
MANAGEMENT AUDIT OF

FINAL AGREEMENT

CONCERNING FLYING CLOUD AIRPORT

AND MAC ORDINANCE No. 51

BETWEEN

THE CITY OF EDEN PRAIRIE, MINNESOTA

AND

THE METROPOLITAN AIRPORTS COMMISSION

December 2002

FEBRUARY 3, 2009

**FINAL AGREEMENT
CONCERNING FLYING CLOUD AIRPORT
AND ORDINANCE NO. 51**

This Final Agreement Concerning Flying Cloud Airport and Ordinance No. 51 (“this Agreement”) is made this ___ day of _____, 2002, between the CITY OF EDEN PRAIRIE, MINNESOTA (“Eden Prairie”), a statutory city acting pursuant to the authority of Resolution No. ___, passed _____, 2002, and the METROPOLITAN AIRPORTS COMMISSION (“MAC”), a public corporation of the State of Minnesota.

RECITALS

WHEREAS, MAC owns and operates Minneapolis-St. Paul International Airport, one intermediate airport, and five minor airports, including Flying Cloud Airport; and

WHEREAS, Flying Cloud Airport is located entirely within the geographic and jurisdictional boundaries of the City of Eden Prairie; and

WHEREAS, on January 16, 1978, MAC adopted Ordinance No. 51, which prohibits the operation of jet aircraft at Flying Cloud Airport except jet aircraft with a maximum takeoff weight of 20,000 pounds or less; and

WHEREAS, by correspondence dated September 27, 2000, October 13, 2000, and January 30, 2001, the Federal Aviation Administration stated that it believed that Ordinance No. 51 was inconsistent with Federal law and MAC’s contractual obligations to the Federal government and that MAC accordingly should develop a plan to amend or repeal Ordinance No. 51; and

WHEREAS, MAC has proposed to expand Flying Cloud Airport for the purpose of diverting more general aviation traffic to the Airport by, among other improvements, extending the length of the two parallel runways and developing property for new hangar construction; and

WHEREAS, in October 1992, MAC adopted a Long-Term Comprehensive Plan, approved by the Metropolitan Council in April 1996, calling for expansion of Flying Cloud Airport to meet forecast aviation demand in the metropolitan area; and

WHEREAS, by public statements and other actions, including the adoption of Resolution No. 88-299 and Resolution No. 92-124, Eden Prairie has opposed the expansion of Flying Cloud Airport because of the noise and other environmental consequences projected to result from such expansion; and

WHEREAS, MAC finds that the elements of this Agreement will reduce the noise exposure that otherwise would be associated with the proposed expansion of Flying Cloud Airport; and

WHEREAS, Minnesota Statutes Section 473.641 subdivision 4 prohibits MAC from extending the runway length at minor airports beyond 5,000 feet without prior legislative authorization; and

WHEREAS, two members of the Eden Prairie City Council and two members of the MAC Commission signed a Memorandum of Understanding on December 4, 2001, which was endorsed by the MAC Planning and Environmental Committee and the Eden Prairie City Council on December 4, 2001 and by the MAC Commission on December 17, 2001; and

WHEREAS, MAC and Eden Prairie presented the Memorandum of Understanding to officials of the Federal Aviation Administration; and

WHEREAS, the Memorandum of Understanding recommended that MAC and Eden Prairie draft and execute a final agreement consistent with the terms of the Memorandum of Understanding and the FAA's comments on the Memorandum of Understanding.

AGREEMENT

NOW THEREFORE, in consideration of the mutual covenants contained herein, Eden Prairie and MAC hereby agree as follows:

ARTICLE 1 **DEFINITIONS**

As used in this Agreement, the words and phrases defined below have the following meanings:

- 1.1 **Agreement** means this Final Agreement Concerning Flying Cloud Airport and Ordinance No. 51 and all exhibits and attachments hereto.
- 1.2 **Airport** means Flying Cloud Airport, Eden Prairie, Minnesota.
- 1.3 **Airport User** means the owner or operator of an aircraft who conducts a takeoff, landing, or other aircraft operation of any kind, including maintenance and repair, at the Airport during the effective period of this Agreement.
- 1.4 **Amended Ordinance No. 51** means the ordinance attached hereto as Exhibit 1 which is intended to replace Ordinance No. 51 and provide mandatory limits on the operation of aircraft to, from, and at the Airport.
- 1.5 **Designated Representative of Eden Prairie** means the City Manager of the City of Eden Prairie or the individual appointed by the City Manager, as communicated to MAC in writing, to act as the designated representative.
- 1.6 **Eden Prairie** means the municipal corporation of Eden Prairie, Minnesota.
- 1.7 **FAA** means the Federal Aviation Administration, United States Department of Transportation, or any successor agency or department.
- 1.8 **Final FAA Decision** means a decision of the FAA subject to judicial review pursuant to 49 U.S.C. § 46110 and/or 5 U.S.C. §§ 701 – 706, as each may be

amended, or any successor law or judicial decision relating to judicial review of FAA decisions.

- 1.9 **Fixed Base Operator** means an individual or company providing commercial aeronautical services at the Airport such as one or more of the following: aircraft maintenance and repair, fueling, aircraft storage, aircraft sales, and flight instructions.
- 1.10 **MAC** means the Metropolitan Airports Commission, authorized by L.1943, c.500.
- 1.11 **MOU** means the Memorandum of Understanding Concerning Flying Cloud Airport and Ordinance No. 51 executed on December 4, 2001, by two members of the Eden Prairie City Council and two members of the Metropolitan Airports Commission and endorsed by the Eden Prairie City Council and the MAC Commission.
- 1.12 **Major Air Cargo Operations** means the operation of a business engaged principally in the transportation of cargo, whose operations at Flying Cloud Airport would involve the operation of aircraft weighing more than 60,000 pounds and/or whose facilities at the Airport would exceed 80,000 square feet in size.
- 1.13 **Nighttime Aircraft Operation** means any takeoff or landing of an aircraft at Flying Cloud Airport between the hours of 10:00 p.m. local time and 6:00 a.m. local time.
- 1.14 **Nighttime Currency Requirements** means the nighttime training requirements of 14 C.F.R. Part 91, as the same may be amended from time to time.
- 1.15 **Ordinance No. 51** means the ordinance adopted by MAC on January 16, 1978 concerning the operation of jet aircraft at Flying Cloud Airport.
- 1.16 **Part 139 Certification** means an airport operating certificate issued by the FAA pursuant to 14 C.F.R. Part 139, authorizing an airport operator to accept scheduled and unscheduled passenger operations of an air carrier. For purposes of this Agreement, 14 C.F.R. Part 139 includes the regulation in effect as of the date of this Agreement and amendments to Part 139 that are consistent with amendments proposed by the FAA at 65 Fed. Reg. 38,636 (2000), but does not otherwise include future amendments to the regulation or any successor regulation.
- 1.17 **Passenger Facility Charge** means the passenger facility charge described in 49 U.S.C. § 40117, as the same may be amended from time to time.
- 1.18 **Proposed Airport Expansion** means capital improvements at the Airport proposed by MAC, described and depicted as Alternative F in the Supplement to the Draft Environmental Impact Statement, Expansion of Flying Cloud Airport (August 2001), attached as Exhibit 2 (without appendices), including, but not limited to, extension of the two parallel runways, development of property for new hangar construction, acquisition of additional property, and any minor changes in the proposed capital improvements.

- 1.19 **Runway Weight Bearing Capacity** means the weight-bearing capacity of the Airport runways as determined by an engineering study and is: maximum gross takeoff weight 60,000 pounds, dual wheel.
- 1.20 **Stage 2 Aircraft** means an aircraft that has been certificated as meeting the Stage 2 noise levels prescribed in FAR pt. 36, App. C, § C36.5 and that does not meet the Stage 3 noise levels prescribed therein.

ARTICLE 2

CONDITIONS PRECEDENT

2.1 **Conditions Precedent.** This Agreement shall not be effective unless and until the following occurs:

2.1.1 MAC adopts an ordinance substantially the same as Exhibit 1 (“Amended Ordinance No. 51”).

2005 MAC Response: MAC has adopted Ordinance 97 (effective January 31, 2003), which replaces Ordinance 51.

See Audit Exhibit 1

2009 MAC Response: Previous response stands.

2.1.2 Eden Prairie adopts a resolution substantially the same as Exhibit 3, repealing Resolution No. 88-299 and Resolution No. 92-124.

2005 Eden Prairie Response: The City Council adopted Resolution No. 2002-196 on December 17, 2002, repealing Resolutions No. 88-299 and 92-124.

See Audit Exhibit 2

2009 Eden Prairie Response: Previous response stands.

2.13 Eden Prairie amends the City of Eden Prairie Comprehensive Guide Plan to include a chapter on the Airport substantially the same as Exhibit 4.

2005 Eden Prairie Response: The City Council adopted Resolution No. 2002-197 on December 17, 2002, adopting Chapter 6 – Airport Element and Amendments to the Aviation Goals Section of Chapter 2 of the 2002 Comprehensive Guide Plan Update.

See Audit Exhibit 3

2009 Eden Prairie Response: Previous response stands.

ARTICLE 3
MAC COMMITMENTS AND REPRESENTATIONS

- 3.1 **Amended Ordinance No. 51.** MAC shall implement and enforce Amended Ordinance No. 51 on and after the effective date identified therein.

2005 MAC Response: MAC Ordinance No. 97 has been implemented effective January 31, 2003 and replaces the previous MAC Ordinance No. 51. The new Ordinance prohibits aircraft maintenance run-ups at Flying Cloud Airport between the hours of 10:00 p.m. and 7:00 a.m. and restricts the use of the airport to only aircraft weighing less than 60,000 pounds certified max gross takeoff weight, dual wheel (with exceptions noted in Ordinance 97).

See Exhibit 1

2009 MAC Response: Previous response stands.

- 3.2 **Runway Length.** MAC shall not take any action to increase the length of the runways at the Airport in excess of the length contemplated in the Proposed Airport Expansion, unless required to do so by State law, provided that MAC will not initiate, promote, or otherwise support enactment of such law.

2005 MAC Response: MAC has no plans to extend runways at FCM beyond that outlined in the EIS for the current plans. State law prevents MAC from extending runways at FCM beyond 5,000 feet.

2009 MAC Response: Previous response stands.

- 3.3 **Pavement Strength.** MAC shall not take any action to increase the Runway Pavement Weight-Bearing Capacity at the Airport, unless required to do so by State law, provided that MAC will not initiate, promote, or otherwise support enactment of such law.

2005 MAC Response: MAC has not and will not take action to increase runway weight bearing capacity for the express purpose of servicing larger aircraft.

See Audit Exhibit 5

2009 MAC Response; Previous response stands.

- 3.4 **Part 139 Certification.** MAC shall not apply for Part 139 Certification at the Airport to provide facilities for air carrier operations.

2005 MAC Response: MAC has not, and does not plan to apply for Part 139 certification for FCM, to provide facilities for air carrier operations.

