



On October 26, 2017, Port Executive Director Ed Galligan met with members of the public interested in the Port's approved lease for the East Bay property in the City of Olympia where the Westman Mill development project is currently proposed. At the conclusion of the meeting, Executive Director Galligan promised follow up responses to a member of the public who participated. This document provides the follow up questions asked by that member of the public, and provides the Port's responses.

**Question #1:** *Did Port Commissioners have an opportunity to see the Ground Lease/lease option agreement as part of a Port Meeting? There seems to be a difference of opinion here: you thought so, but an audience member disagreed. It was requested that you provide the date of the meeting where the Ground Lease was presented.*

**Port Response:** The Port does not routinely attach complete real estate contracts, options, leases, amendments, or other transactional documents to its published Commission agenda packets. Instead, the Port's practice is for staff to prepare a cover memorandum and associated presentation summarizing key

elements of the transaction, which are included with published agenda materials for the Commission meeting(s) at which a specific proposed real estate transaction will be presented. Port practice is also that a Commission Advisory is provided in an open public meeting no less than two weeks before the open public meeting in which a Commission action is taken. This period allows Commissioners to request and review additional information (including copies of transactional documents), or to meet with Port staff to obtain answers to individual Commission questions prior to taking action.

In this instance, Port staff presented the proposed ground lease and option agreement with 3rd Gen to the Commission as an advisory item on November 14, 2016, and then as an action item on January 9, 2017, over six weeks later. Consistent with Port practice summarized above, the published materials for each of these Commission meetings included a staff cover memorandum and presentation detailing key elements of the proposed lease and option agreements with 3rd Gen, which were presented and available to the public. The Commission voted unanimously on January 9, 2017 to authorize the Executive Director to enter into

the ground lease and option agreement as presented, as reflected in the Commission-approved minutes for the January 9, 2017 meeting. No Commissioner requested additional information from Port staff prior to taking action to approve the ground lease and option agreement. Copies of staff materials presented at both meetings together with minutes are available online at the Port website.

**Question #2:** *Could you please list the Port meetings where the property was discussed? As a follow-on to the questions raised at the meeting, I would add this: Were any of the terms of the lease option agreements between the Port and 3rd Gen/Walker John, or affiliates like Mr Thomas, discussed by Port commissioners at an executive session?*

**Port Response:** The following Port Commission meetings included agenda items related to the East Bay option and lease agreements:

- 11/9/15 (Advisory re: Option Agreement)
- 11/23/15 (Action re: Option Agreement)
- 11/14/16 (Advisory re: Ground Lease and Option Agreement)
- 1/9/17 (Action re: Ground Lease and Option Agreement)
- 10/23/17 (Consent re: Amendment to Ground Lease and Option Agreement)

It is possible that the Port Commission discussed the proposed terms of the East Bay lease and/or option during an executive session; however, the Port does not maintain records or minutes of executive session discussions. To the extent that the Commission held such an executive session or sessions regarding this proposed transaction, any and all information that would have been presented to the Commission was subsequently presented in one or more of the open public meetings listed above prior to Commission action. The Port also notes that any such executive sessions would have occurred prior to the Washington Supreme Court's decision in *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 421, 395 P.3d 1031, on June 8, 2017, which interpreted and clarified the scope of the minimum price exemption to the Open Public Meetings Act pursuant to RCW 42.30.110(1)(c) for the first time. The Port Commission has not held any executive sessions pursuant to RCW 42.30.110(1)(c) since the *Columbia Riverkeeper* decision was issued.

**Question #3:** *Does the lease option agreement allocate liability between the parties in the event that Moxlie Creek requires remedy/restoration?*

**Port Response:** No. However, the Port notes that no portion of Moxlie Creek lies within the area subject to the approved ground lease with 3rd Gen. A small portion of Moxlie Creek crosses Port property at the corner of Chestnut and Olympia, where it is currently culverted. While this property is included within the area subject to the option agreement, the remainder of Moxlie Creek lies within the City of Olympia, which has no current or future plans to restore it.

**Question #4:** *Just to verify: The Port plays no role in permitting?*

**Port Response:** The City of Olympia has jurisdiction over all land use and building permits for 3rd Gen's proposed Westman Mill project as well as all development on Port property located within the City of Olympia.

**Question #5:** *The Port did not obtain a professional appraisal of the specific property where development is proposed, correct? The valuation was not updated to reflect current market conditions at the time of the lease, right?*

**Port Response:** The Port obtained an appraisal dated March 6, 2015, prior to entering into the original option agreement, in order to provide an indication of fee simple land values in the general area. Typically appraisals give an indication of what a sales price should be for a fee simple transaction; however, in this case, the East Bay property in question is not being sold, but is ground leased. Therefore, Port staff used the appraisal as one of many factors to determine the recommended ground lease rate that was ultimately presented to and approved by the Port Commission. Other contributing factors included: tax assessed value, rate of return associated with onsite expenses, comparison to other existing ground leases on nearby Port property, and direct market place negotiation.

