

Ouderkirk & Hollen
Attorneys at Law

P. O. Box 1167
Newport, OR 97365

615 SW Hurbert Street, Ste A
Tel: 541-574-1630 Fax: 541-574-1638
www.ouderkirkhollen.com

J. F. "Jeff" Ouderkirk
jeffo@ouderkirkhollen.com

Jeffrey C. Hollen
jeffh@ouderkirkhollen.com

June 27, 2017

Port of Newport
Attn: Kevin Greenwood, General Manager
600 SE Bay Blvd.
Newport, OR 97365

HAND-DELIVERED

Re: Special Meeting: 6/27/2017
Silvan/Teevin Contracts

To the Port Commissioners:

I represent Midwater Trawlers Cooperative with respect to the proposed contracts with Silvan Forest LLC and Teevin Bros. Land & Timber Co. LLC. I have provided with this letter an analysis of the proposed Lease Agreement, and the contracts associated with that agreement. I intend to be present at the special meeting scheduled today for review of these contracts, and to respond to any questions related to this issue.

Thank you in advance for your consideration.

Sincerely,

OUDEKIRK & HOLLEN


Jeffrey C. Hollen

JCH/
c: client
Enclosure

ANALYSIS OF PROPOSED LEASE BETWEEN PORT OF NEWPORT AND TEEVIN
BROS. LAND & TIMBER CO. LLC

By: Jeffrey C. Hollen, Attorney at Law,
Representative of Midwater Trawlers Cooperative

The Lease Agreement between the Port of Newport and Teevin Brothers Land and Timber Company, LLC, cannot be considered alone, as it is linked to terms of other agreements. For example, paragraph 3b of the Lease Agreement refers to an estimated six month period when the “lay down site” as identified in Exhibit ___ of the contract is being constructed. However, there is no Exhibit ___ attached to the lease. Assuming that the Exhibit attached to the Lease is intended to be the Three-Party Project Undertaking and Facility Operations Agreement, the “lay down site” would seem to include the construction “Project” to be engineered and constructed by the Port, as required by paragraph 1b of the Three Party contract, and as described in the “Port’s Plans” referenced in paragraph 3c of the Three Party contract. Those plans are not further described. The Project shall be funded as provided in the Cooperative Project Funding Agreement between Silvan and the Port. Paragraph 1.2 of that agreement requires creation of a “coordinated plan” for the Project and Initial Improvements among Silvan, the Port, and Teevin. These agreements are interrelated and interdependent, but do not contain a provision terminating all agreements if any one of them is terminated. The Port could end up with the Project completed, with no Teevin lease or Silvan funding, and no Silvan shipping revenues. The Port would, however, have the Tiger and IFA debts to pay from its own funds.

Another reference to an external agreement is in the third paragraph of the lease Recitals on the first page of the lease, where the terms of the Option to Lease dated April 28, 2015 are “incorporated.” That Option expired December 31, 2016, and the undersigned is not aware of any renewal or extension. The terms of the Option conflict to some extent with the terms of the proposed Lease Agreement, and incorporating any terms of the Option into the proposed Lease Agreement should be avoided.

Paragraph 2b of the Lease Agreement states that the Initial Term of the lease commences upon completion of construction of the “Initial Improvements.” Paragraph 4 defines Initial Improvements as including a debarking system, office facilities, and other improvements to be installed and paid for by Teevin. Under paragraph 3b, Base Rent will commence when the lay down improvements are complete, and Teevin “deems the Premises ready for use as forest product handling facility.” The determination of when the facilities are “ready” for forest product handling is completely up to Teevin. If Teevin does not install the Initial Improvements needed for forest product handling, it does not need to pay rent.

Paragraph 20 of the Lease Agreement allows Teevin two years to install the Initial Improvements and commence industrial use before the Port can terminate the lease. The Port may be required to wait two years without rent or forest product handling by Teevin. Even if Teevin installs the Initial Improvements and begins to pay the Base Rent within that two years, Paragraph 20 does not require it to continue industrial use. Paragraph 2b allows Teevin to cease industrial use for up to twelve months before the Port can give notice of termination. Teevin may start and then stop industrial uses for 11 month intervals at a time, without breach of the agreement.

Paragraph 11 of the Lease Agreement requires the Port to pay for any environmental remediation or related liability caused by anyone other than Teevin, the Lessee. This includes payment by the Port for environmental issues created by third parties other than Teevin, such as persons or entities engaged in business with Teevin at the premises. The Port will not likely be aware of entries onto the leased premises by Teevin's business associates or invitees which may pose environmental risks. For that reason, the liability and responsibility for environmental remediation would typically fall upon the lessee, not the lessor.

Section 5A of the Oregon IFA loan requires a line of Credit Trust Deed covering the property to be leased to Teevin, to secure payments on that loan. Paragraph 19 of the Lease Agreement states that the Port shall obtain a written nondisturbance agreement from the lienholder in "form and substance acceptable to Lessee in its sole discretion..." Before entering into the Lease, the Port should confirm that the nondisturbance agreement will be accepted by the Oregon IFA. It would be unusual for a funding agency to agree to that form of agreement, when its remedy is advertisement and sale of the property.

