

July 11, 2007

Community Development Committee Meeting

From Councilor James Cloutier, Chair of the Community Development Committee

Recommendation

I am making the following recommendations to my fellow members of the Community Development Committee and to the City Council concerning the Maine State Pier. As will be noted, I have the opinion that both companies have the capability to operate a meaningful development at the Maine State Pier. I am suggesting the city pursue negotiations with the proposer which I believe offers the greatest enhancement of our working waterfront opportunities, and offers reasonable financial return to the city.

I thank the proposers, city staff and the many members of the public who have spoken on many issues involved in this redevelopment. One purpose of this discussion and recommendation is to frame as well as I can the many issues involved in this project for consideration by the City Council.

Below are my recommendations, followed by a discussion of the factors leading to these recommendations. As with any complex issue, these proposals and remarks reflect my

current understanding of the facts and the interplay of facts, and remains subject to revision arising from additional data, deliberation and evaluation.

I list recommendations common to each, followed by project specific recommendations.

1. **Outside Expertise.** The City of Portland Corporation Counsel's Office does not routinely negotiate capital leases extending to the term and scope of the likely Maine State Pier agreement. Accordingly, the office should be empowered to seek outside counsel to assist or lead in the negotiation of any lease.

2. **Initial Timing.** A memorandum of Agreement, and preferably, a contract for lease should be completed within sixty days of council action authorizing negotiations.

3. **Repricing.** The extended term of the proposed agreements are the hallmark of a capital lease, however, the proposed terms, even without extensions, are a few generations. The "inflater" clauses proposed are unlikely to match well with economic change over generational time frames, and, accordingly, following an initial capital amortization period, part of the economic package should include a fair mechanism for repricing.

4. **Water Dependant Uses.** My recommendation follows my understanding of which applicant matches best with the water dependant aspects of our public policy at and near the pier. However, neither applicant has articulated a means for encouraging water dependant business development, and only one is proposing to operate water dependant businesses at the site. Meeting the requirement for water dependant use would be far more advantageous to the waterfront economy if water dependant small business development, even if somewhat uncertain in present scope, were substituted for some or all of the leasing proposed for the tug boat offices, CBITD and the Portland Fire Department.

5. **Parking.** Neither proposer has set out parking arrangements sufficient to satisfy the project need for parking. The contract zone rules state that the Council shall, after advice

from the Planning Board, set the parking requirement for the project. Since the city requires no less from any other property owner, I expect that the parking and circulation arrangements for the uses on this site would be obviously sufficient for the need. I accept the TOC proposition that some of this could, even should, be satisfied remotely.

The capacity created by the city's investment in nearby parking facilities was intended for other community development purposes, and would not be suitable as a long term source of parking capacity for this project in my opinion.

6. **Public Space Design.** The design and operation of public spaces should be completed in collaboration with the Portland Department of Parks and Recreation and the Council's Health and Recreation Committee. Specific opportunities for wider public use of Compass Park and signature public art/architecture on Compass Park should be a focus.

7. **Security for Performance, Other Conditions.** The contract should contain adequate performance guarantees and should be understood to include commercially reasonable provisions developed by city managers and counsel representing the city in the discussions. These should include dispute resolution and, where appropriate, performance benchmarks for future conditions, including project permitting and commencement benchmarks.

8. **Site Plans Conditions.** Each proposer has shown variances from the physical requirements of the zoning scheme. This recommendation is not an endorsement of those site plan variances.

9. **Additional Proposer Specific Conditions.** For the reasons set forth in the attached, I believe both proposers are qualified to complete a plan on this site. Based on my current understandings, I believe the Ocean Properties proposal is the better opportunity for the city and recommend that negotiations be undertaken with that group. Should such

negotiations fail, I would recommend negotiations with The Olympia Companies be undertaken.

In each instance, my recommendation is based on additional understandings about issues to be raised in negotiations, and my final interest in approving a contract with either proposer is specifically subject to review of the final project proposal, including the contract proposals affecting the recommendations set forth herein.

Ocean Properties.

** Conditions 1-8 above apply.

** Ocean Properties should devote substantial effort to describing and improving its design processes, with particular reference to the Eastern Waterfront Design Standards. A consultative/collaborative process before final design with city Planning Staff and the local architects association should lead to a detailed textural description of the architectural premises of their final plan proposal.

** An operational plan that integrates large vessel access at the State Pier with Atlantic Pier operations should allocate responsibilities for security, vessel and ferry accommodation and integrated uses of staging areas, transportation capacity and similar matters.

** Ocean Properties makes reasonable assurances concerning the operation of water dependant businesses contemplated in their proposal, including a Cruise Port, Fast Ferry, local tourist business such as whale watching, or equivalent undertakings.