2009 MAC Response: Previous response stands.

- 3.5 **Voluntary Restraint on Nighttime Aircraft Operations and Recommended Procedures for Early Morning Departures.** MAC shall implement a program of voluntary restraints on Nighttime Aircraft Operations, except operations between 10:00 p.m. and 12:00 a.m. conducted to meet Nighttime Currency Requirements. Within six months of the effective date of this Agreement, MAC shall identify and evaluate specific operational procedures that would limit the noise impact of aircraft operations between 6:00 a.m. and 7:00 a.m., which procedures could include, but are not limited to, dispersion of aircraft departures, defined flight routes, or noise abatement departure procedures. Upon completion of this evaluation, MAC shall adopt those operational procedures that are mutually acceptable to MAC and Eden Prairie.

2005 MAC Response: The Operational Implementation Plan – September 2003, outlines the voluntary nighttime operations restrictions as follows: The letter of intent will voluntarily commit the users to not operate at the airport between the hours of 10:00 p.m. and 6:00 a.m. In addition, pilots will be granted the opportunity to conduct night flights between 10:00 p.m. and 12:00 a.m. for nighttime flight currency purposes only.

The Operational Implementation Plan – September 2003 also outlines the recommended departure and arrival procedures to be used at the airport as follows: The letter of intent will voluntarily commit the users to comply with any established arrival or departure paths or procedures at the airport as outlined in the voluntary FCM Noise Abatement Plan. Specifically, aircraft operating in the pattern will utilize the south parallel runway (Runway 28L/10R) and execute turns to the south of the airport as soon as operationally practical, and/or assigned by the FAA. Turbine aircraft departure operations will utilize the south parallel runway (Runway 28L/10R) and execute turns to the south of the airport as soon as operationally practical, and/or assigned by the FAA. Adherence to the southbound turn procedure applies to all operations when the tower is closed, especially between the hours of 6:00 a.m. and 7:00 a.m. All turbine aircraft shall use the National Business Aviation Association Noise Abatement Procedures when arriving to or departing the airport. Arrival operations on runways equipped with a visual approach indicator or precision approach slope indicator shall maintain an altitude at or above the glide slope until a lower altitude is necessary for a safe landing. In addition, airport users will voluntarily commit to comply with future procedures that may be applied or amended at the discretion of the MAC for the purposes of noise abatement.

See Audit Exhibit 4

2009 MAC Response: Previous response stands.

3.6 **Limits on Operations of Stage 2 Aircraft**

- 3.6.1 MAC shall implement a voluntary program to preclude all operations at the Airport by Stage 2 Aircraft.

2005 MAC Response: The Operational Implementation Plan – September 2003, outlines the voluntary stage II operations restrictions as follows: The letter of intent will voluntarily commit the users to not operate Stage II aircraft at FCM. Furthermore, the users will be notified in the letter that if the total number of Stage II aircraft operations at FCM exceeds seventy-five (75) in any rolling twelve-month period, a process to implement a mandatory ban on Stage II aircraft at FCM will be initiated. Since September 2003 there have been six Stage II operations that were verified with ANOMS to have occurred at FCM.

The commercial operators that serve turbine aircraft have signed a declaration of intent to enter into a voluntary agreement to restrict nighttime engine run-ups, and the night time operations of stage II turbine aircraft. Since signing the declaration of intent, the commercial operators have operated consistent with the Noise Abatement Plan for the Flying Cloud Airport, and the mitigation recommendations contained in the Supplement Draft Environmental Impact Statement, as evidenced by the limited number of Stage II operations (see above).

See Audit Exhibit 4

2009 MAC Response: The Operational Implementation Plan – September 2003, outlines the voluntary stage II operations restrictions as follows: The letter of intent will voluntarily commit the users to not operate Stage II aircraft at FCM. Furthermore, the users will be notified in the letter that if the total number of Stage II aircraft operations at FCM exceeds seventy-five (75) in any rolling twelve-month period, a process to implement a mandatory ban on Stage II aircraft at FCM will be initiated. Since June 2004, ANOMS has verified that there have been zero Stage II operations at FCM.

- 3.6.2 In the event that the number of departures at the Airport by Stage 2 Aircraft exceeds seventy-five (75) in any rolling twelve-month period, MAC shall prohibit operations by all Stage 2 Aircraft from operating at the Airport; provided that Eden Prairie may, in its sole discretion, waive this requirement if Eden Prairie determines that unusual or unique circumstances caused the number of departures by Stage 2 Aircraft to exceed seventy-five.

2005 MAC Response: In the event Stage II operations exceed 75 in any twelve month rolling period MAC agrees to conduct a Part 161 analysis consistent with the provisions in section 3.6.3 in an effort to restrict Stage II operations at FCM.

See Audit Exhibit 4

2009 MAC Response: Previous response stands.

3.6.3 Before implementing the prohibition on Stage 2 Aircraft identified in Section 3.6.2, MAC shall complete any necessary procedural steps as required under federal law, including a study required by 14 C.F.R. Part 161, as the same may be amended in the future (“Part 161 Study”).

2005 MAC Response: See 3.6.2 Response.

2009 MAC Response: Previous response stands.

3.6.3.1 MAC shall perform the Part 161 Study in a thorough and professional manner.

2005 MAC Response: See 3.6.2 Response.

2009 MAC Response: Previous response stands.

3.6.3.2 MAC shall consult closely with Eden Prairie in preparing a scope of work and evaluating and selecting a consultant to perform the Part 161 Study.

2005 MAC Response: See 3.6.2 Response.

2009 MAC Response: Previous response stands.

3.6.3.3 MAC shall seek acknowledgement from the FAA that the Part 161 Study complies with Part 161.

2005 MAC Response: See 3.6.2 Response.

2009 MAC Response: Previous response stands.

3.6.3.4 MAC shall prepare a second or supplemental study in the event that the FAA criticizes the Part 161 Study as legally inadequate or otherwise not in full compliance with Part 161.

2005 MAC Response: See 3.6.2 Response.

2009 MAC Response: Previous response stands.

3.6.3.5 The parties recognize that the Part 161 Study, including a second or supplemental study, could cost Five Hundred Thousand Dollars (\$500,000) or more.

2005 MAC Response: See 3.6.2 Response.

2009 MAC Response: Previous response stands.

3.7 **Noise Attenuation Testing and Sound Insulation**

2005 Eden Prairie Response: MAC and Eden Prairie staff have agreed upon a representative sampling from the pool of potential residences for noise testing. If any of the residences within the sampling of homes has an exterior to interior noise attenuation of less than 20 dBA based on the methodology used for testing the homes, all homes identified on Exhibit 5 of the Final Agreement will be tested. Preliminary planning for the testing of the representative sampling of homes was initiated in December 2003, but put on hold by MAC until more is known about the Commission's decisions regarding the reliever airport development. The Agreement requires that MAC complete the testing within two years from the date that the extended runways are made available for use. No runways have been extended to date.

See Audit Exhibit 6

2009 Eden Prairie Response: The north parallel runway extension was completed in the summer of 2008. The south parallel runway is proposed to be constructed beginning in the summer of 2009.

2005 MAC Response: MAC has committed to conducting the monitoring, in accordance with Section 3.7, within two years from the date that the extended runways are available.

2009 MAC Response: Previous response stands.

3.7.1 MAC shall test the residences shown on Exhibit 5, in accordance with a methodology agreed upon by MAC and Eden Prairie, to determine the existing exterior to interior noise reduction level. MAC shall complete testing within two years from the date that the extended runways are made available for use.

2005 MAC Response: See 3.7 Response.

2009 MAC Response: Previous response stands.

3.7.2 In the event that any residence shown on Exhibit 5 has an exterior to interior noise attenuation of less than 20 dBA, MAC shall provide sound insulation to achieve a noise reduction of at least 20 dBA. MAC shall consult with Eden Prairie to determine the nature and extent of sound insulation to be provided for eligible residences. MAC shall complete sound insulation of all eligible residences within two years from the date that the extended runways are made available for use.

2005 MAC Response: See 3.7 Response.

2009 MAC Response: Previous response stands.

3.7.3 MAC shall provide testing and sound insulation pursuant to this Paragraph 3.7 regardless of whether funding is provided by the federal government.

2005 MAC Response: See 3.7 Response.

2009 MAC Response: Previous response stands.

3.7.4 No new residence for which final building permits were issued on or after December 4, 2001, shall be eligible to receive testing or sound insulation pursuant to this Paragraph 3.7.

2005 MAC Response: See 3.7 Response.

2009 MAC Response: Previous response stands.

3.8 **Cargo Operations.** MAC represents that, based on the commitments and representations contained in this Article 3, Major Air Cargo Operations will not be able to use the Airport.

2005 MAC Response: Major Air Cargo Operations do not occur and are not anticipated to occur at FCM.

2009 MAC Response: Previous response stands.

3.9 **Nonexclusive Nature of Commitments and Representations.** The commitments and representations contained in this Article 3 are in addition to any existing, proposed, or future measure to control aircraft and Airport noise and the environmental consequences of Airport operations and development and do not prohibit or limit in any way (1) MAC's ability or responsibility to adopt other such measures as MAC may deem necessary and appropriate or be required to adopt, or (2) Eden Prairie's ability to request that MAC adopt other such measures.

2005 MAC Response: Statement stands.

2009 MAC Response: Previous response stands.

3.10 **Implementation and Enforcement**

3.10.1 **Airport Operating Rules and Regulations.** MAC shall, within six months from the effective date of this Agreement, prepare and distribute operating rules and regulations for Flying Cloud Airport that will contain the commitments and representations consistent with this Article 3 and Amended Ordinance No. 51 that affect the actions of Airport Users and Fixed Base Operators, other operational requirements and noise abatement measures that MAC has adopted previously, and any additional operational requirements and noise abatement measures as MAC, in its sole discretion, may choose to adopt and include.

2005 MAC Response: MAC completed the Operation Implementation Plan for the Final Agreement Between The City of Eden Prairie, Minnesota and The Metropolitan Airports Commission – September 2003. This plan was distributed to fixed based operators shortly thereafter, and is reviewed on an annual basis.

See Audit Exhibit 4

2009 MAC Response: MAC completed the Operation Implementation Plan for the Final Agreement Between The City of Eden Prairie, Minnesota and The Metropolitan Airports Commission – September 2003.

- 3.10.2 **Letters of Intent.** MAC shall use its best efforts to negotiate with Fixed Base Operators, Airport Users who base aircraft at the Airport and other Airport Users, as determined by MAC, voluntary letters of intent committing the Fixed Base Operator or Airport User to (1) adhere to the voluntary limits on aircraft operations contained in this Article 3, and (2) participate actively in implementing and monitoring compliance with Amended Ordinance No. 51 and the measures contained in this Article 3.

2005 Eden Prairie Response: The City does not know to what extent letters of intent have been obtained. MAC's effort to obtain commitments from the commercial operators is an important first step. Additional efforts may be need at this time to seek commitments to the voluntary limits on aircraft operations from other airport users who base aircraft at the airport as stated in Article 3. In addition, the letters of intent should address adherence to all the voluntary limits on aircraft operations contained in Article 3, not just nighttime operations of stage II turbine aircraft.

