

**SPRINGBANK AIRPORT BUSINESS AND PILOTS ASSOCIATION
MEMORANDUM THE
CALGARY AIRPORT AUTHORITY LEASE AGREEMENT**

DATE: April 25, 2005
TO: Calgary Airport Authority
FROM: SABPA
RE: Calgary Airport Authority – Lease Agreement

The following is a compilation of comments that SABPA has derived from its members in its review of the standard form lease.

The particular document reviewed is called the “Springbank Ground Lease (for construction of building) with rent review, Springbank document 6, January 2001” (the “lease”).

General Comments

The fee simple title to the Springbank airport land is held by the federal Crown. The Calgary Airport Authority (“CAA”) leases the land from the federal government and then subleases it to the various tenants. The fee simple certificates of title held by the federal Crown are not divided into the various lots as designated by the Calgary Airport Authority, but rather cover various sized blocks of land; in one case, 1045 acres.

The lease can best be described as being consistent with medieval feudalism, likely a holdover from the days of Transport Canada administration of Springbank. It is a very awkward document, particularly when multiple hangars are built on one lot. It is not appropriate for a modern economy and the development of the Springbank airport. It has been consistently condemned by the Calgary real property legal community.

The most significant problems concerning the CAA lease are as follows:

1. The lease is commercially extremely onerous, and often draconian. There are several examples of this described below, but the primary reason is because the lease term is typically 25 to 30 years with no right of renewal. At the end of the 25 or 30-year period, the tenant, who is required to build a building to local building code standards, forfeits any property interest he may have in the building he paid to construct or buy from a predecessor tenant. If the tenant wishes to renew the lease, it is entirely at the discretion of the CAA individual then in charge. There is no assurance that any renewal lease, or acceptable lease renewal, will be forthcoming. A tenant can have a building worth \$700,000 at the end of the lease, only to see it confiscated without compensation.

2. There are a series of discretionary provisions in the lease that are, to say the least, alarming. These are detailed below. These discretionary provisions permit arbitrary actions by the CAA without any express requirement to act reasonably. Such provisions put the tenant completely at the mercy of whatever relationship he may or may not enjoy with the individuals representing the CAA.

3. Because of the current land tenure with the bulk of the lands available for lease being registered in fee simple on one or two certificates of title, transactions desired by prospective tenants are awkward, time consuming and expensive. For example, a tenant can only register its land interest by way of caveat against the certificate of title to the land held in fee simple by the federal government. In every transaction concerning the land, such as a purchase and sale, or mortgage, the solicitor for the tenant and the solicitor for the mortgagee bank must first obtain and then review every caveat and other registration on the certificate of title. There are in some cases 30 to 40 registrations. These will increase over time. Notwithstanding that most of these registrations are irrelevant because they deal with other lots in which the tenant or his bank are not interested, the registrations must nevertheless be reviewed in their entirety by the solicitors. This makes it not only very expensive to conduct a purchase, sale or mortgage transaction, but discourages such transactions due to being so unnecessarily

cumbersome. The Land Titles Act is one of the best land tenure and registry systems in the world, but the lack of subdivided titles impairs access to it by the CAA and its tenants. Land tenure has to be reinvented with every new building or tenant.

4. Many hangars are condo style hangars. The lack of subdivision impairs access to the Land Titles Act and the Condominium Act, which would solve many of the issues discussed. Without subdivision and access to the Land Titles Act and Condo Act, every lease and sublease, and condo of hangars, become an increasingly awkward exercise and re-invention of the land tenure wheel. Administration will become increasingly burdensome and could have been avoided. This is why we have those Acts. Why not use them?

It is for these reasons, in addition to the specific comments below, that this form of lease discourages commercial investment in the Springbank Airport. The lease is not commercially reasonable; it is, as we have seen, only entered into by those who can swallow very hard, and always reluctantly and with misgivings and against the advice of counsel. Developers at Springbank often do not have to live with the lease once they sell their buildings. The CAA and tenant must live with the lease long-term.

Specific Comments

1. Term – the lease is for a fixed term, typically 25 years. There is no right of renewal. Although the current general manager of the airport states publicly that the CAA is not interested in taking over buildings left by tenants and that it is customary to issue a new lease, this is solely at the discretion of the CAA and is not commercially reasonable. This is the primary element in the lease discouraging investment and certainly any renewed investment during the last several years of a lease term. The landlord has the right to take over the buildings or require the tenant to demolish them at the expiry of the term. Hangar type buildings typically cost \$75 to \$100 per square foot to construct. It is

unacceptable that such an investment is to be forfeited at the end of the primary term when a building, built to code, has a 50 to 60 year life. This is not a commercially reasonable risk given the cost of typical hangarages. Buildings worth several hundred thousand dollars at the end of the term are simply confiscated without compensation.