** My assumption is that the financial status of the company and its capacity to proceed with this project is confirmed. The superior financial capacity of Ocean Properties is a material element of my consideration in making this recommendation.

The Olympia Companies.

** Conditions 1-8 above apply.

** My recommendation is that negotiations with TOC be undertaken if Ocean Properties should prove unwilling or unable to complete the project. Should the council choose TOC for negotiations, these recommendations would be some of the basis on which I would evaluate a proposed contract.

** The plan by TOC to place a hotel substantially south of Commercial Street should be separately approved by council resolution before further planning is done on that basis.

** The site plan proposal by TOC to seek DEP approval for reclassification of waterfront habitat or other regulatory relief for filling of the waterfront bottom should first be addressed in a separate resolution by the Council seeking authorization to seek such relief.

** Functional space for a tug boat pier between the State Pier and the Atlantic Pier needs to be reserved.

** An early evaluation of the compliance of any proposed site plan with Homeland Security operational requirements and large vessel berthing, loading and circulation requirements, some of which is outlined in the Portland Transportation Department evaluation, should be completed and reviewed by a qualified professional for feasibility.

** The Compass Park commercial uses should be deleted and a public access, use and configuration plan developed in concert with appropriate city departments, including public involvement in features and design. The financial capability of the proposer to complete the project with this alteration will need to be the subject of a detailed financial "approval with conditions" letter from a commercial lender early in the process.

** A site plan consistent with the above will need to be developed at a greater level of detail than now available. Early confirmation of financial commitments to construct the improvements and absorb the risks of the maritime construction should be sought.

DISCUSSION

I am quite enthusiastic about this project and regard both of the proposers as having done a great service to the City of Portland by their effort. Both Ocean Properties and Olympia Companies have shown creativity, determination, flexibility and financial commitment to a vision of a new community opportunity, one which will be beneficial to several generations of Mainers and Portlanders. I am not intimidated by the obstacles, including those described here. It is not my place to be a cheerleader for this process or its results, and I believe the inherent use conflicts make this is a difficult fit. My intent is to outline, based on the public process and my previous experience with waterfront issues, the challenges still not addressed and the details of the challenges addressed to date by the applicants, including my rationale for recommending that both are at least preliminarily qualified to create a project on the Maine State Pier, and that Ocean Properties should be given the first opportunity to attempt to negotiate a contract with the city.

One or the other seems to me to be suited to the task of further progress in serving the city's priority needs, which means to me that we should attempt to work with one of these proposers to reach an agreement on a project.

Procedural Matters. First, a matter of some controversy in our public proceedings has been the allowance by the CDC of "amendments" to plans submitted. This has led our newest member to assert he will only judge matters as received in February. He is, of course, at liberty to judge these applicants on any basis he deems appropriate.

The CDC procedure is to allow changes to submissions, a procedure in place for a very particular reason. No one has the "right" to an approval. The application package very clearly points out that the city reserves the unfettered right to reject any and all proposals. This is a development proposal solicitation, which we have often referred to as a "concept RFP." The

two applicants were present with their principals (The Olympia Companies, hereinafter “TOC”) or counsel (Ocean Properties. LLC, hereinafter “OP”) when the meaning and application of the “concept RFP” was discussed by the CDC, in public, last October.¹ The matter of submissions and how they are handled was fully discussed. Those objecting to aspects of our procedure are free, of course, to object on any basis they wish, however, the description of how we approach this issue has been clear from the outset.²

The reason we proceed in a flexible manner is two-fold – to encourage innovation or “risk taking” in making proposals, and to induce competition in proposal development to maximize the degree to which proposals confer benefits on the people of Portland and address the priorities of the city.³

¹ In fact, the record shows that Councilor Donoghue was also present, although not then a councilor.

² A transcript of the meeting is being prepared for reference by the council in evaluating this issue, if the need arises. While not yet complete, it contains the following observation, made by me.

“We are only a recommending body to the City Council. The only authority that we have is to make a recommendation to the City Council. It has therefore always been our point of view that since any person who makes an application may make a new application to the City Council and thereby convince the City Council to reject anything received in an RFP and proceed on a different path, then it is permissible for us to receive amendments, modifications and that kind of thing after the so called deadlines have been met or passed. “

“...there is a limit to the degree to which we can assure anybody that any of these deadlines will be adhered to. If there is anyone who believes that they need to have them strictly adhered to is likely to be sorely disappointed. It is normally not the practice.”

³ The short answer to the question of what happens if the proposals are judged by the original submissions is rather easy for me. I would approve neither. In matters of site development, finances and marine use, neither plan met requirements.