2009 Eden Prairie Response: The City does not know to what extent letters of intent have been obtained by MAC to the voluntary limits on aircraft operations. The Record of Decision on the airport expansion was approved by the FAA in 2008 and runway improvements are underway. It is important at this time to re-visit with all Fixed Based Operators, Airport Users that base aircraft at the Airport and other Airport Users to seek commitments to the voluntary limits on aircraft operations, including letters of intent to abide by the voluntary restrictions set forth in Article 3.

The voluntary limit on nighttime and early morning operations is the key factor in reducing noise complaints from area residents. Every effort should be made by MAC and the Flying Cloud Airport Advisory Commission to reduce the number of nighttime and early morning operations.

2005 MAC Response: The commercial operators that serve turbine aircraft have signed a declaration of intent to enter into a voluntary

agreement to restrict nighttime engine run-ups, and the night time operations of stage II turbine aircraft. Since signing the declaration of intent, the commercial operators have operated consistent with the Noise Abatement Plan for the Flying Cloud Airport, and the mitigation recommendations contained in the Supplement Draft Environmental Impact Statement, as evidenced by the limited number of Stage II operations.

See Audit Exhibit 4

2009 MAC Response: 2009 MAC Response: At the end of 2004 and early 2005, MAC staff attempted to negotiate with Fixed Based Operators and other airport users, voluntary letters of intent committing the airport users to adhere to the voluntary nighttime limits on flights, voluntary Stage II operations restrictions, preferred noise abatement procedures, attendance at annual pilot briefings and adherence to Ordinance 97. Although the Fixed Based Operators and other airport users were willing to agree to comply with the items outlined in the original letter of intent, many were unwilling at the time to sign the letter.

Although MAC received a limited number of signed letters of intent from airport users, the Fixed Based Operators and other airport users have remained committed to the success of the voluntary noise abatement program and have demonstrated their compliance and cooperation with the items outlined in the original letter of intent as demonstrated by no confirmed violations of Ordinance 97, no Stage II aircraft operations since 2004, use of preferred noise abatement procedures and attendance by various airport users at the annual pilot briefings.

MAC staff agrees that additional efforts may be needed at this time to seek commitments from the Fixed Based Operators and other airport users to use their best efforts to comply with the items outlined in the original letter of intent. MAC will work with the City and the Flying Cloud Airport Advisory Commission to obtain commitments from the Fixed Based Operators and other airport users to comply with the items outlined in the original letter of intent.

- 3.10.3 **Notice to Fixed Base Operators and Airport Users.** MAC shall inform current and future Airport Users and Fixed Base Operators about the commitments contained in this Article 3 and Amended Ordinance No. 51 that affect aircraft operations at the Airport by publishing and keeping current notice in the following publications: Airport Facility Directory; Department of Defense Flight Information Manual; Jeppesen Information Manual; and relevant MAC publications.

2005 MAC Response: Consistent with the publications' guidelines, MAC has identified that Flying Cloud Airport has a noise abatement plan in effect.

2009 MAC Response: The MAC takes every opportunity in meeting with airport tenants and the air traffic control staff throughout the year to stress the importance of flying neighborly arrival and departure procedures. MAC tours the FBO to verify the flight planning rooms are stocked with information in regard to the local noise abatement program. The MAC has continued to publish pertinent airport information in publications most used by pilots for flight planning purposes, including a local phone number and web site information.

- 3.10.4 **Pilot Education Program.** MAC shall implement a Pilot Education Program designed to inform Airport Users and Fixed Base Operators about the commitments contained in this Article 3 and Amended Ordinance No. 51 that affect the actions of Airport Users and Fixed Base Operators, other operational requirements and noise abatement measures that MAC has adopted previously, and any additional operational requirements and noise abatement measures as MAC, in its sole discretion, may choose to adopt and include. The Pilot Education Program may include, but will not be limited to, posting and display of information in facilities maintained by Fixed Base Operators and airfield signage. MAC will consult on at least an annual basis with the Designated Representative of Eden Prairie on the curriculum for and implementation of the Pilot Education Program.

2005 MAC Response: The Operational Implementation Plan – September 2003, states that the outreach and education program will consist of MAC staff conducting annual pilot briefings on two separate dates throughout the year and by maintaining a FCM pilot airport noise issue/operation information page on the internet at www.macnoise.com. MAC staff completed a noise briefing at the ATC user's forum on 5-19-05 and will be conducting another briefing on August 31, 2005. Additionally, the MAC noise program maintains a pilot information page on the internet at: <http://www.macnoise.com/relievers/fcm/quiet.htm>.

See Audit Exhibit 4

2009 MAC Response: The Operational Implementation Plan – September 2003, states that the outreach and education program will consist of MAC Noise Program staff conducting annual pilot briefings on two separate dates throughout the year and by maintaining a FCM pilot airport noise issue/operation information page on the internet at www.macnoise.com. MAC staff completed a noise briefing at the ATC users forum on 4-29-08 and also at the airport users forum on 8-21-08. Additionally, the MAC noise program maintains a pilot information page on the internet at: <http://www.macnoise.com/relievers/fcm>.

- 3.10.5 **Award Program for Voluntary Compliance.** MAC will publicly recognize, through a certificate, award, or similar means, on an at least annual basis the actions and efforts of one or more Airport Users or Fixed Base Operators that avoid or promote avoidance of operations inconsistent with the voluntary limits contained in this Article 3.

2005 MAC Response: The Operational Implementation Plan – September 2003, states an annual award will be presented at the briefing to an airport user who has demonstrated a high level of compliance with the voluntary measures and thus contributed to the ongoing success of the program. The initial award will be issued in the summer of 2005.

2009 MAC Response: The Operational Implementation Plan – September 2003, states an annual award will be presented at the briefing to an airport user who has demonstrated a high level of compliance with the voluntary measures and thus contributed to the ongoing success of the program. To date MAC presented the award to an airport user who has demonstrated a high level of compliance with the voluntary measures in each of the last three years. The 2008 award was issued in the fall of 2008.

- 3.10.6 **Complaints and Investigation.** MAC shall thoroughly investigate all credible complaints and information received from local residents, Eden Prairie, Airport Users, Fixed Base Operators, or any other source to determine whether a violation or failure to comply with a voluntary measure has occurred and take appropriate action as dictated by the relevant provision of this Article 3 or Amended Ordinance No. 51.

2005 Eden Prairie Response: Between August 2004 and October 2005, the City has received 19 letters from MAC identifying failure to abide by the voluntary nighttime operating restrictions.

See Audit Exhibit 7

2009 Eden Prairie Response: MAC staff promptly investigates all verifiable violations to the voluntary noise measures and reports the number and type of violations that have occurred to the Flying Cloud Airport Advisory Commission on a bimonthly basis. To the best of our knowledge all letters of violation sent to the owner/operator between August 2004 and December 2008 have been copied to the Designated Representative of Eden Prairie.

2005 MAC Response: The Operational Implementation Plan – September 2003, outlines that complaints received from Eden Prairie residents, airport users, Fixed Base Operators or any other source will be evaluated/investigated to determine whether a violation or failure to comply with a voluntary measure has occurred. MAC staff investigates all FCM complaints per the Operational Implementation Plan on an on-going basis and has developed an Interactive Complaint Form that includes the

reliever airports to make it more convenient to file reliever airport noise complaints.

Between August 2004 and June 2005 there were 46 complaints registered for operations occurring between 10 p.m. and 7 a.m. at FCM. Of these complaints, 12 operations were verified with ANOMS and 12 letters were sent to the respective operators.

2009 MAC Response: The Operational Implementation Plan – September 2003, outlines that complaints received from Eden Prairie residents, airport users, Fixed Base Operators or any other source will be evaluated/investigated to determine whether a violation or failure to comply with a voluntary measure has occurred. MAC Noise Program staff investigates all FCM complaints per the Operational Implementation Plan on an on-going basis and has developed an Interactive Complaint Form that includes the reliever airports to make it more convenient to file reliever airport noise complaints.

Between August 2004 and December 2008 there were 3,076 complaints registered for operations occurring between 10 pm and 7 am at FCM. Of these complaints, 830 letters were sent to the respective operators notifying them of a failure to comply with a voluntary measure.

- 3.10.7 **Enforcement.** MAC shall coordinate and cooperate with Eden Prairie in the prosecution of any violation of Amended Ordinance No. 51.

2005 MAC Response: When, and if, required, the above provision will occur.

2009 MAC Response: When, and if, required the above provision will occur.

Additionally, MAC has taken steps to further monitor and investigate compliance with Ordinance 51 and the voluntary noise abatement measures. These additional steps are above and beyond what was outlined in the December 2002 Final Agreement and the September 2003 Operational Implementation Plan. MAC installed a portable camera on the airfield at FCM to monitor any potential violations of Ordinance 51. Historic images obtained from the camera are also reviewed during the investigation process of potential violations of Ordinance 51.

MAC also installed an aviation radio frequency scanning device at FCM that records and saves all aviation radio transmissions on a personal computer that can be accessed remotely by Noise Program staff via the internet. When necessary or when ANOMS operational data is unavailable, MAC reviews the aircraft call sign information to help identify suspected violaters of Ordinance 51 or violations of any voluntary noise abatement measures.

3.10.8 Monitoring Compliance

3.10.8.1 MAC shall instruct all MAC employees working on a temporary or permanent basis at the Airport of the commitments of this Article 3 and Amended Ordinance No. 51 and provide instructions on procedures for notifying the proper parties of a potential violation or failure to comply with a voluntary measure.

2005 MAC Response: All MAC employees at FCM have received a copy of the Final Agreement and have been briefed on the Agreement.

2009 MAC Response: The airport manager reviews the noise abatement policies on an annual basis with airport employees and upon the hire of new employees.

3.10.8.2 MAC shall perform, on no less than a monthly basis, a review of the ANOMS flight track database to identify any and all Stage 2 Aircraft operations occurring at the Airport since the prior review. MAC shall keep a separate record of all Stage 2 Aircraft operations and provide the Designated Representative of Eden Prairie, on a quarterly basis, with a notice identifying the date and time of each Stage 2 Aircraft operation in the quarter and a total of all Stage 2 Aircraft operations in the preceding rolling twelve months.

2005 Eden Prairie Response: The City has received via email copies of the monthly reports beginning in January 2005.

See Audit Exhibit 8

2009 Eden Prairie Response: The City continues to receive, via email, access to quarterly and rolling twelve month reports on Stage 2 Aircraft operations. A total of 4 Stage 2 aircraft have been recorded at FCM since the Operational Implementation Plan was adopted in September 2003. None have been reported after 2004.

2005 MAC Response: The Operational Implementation Plan – September 2003, outlines that three ANOMS operation reports will be generated for FCM to assess Stage II operations at the airport. These include a weekly and quarterly report that will summarize the Stage 2 aircraft types and the associated number of operations. MAC staff

will maintain a count of the total number of Stage II operations occurring during the preceding rolling twelve-month period. This will include the date and time of any known Stage II operation that takes place at FCM. Reports are published on the internet at: <http://www.macnoise.com/relievers/fcm/finalagree.htm>. MAC Noise Program staff notifies the Designated Representative of Eden Prairie on a monthly basis of the most recent weekly, quarterly and rolling twelve-month stage II reports.

