, CALC assigned some of its rights to Backus Family Investments, LLC (BFI).³⁹ BFI stated its intention to develop the property into lots covering about 15.6 acres of land. The agreement contained a series of deadlines for development of the property. The conditions in the agreement should be reviewed to determine whether they were all met.

³⁴ Exhibit #13.

³⁵ Exhibit #14.

³⁶ Exhibit #15.

³⁷ Exhibit #16, 8th Amendment to Master Lease.

³⁸ Exhibit #18, portion of minutes from July 17, 2001 City Council meeting (2 pages)

³⁹ Exhibit #17.

Note that the City proposed a new development timetable with Mr. Backus for the property.⁴⁰
2005

February 2003—CALC is behind three (3) acres in its development schedule

City staff discovered that CALC was behind by three years in the development schedule set out in the 1983 lease agreement. To settle this issue, CALC agreed to release additional land to the City.⁴¹ Mr. Mickelson stated that the land to be released by CALC to the City was about two and one-half acres.

Note that CALC was to develop 10 acres every five years.⁴²

June 2003, Backus seeks permission to replat lots 109-116

Backus sought permission to replat lots 109 to 116. He stated that he was then replated so he can re subdivide them to create smaller, more economical lots. City agrees to Backus request.⁴³

November 4, 2003 – Consent to assignment in lot 115

BFI (Bakus) explained to the Council that Howard Kimmel of Precision Labs had just moved to the Airpark and the company would employ eight persons.⁴⁴ A transfer of certain rights from BFI to Precision Labs was approved.

May 19, 2005 – 64-acre parcel on the south and west sides of airport transferred from CALC

At the City Council meeting of May 19, 2005, the Council approved the transfer of three parcels of land on the south and west sides of the Airpark to three separate entities. The transfer resulted in three amendments to the 1983 Master lease: Numbers 11, 12, and 13.

The eleventh amendment was to Testan Properties for 20 acres and in the amendment Testan inherited the development schedule found in the Master lease and originally agreed to by the City and Cottonwood Airpark, Inc.⁴⁵ Although the minutes of the City Council indicate that that Testan Properties develop ten acres of the 20 acres by December 31, 2008, the actual lease between the City and Testan does not contain this requirement.⁴⁶

The twelfth amendment was to Happy Jack Lodge, L.L.C., for approximately 20 acres. The lease states that “it appears that the best interests of the City will be served by permitting [Happy Jack Lodge, L.L.C.] to develop the parcel, thus increasing the development and tax base for the City of Cottonwood.”⁴⁷ Note that the lease states that it covers only 15.32 acres.

⁴⁰ Exhibit 19, a portion of the minutes of the February 4, 2003 City Council meeting.

⁴¹ Exhibit 19.

⁴² Exhibit 19.

⁴³ Council minutes of June 3, 2003.

⁴⁴ Council minutes of November 4, 2003.

⁴⁵ Exhibit #20, portion of minutes of City Council meeting of May 17, 2005.

⁴⁶ Exhibit #21, Assignment of Tenant’s Right in Parcel 2 of Cottonwood Airpark.

⁴⁷ Exhibit #22, Assignment of Tenant’s Rights in Parcel 1 of Cottonwood Airpark.

The thirteenth amendment was to Mongini House 1, L.L.C. for approximately 24 acres.⁴⁸ The lease states that there was 28.10 acres involved.⁴⁹

At the Council meeting, Mr. Seitz described the developments CAP (his company) had made at the airport over the last twenty years, stating the whole purpose was to bring businesses in and create jobs.⁵⁰

According to the minutes of the meeting, "Mr. Mongini described the type of development for industrial users Testan Properties would be doing at the airport. He said Happy Jack Lodge would develop RV storage for transitional use, and that the Mongini House parcel would be an affordable housing concept." The minutes do not state how Testan would use the property.⁵¹

October 2007 -- Happy Jack Lodge applies for condition use permit with Planning and Zoning Committee

In October Happy Jack Lodge is listed as the applicant seeking a conditional use permit before the Cottonwood Planning and Zoning Commission. Recall that the Council Minutes from about two years earlier stated that Happy Jack Lodge would "develop RV storage for transition use." The following is taken from the minutes of the Planning and Zoning Commission:⁵²

PCU 07-037 Consideration of a Conditional Use Permit to allow materials processing on a portion of a 65-acre site in the I-2 (Heavy Industrial) zone. The site is located on Happy Jack Way west of Hwy. 89A and south of Mingus Ave. APN: 406-08-002L.

Owner/Applicant: Happy Jack Lodge LLC. Agent: Michael Mongini.

Planner Ballew presented the staff memo and showed graphics depicting the site. The site is located in an industrial area near the airport. Industrial property surrounds the subject property on all sides. The applicant states on the application that he will be processing both onsite and imported materials. The City Council would need to review any processing of onsite materials because they lease the property to the applicant. Sand and gravel plants are listed as a Conditional Use in the I-2 zone.

Commissioner Kevin moved to approve PCU 07-037 with the following seven stipulations.

1. That the storm water notice of intent (NOI) and storm water management plan (SWWP) are completed and in compliance with ADEQ Storm water rules
2. That all blowing dust is controlled in order to minimize any effects on the airport

⁴⁸ Exhibit #20, portion of minutes of City Council meeting of May 17, 2005.

⁴⁹ Exhibit #23, Assignment of Tenant's Rights in Parcel 3 of Cottonwood Airpark.