Site Issues. Neither project proposed legal site arrangements, as both applicants now acknowledge. The illegalities are not minor. In the case of OP, the DEP invalidated portions of our zoning in April, rendering portions of their plan illegal under local zoning. TOC now acknowledges that their original proposal violates NRPA restrictions. It is now their primary approach to seek city approval of an attempt to alter state environmental rules to allow more frequent filling of wetlands. They were apparently unaware of this issue until recently as the issue was not identified in an outline of needed regulatory changes for permitting their project provided in response to a committee request in March.

TOC proposed a commercial use of Compass Park, roughly the southwest quadrant of the entire property. This property is not included in the area outlined in the proposal documents for commercial use. While the city has not completed discussions with the Department of Conservation on mutual roles in public trust administration, the area of Compass Park probably cannot be used in the manner proposed by TOC, even if the city’s policy is changed to accept this area for development as a retail destination.

The parking proposals are a critical element of site issues, and as often happens, particularly on the waterfront, have been a source of great contention and dissatisfaction. TOC proposed a parking fund. OP proposed a parking garage. The DEP basically prohibited the OP approach in April. It was disfavored

In this case, each applicant proposed plans which are basically prohibited by some regulatory agency with direct jurisdiction over the state pier. They did so in part to maximize use values important to the success of the project from one of the points of view expressed in the criteria for applicant selection. There is no reason to question the good faith of either in these proposals. Each has pulled back from their original plan, or expressed a willingness to adapt their plan to conform to legal requirements.⁴

under the pertinent site and use rules before that. TOC projects much lower parking demand than OP – mostly arising from far less use by water dependant users of the pier. To summarize, the OP proposal was disfavored until it became illegal. The TOC provides money for parking, but no site information.

Financial. Both proposals included financial arrangements which were not acceptable by a very wide margin. Each wanted a substantial Tax Increment Financing arrangement which would diminish financial return to the city (county and state) to a large degree for a generation. TOC proposed to pay rent, but did not have a business plan to implement for the pier. Its proposed tax revenue calculations appear to be too high. It would not bring any new business to the pier. OP did not propose to pay rent initially, but had a calculation of marine operations results which it thought – inaccurately I think – conferred a greater financial benefit on city taxpayers.

The terms – essentially 200 years for OP and either 150 years or, failing mutual agreement at 75 years, a requirement that the City of Portland pay TOC the fair market value of their improvements, were not reasonable.

Information to be gleaned from the original proposal undercuts the adequate financial capacity status of TOC as well. OP is a huge company. Any financial issue related to it only involves the willingness of the company to use its undoubted financial capacity, which for all practical purposes is, in a transaction of this size, unlimited. Not so with TOC, which has a practical limit on its ability to gather investment dollars for projects. Its original proposal was described as three “bankruptcy remote” LLCs independently financing three largely financially independent enterprises – the hotel, the office building and the retail complex. Each contributed financial capacity to the investment needs of the project as detailed, including pier reconstruction, parking and public infrastructure, including open space.

The conclusion that the retail project is illegal or should not be allowed undermined the needed conclusion that TOC has the financial capacity to complete the other elements of its project. In any circumstance, the Maine State Pier project is an order of magnitude change for TOC. It has grown rapidly in recent years, relies on leverage as a necessary component of its capital expansion financing and has never passed through a national recession in anything close to its current status or configuration. It typically undertakes projects no greater than a third of the size (i.e., cost) of the Maine State Pier project, and has never undertaken one larger than half the size of their proposal. It has no experience or infrastructure related to commercial marine or marine transportation operations.

Marine Uses. It is possible to conclude that either or both proposals comply, or don’t, with the particular details of rules for a contract zone/conditional rezoning which are specifically related to the working waterfront requirements of this pier. Many of the basic flaws in the marine use issues persist, and are the discussed further in other parts of this review.

In relation to water dependant uses, preservation is a requirement, enhancement is a primary goal. Both proposals stretch to include space for the Portland Fire Department, the Casco Bay Island Transit District and office space for the Tug Boat operators to achieve the 50% water dependant use required by our ordinance – and basically included in the DEP rules by incorporation. Neither, in these undertakings, is adding much to the marine economy, and are probably proposing uses which will not be of great interest to the public entities involved, which would normally avoid the costs involved.

⁴ TOC proposed originally that it would only do so after being selected as the provider. Since it appeared quite likely that elements of their proposal which they described as critical would be substantially altered,

In the event, the applicants each availed themselves of the opportunity to revise their proposals. It is good that they have, as each of the proposals submitted could not be accepted, in my opinion, for reasons including those set out in note 3.

As will also be clear, I think that either developer, if selected, will need to modify their proposal substantially in order to meet the needs of the city.

Use of the Site.