2009 MAC Response: Previous response stands, however, the current website is: <http://www.macnoise.com/relievers/fcm/fcmplan#reports>

- 3.10.9 **Notice of Operation Inconsistent with Voluntary Measure.** MAC shall send a written notice to the owner or operator of any aircraft known to have operated in a manner inconsistent with the voluntary restraints on Nighttime Aircraft Operations, early morning departures (as developed and modified pursuant to Paragraph 3.5), and operations by Stage 2 Aircraft. The notice shall provide information about the inconsistent operation, state that MAC's policy is to limit voluntarily inconsistent operations, and request that the owner or operator provide a detailed response describing the reason for the inconsistent operation. MAC shall maintain a record of all such correspondence and provide copies of such correspondence to the Designated Representative of Eden Prairie.

2005 Eden Prairie Response: See 3.10.6 Response.

2009 Eden Prairie Response: Previous response stands.

2005 MAC Response: MAC staff investigates all FCM complaints per the Operational Implementation Plan on an on-going basis and if a complaint is verified, MAC sends a letter to the owner/operator (in cases where contact information is accessible) notifying them that they have operated in a manner inconsistent with the voluntary restraints on nighttime aircraft operations, early morning departures and operations by Stage II aircraft. To-date, 16 letters have been sent out.

2009 MAC Response: Previous response stands however, through December 2008, 830 letters have been sent out.

3.10.10 **Eden Prairie Involvement**

- 3.10.10.1 MAC shall provide the Designated Representative of Eden Prairie with a copy of all notices to or other correspondence with Airport Users and Fixed Base Operators concerning

any identified violation or failure to comply with a voluntary measure.

2005 Eden Prairie Response: See 3.10.6 Response.

2009 Eden Prairie Response: Previous response stands.

2005 MAC Response: The Designated Representative of Eden Prairie is carbon-copied via e-mail on all identified violation or failure to comply with a voluntary measure correspondence.

2009 MAC Response: Previous response stands.

3.10.10.2 MAC shall provide Eden Prairie, upon reasonable notice, access to the Airport, accompanied by a MAC employee, to inspect any facility to which MAC has access.

2005 MAC Response: MAC will provide access as appropriate.

2009 MAC Response: The MAC remains dedicated to granting the city officials and its representatives access to the airport at all times upon request. The City of Eden Prairie fire inspector has inspected all commercial and storage facilities two times in the last four years. Moreover, the MAC in coordination with the air traffic control tower and the city police and fire departments has conducted several training exercises at the airport in the past year, too. The Flying Cloud Airport Advisory Commission and members of the city staff has also toured in each of the last three years. The MAC remains dedicated to granting the city access at all times upon request.

3.10.10.3 MAC will make presentations to the Eden Prairie City Council as requested concerning MAC's implementation and enforcement of the commitments contained in this Article 3.

2005 MAC Response: MAC continues to be available for discussions and presentations relative to the implementation of the agreement elements.

2009 MAC Response: MAC continues to be available for discussions and presentations relative to the implementation of the agreement elements. MAC staff also attends each meeting of the Flying Cloud Airport Advisory Commission and provides a report on airport noise

complaints, violations of Ordinance 51, Stage II aircraft operations and compliance with voluntary noise abatement measures.

ARTICLE 4
EDEN PRAIRIE COMMITMENTS AND REPRESENTATIONS

- 4.1 **Eden Prairie Support for MAC Commitments and Representations.** Eden Prairie supports MAC’s adoption of Amended Ordinance No. 51 and the commitments and representations contained in Article 3.

2005 Eden Prairie Response: No change in the City’s support.

2009 Eden Prairie Response: Previous response stands.

- 4.2 **Eden Prairie Support for Proposed Airport Expansion**

- 4.2.1 Eden Prairie shall not file or serve a complaint or other pleading with any court challenging the Proposed Airport Expansion or the Environmental Impact Statement concerning the Proposed Airport Expansion.

2005 Eden Prairie Responses: The City is in compliance with this provision.

2009 Eden Prairie Response: Previous response stands.

- 4.2.2 Eden Prairie shall not file with the FAA or other governmental authority comments that state or imply that the Proposed Airport Expansion should not occur, that MAC should consider or pursue an alternative to the Proposed Airport Expansion, or, subject to Paragraph 4.2.5.1, that the Environmental Impact Statement concerning the Proposed Airport Expansion is inadequate.

2005 Eden Prairie Response: The City is in compliance with this provision.

2009 Eden Prairie Response: Previous response stands.

- 4.2.3 Eden Prairie shall not advocate against the Proposed Airport Expansion by attempting to persuade the FAA or other governmental authority not to approve, authorize, or permit the Proposed Airport Expansion or the Environmental Impact Statement for the Proposed Airport Expansion.

2005 Eden Prairie Response: The City is in compliance with this provision.

2009 Eden Prairie Response: Previous response stands.

4.2.4 Eden Prairie shall not promote, represent or in any way support any third party in opposing the Proposed Airport Expansion or the Environmental Impact Statement for the Proposed Airport Expansion, including without limitation by drafting documents for the purpose of supporting the opposition of such parties.

2005 Eden Prairie Response: The City is in compliance with this provision.

2009 Eden Prairie Response: Previous response stands.

4.2.5 The following actions shall not constitute violations of Eden Prairie's commitments under this Paragraph 4.2:

4.2.5.1 In the interest of protecting the health, safety and welfare of members of the community, Eden Prairie may request that MAC provide additional disclosures concerning the environmental consequences of the Proposed Airport Expansion, and Eden Prairie may promote mitigation of any environmental consequences other than mitigation measures and environmental consequences addressed in this Agreement.

2005 Eden Prairie Response: The City of Eden Prairie did request MAC to provide additional disclosure concerning the environmental consequences of the Proposed Airport Expansion in an August 16, 2004 letter responding to a request for comments on the Final Environmental Impact Statement for the Flying Cloud Airport.

See Audit Exhibit 9

2009 Eden Prairie Response: No additional disclosures have been requested.

4.2.5.2 Eden Prairie may disclose documents as required by the Minnesota Data Practices Act or as otherwise required by Minnesota law.

2005 Eden Prairie Response: The City of Eden Prairie has disclosed documents as required by the Minnesota Data Practices Act.

2009 Eden Prairie Response: Previous response stands.

4.2.5.3 Officials and employees of Eden Prairie may take any action concerning the Proposed Airport Expansion so long as such officials and employees are not acting on behalf of Eden Prairie.

4.2.5.4 Eden Prairie may oppose or take any other action concerning capital improvement projects or other MAC actions that (1) require supplementing the Environmental Impact Statement as prescribed by FAA Order 5050.4A Section 104, as the same may be amended in the future, or (2) that are in addition to the Proposed Airport Expansion.

4.3 **Eden Prairie Commitments on Land Use Compatibility.** Eden Prairie shall notify MAC of any public hearing at which Eden Prairie will consider amending the Eden Prairie Comprehensive Guide Plan to permit development of residences on any property that is shown in the then-current Comprehensive Guide Plan as being exposed to Airport noise in excess of DNL 60 dB.

2005 Eden Prairie Response: While not specifically located within the current Comprehensive Plan as being exposed to Airport noise in excess of DNL 60 dB, the City of Eden Prairie has notified MAC of public hearings at which Eden Prairie considered amending the Comprehensive Guide Plan to permit development of residences on property relatively near the Airport for the following projects: a) Hennepin Village Office Site 1 and 2; b) Hennepin Village Sites C and D. In addition, the City provides MAC with land development plans for projects that are proposed near the airport.

See Audit Exhibit 10

2009 Eden Prairie Response: Since the 2005 Management Audit no Comprehensive Plan changes have been made to permit development of residences on any property that is shown in the then-current Comprehensive Guide Plan as being exposed to Airport noise in excess of DNL 60 dB.

ARTICLE 5

THIRD PARTY CHALLENGES

2005 Eden Prairie Response: The City is aware of a third party challenge made to the FAA by Northwest Airlines, Inc. The document regarding this issue is entitled “Revenue Diversion Issues at Flying Cloud Airport, Eden Prairie, Minnesota” and dated September 24, 2003.

See Audit Exhibit 11

2009 MAC Response: On November 7, 2007, Northwest Airlines withdrew its complaint citing resolution with MAC on the issues.

5.1 **Duty to Defend.** If any party, including without limitation any individual, organization, corporation, association, or government agency (including the FAA), challenges or contests the legality of this Agreement, the authority of either party to enter into this Agreement, Amended Ordinance No. 51, the other commitments or representations contained in this Agreement, the Part 161 Study,

or any action taken to comply with this Agreement, in any judicial, administrative, or similar forum, MAC and Eden Prairie shall, except as expressly provided in this Agreement, take the following action(s):

- 5.1.1 Defend vigorously this Agreement, the authority of either party to enter into this Agreement, Amended Ordinance No. 51, the other commitments or representations contained in this Agreement, the Part 161 Study, or any action taken to comply with this Agreement.
- 5.1.2 Oppose and defend against any attempt to prevent either party from performing any or all of the requirements contained in this Agreement.
- 5.1.3 Prosecute fully such defense or opposition provided for above and, if the judicial, administrative or other action or proceeding is not dismissed voluntarily, obtain a final order or decision from the judicial, administrative or other decisionmaker, including without limitation a final, appealable trial court decision or Final FAA Decision.
- 5.1.4 Each party shall support any request by the other party to intervene or participate in any such judicial, administrative or other action or proceeding.
- 5.1.5 Each party promptly shall provide the other party with a copy of any correspondence, complaint, filings, pleadings, court orders or other non-privileged writing concerning an administrative or judicial proceeding or action described herein.

5.2 **MAC's Authority to Defer Enforcement or Implementation of Commitment.** MAC may defer enforcement or implementation of any commitment contained in this Agreement only as follows:

- 5.2.1 During the pendency of any proceeding or action described in Paragraph 5.1, but only if the FAA asserts in writing that immediate deferral is legally required to retain eligibility for state or federal financial assistance, including eligibility to receive discretionary Airport Improvement Program funds, or to retain authority to impose, collect or use Passenger Facility Charges;
- 5.2.2 For a period of not longer than sixty (60) days to respond to a written request by the FAA to defer enforcement but only if MAC reasonably believes that the deferral is necessary to retain eligibility for state or federal financial assistance, including eligibility to receive discretionary Airport Improvement Program funds, or to impose, collect or use Passenger Facility Charges and only if MAC works within the sixty day period to address FAA's concerns; or
- 5.2.3 As strictly necessary to comply with an order of a court of competent jurisdiction.
- 5.2.4 Each party promptly shall provide the other party with a copy of any letter, court order or other writing referred to in this Paragraph 5.2, or any subsequent letter, court order or other writing regarding the same subject.

5.3 **Duties in Response to Adverse Judicial or Administrative Decision.** In the event a Final FAA Decision or appealable court decision determines that a commitment or representation contained in this Agreement, excluding the commitment contained in Paragraph 3.6.2, is unlawful, would render MAC ineligible for state or federal financial assistance, including discretionary Airport Improvement Program funds, would terminate MAC's authority to impose, collect or use Passenger Facility Charges, or otherwise prevents MAC from performing as required in this Agreement, MAC shall adopt alternative measures designed to guarantee that the total number of residences projected (five years from the date of the Final FAA decision or appealable court decision) to be exposed to noise associated with the Airport in excess of DNL 60 dB shall be no greater than the number of residences MAC and Eden Prairie mutually agree reflects the number of residences that are projected (after the same five years) to be exposed to noise in excess of DNL 60 dB if the commitments or restriction contained in Article 3 were fully in force and effect.