2. Vesting of improvements – If the CAA wishes to take over the building on an expired lease which it refuses to renew, it should be required to pay the residual fair market value of that building.
3. Rent – the obligation to pay rent includes Additional Rent. There is no description of what makes up the Additional Rent. What is it?
4. Airport Maintenance Charge – there is only a vague definition of what comprises the airport maintenance charge. The definition purports to include “common areas” and “utility installations”. What are the common areas and what are the specific utility installations? Do they include common areas and utilities installations that are not for the benefit of the particular tenant? For example, are new utilities installed for the opening on new lots and hangarage included? Where are the common areas? Further, there should be a provision to renew and challenge the airport maintenance charge just as there is for Additional Rent.
5. Official Languages – the lease requires that the tenant adhere to the Official Languages Act. Virtually no tenants comply with this act at present and it would be absurd to attempt to enforce such provision. Virtually every tenant is in default of this provision. If there is no present compliance, and no intention to require comply, then it should not be a provision of the lease.
6. Signage – the landlord has complete discretion over signage, without the requirement to act reasonably. This is not commercially reasonable.

7. Transfers – the landlord can arbitrarily withhold consent to a transfer of a tenant’s interest in a lease. This is not commercially reasonable. Further, if the landlord does care to consent, it can require its own solicitors to prepare the documentation at the cost of the tenant. This is no different than the tenant wiring a blank cheque to the benefit of the CAA’s law firm of the day. Further, if the tenant does transfer it is not released from future obligations under the lease. In fact, the lease states that the predecessor tenant shall be “jointly and severally liable with the transferee for the term of the lease”. This means every predecessor in title remains fully obligated under the lease, even through he may have sold his interest 20 years previous. This is neither commercially reasonable nor acceptable. If a tenant desires to transfer, or sublet, for example, it is not allowed to advertise such desire without the consent of the landlord, which may be arbitrarily withheld. This is not commercially reasonable or acceptable.

A further concern is with the corporation who is a tenant. If the ownership of the corporation changes the landlord then has the right to terminate the lease on 5 days notice. This is one of the most offensive provisions one could imagine. If a tenant, who is a corporation, is the subject of a hostile takeover or a friendly sale or a transfer of its shares by virtue of an inheritance, the landlord has the right to terminate the lease and expropriate value without compensation. It is absurd that the CAA wants to be in the business of controlling and deciding corporate ownerships, both public and private. The CAA should be no different from any other commercial landlord – it should decide on the suitability of any prospective tenant, individual or corporation, and not unreasonably withhold consent to transfer of a lease.

8. Mortgaging – the mortgaging provisions are enough to spook any banker. A mortgagee in possession becomes jointly and severally liable with a tenant. What bank would ever be comfortable with such a provision? Once a bank assigns the lease after foreclosure, it would continue to be jointly and severally liable with the new tenant.

9. Insurance Provisions – the insurance requirements set out in Schedule B to the lease are so excessive as to be not only unavailable, would be enormously expensive if such insurance was available. The property and liability provisions are completely unreasonable, particularly in this market. Business interruption insurance for the CAA at the expense of the tenant? Five million dollars liability insurance for the CAA at the expense of the tenant to cover product liability, blanket contractual liability, defence costs, garage liability? How many tenants comply with this now?

10. Rent Review – the rent review process is seriously flawed. The “Market Value” definition does not require consideration of the fact that the lease restricts the nature and use of the buildings to be constructed to narrow aviation uses, such as hangarage for the storage of aircraft, flight school or related maintenance facilities. It has been the habit of the Calgary Airport Authority to use as comparatives for lot evaluation in Springbank Airport commercial lots surrounding and within the City of Calgary that have no similar restrictions to buildings and uses. Without any recognition of the restrictive usage and constrained nature of the land at the Springbank airport, any market evaluation will be flawed. Further, the landlord essentially decides who the appraisers will be, and there can be little doubt that it will be appraisers that are well known to the CAA to give values of which the CAA approves. This is a commercially unreasonable provision.

Recommendations

The lease must be structured to encourage investment, not discourage it. It must be made less awkward. It must also be commercially fair.

1. The current land tenure and lease provisions are archaic and do not take appropriate advantage of the Land Titles Act or the Condominium Act. At a very

minimum, the CAA should subdivide its leasehold interest so that separate leasehold certificates of title exist for each lot. The CAA should consider exercising its option to buy the fee simple title. This would solve many commercial and legal issues. SABPA's legal advice is that the CAA is not correct when it thinks it will lose federal jurisdiction if it owns fee simple title to the airport. Federal jurisdiction is determined by the Aeronautics Act, s.3(1) and s. 4.2. Nothing in that Act, nor the case law considering federal jurisdiction (see *Taylor v Alberta (Registrar, South Alberta Land Registration District)*, 2003 ABQB821, for an excellent review of the case law), turns on the type of land ownership, that is, whether the land is held by fee simple or leasehold from the federal Crown. The CAA and its tenants can have access to the provisions and protections of the Land Titles Act and Condominium Act of Alberta to facilitate subdivision, holdings and transfers, while maintaining federal jurisdiction.

2. At a minimum, in each lease there should be a renewal right of 25 years which with the original 25 year term which corresponds to the life of a code building which costs \$75 to \$100 per square foot to construct and has a minimum life expectancy of 60 years. Further, the tenant should have the right at the end of the term to salvage the building if the CAA refuses a renewal.
3. The discretionary provisions must be revised. At a minimum, any exercise of discretion must be within the constraint of "acting reasonably".
4. The rent review provision should be changed so that each party can appoint an appraiser of its choosing and that the appraiser must take into account the restrictive nature of the land usage. If there is disagreement between the appraisers, they could then appoint a third appraiser.