The redevelopment of the state pier through a public/private partnership was conceived for two reasons – financial and business or economic. The assistance of private redevelopment funding is welcome for a city government with many infrastructure needs and the financial management need to limit borrowings and other capital expenses. The second reason – the need for a business plan for the pier – became obvious when the city unsuccessfully sought to extend its industrial life through and after the BIW era and the Cianbro lease of the pier and berth for the oil rig projects earlier this decade.

The central requirement of the redevelopment is the maintenance of the pier as the critical central element of waterfront infrastructure supporting marine economic activity.

This central requirement is supported by interlocking legal requirements.

this permutation of the argument that only the February submissions could be considered seemed difficult to reconcile with common sense or the fiduciary obligation of city councilors to advance the public interest. Eliminating other proposals from consideration without even knowing what the general outlines of a solution to the legal problems inherent in the TOC proposal would be would clearly undermine our ability to go forward on a basis in the best interests of the people of Portland. It cannot be lost on TOC that the City's negotiating position materially and adversely changes once a proposer is accepted, as the length of time for approval and departure from the process of all other potential participants means, as a practical matter, that the city will either accept whatever it can negotiate, as modified by the extensive regulatory process, or cancel the project at the end of unsuccessful negotiations or renegotiations. The history is that the city will compromise or accommodate repeatedly before it even considers cancellation of a major project.

The statement of purpose of the zone adopted by the City Council last year, as well as accompanying comprehensive plan element, reflect this purpose. It is worthwhile to repeat in its entirety this statement of public policy.

Sec. 14-300. Purpose. The Eastern Waterfront Port Zone is created to nurture deepwater dependent activity within the context of the established waterfront. The transport of goods and passengers by water is an important component of both the local and regional economies and this transport and other forms of marine industry are dependent upon land and piers with direct access to Portland Harbor. Given the existing pier infrastructure, proximity to deep water, and urban context, Portland's Eastern Waterfront is uniquely situated to support a wide range of water-dependent industry and commerce through a variety of marine activities. The support and expansion of Portland's marine industry requires piers, uplands, and circulation consistent with the transportation purpose and use of marine facilities. The growth of Portland's marine passenger industry also requires supporting services and activities to provide a safe, convenient, and enjoyable travel experience for users of marine passenger facilities. Non-marine uses that complement the marine passenger industry, are compatible with existing and future water-dependent uses, and provide opportunities for residents and visitors alike to enjoy the Eastern Waterfront throughout the year, are encouraged. The primary use of the deep-water resources must be for the berthing and support of large vessels. Non-marine uses that complement and support the deepwater infrastructure and do not conflict or compete for limited space with existing or anticipated deepwater-dependent uses are encouraged. Existing and future pier infrastructure and upland support areas should be designed and maintained to support a variety of marine uses and be responsive to future technologies and trends in the marine industry. Given the need to nurture and support deepwater-dependent uses and the need for non-deepwater dependent uses to complement the marine passenger industry and to support the maintenance and repair of pier infrastructure, the Eastern Waterfront Port Zone recognizes the following hierarchy of uses:

(a) The first priority of this zone is to protect and nurture existing and potential deepwater dependent uses (those uses requiring a minimum of 15 feet of water depth);

(b) The second priority is to allow shallow water-dependent and other permitted marine uses, so long as they do not interfere with deepwater dependent uses, either directly by displacement or indirectly by placing incompatible demands on the zone's infrastructure; and

(c) Other uses specified herein are allowed only if they do not interfere with and are not incompatible with higher priority uses.

I fully support the very specific priority of enhancing the working waterfront economy by leveraging the usefulness of the Maine State Pier's deep water berth as essential waterfront infrastructure.⁵ As the document states, "piers, uplands and circulation" are critical parts of the infrastructure.

The City of Portland is no longer the only regulatory authority interested in preserving working waterfront opportunity and values. At times in the past, there was little recognition, particularly outside of Portland, of the value of this protection in maintaining our community heritage, economic vitality and resource-based enterprises. It is now the case that both state and federal regulatory authorities recognize a responsibility to protect the uses which enhance public access and enable practical use of urban waterfronts for water dependant economic activity. The Maine Department of Environmental Protection reviews and approves shoreland zoning for all of Maine, applying now well developed rules, and administers the Natural Resources Protection Act, a Maine statute which protects wetlands and aquatic habitat, among other things.⁶ The DEP has probable authority, as well, under the Site Location of Development Act.⁷ The Maine Department of Conservation has both ownership authority (the state retains ownership of most submerged lands in Maine⁸ and administrative responsibility

⁵ I am fully aware of the various suggestions for construction and use of the "megaberth." Opinions differ to some degree on the functionality of that for various waterfront uses. Whatever the merits of those ideas, they are not a substitute for implementing the policy expressed in our zoning and comprehensive plan documents concerning the Maine State Pier.