5.3.1 The alternative measures shall include mandatory measures or a combination of mandatory and voluntary measures but shall not include voluntary measures alone.

5.3.2 In the event that Eden Prairie and MAC are unable to agree on whether the proposed measures would achieve the standard contained in this Paragraph 5.3, the parties shall complete the formal mediation described in Article 6. In the event that the parties are unable to agree after completing formal mediation, the parties shall submit to binding arbitration. The scope of the mediation and arbitration shall not include consideration of whether MAC is obligated to adopt a measure that will satisfy the standard contained in this Paragraph 5.3.

5.3.3 Notwithstanding the above, no proposed agreement, measure or judgment in arbitration shall render MAC ineligible for state or federal financial assistance, including discretionary Airport Improvement Program funds, or terminate MAC's authority to impose, collect or use Passenger Facility Charges

5.4 **Duties in Response to Adverse Judicial or Administrative Decision on Stage 2 Ban.** In the event a Final FAA Decision or appealable court decision determines that a mandatory prohibition on operations at the Airport by Stage 2 Aircraft imposed pursuant to Paragraph 3.6.2 is unlawful, would render MAC ineligible for state or federal financial assistance, including discretionary Airport Improvement Program funds, or would terminate MAC's authority to impose, collect or use Passenger Facility Charges, MAC shall be excused from the obligation to implement the prohibition on Stage 2 Aircraft, provided that MAC shall continue to limit operations by Stage 2 Aircraft at the Airport pursuant to Paragraph 3.6.1.

ARTICLE 6

DISPUTE RESOLUTION

2005 Eden Prairie Response: No disputes have been filed by the City of Eden Prairie or MAC as of the date of this audit report.

2009 Eden Prairie Response: Previous response stands.

- 6.1 **Notice of Default.** At no time shall Eden Prairie or MAC be deemed to be in default under, or breach of, this Agreement unless and until the other party has provided written notice to the parties identified in Paragraph 8.4 specifying such alleged breach or default (“Notice of Default”) and such alleged breach or default has not been cured as provided in Paragraph 6.2.
- 6.2 **Right to Cure Default.** The party who has received a Notice of Default shall have thirty (30) days in which to cure the alleged breach or default and provide notice to the other party that such alleged breach or default has been cured.
- 6.3 **Informal Dispute Resolution.** Immediately after receipt of a Notice of Default, the Executive Director of MAC and the City Manager of Eden Prairie shall meet and attempt to resolve the matter.
- 6.4 **Formal Mediation.** If the parties fail to resolve the matter informally under Paragraph 6.3 within thirty (30) days, the parties shall submit their dispute to a mediator. The parties shall have ten (10) days to select a mediator. If the parties are unable to agree upon a mediator, the Chief Judge of the 4th Judicial District, Hennepin County, Minnesota, shall select a mediator. The mediation shall be conducted pursuant to the rules generally used by the mediator in the mediator’s practice, provided that the entire mediation process be concluded within 30 days of appointment of the mediator, or within such other time as the parties may agree in writing. If the mediation process fails to resolve the matter, both informal and formal dispute resolution shall be deemed to be complete.
- 6.5 **Costs of Alternative Dispute Resolution.** Each party shall bear its own costs of the informal dispute resolution process and formal mediation process described above. The parties shall share equally the fees and expenses of the mediator.
- 6.6 **Dispute Resolution Process Mandatory.** No action shall be commenced in any court to enforce or otherwise apply, interpret, or seek cure for a breach of, this Agreement, excluding an action requesting preliminary or temporary relief, before the completion of the informal and formal dispute resolution process set forth in this Article 6. Neither party shall assert, plead, raise, allege, or rely upon the applicable statute of limitations, laches, timeliness, delay, or any other defense based on the passage of time during the dispute resolution process in any subsequent judicial or administrative proceeding. The dispute resolution provisions set forth in this Article 6 shall apply only to MAC and Eden Prairie, and shall not apply to any successor in interest to either Party.
- 6.7 **Confidentiality.** The alternative dispute resolution process described in this Article 6 constitutes compromise negotiation for purposes of applicable rules of evidence. Information prepared for or disclosed during the alternative dispute resolution process shall be inadmissible in evidence pursuant to Rule 408 of the Federal Rules of Evidence or Rule 408 of the Minnesota Rules of Evidence, and shall be withheld from disclosure to the maximum extent permissible under the Minnesota Data Practices Act and other applicable laws.

- 6.8 **Waiver of Rights.** The failure of either party to object to, or to take affirmative action with respect to, any conduct of the other which is in violation of the terms of this Agreement shall not be construed as a waiver of such violation or breach, or of any future violation, breach or wrongful conduct. Subsequent acceptance of performance under this Agreement by Eden Prairie or MAC shall not be deemed to be a waiver of any preceding breach by the other Party of the terms of this Agreement, regardless of Eden Prairie's or MAC's knowledge of such preceding breach at the time of acceptance of performance. No waiver or relinquishment of a right or power under this Agreement shall be deemed a waiver of such right or power at any other time, nor shall any failure of either party to require or exact full and complete compliance with any of the covenants or conditions of this Agreement be construed as changing in any manner the terms hereof or preventing either party from enforcing the full provisions hereof.

ARTICLE 7 **REMEDIES**

2005 Eden Prairie Response: No remedies needed as of the date of this audit report.

2009 Eden Prairie Response: Previous response stands.

- 7.1 **General Remedies: Specific Performance and Injunctive Relief.** The parties acknowledge and agree that damages as a result of a breach of this Agreement by either party are not readily ascertainable, that money damages or other legal relief will not adequately compensate for any such breach, and that the party that has not breached this Agreement is entitled to specific performance of those obligations under this Agreement and/or injunctive relief to compel performance of those obligations. Subject to the right to seek specific performance, stated above, the parties expressly reserve their right to oppose a request by the other party for a preliminary or permanent injunction, including grounds that the party seeking relief would not suffer irreparable harm as a result of such breach.
- 7.2 **Specific Remedies.** The parties further acknowledge that the breach of certain commitments and representations provided for in this Agreement necessitate different remedies, including the following:
- 7.2.1 **Eden Prairie Commitments Concerning Proposed Airport Expansion.** In the event that Eden Prairie has been found by a court of competent jurisdiction to have breached the commitments contained in Paragraph 4.2 concerning the Proposed Airport Expansion, MAC shall be relieved of its commitments and representations contained in this Agreement as it chooses, and this Agreement otherwise shall be voidable by MAC.
- 7.2.2 **MAC Commitments and Representations.** In addition to any remedy that might be available under Paragraph 7.1, in the event that MAC is found by a court of competent jurisdiction to have breached the commitments and representations contained in Article 3, Eden Prairie shall

be relieved of its commitments and representations contained in Article 4 as it chooses.

ARTICLE 8
GENERAL PROVISIONS

- 8.1 **Duration.** This Agreement shall remain in full force and effect unless and until terminated by written agreement of both parties.
- 8.2 **Amendment.** This Agreement may be altered, amended or modified only by a written instrument executed pursuant to the governmental consent of both Eden Prairie and MAC. Neither this Agreement, nor any term hereof, may be changed, modified or abandoned, in whole or in part, except by instrument in writing.
- 8.3 **Headings.** Headings have been inserted herein only as a matter of convenience and for reference, and are not to be considered when construing the provisions of this Agreement.
- 8.4 **Notices.** Where the terms of this Agreement provide that either party will furnish or provide any document or material to the other party, unless otherwise provided herein, such document or material shall be delivered by hand to each party at the following address, respectively:

If to Eden Prairie: City Manager
 City of Eden Prairie
 8080 Mitchell Road
 Eden Prairie, MN 55344
 (952) 949-8399
 (952) 949-8390 (fax)

With a copy to: Richard F. Rosow, City Attorney
 Gregerson, Rosow, Johnson & Nilan, Ltd.
 1600 Park Building
 650 Third Avenue South
 Minneapolis, MN 55402-4337
 (612) 338-0755
 (612) 349-6718 (fax)

If to MAC: Jeffrey W. Hamiel, Executive Director
 Metropolitan Airports Commission
 6040 28th Avenue South
 Minneapolis, MN 55450-2799
 (612) 726-8188
 (612) 726-5306 (fax)

With a copy to: Thomas W. Anderson, General Counsel
 Metropolitan Airports Commission
 6040 28th Avenue South
 Minneapolis, MN 55450-2799
 (612) 726-8178

(612) 726-5306 (fax)

- 8.4.1 Such notice shall be deemed to have been received on the date of its delivery to the above-listed address.
- 8.4.2 If hand delivery is not possible, the document or material shall be sent to the above-listed address by overnight express courier service, and shall be deemed to have been received on the first business day after the date of its receipt by the express courier service.
- 8.5 **Exhibits.** Exhibits 1 through 5 of this Agreement are incorporated herein by reference and made a part hereof.
- 8.6 **Counterparts.** This Agreement may be executed in four counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.
- 8.7 **Governing Law.** This Agreement shall be subject to and governed by the laws of the State of Minnesota.
- 8.8 **Severability.** If any provision, paragraph, or subparagraph of this Agreement is adjudged by any court to be invalid, illegal, or unenforceable in whole or in part, this adjudication will not affect the validity of the remainder of this Agreement, including any other provision, paragraph, or subparagraph. In the event that any of the commitments or representations contained in Article 3 is adjudged by any court to be invalid, illegal, or unenforceable in whole or in part, Section 5.3 shall survive as an independent obligation.
- 8.9 **No Third-Party Beneficiary.** This Agreement is solely for the benefit of the parties hereto and no third party shall be entitled to claim or enforce any rights hereunder except as specifically provided in this Agreement.
- 8.10 **Successors and Assigns.** This Agreement shall be binding upon and shall inure to the benefit of the successors in interest and assigns of Eden Prairie and of MAC.
- 8.11 **Complete Agreement.** This Agreement embodies and supercedes, to the extent of any inconsistency, all of the representations, warranties, covenants and agreements of the parties in relation to the subject matter hereof.
- 8.12 **Change in Law.** If either party believes that a new federal or Minnesota statute or regulation may result in either party being unable to perform any obligation contained in this Agreement, MAC and Eden Prairie shall meet and confer to discuss in good faith (1) the specific effect of the change in law on this Agreement and (2) whether there are possible amendments to this Agreement that will confer substantially the same benefits as this Agreement and conform to the new or amended federal or Minnesota statute or regulation. The parties shall treat each obligation as independent and allow the change in law to affect performance under this Agreement only to the extent made necessary by the change in law.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first written above.