Another aspect of the IFA loan which should be considered before entering into the Lease Agreement with Teevin is Section 8G, which states that the Port "...shall not ...lease...any substantial portion of or interest in the Project or any system that provides revenues for payment or is security for the Loan..." Section 8G requires the Port to prepay the entire outstanding balance of the Loan if that provision is breached. The consent of the lender must be obtained in advance of entering into the Lease Agreement, or the Port will be in breach of both the loan and lease agreements.

Yet another aspect of the IFA loan which should be investigated before entering into the Lease Agreement is Section 8R. That section restricts the Port from entering into an agreement for a private party to manage the operation of the Project, or to allow the funding to be used directly or indirectly in a manner which would constitute "private business use" as defined in the Internal Revenue Code. A "private business use" is defined in 26 USC 141(6) as a "...use (directly or indirectly) in a trade or business carried on by any person other than a governmental unit." The lease to Teevin and the agreement with Silvan appear to afford them the use of the Port's improvements funded by the IFA loan, in violation of this loan agreement. Again, violation of the loan agreement requires the Port to immediately pay the entire loan. The property leased to Teevin, and perhaps the other Port property being improved, would be subject to foreclosure by the lender under the Trust Deed required by the IFA loan. The undersigned is not a tax expert, but such an expert should review this issue prior to signing a lease or accepting the IFA loan.

As a final question related to the IFA loan, does the Port have authority to encumber Port property to secure payment of a debt? That is for counsel for the Port to answer. A review of ORS chapter 777 provides no direct authority to do so, other than a reference to security in ORS 777.447, which also provides a \$1 million dollar limit to the Port's authority to issue promissory notes.

In reviewing the Project description attached as Exhibit B to the Cooperative agreement, it appears that most of the work is to be done on the parcel leased to Teevin. Based on the Project funding, it appears that most of the 6.5 million dollars will be expended on that parcel. A

lease payment of \$5,000 per month on a property value in excess of 6.5 million dollars gives the lessee an enormous competitive advantage. It would likely discourage any competitor from attempting to ship forest products from the Port terminals. A lease payment commensurate with land value with improvements, as appraised, might create a more competitive market. To the extent that the Port gives Teevin and Silvan the equivalent of exclusive rights to the Port terminals for forest products, it creates a monopoly. Silvan's presence at the other Oregon ports that ship timber has been noted in the Port manager summaries. This may also subject the Port to significant disadvantages when attempting to deal with Teevin and Silvan in the future.

My client, Midwater Trawlers Cooperative, is not in favor of entering into a contract which provides priority dock space to Silvan for twenty years. Paragraph 2.2.3 of the Cooperative Project Funding Agreement provides that priority at the west berth for the duration of the terms of the Cooperative Funding contract and the 3-Party Agreement. It is not clear whether both agreements have to be terminated before the priority provision expires. The Cooperative Funding agreement remains in effect until the Silvan debt is paid. Paragraph 2.2 requires payment to Silvan of \$60,000.00 per year as a flat "return of investment" until the loan is repaid from the "Restricted Funds" as provided in paragraph 2.6. (This amount would be usurious interest, especially during the years when that loan is significantly reduced, to \$100,000.00, for example.) The \$60,000.00 does not come from the Restricted Funds, which are payments to the Port from Silvan or from Silvan-related sources as described in paragraph 2.5. So, the \$60,000.00 will be paid out of other Port revenues. The Restricted Fund will be used to first pay the IFA loan, then for the Port employee required to exclusively serve the International Terminal, and then to the Port and Silvan in equal shares. This schedule does not expressly allow prepayments from other sources than the Restricted Fund account, which would likely guarantee that the term of repayment will take 20 years or more. The duration of repayments are commensurate with the term of that agreement. The term of the 3-Party Agreement under paragraph 8 is 20 years, to run with the Lease and Cooperative Funding Agreement. It does not expressly terminate when the Lease and Cooperative Funding Agreement terminate. The priority requirement for shipping appears to extend for 20 years, regardless of whether the Lease Agreement is terminated. My client's position is that the Port should retain complete authority to regulate the use of their docks, and committing to a 20 year priority regardless of future economic conditions is not a reasonable business decision.

The Silvan loan is also to be secured by the "security agreement incorporated herein" according to paragraph 2.2. It is not clear what Port property is to be provided as security, as there is no security agreement described in the Cooperative agreement. Incidentally, paragraph 3 of the Cooperative agreement states that the Silvan Funds are not a loan, but there is not another legal description that is appropriate when someone provides money to another and requires repayment.

As the legal representative of Midwater Trawlers Cooperative, it is my opinion that the terms of the agreements with Teevin and Silvan favor those parties, and not the Port. My client advocates for terms that allow the Port to control the wharves and adjoining areas in a manner that is best for the Port, and which allows the Port to adjust usage depending upon future economic conditions. The present agreements do not provide this latitude, when they dictate priority for timber interests.