⁶ This statute is currently famous for upcoming vernal pool rules.

⁷ These jurisdictions should be understood as independent and freestanding in their requirements.

⁸ A law school course in property law could use the status of legal title of the Maine State Pier area as a case study. The city has two deeds, each possibly flawed or insufficient. It purchased the property for over \$4,000,000.00 from the state in the early 1980's, after approval and funding of the BIW project by the voters, a project which contemplated the sale as a means of financing some of the project costs. Since special legal rules apply to the transfer of lands held under the doctrine of public trust – as all submerged lands are held – little legal precedent guides the interpretation of these rules. Compounding the issue,

akin to regulatory authority related to the public trust doctrine, which requires that the public endowment of the submerged lands be used in a manner which benefits the public.

Legal impediments to development on a pier are many, particularly if the area to be developed extends over ocean bottom, supported by pilings or other structural supports.

Here, the City has added improved public access as another primary purpose to be achieved by the redevelopment. In so doing, we have introduced more fully the possibility of use conflict between water dependant uses and other uses. It is important to note that the water dependency policies envision that uses must be compatible not just with present uses, but also with future marine dependant uses. The potential conflict is manageable with effort. Already, about one million passengers use the Maine State Pier to access the island ferry service; as well, as many as 50,000 – 100,000 people arrive at the Pier via cruise ship, military vessel, water taxi or other conveyance each year. Marine transportation is explicitly recognized as an activity served by the MSP infrastructure.

The Olympia Companies Concept Plan.

Site Plan. The original TOC site plan consumes the entire site without generous accommodation to water dependant uses. It projects compliance with water dependant minimum requirements by positioning office space and storage areas for existing enterprises functioning on or near the pier, including CBITD, the Portland Fire Department and the tug boat operators. The original plan⁹ includes spectacular public access along the pier edge and

historical research of actual then prevailing use in many places along the Portland waterfront often reveals circumstances which entirely change the legal analysis.

The city's title counsel has opined that the city's title to the submerged areas is good. It is believed there is no question that the city's ownership of the Maine State Pier (but perhaps not some of the ocean bottom beneath it) is clear.

⁹ TOC has submitted what seems to be a back-up plan. At our last public hearing, the proposers' time was enlarged to allow longer presentations on the assumption that TOC would want to preset their new plan, but the presentation was conceptual – emphasizing TOC's broad vision of the undertaking and its commitment to completing a quality project.. As with OP, the concept outlines of their plans are clear whether you

at the corner of Franklin and Commercial. A hotel is shown above a currently piling supported pier area – TOC proposes to fill as part of the reconstruction of the support system for the pier. The applicant has informed us that the DEP has indicated that the NPCA prohibits this, and in response, the applicant has indicated a wish to seek alteration of the DEP rules.¹⁰

One of the purposes of the tidal wetlands jurisdiction of both the DEP and DOC is preservation of working waterfront capability. On the Portland waterfront, we have convinced the DEP, based on our long experience with highly restrictive zoning, that certain set backs – 75' from the pier edge, are the practical limit for actual usefulness for water dependant enterprise activities. As well, our experience has taught us that very little activity above the first floor of buildings on piers can support water dependant activities. In the Central Waterfront zone, 100% of the first floor of pier buildings within 75' of the pier edge must be reserved for water dependant use. Finally, our zoning reserves setbacks from the pier edge to assure access for trucking, loading equipment, etc.

The State Pier has a different rule – 50% of the first floor space within 100' of the pier edge must be devoted to water dependant use. Recognizing the projected use of the berth by

examine their first or second site plan. Each is modified by understandings about finances, parking issues and marine operations.

¹⁰ Whether the City of Portland supports this would need to be considered before this avenue is explored. When the City Council approved the rules pertaining to conditional rezoning/contract zoning which would allow a pier, an amendment to the CDC draft promulgated a rule requiring that the hotel be “off the pier.” To accomplish this, a setback from the mean high tide line was used. In essence, TOC has proposed, by filling, to move the tide line so it can put the hotel on the pier. Late in the process, the applicant also indicated it would seek to support the hotel with pilings. This would require a zoning change, which would require policy approval from the DEP. Afterwards, the applicant proposed a new site plan as an alternative. It is unclear to what degree this plan has been analyzed for regulatory compliance or construction feasibility.