METROPOLITAN AIRPORTS COMMISSION

BY: _____
Jeffrey W. Hamiel
Executive Director

MEMORANDUM OF UNDERSTANDING
CONCERNING COOPERATIVE SOLUTIONS TO
INFRASTRUCTURE, RIGHT-OF-WAY/EASEMENT AND PARK NEEDS BETWEEN
THE CITY OF EDEN PRAIRIE AND THE METROPOLITAN AIRPORTS
COMMISSION REGARDING FLYING CLOUD AIRPORT

This Memorandum of Understanding (“MOU”) is entered into between the City of Eden Prairie (“Eden Prairie” or “City”) and the Metropolitan Airports Commission (“MAC”) regarding cooperative solutions to outstanding infrastructure, assessment, right-of-way/easement and parkland issues relating to the Flying Cloud Airport. The undersigned parties believe that the elements of this MOU will establish a cooperative relationship between Eden Prairie and MAC for the compatible implementation of infrastructure improvements and private property development. In exchange for all the commitments in this MOU the parties agree as follows:

1. Easements for Charlson Area Improvements.

A. MAC RESPONSIBILITIES AND COMMITMENTS:

- (1) MAC shall convey right-of-way and/or easements (subject to FAA approval) in general conformance to the drawing attached as Exhibit A.
 - (a) The areas in *yellow* (approximately 4 acres) shall be conveyed to Eden Prairie at no additional consideration or compensation. The undersigned recognize that this right-of-way was the subject of an agreement dated November 10, 1997 between Grace Church and Lynn L. Charlson (and successors and assigns), wherein the property owner covenanted to dedicate right-of-way for the realignment of County Road 4 at no monetary compensation.

2005 Eden Prairie Response: See (b) below.

2009 Eden Prairie Response: Previous response stands.

2005 MAC Response: Agreement executed for construction. Permanent right-of-way conveyance will not happen until a land release/concurrent use determination is approved by the FAA. That submittal is pending resolution to the revenue diversion issue.

2009 MAC Response: On July 1, 2003, MAC issued a right-of-entry to the City for construction of the Charlson Area Improvements. With the completion of the FAA Record of Decision on the Final Environmental Impact Statement in 2008,

MAC is preparing a submittal to the FAA for the final federal action involving airport property. Submittal of this document to the FAA is expected by the end of 2008. Conveyance of permanent right-of-way will be completed upon approval of the final FAA action.

- (b) The area generally highlighted in *purple* minus the area highlighted in *red* (that will be vacated), approximately 4.1 acres net, shall be conveyed to Eden Prairie.

2005 Eden Prairie Response: Incomplete. It is the City's responsibility to initiate these items, which cannot occur until we obtain a turn back of Spring Road from Hennepin County. I anticipate that this could occur in late 2005 or in 2006. This aspect will require a level of coordination between Hennepin County, MAC and Eden Prairie, since we will need to provide Hennepin County with the right-of-way for the new alignment of CSAH 4 (Eden Prairie Road) contemporaneously with them turning Spring Road back to us, contemporaneously with us vacating portions of the un-used right-of-way to MAC, contemporaneously with MAC executing conveyance documents to either Eden Prairie or Hennepin County. The realignment project is not 100% complete, since the wear course and final restoration are not totally finished. We have not negotiated an Agreement with Hennepin County for the turn back process in exchange—we will be delivering a brand new roadway built to Hennepin County's standards and specifications and receiving back Spring Road in some level of distress. This will also include negotiating a solution, with partial reconstruction of Spring Road being a requirement of Grace Church.

2009 Eden Prairie Response: Incomplete. Right-of-way has been exchanged with Hennepin County – City expects to complete by 2nd quarter of 2009.

2005 MAC Response: Same as (a) above.

2009 MAC Response: Previous response stands.

- (c) MAC shall provide temporary construction easements for construction of the improvements as shown on Exhibit A at no additional compensation. The parties acknowledge that not all of the easement areas have been “final designed” but recognize that they are temporary in nature and will vary in accordance with construction needs. Conveyance of easements is subject to final design approval by MAC.

2005 Eden Prairie Response: Copies of these executed easements have been sent to the City, along with a copy of the executed ponding easement between MAC and Hennepin Village. The City of Eden Prairie did pay for these easements.

See Audit Exhibit 12.

2009 Eden Prairie Response: Complete.

2005 MAC Response: Done. Temporary easements granted and construction is complete.

2009 MAC Response: Complete. See (a) above.

B. EDEN PRAIRIE RESPONSIBILITIES AND COMMITMENTS

(1) Eden Prairie shall reimburse MAC in accordance with the following:

- (a) Pending special assessments for parcels labeled MAC 2 and MAC 3 (see Exhibit A) will not be levied by City. The estimated amount of these special assessments is \$332,304. Trunk assessments against these two parcels will be absorbed by the City and pending local assessments from the Charlson Area Feasibility Study will be reassigned to non-MAC property as right-of-way acquisition costs.

2005 Eden Prairie Response: The final assessment roll for I.C. 99-5484 does not include MAC as being assessed for the two referenced parcels MAC 2 and MAC 3.

See Audit Exhibit 13, page 3.

2009 Eden Prairie Response: Complete per agreement.

- (b) Except for provisions to collect trunk sewer and water assessments for current and proposed buildings on the airport property (see Paragraph 6) and in consideration and approval of all the elements of this MOU, Eden Prairie will not levy any additional trunk sewer and water assessments to MAC-owned land as assembled for development and protection of the Flying Cloud Airport.

2005 Eden Prairie Response: Statement stands.

2009 Eden Prairie Response: Previous response stands.

- (c) City will grant MAC a "curb cut" on Charlson Road in a manner to permit access from the Southwest corner of the south hangar area to Charlson Road in a location to be mutually agreed upon between MAC and the City.

2005 Eden Prairie Response: This item is still pending. When MAC submits a development plan for the hangar area on the south side of the airport, we anticipate and will grant a permit for a curb cut to Charlson Road.

2009 Eden Prairie Response: Pending. MAC has not advanced the hangar project or the need to construct the driveway.

C. GENERAL

- (1) The final design details of the CSAH 4 (Eden Prairie Road/Spring Road) alignment are subject to approval by Hennepin County and MAC. It is expected that the area of *purple* may be enlarged or reduced and that a corresponding enlargement or reduction in the area shown in *red* to be vacated may occur, but that the net acreage is expected to remain at approximately 4.1 acres.

2005 Eden Prairie Response: These details have not been finalized. The final completion of the realignment of Spring Road/Eden Prairie Road will be complete in 2005, whereupon, a turn back process and exchange of right-of-way will occur with MAC, Hennepin County and Eden Prairie. It is likely that this will happen in late 2005 or 2006.

2009 Eden Prairie Response: Field construction complete. See Comment 1.A. (1) (b).

2005 MAC Response: Area included in the agreement with the City discussed under 1(a) above.

2009 MAC Response: Complete. MAC reviewed the final design details prior to issuing the right-of-entry for construction.

- (2) Grading of the Charlson property and construction of Charlson Road including utility stub locations shall be subject to MAC approval and will be granted if the grading plans are designed to be compatible with the MAC grading plans so as not to compromise the integrity of MAC's present and known future development plans, except as provided for in that certain Settlement Agreement dated July 16, 2002 between MAC, Lynn Charlson, Pentom and the City of Eden Prairie ("Settlement Agreement").

2005 Eden Prairie Response: One of the granted easement documents from MAC is the easement for construction of Charlson Road. This easement is the culmination of the review process and approval granted by MAC.

See Audit Exhibit 12.

2009 Eden Prairie Response: Complete.

2005 MAC Response: Done.

2009 MAC Response: Complete. MAC reviewed final design details prior to issuing the right-of-entry.

2. TH 212 and Pioneer Trail Utilities.

A. MAC RESPONSIBILITIES AND COMMITMENTS

- (1) MAC shall loop the watermain through airport property from the South Hangar area to Pioneer Trail to meet fire flow/safety requirements (established by the Fire Marshall as 2000 gallons per minute to office/industrial areas and 3000 gallons per minute to hangar areas). MAC will dedicate necessary easements for ownership, maintenance and repairs by the City.

2009 Eden Prairie Response: Upon final analysis and based on completion of a watermain loop in Charlson Road, City has advised MAC that this item is no longer required.

2005 MAC Response: This work will occur when the runway extensions and south building projects are constructed.

2009 MAC Response: Through it's review of MAC's plans and permits, the City determined this loop would not be necessary.

B. EDEN PRAIRIE RESPONSIBILITIES AND COMMITMENTS

- (1) City shall construct and finance from its Trunk Utility Fund the 16-inch watermain connection under Pioneer Trail and TH 212.

2005 Eden Prairie Response: For I.C. 52-204, a summary of the project costs and assessments related to this item shows a City share of \$122,277.60, which includes the cost of the 16" watermain under Pioneer Trail and TH 212. Also the final pay estimate for the utility project included the City constructing the 16" watermain under Pioneer Trail and Flying Cloud Drive.

See Audit Exhibits **13**, page 2, and **14**

2009 Eden Prairie Response: Complete.

- (2) Eden Prairie shall reimburse MAC for expenses MAC incurs in extending watermain along TH 212/Flying Cloud Drive from the point that the waterline is necessary to serve the building area in the vicinity of the

control tower to the westerly MAC property line (estimated to be approximately 300 to 500 feet).

2005 Eden Prairie Response: The segment of watermain referred to was actually eliminated from the MAC contract to construct utilities in Flying Cloud Drive right-of-way. The segment of watermain is part of the current project of Charlson Road TH 212 intersection that will be assessed to United Properties.

2009 Eden Prairie Response: Complete.

- (3) The Feasibility Study shall indicate the cost of an 8-inch watermain along Flying Cloud Drive to be assessed to adjacent properties with the City paying the cost to oversize to a 12-inch watermain.

2005 Eden Prairie Response: The Pioneer Trail/Flying Cloud Drive Area Feasibility Study I.C. 52-204 indicates that the City of Eden Prairie will reimburse MAC for the over sizing costs from an 8” to a 12” watermain.

See Audit Exhibit 15

2009 Eden Prairie Response: Complete.

- (4) Upon execution Eden Prairie shall finalize the Pioneer Trail/Flying Cloud Drive Area Feasibility Study, conduct the public hearing and let the contract for the portion to be constructed by Eden Prairie.

2005 Eden Prairie Response: The public hearing was held, a Resolution adopted ordering the improvements, and a contract awarded.

See Audit Exhibit 16

2009 Eden Prairie Response: Complete.

C. GENERAL

- (1) Each party shall be responsible for one half of the full cost to install an 8-inch watermain along Pioneer Trail (from Staring Lake Parkway to TH212), with Eden Prairie reimbursing MAC for the cost to oversize the watermain from an 8-inch to 12-inch diameter trunk line.

2005 Eden Prairie Response: The City will reimburse MAC for the cost of over sizing the watermain. This work has not commenced due to funding shortfalls at the MAC.

See Audit Exhibit 15

2009 Eden Prairie Response: Construction by MAC contractor complete. E.P. Staff and MAC are negotiating terms of easements to maintain trunk line and laterals. Completion expected in 1st quarter of 2009.

2005 MAC Response: Reimbursement from the City to MAC will be made when the construction is completed. This project is currently not planned until 2007 at the earliest.

2009 MAC Response: MAC has funded this project, and upon completion of final costs and quantities, MAC will submit an invoice to the City for their portion of the work. A meeting with City staff has already occurred to gain concurrence with the final costs.