The Port's approach to developing the recommended 3rd Gen ground lease rate as approved by the Port Commission is consistent with Port Policy 1101: Real Property Agreements for determining lease rates, as excerpted below. A complete copy of Policy 1101 can be found at: [www.portolympia.com/DocumentCenter/View/2987](http://www.portolympia.com/DocumentCenter/View/2987)

**Setting Rental Lease Rates:** The Executive Director may present recommendations related to rents and/or methodologies for calculating rents for real estate leasing and rentals, provided such recommendations ensure a return to the Port consistent with the financial goals of the Port of Olympia and fair market practices. Recommendations will be presented to the Port Commission for consideration and approved in public session under the public session laws.

In conjunction with preparation of the Port staff's recommendation, the Port's former Finance Director, Jeff Smith, also evaluated the proposed lease for compliance with Port financial policies, including Policy 1204, which sets benchmarks for rate of return on investments. Since Mr. Smith has since retired from the Port, the Port staff recently had the Port's outside contract financial advisor analyze the proposed lease again for compliance with Policy 1204. That analysis once again concluded that the lease met or exceeded all financial policy benchmarks for rate of return. A complete copy of Policy 1204 can be found at: [www.portolympia.com/DocumentCenter/View/2985](http://www.portolympia.com/DocumentCenter/View/2985)

**Question #6:** *Did the Port go into negotiations with its own determination of fair market value? If so, how was it arrived at?*

**Port Response:** See response to Question #5.



**Question #7:** *Was the Isthmus property used as a comparable? And just to be sure of what was discussed: the Port has not looked at other 3rd Gen/Walker John properties?*

**Port Response:** The Port's March 6, 2015 appraisal evaluated numerous properties to provide a fee simple land value; however, as noted in the Port's response to Question #5 above, an appraisal does not contemplate ground lease values. Port staff presented information regarding other Walker John projects in the City of Olympia to the Commission during advisory presentations on the proposed lease and option agreements for illustrative purposes in order to show examples of quality of construction and project scope only.

**Question #8:** *Based on the discussion, it appears fair to say that the Port did not obtain a professional appraisal of the specific property where development is proposed. Is that correct? And the valuation was not updated to reflect current market conditions at the time of the lease, correct? ( I will remind you, the reason why these questions were asked, fundamentally, is that the Port agreed to an annual 2% increase over 50 years, which makes the initial valuation quite critical for how much revenue the Port ultimately derives from the deal. This has a direct impact on the public.)*

**Port Response:** See response to Question #5.

**Question #9:** *Did the Port go into negotiations with its own determination of fair market value, and if so, how was it arrived at?*

**Port Response:** See response to Question #5.

**Question #10:** *Based on the discussion: the Port negotiated a rate of 6.5% of fair market value, this was the Port's intention going in, and in addition it was the intention to ramp up to 6.5% only after three to four years. Is this correct? And can you provide the schedule of the ramp up: is it 0 the first year, 25%, 50%, 75% and then 100% after four years?*

**Port Response:** To clarify, Port staff negotiated and recommended a proposed price per leased square foot, not a rate determined by percentage of fair market land value. The rental rate schedule is found on pages 3 and 4 of the approved ground lease, as excerpted:

	Monthly Base Rent*	Annual Base Rent*
Lease Commencement Date to Rent Commencement Date	\$0	\$0
From the Rent Commencement Date through the first anniversary of the Rent Commencement Date	\$2,705.71 *	\$32,468.50*
Beginning following the first anniversary of the Rent Commencement Date	\$5,411.42*	\$64,937.00*
Beginning following the third anniversary of the Rent Commencement Date, and on each anniversary thereafter through the remaining term and renewal term, if applicable	102% of the Monthly Base Rent in effect prior to such anniversary	102% of the Annual Base Rent in effect prior to such anniversary
(*Plus Leasehold Excise Tax)		

**PERCENTAGE RENT COMMENCEMENT DATE**

Percentage Rent shall commence to accrue and be due beginning on the first day following the third year anniversary of the Lease Commencement Date.

**BASE RENT**

**Rent Commencement:** Tenant shall pay rent monthly in the amount of one-twelfth (1/12) of the Annual Base Rent, plus applicable Percentage Rent and leasehold excise tax. The estimated Monthly and Annual Base Rents for each year are set forth below.

**Annual Base Rent:** The exact Monthly and Annual Base Rents shall be calculated on a per square foot basis size of the Premises following the subdivision of Lot 3 of SS-070154 OL and the Lease Addendum shall include the exact Monthly and Annual Base Rents. If the Rent Commencement Date predates the completion of the subdivision, the rent shall be based upon sixty-four thousand nine hundred thirty-seven (64,937) square feet and subsequently adjusted if the actual area of Lot A and Lot B exceeds sixty-four thousand nine hundred thirty-seven (64,937) square feet.