I understood the proposal to require any hotel to be “off the pier” as a rule designed to limit the on pier activity associated with the hotel, to protect the opportunity for water dependant activity, particularly circulation, trucking and loading. I was of the opinion that the contract zoning/conditional rezoning authority of the council would provide adequate opportunity to accomplish this, however, I had no particular objection to incorporation of this rule into the ordinance. The proposal by TOC to move the zoning line (by filling the ocean bottom under their proposed hotel) doesn't seem to meet the spirit of this idea, however, they have made a detailed presentation concerning why they believe the location they have shown is best.

large vessels, a 36' structure setback from the edge is required.¹¹ These rules are hoped to create an opportunity for a better designed and integrated complex while maintaining the water dependant requirement, given the long length of the berth. The DEP has approved this concept in applying shoreland zoning.

The above is a long way to say this – environmental agencies have now recognized working waterfront issues as important subjects for preservation. When water dependant use areas are converted to some other purpose, it is said to be “lost.” While the precise details of the value of any particular tidal waterfront habitat – including under the state pier - might be subject to various points of view, there are larger issues. Many might question the propriety of changing the rules so an area now reserved for water dependant use can be used as a hotel site. The TOC suggestion that this rule be changed is a potentially explosive public question, as may create working waterfront and public access conflicts which cannot be readily accommodated.¹²

TOC also proposes an office building and a retail center. The retail center is on Compass Park, an area reserved for public access, but an area where proposers were invited to suggest public access enhancements. Notably, the applicant has indicated its alternative for this proposal might be to restrict this area to water dependant uses, although the financial consequence of this is not known.

The notable issue in the TOC proposal is the lack of water dependant activity. One gauge of this could be employment - no new waterfront function or job is created, other than that of repetitively converting the eastern pier edge from pier operations to public access use.

¹¹ The requirement of a 36' structure setback from the pier edge means that, as a practical matter, the city has a higher proportion requirement for water dependant uses on the State Pier than prevails in the Central Waterfront.

¹² It is not clear to me that the DOC would approve a hotel use over the water or over land which is created by filling submerged land, assuming they have jurisdiction.

TOC does not currently have marine operations as a significant part of its business activities. Operating the deep water berth involves security operations and logistics with which it is not presently familiar.

Lastly, the plan makes no on site or near site provision for parking. TOC argues this as a public benefit, citing its financial commitment to alternative approaches and its willingness to invest in remote parking solutions. The available data show a shortage of parking in the area, with rising rates. While a major city project should normally address shortages to some degree, the least that it should accomplish is to not aggravate an existing problem.

Financial Capacity and Proposals. The TOC calculation of the major financial benefits to the city from its proposal included rent on an escalating scale and an estimate of taxable revenues. This latter, approximately three quarters of the listed benefit, was undoubtedly estimated too high. The TOC proposal originally sought a FMV buyout – sort of a real estate “put,” at 75 years in the absence of a lease extension agreement. There was also a large TIFF request.

The complex structure originally suggested by TOC for its financial structure on the pier underscored the capacity differences between TOC and OP. It seems clear that TOC will be raising capital from lending and equity sources based on the projected financial performance of this project as a necessity in order to meet its financial responsibilities. This is hardly unusual for a developer, of course. TOC has since simplified the legal structures, although it appears the financing will continue to be a complex, three enterprise financing arrangement, underwritten by multiple lenders.

The city has negotiated transactions successfully in the past based on these kinds of parameters. While I was initially doubtful that TOC had shown sufficient financial capacity to

undertake the size¹³ and risk¹⁴ of their proposed project, the research by city staff and our consultant has persuaded me that, at least for the purposes of contract negotiation, we should assume that the TOC has adequate capacity to perform in a commercially reasonable way the details of their proposal.

As well, the financial proposals have improved dramatically since the initial filing. With the deletion of the tiff and the repurchase requirement, the basic transaction includes a rent level and taxation on the assessable improvements. At the moment, it appears that the taxation value and the rent levels would be lower for the TOC proposal.¹⁵

Marine Uses. The TOC plan does not directly introduce new marine uses. The original plan attempts to “co-use” the east edge of the pier by using the site as both a deep water marine berth and as a public access area. The TOC plan emphasizes public access and this element is an important element of that access. Unfortunately, it appears to me that the proposed operation would encounter significant regulatory issues and would tend to damage water dependant uses both directly and indirectly.

The affected area is one of the most important marine infrastructure installations in Maine. The structural restoration of the deep water berth at the Maine State Pier is the primary reason for the city’s undertaking. It is affected by Homeland Security regulations, which require that, when it is in use for marine commercial purposes, that a secure zone be in place

¹³ Our information, hopefully accurate, is that TOC typically undertakes projects no greater than one third the size of its proposal. Its largest project its date is about half the size of this proposal. TOC began its operations at the Doubletree Hotel – its first partnership – in 1997, so it has yet to enjoy the rigors of a full blown recession. It has grown quite quickly since, with operations concentrated in Portland and in several New Hampshire locations.