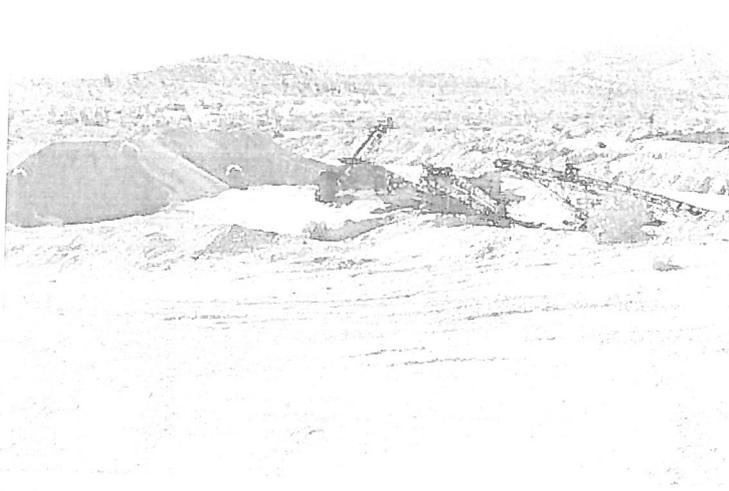
⁵⁰ Exhibit #20, portion of minutes of City Council meeting of May 17, 2005.

⁵¹ Exhibit #20, portion of minutes of City Council meeting of May 17, 2005.

⁵² Exhibit #24, Draft of P&Z minutes of October 15, 2007.

3. That the project is operated in a manner that avoids depositing mud or other materials on city streets and that loads on trucks are tarped.
4. That hours of operation be limited to between 7 a.m. and dusk.
5. That any processing of onsite materials be approved by the City Council.
6. That the Conditional Use Permit be reviewed in one year
7. That staff addresses any resulting traffic issues.

Commissioner Lovett seconded and the motion carried unanimously.



A diagram was found in City files that depicts how Jack Seitz believed the 64 acres would be subdivided. Happy Jack Lodge has rights to parcel #1 and it is not clear that the gravel operation is located on the Happy Jack Lodge portion of the property.⁵³

January 1, 2006 – CALC assigns Backus Family Investments, L.L.C. 8.91 acres located south of Lot 122 of the replat.

This was another of the many assignments CALC made to various entities. In this one, it granted Backus Family Investments, L.L.C. its rights under the ground lease.⁵⁴

June 30, 2006 – CALC assigns rights to Lot 104 to Seeley, LLC.

CALC appears to continue cleaning out its obligations on the 1983 ground lease by transferring its obligations for payment. The result is that virtually all of the tenants now occupying Cottonwood Airpark will deal directly with the City in terms of ground lease payments.

⁵³ Exhibit #25.

⁵⁴ Exhibit #26.

January 2, 2007 Cottonwood Airpark L.C. (CALC) Dissolves

According to documents on file with the Arizona Corporation Commission, Cottonwood Airpark L.C. (CALC) was dissolved on January 2, 2007.⁵⁵ The named incorporators on the Commission document were: Jack Seitz, William B. Fulkerson, and William Molly.⁵⁶

To the best of the writer's knowledge, there was no assignment of CALC's rights as the "tenant" under the lease to another corporation. However, and this is important, at various times since 1983, as this memo shows, CALC assigned all or part of its rights to other entities in Airpark. Note Section 12 of the lease agreement regarding assignment.⁵⁷

March 9, 2007 – Tenants Association created for Backus lots 123 thru 135

In March, 2007, a nonprofit Airpark Tenants Association was created by the Backus family. A copy of the Association principles was attached to Memo #1. As noted in Memo #1, there may (or may not) be a conflict between the original restrictions placed on the airpark and this new association.⁵⁸

Conclusion

1. All tenants occupying space on Cottonwood Airpark must now deal directly in terms of lease payments with the City of Cottonwood. CAP and its successors have abandoned the lease.
2. Language from City Council meetings, the original 1983 lease agreement, and language in sub leases indicate a strong public interest in each property to see to it that Cottonwood's tax base and employment are increased.
3. Reasonable questions can be raised regarding the 2005 transfer of 64 acres and its subsequent use. It appears inconsistent with the intent of the 1983 lease agreement because issues such as number of employees, future development, etc. were never discussed. Unfortunately, a search of the audio tape files of the Council meeting at which the transfer was approved were without avail. The tape may have been lost or, more likely, taped over.
4. Note the stated purpose of the use of the 64 acres and the request for a conditional use permit made by Happy Jack to the P&Z Committee.
5. It is not clear that Happy Jack occupied the land for which it was making application of the condition use permit. It probably did but it may have made a mistake. Council should review the land occupied by Happy Jack at the time it made its request to determine whether the gravel pit operation is included within it.
6. At various times over the years the City has renegotiated terms of the lease with a sub lessee or CAP. This may make it possible to renegotiate some of the land associated with the 64 acre transfer.

⁵⁵ Exhibit #8, Arizona Corporation Commission on-line record showing the dissolution of Cottonwood Airpark, L.C.

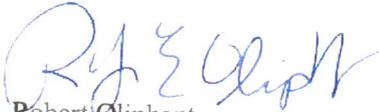
⁵⁶ Please see Memo #1, Exhibit #8.

⁵⁷ Please see Memo #1 Exhibit #1, p. 13, Section 12.

⁵⁸ Please see Memo #1 where this is briefly discussed.

7. The development time schedule set out for Testan industries, discussed by the Council in 2005, should be reviewed to determine whether it met the December 2007 deadline requirements.
8. For your information, a general list of Airpark leasehold interest is attached as Exhibit #27. It should be updated.
9. For your information, a schedule and summary of the 15 amendments to the Master 1983 lease is attached as Exhibit #28. It should be updated.
10. What is the possibility of buying out at least 50 acres of the Cottonwood Airpark now leased to the three entities for which Mike Mongini is the agent? This would preserve the land for business development over the next 25 -50 years and a serious effort could be made to attract industry to Cottonwood?

Respectfully submitted,



Robert Oliphant

Volunteer