(2) MAC and Eden Prairie shall cooperate in the construction of the utilities as follows:

(a) Eden Prairie shall hold public hearings and be responsible for managing the public process in accordance with Minnesota Statutes Chapter 429 regarding special assessment procedures.

2005 Eden Prairie Response: The public hearing process has taken place in accordance with Minnesota Statutes Chapter 429.

See Audit Exhibit 16

2009 Eden Prairie Response: Complete.

(b) Eden Prairie shall design, let and administer the phase of the construction project generally north of Pioneer Trail and including the crossing of Pioneer Trail of the proposed sanitary sewer and all of the 16-inch watermain.

2005 Eden Prairie Response: This project has been completed.

See Audit Exhibit 14

2009 Eden Prairie Response: Complete.

(c) MAC shall design, let and administer all remaining portions of the project for which Eden Prairie will reimburse MAC for costs beyond MAC's share of the project as defined in the Feasibility Study.

2005 Eden Prairie Response: The City has reimbursed MAC for costs beyond MAC's share for the completion of the utility project along Flying Cloud Drive, south of Pioneer Trail.

See Audit Exhibit 13, pages 6 and 7

2009 Eden Prairie Response: Construction complete. Pay off pending.

2005 MAC Response: Done and reimbursement made to MAC for utilities installed along Highway 212. For utilities along Pioneer Trail, see C (1) above.

2009 MAC Response: See C (1) above.

- (d) MAC shall follow all applicable public procurement and bidding requirements to meet the requirements of special assessment statutes, i.e., public bids, advertising, plan approval, change order approvals and documentation.

2005 MAC Response: Done for utilities installed along Highway 212.

2009 MAC Response: Complete.

- (e) Upon completion of the MAC portion of the utilities, the City shall become owner of the trunk sanitary sewers and trunk watermains installed along Pioneer Trail and Flying Cloud Drive, including the airport loop watermain identified in Paragraph 2 A(1) above. MAC will dedicate necessary easements for maintenance and repairs by the City at City's sole cost.

2005 Eden Prairie Response: The work along Flying Cloud Drive has been complete. There is no document that officially transfers ownership to the City of Eden Prairie. However, it is within public right-of-way and this MOU attests to ownership. The Pioneer Trail and loop through the property have not been completed, due to funding issues at MAC.

2009 Eden Prairie Response: Easements have been drafted and negotiations of details underway. Completion anticipated 1st quarter of 2009.

2005 MAC Response: Dedication of easements requires approval of a land release/concurrent use determination from the FAA. This submittal to the FAA is pending resolution to the revenue diversion issue.

2009 MAC Response: MAC has provided a draft agreement to the City for review; pending receipt of comments from the City, the agreement can be finalized. The City and MAC have agreed to

address access to the airport in the Maintenance Agreement, and that no formal easement may not be required.

- (f) Eden Prairie will assemble the final costs as incurred by MAC and Eden Prairie and develop the final allocation of costs in accordance with the Feasibility Study and levy applicable special assessments.

2005 Eden Prairie Response: The final cost allocation was prepared for work completed along Flying Cloud Drive.

See Audit Exhibit 13, page 9

2009 Eden Prairie Response: Pending with easement resolution.

- 3. **SAC/WAC Fees.** Eden Prairie will charge non-commercial tenants (storage facilities) at the prevailing City Residential SAC/WAC rate at time of plumbing permit issuance. MCES SAC, water meters and inspection fees will also be collected at time of permit issuance at prevailing rates. Buildings utilized for commercial uses would pay at prevailing commercial SAC/WAC rates.

2005 Eden Prairie Response: SAC and City water (WAC) fees are being collected in accordance with the Agreement.

See Audit Exhibit 17

2009 Eden Prairie Response: Previous response stands.

- 4. **Airport Drainage and Water Quality Facilities.** In accordance with the Settlement Agreement, the City will pursue design of the “North Pond” to be a dry pond facility subject to approval of applicable regulatory agencies. However, if the resultant facility is a pond containing a permanent water pool, the design will be developed in accordance with FAA Advisory Circular 150/500-33 (5-1-97) Section C 3-7. The parties acknowledge that the City does not have (nor contemplates) any special maintenance provisions that would limit waterfowl utilization of the pond. The Settlement Agreement contemplated that the North Pond will be a joint use facility and will be maintained by the City of Eden Prairie at no cost to MAC, with no special waterfowl maintenance requirement. Upon application to City, MAC shall be granted such permits as are reasonably necessary for MAC to perform waterfowl maintenance and control.

2005 Eden Prairie Response: The pond was constructed in accordance with FAA recommendations.

See Audit Exhibit 18

2009 Eden Prairie Response: Previous response stands.

2005 MAC Response: Construction is complete.

2009 MAC Response: The City has completed construction of this pond. To date, no wildlife issues have resulted.

5. **Future Right-of-Way for CSAH 1.** Subject to the conditions set forth in the second sentence of this paragraph MAC shall cooperate with Hennepin County at a future date to provide right-of-way at no monetary compensation for the anticipated expansion of CSAH 1 (Pioneer Trail) provided that the improvements do not compromise the use of the property by MAC or its tenants as determined by MAC. The conditions to MAC's cooperation are that there will be (i) no out of pocket cost or assessments to MAC, (ii) accommodation of MAC storm water, (iii) no net loss in parking spaces, (iv) fencing that may be required for relocation will be removed and replaced to provide continuous and ongoing security for the airport facility, (v) complete restoration of the airport grounds to be equal or better than existing, and (vi) final design approval by MAC. Further the parties agree that if an opportunity for a three-party cooperative agreement between MAC, Eden Prairie and Hennepin County exists for acquiring a parcel generally known as the "Sjostrand Property" as a solution for right-of-way needs in conjunction with the CSAH 1 improvements, that a mutually acceptable acquisition be pursued.

2005 Eden Prairie Response: Over the past nine months, Hennepin County, Eden Prairie and MAC have worked cooperatively on developing the layout plan for County Road 1. In that time, there have been a number of coordination meetings to make sure that the needs of all parties have been met to the greatest extent possible. It is still early in the process however, there does not appear to be any significant issue with meeting MAC's conditions, as outlined in the Agreement.

2009 Eden Prairie Response: Pending.

2005 MAC Response: MAC is currently working with Hennepin County and the City on the preliminary design for this project, and is incorporating these specific items in exchange for the right-of-way to be requested for the project. MAC has been an active participant and a member of the Community Advisory Committee. It does not appear at this time that it will be necessary to pursuing acquisition of the Sjostrand property.

2009 MAC Response: In September 2008, MAC and Hennepin County executed a Joint Powers Agreement granting a right-of-entry for construction. With the completion of the FAA Record of Decision on the Final Environmental Impact Statement in 2008, MAC is preparing a submittal to the FAA for the final federal action involving airport property. Submittal of this document to the FAA is expected by the end of 2008. Conveyance of permanent right-of-way will be completed upon approval of the final FAA action.

6. **Trunk Assessments.** Eden Prairie shall collect trunk sewer and water assessments for existing airport property (in the hangar and building area) based on the following:
- A. Assessments would be collected on a "fee basis" at the same time as SAC/WAC fees at time of issuance of plumbing permits.

- B. The amount of the assessment shall be based on dividing the gross square footage of the building by 20% and multiplying by the prevailing acreage trunk assessment rate as established on an annual basis by Eden Prairie City Council on a community-wide basis.
- C. All existing and proposed future buildings on the airport that will utilize sewer and water service in the future will be connected to the municipal utility system on a reasonable time schedule as established by MAC Policy for Sanitary Sewer and Water Installation at the Reliever Airports, amended as of October 16, 2000, and are subject to these fees.

2005 Eden Prairie Response: The City has issued permits for connecting buildings that will utilize sewer and water. Collection of trunk assessments is at the time of a building permit. There have only been a couple of buildings that have connected at this point.

See Audit Exhibit 17

2009 Eden Prairie Response: Ongoing.

7. **Hustad Property/Atkins Property/Special Assessments.**

A. MAC RESPONSIBILITIES AND COMMITMENTS

- (1) Subject to FAA approval for compliance with land release and revenue diversion, MAC shall provide a permanent license in favor of Eden Prairie for park and open space purposes over land acquired by MAC from “Hustad” (approximately 32 acres) and “Atkins” (approximately 10 acres). MAC shall seek such approval from the FAA immediately after receiving from Eden Prairie the utilization plan identified below in 7.B.(2).

2005 Eden Prairie Response: The MAC has not approved the land lease as they are waiting approval of the FAA. The City understands the FAA will not make any approvals of the agreement until the lawsuit between Northwest Airlines and the MAC is settled.

The City has reserved the City’s share for “payment” of the park land in its park dedication fund.

2009 Eden Prairie Response: We understand from MAC that Northwest Airlines has withdrawn its complaint. At this time no permanent license for park and open space use has been issued to the City.

2005 MAC Response: Plans have been submitted by the City however, submittal to the FAA is pending resolution to the revenue diversion issue.

2009 MAC Response: With the completion of the FAA Record of Decision on the Final Environmental Impact Statement in 2008, MAC is

preparing a submittal to the FAA for the final federal action involving airport property. Submittal of this document to the FAA is expected by the end of 2008. Conveyance of permanent park license will be completed upon approval of the final FAA action.

B. EDEN PRAIRIE RESPONSIBILITIES AND COMMITMENTS

- (1) Subject to receipt of FAA approval as provided for in 7.A.(1) above, Eden Prairie will not levy pending assessments estimated at \$1,140,685 as proposed by the Charlson Area Feasibility Study against property acquired by MAC generally known as the “Hustad Property”, which was the subject of a certain special assessment agreement filed as Document Number 6777956 (filed in Abstract) and Document Number 2839728 (filed in Torrens). Eden Prairie shall not reassign or assess these costs to any other MAC or non-MAC property.

2005 Eden Prairie Response: Although the estimated amount of assessments against the former Hustad property was \$1,140,685.00, the information shown in I.C. 99-5484 lists the City’s share (Park) as \$869,421.05. This is the final amount and is being paid for by the City, in accordance with the MOU.

See Audit Exhibit 13, page 3

2009 Eden Prairie Response: Previous response stands.

- (2) Eden Prairie shall prepare a utilization plan of the park and open space area for review and approval by MAC for conformance to FAA and State Zone A and B requirements. It is understood that Eden Prairie desires to create a neighborhood park and parking lot on a portion of this site. Eden Prairie’s use of the property for park and open space use shall be subject to restrictive covenants prohibiting uses other than in the approved utilization plan, which restrictive covenants shall be specifically enforceable by MAC and shall be filed against the property.

2005 Eden Prairie Response: The neighborhood park plan was submitted to MAC staff for review and approval in 2004. The City has not received a formal approval from the MAC at this time, although we have received informal approval from our discussions with their staff.