¹⁴ The risk of waterfront construction is enormous. Engineering estimates of costs for Oceangateway, including some of the engineers involved in this planning, were inaccurately too low repeatedly over a number of years, and missed with an underestimate by a very wide percentage just a few weeks before the project was bid. Since roadway work familiar to the city’s DPW was a substantial portion of the project, the marine construction valuations were basically not even remotely accurately estimated.

¹⁵ I still am concerned about the financial effects of the probable regulatory requirements of change of the Compass Park proposal, and the financial impacts from the details of the redesigned project are not known. The financial margin for error does not seem large for TOC and the financial effects of deleting the Compass Park activity or adjusting to increased costs in building the new plan may render the financial plan infeasible.

to protect vessels, personnel, utilities and passengers. In this condition, public access is not allowed.

Apparently, there is the possibility of consideration of the installation of moveable fencing or other barriers to accommodate intermittent or space limited public use. In fact, it appears that OP is using this technique to a limited degree.¹⁶

The TOC concept too heavily emphasizes at least the possibilities of public access to this industrial/commercial installation. Their concepts have been criticized by the city Director of Transportation, who points out that the co-use will involve space limitations which make the berth area impossibly cramped for typical marine operations. As well, to convert to marine use, the operator will be required to “staff up” a team to “sweep clean” the area for Homeland Security purposes, likely requiring an entire day to prepare for an ensuing day of water dependant activity.

The current volume of cruise ship visits to the pier is about 30-45 per year, all in the May-October months. At present this berth is used by tankers to take on fresh water, is a berth for large visiting vessels (military port of calls, training vessels, etc..) and is used by the tugboat fleet when available. It is the location for vessel repair activity, and was fully in use when the oil rig reconstructions were underway.

These various uses make the berth area unsuitable for the use proposed by TOC. Ready access is inconsistent with the working waterfront uses. The repetitive staging/unstaging of berthing uses is likely to be expensive and result in dissatisfaction with the uses by both primary participants. One of the design elements specifically repeated in our

¹⁶ TOC points to a letter in their submission from the Coast Guard as acknowledgement of the feasibility of their plan. While the letter appears to me to be quite non-committal, city staff has considerable experience and knowledge concerning Homeland Security issues involving the port, and they believe that some plan could be approved, without suggesting that the degree of conflict between access and security shown in the TOC plan is approvable.

zoning requires that both existing and future water dependant uses be protected through the design implemented.

I do not see that the current uses are readily accommodated here, nor is there a discernible means for future uses to be served.¹⁷ The cost of the disruption and difficult logistics means that there will be continuous economic pressure to rationalize the uses of the berth, to the likely long term disadvantage of marine uses. Our planning has assumed for twenty years that when piers become too crowded – with parking, with non-marine uses or otherwise, - that the marine economy will suffer dislocation and harm.

Many of the pertinent issues are outlined in the Transportation Director’s summary. While neither proposal fully addresses operational issues, the marine economy issues addressed in the instance of TOC appear more numerous and more difficult to resolve.

A second issue is the general requirement that the Maine State Pier uses comply with the first floor working waterfront rules that prevail along the entire Portland working waterfront. Both proposals suffer from the flaw that much of the “water dependant” use is office or storage space for the CBITD, the Tug boat companies or the Portland Fire Department. I do not quibble with the legal conclusion that these uses, technically accessory to decidedly water dependant uses, are permitted water dependant uses in the zone. In that sense, the square footage assigned to these activities “counts” against the working waterfront requirements. However, I expect to hold the city to a higher standard than that, and I frankly doubt that any of these entities will want all, and maybe even any, of this space.¹⁸

¹⁷ The tug boat operators acknowledge that both proposals accommodate their existing status on the pier. However, they point out that that status is unsatisfactorily expensive and disruptive, as they are frequently required to depart the berth for irregular periods of time to accommodate other uses of the berth. As a result, they incur vessel expense, staffing costs and their access to the vessel for on-shore operational needs is reduced.

¹⁸ The proposal requirements directed the proposers to these users to understand their needs, etc. It appears to me that the possible needs of these users were substituted for marine related business development possibilities.

In assessing in what manner to proceed, my intention is to pay close attention to the marine working waterfront values contained in the concepts proposed. One of the principal reasons for proposing the various changes in approach which have brought Portland to this point in considering the uses of the Maine State Pier has been the recognition that the city needs a private sector partner to develop a “business plan” for the pier. Promoting maritime activity is important to this process, and the reservation of capacity to meet this need now and in the future seems critical to fulfilling the stated purposes of this undertaking. On this axis, the current TOC approach is less desirable than the OP concept, but each needs further attention should negotiations ensue.