Beginning on the Rent Commencement Date, Tenant shall pay one-twelfth (1/12) of the Annual Base Rent amount as Monthly Rent, plus applicable Percentage Rent, plus leasehold excise tax according to the following schedule, subject to adjustment if Lots A and B are larger or smaller than sixty-four thousand nine hundred thirty-seven (64,937) square feet:

**Question #11:** *Why did the Port not negotiate to the 2017 percentage for fair market value of 8%, as is listed for East Bay?*

**Port Response:** Port staff negotiated the recommended lease rate presented for Commission approval consistent with Port Policy 1101. See response to Question #5.

**Question #12:** *Did Commissioners receive documentation regarding all modifications to the "standard" lease agreement [sic]? Again, it does not appear in the meeting packets available to the public on the website. Were there other packets prepared, or other meetings?*

**Port Response:** See responses to Questions #1 and #2 regarding public meeting dates and scope of materials prepared and presented for advisory and action agenda items for the 3rd Gen option and lease agreements. There were no packets or meetings other than as described in these earlier responses.

**Question #13:** *The parcel size for the development: definitely 64,937 square feet?*

**Port Response:** The area of the Port's approved ground lease with 3rd Gen is approximately 64,937 square feet, representing a portion of what is presently Lots 2 and 3.



**Question #14:** *LEED silver certification (the "10 points out of 100"): Did the Port ascertain what specific steps the developer would take to achieve Silver certification? Going into negotiations, or up to now, does the Port know the approximate cost of these improvements? Can it define the benefits to the public in specific terms? Did the Port consider other ways of paying for these improvements besides a 2.5% "override" (or revenue share plus 0.5% penalty, as the Port sees it) over 50 years?*

**Port Response:** LEED certification requirements for new construction are determined, published, and implemented by the U.S. Green Building Council. Port staff negotiated the proposed LEED incentive term in the subject lease in response to Port Policy 1301: Environmental Stewardship and Compliance, as excerpted below in italics. A complete copy of Policy 1301 can be found at: [www.portolympia.com/DocumentCenter/View/2986](http://www.portolympia.com/DocumentCenter/View/2986). The proposed LEED term found in the approved lease was also included in published agenda materials. See response to Question #5.

#### **Environmental Guidelines**

2. To achieve performance excellence in its environmental practices, the Port of Olympia will:
  - a. Seek opportunities to exceed environmental regulatory requirements and mitigation goals, where practical and appropriate;
  - b. Look to promote and incorporate low impact and environmentally conscious principles in our project designs, including Leadership in Energy and Environmental Design (LEED®) development tools and performance criteria;

**Question #15:** *There is no other Port property to which the Port's negotiations with 3rd Gen regarding revenue shares (2.5%, 3% etc) can be compared. Correct?*

**Port Response:** The Port is not clear what this question is intended to refer to. Other Port ground leases have included percentage rent terms.

**Question #16:** *What methods does the Port use to determine the balance between generating revenue for the Port and enabling a tenant to lease from the Port yet still be competitive? How does the Port distinguish between discounting a lease, and other forms of negotiation/restructuring that lead to similar results [sic]?*

**Port Response:** Port staff negotiates proposed lease rates and terms for Port properties and recommends such rates and terms to the Commission for approval pursuant to adopted Port plans and policies. See response to Question #5.

**Question #17:** *In the event of a release of legacy hazardous material, is the tenant held harmless even if the tenant is responsible for the release? Does the Port (public) assume full responsibility regardless of the cause?*

**Port Response:** The Port assumes that your question regarding "legacy hazardous material" refers to the Port's cleanup of the East Bay site, which includes the area subject to the Port's approved ground lease with 3rd Gen. Under the terms and conditions of the approved ground lease with 3rd Gen, the Port is required to deliver a fully remediated site. Construction activities associated with 3rd Gen's development of the leased property are subject to Ecology approval. 3rd Gen must also comply with permanent environmental covenants intended to protect human health and the environment, which are required as part of the approved cleanup. Additional information regarding the East Bay Redevelopment cleanup is available on the Ecology website at: <https://fortress.wa.gov/ecy/gsp/Sitepage.aspx?csid=407>.

Other lease provisions specifically address Tenant liability for the release of hazardous substances and indemnification of the Port should that occur. These are standard provisions common to all Port leases.

**Question #18:** *We discussed liability in the event that there is an accidental release of hazardous materials. We also discussed flood, earthquake and fire insurance. Can [the Port] provide some more details on what we discussed, in regard to liability and disclosure?*

**Port Response:** With respect to "accidental release of hazardous materials," see response to Question #17, with respect to activities associated with the East Bay Redevelopment cleanup. With respect to insurance, Tenant is required to maintain commercial general liability and property damage insurance in addition to fire and extended coverage property insurance for any improvements constructed on the leased property. Earthquake and flood insurance are not required; however, the Tenant is obligated under the lease to restore any buildings or improvements on the property that are damaged or destroyed for any reason. These are standard provisions common to all Port leases.