See Audit Exhibit 19

2009 Eden Prairie Response: Previous response stands.

- (3) The permanent pond shown along the east side of Eden Prairie Road as generally depicted on Exhibit A (labeled Pond 2) will be relocated to the west side of Eden Prairie Road onto the park and open space property. The City will pursue design of the pond to be a dry pond facility subject to

approval of applicable regulatory agencies. However, if the resultant facility is a pond containing a permanent water pool, the design will be developed in accordance with FAA Advisory Circular 150/500-33 (5-1-97) Section C 3-7. The parties acknowledge that the City does not have (nor contemplates) any special maintenance provisions that would limit waterfowl utilization of the pond. The pond will be maintained by the City of Eden Prairie at no cost to the MAC, with no special waterfowl maintenance requirement. Upon application to City, MAC shall be granted such permits as are reasonably necessary for MAC to perform waterfowl maintenance and/or control.

2005 Eden Prairie Response: The pond referred to in this section was completed in accordance with the MOU.

See Audit Exhibit 20

2009 Eden Prairie Response: Previous response stands.

- (4) All existing and future MAC land utilized by Eden Prairie for park and open space purposes will not be subject to cash park fees or storm water utility fee billings to MAC.

2005 Eden Prairie Response: In accordance with this Agreement, the City will not assess MAC cash park fees or storm water utility fees.

2009 Eden Prairie Response: Previous response stands.

8. **Storm Water Utility Fees.** For purposes of computation of storm water utility fees 50.32 acres of property at Flying Cloud Airport shall be included (of which 44.32 acres are “undeveloped” and 6 acres are “developed”). The current quarterly fee for the Airport at its current level of development is \$114.28. Eden Prairie shall apply the rates to the applicable acreage retroactively to the date of origination of the fee structure without penalty or interest and upon payment by MAC of the corrected amount, Eden Prairie shall direct that County Tax Records be expunged of the delinquencies currently listed. Future fees will vary as modified by City Council from time to time so long as such fees are modified on a community-wide basis or as additional Airport Property is developed except as noted in Paragraph 7. B.(4) above.

2005 Eden Prairie Response: MAC is current with storm water utility payments. Eden Prairie has requested that Hennepin County cancel all delinquent utility assessments against MAC property.

See Audit Exhibits 21 and 22

2009 Eden Prairie Response: Completed.

9. **City Outside Storage Facility.** Eden Prairie shall provide MAC preliminary development plans for the City-owned outside storage facility along the east side of TH

212 (old theatre site) prior to implementation of improvements for advice and counsel regarding minimization of adverse impacts to airport operations prior to submission to FAA for its Airspace (Form 7460) review.

2005 Eden Prairie Response: The City worked with MAC to coordinate the review of the project and any required approvals. The project is now under construction.

2009 Eden Prairie Response: The City's storage facility is completed and in operation at this time.

2005 MAC Response: MAC worked with the City on preliminary plans and potential height restrictions. The City has received the necessary non-hazard determinations and construction is scheduled to start in November 2005.

2009 MAC Response: Complete. MAC worked closely with the City during design of the facility. Construction is complete.

10. Flying Cloud Ball Field Expansion. Eden Prairie desires to expand its utilization of MAC-owned property westerly from the existing Flying Cloud Ball Field area to existing Spring Road. This would increase the acreage currently being utilized for Flying Cloud Ball Fields from approximately 31 acres to approximately 56 acres. The parties agree as follows:

A. The existing Flying Cloud Ball Field Open Space and Park Area shall be converted from a year-to-year lease to a 3 year renewable lease with mutually agreeable language designed to provide a long term utilization of the MAC property for compatible recreational purposes, provided the property shall be subject to recapture by MAC upon one (1) year written notice to City with no monetary compensation to City.

2005 Eden Prairie Response: Although the terms of this agreement have been approved in the MOU the MAC has indicated that this expansion cannot go forward until the lawsuit with Northwest Airlines is settled.

2009 Eden Prairie Response: We understand from MAC that Northwest Airlines has withdrawn its complaint at this time.

2005 MAC Response: MAC staff will discuss the lease terms when the City of Eden Prairie is ready for the development of this area.

2009 MAC Response: This property remains under a renewable lease agreement with MAC.

B. The 25-acre \pm expansion area to be provided to Eden Prairie for recreational purposes shall be incorporated in the lease arrangement as noted in a) above.

2005 Eden Prairie Response: The MAC staff has approved the plan, but they are waiting FAA approval, again for the same reason stated above.

See Audit Exhibit 23

2009 Eden Prairie Response: We understand from MAC that Northwest Airlines has withdrawn its complaint at this time. The MAC staff has approved the plan. We are waiting for FAA approval of the plan.

2005 MAC Response: This area will be incorporated into the Lease consistent with the Agreement.

2009 MAC Response: Negotiation of a lease arrangement for this expansion can begin at any time.

- C. It is understood that Eden Prairie will use the expansion area solely for soccer and ball fields and associated ancillary uses.

2005 Eden Prairie Response: See 10B Response.

2009 Eden Prairie Response: Eden Prairie will use the expansion area for soccer, ball fields and ancillary uses as agreed. The MAC staff has approved the plan. We are waiting for FAA approval of the plan.

- D. Final design by Eden Prairie for the expansion area shall be subject to review and approval by MAC for conformance with FAA and state rules and regulations and compatibility with airport operational requirements.

2005 Eden Prairie Response: See 10B Response.

2009 Eden Prairie Response: We understand from MAC that Northwest Airlines has withdrawn its complaint at this time. The MAC staff has approved the plan. We are waiting for FAA approval of the plan.

2005 MAC Response: Preliminary plans have been submitted to date, but are expected to change given expected right-of-way taking by the CSAH 1 expansion project.

2009 MAC Response: MAC will review final design plans upon execution of a lease agreement and prior to start of any construction.

- E. The cost to the City of Eden Prairie to lease these properties shall be subject to negotiation, but shall be: (i) in the same order of magnitude as the current lease payments so long as the federal revenue diversion policy remains the same and (ii) consistent with any change made in the future to federal revenue diversion policy.

2005 Eden Prairie Response: The City has had no information relating to changes in lease payments as the date of this report.

2009 Eden Prairie Response: Previous response stands.

2005 MAC Response: The rental rate on the additional acreage will be consistent with the rental rate on original ball field area however, both will be determined via an appraisal process.

2009 MAC Response: The cost for the lease will be included in the lease negotiation.

11. **Right-of-Entry**. The parties agree that upon execution of this MOU, MAC shall execute a right-of-entry document, which will allow Eden Prairie to construct the improvements identified generally in the Charlson Area Feasibility Study in the location of easements contemplated in Paragraph 1 of this MOU.

2005 Eden Prairie Response: The timing of our construction projects were such that easements actually executed and a right of entry was not necessary.

2005 MAC Response: Done.

2009 MAC Response: Complete. See response for item 1.A.(1)(a) above.

12. **Agreements**. The parties agree to enter into such further agreements necessary to carry out the intent of this MOU

2005 Eden Prairie Response: Statement stands.

2009 Eden Prairie Response: Previous response stands.

13. **Dispute Resolution**.

- A. **Notice of Default**. At no time shall Eden Prairie or MAC be deemed to be in default under, or breach of, this MOU unless and until the other party has provided written notice to the other specifying such alleged breach or default (“Notice of Default”) and such alleged breach or default has not been cured as provided in Paragraph 13.B.

2005 Eden Prairie Response: No disputes have been filed by the City of Eden Prairie or MAC as of November 1, 2005.

2009 Eden Prairie Response: No disputes have been filed by the City of Eden Prairie or MAC as of January 8, 2009.

- B. **Right to Cure Default**. The party who has received a Notice of Default shall have thirty (30) days in which to cure the alleged breach or default and provide notice to the other party that such alleged breach or default has been cured.

- C. **Informal Dispute Resolution.** Immediately after receipt of a Notice of Default, the Executive Director of MAC and the City Manager of Eden Prairie shall meet and attempt to resolve the matter.
- D. **Formal Mediation.** If the parties fail to resolve the matter informally under Paragraph 13.C within thirty (30) days, the parties shall submit their dispute to a mediator. The parties shall have ten (10) days to select a mediator. If the parties are unable to agree upon a mediator, the Chief Judge of the 4th Judicial District, Hennepin County, Minnesota, shall select a mediator. The mediator shall be provided a copy of the report(s) specified in Paragraph 13.C. The mediation shall be conducted pursuant to the rules generally used by the mediator in the mediator's practice, provided that the entire mediation process be concluded within 30 days of appointment of the mediator, or within such other time as the parties may agree in writing. If the mediation process fails to resolve the matter, both informal and formal dispute resolution shall be deemed to be complete.
- E. **Costs of Alternative Dispute Resolution.** Each party shall bear its own costs of the informal dispute resolution process and formal mediation process described above. The parties shall share equally the fees and expenses of the mediator.
- F. **Dispute Resolution Process Mandatory.** No action shall be commenced in any court to enforce or otherwise apply, interpret, or seek cure for a breach of, this Agreement, excluding an action requesting preliminary or temporary relief, before the completion of the informal and formal dispute resolution process set forth in this Paragraph 13. Neither party shall assert, plead, raise, allege, or rely upon the applicable statute of limitations, laches, timeliness, delay, or any other defense based on the passage of time during the dispute resolution process in any subsequent judicial or administrative proceeding. The dispute resolution provisions set forth in this Paragraph 13 shall apply only to MAC and Eden Prairie, and shall not apply to any successor in interest to either Party.
- G. **Confidentiality.** The alternative dispute resolution process described in this Paragraph 13 constitutes compromise negotiation for purposes of applicable rules of evidence. Information prepared for or disclosed during the alternative dispute resolution process shall be inadmissible in evidence pursuant to Rule 408 of the Federal Rules of Evidence or Rule 408 of the Minnesota Rules of Evidence, and shall be withheld from disclosure to the maximum extent permissible under the Minnesota Data Practices Act and other applicable laws.
- H. **Waiver of Rights.** The failure of either party to object to, or to take affirmative action with respect to, any conduct of the other which is in violation of the terms of this Agreement shall not be construed as a waiver of such violation or breach, or of any future violation, breach or wrongful conduct. Subsequent acceptance of performance under this Agreement by Eden Prairie or MAC shall not be deemed

to be a waiver of any preceding breach by the other Party of the terms of this Agreement, regardless of Eden Prairie's or MAC's knowledge of such preceding breach at the time of acceptance of performance. No waiver or relinquishment of a right or power under this Agreement shall be deemed a waiver of such right or power at any other time, nor shall any failure of either party to require or exact full and complete compliance with any of the covenants or conditions of this Agreement be construed as changing in any manner the terms hereof or preventing either party from enforcing the full provisions hereof.

Date: _____, 2002

METROPOLITAN AIRPORTS COMMISSION

BY: _____
Jeffrey W. Hamiel
Executive Director

CITY OF EDEN PRAIRIE, MINNESOTA

BY: _____
Nancy Tyra-Lukens
Mayor

BY: _____
Scott Neal
City Manager

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

The foregoing instrument was acknowledged before me this ____ day of _____, 2002, by Nancy Tyra-Lukens and Scott Neal, respectively the Mayor and City Manager, on behalf of the City of Eden Prairie, a municipal corporation.

Notary Public

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

The foregoing instrument was acknowledged before me this ____ day of _____, 2002, by Jeff Hamiel, Executive Director, on behalf of the Metropolitan Airports Commission, a public corporation of the state of Minnesota.

Notary Public