Public Access. The proposals for public access in the TOC plan include the fairly passive opportunity for an elegant park, the continuation of the public use of Compass Park, a probable enlargement of the scope and season of that use through operation of a retail “mini mall” on Compass Park, and projected public access along the eastern pier edge and in interruptions of the wall of structures along the eastern wall.

As noted, two significant aspects of the public access are troubled by compliance issues of some consequence. Compass Park is depicted in the proposal documents as a public access area which could be enhanced by a proposal, but which would not be a part of the development area. At the time of the issuance of the documents, both public testimony and committee discussion concerning Compass Park focused on whether it could be converted in whole or in part to commercial purposes. The conclusion was that it should not be so converted, a variance with the TOC proposal. Second, the pier edge access plan, and possibly the terrace proposal depicted in the TC initial plan appear to render homeland security and berth operations at least heavily conflicted if not marginally possible over the long term.

Finally, active public use by access to a fish market and a possible museum create active use possibilities for residents and visitors alike. As well, pier visitors will likely frequent the restaurants and accessory uses associated with the hotel.

The Ocean Properties Concept Plan.

Site Plan. OP's concept includes a hotel, office building, parking, a cruise port facility, a new pier to accommodate tug boats and a new inter coastal high speed ferry, and tourist facilities to accommodate a whale watching business. It includes a fishermen's' and farmers' cooperative and public access at Commercial Street, near the eastern pier edge and in Compass Park.

These elements have persisted through three site renderings. The current plan reuses most of the freight shed, on the basis that this structure is "grandfathered" for a number of purposes, making the numerous regulatory rules more easily navigated. Non-water dependant uses are largely removed from the pier.

The plan originally submitted by OP was repeatedly criticized for incorporating parking on the site. After our March public hearing, the DEP essentially prohibited parking where OP had placed its parking facility. Subsequently, OP reported that the DEP interpretation of NRPA rules made revision to incorporate shed use the best alternative.

The OP plans are criticized for architectural reasons, including the failure to account in a satisfying way for the required compliance with Eastern Waterfront Design Standards. ¹⁹While this is often a matter left to the (not so) tender mercies of the Planning Board and the Planning Staff, the particular characteristics of the site – as a gateway to Maine and a signature, if not "the" signature Portland public presentation-mean that particular and extensive architectural evaluation and impact on the buildings and grounds should be expected.

¹⁹ During our public hearings, the Portland architects organization suggested neither project was exhibiting architectural values commensurate with the future status of this site.

As a counterpoint to these issues, OP has defined its parking solutions and, at inordinate likely expense, removed them from areas where they would have a practical impact on marine uses or public access to desirable portions of the site. The current plan fully implements at least one site standard – that non-water dependant uses be concentrated at the northern end of the site.

OP points to the quality of the proposed hotel as a distinguishing feature of its non-marine activities. It compares the OP appointments and amenities – rooms over 600 sq. feet with 25 suites, with the TOC proposal for business travel class accommodations, with rooms of about 300 sq. feet. OP indicates it would operate facilities and have a quality of appointments of the “five star” level, substantially above the quality level of accommodations available in Portland at present.

The marine infrastructure is addressed below.

Financial Capacity and Proposals. OP is a huge company, with financial capacities sufficient in all foreseeable circumstances to complete their proposal and operate their development. Their other locations incorporate significant marine operations of several kinds, as well as cruise port operations, ferries and hotels. The company has offered to deposit \$100 million in cash or credit letter to secure the completion of their construction. The company clearly has the financial capacity to complete their proposal and endure any predictable financial risk to be encountered in executing the plan.

The company’s proposals appear to exceed by a modest margin the proposal by TOC. It offers \$500,000.00 per year in rent and the taxation available from its improvements, which are more extensive. The request for TIFF financing of the project has been dropped and, with

the movement of the improvements for the hotel and office space (as well as the parking) off of the pier, the costs for structural repair have risen.²⁰

The current status of the financial proposals for each proposer are somewhat difficult to assess, because we have had difficulty in creating an apples to apples to comparison. OP proposes \$500,000.00 in rent, compared to \$300,000.00 from TOC. I believe TOC expects to share revenues which OP does not. Comparing likely taxable improvements, OP is building a larger hotel, the office buildings are equivalent, I expect that OP would have a higher taxable value for the parking facilities it will need to build, and the “tug boat” pier is several million additional dollars.

I am not recommending approval of the TOC Compass Park commercial construction, although, if approved that would add taxable value to the TOC proposal.

In general, it appears to me that, entering the negotiation phase of this project, the OP values are somewhat higher.

Marine Uses. The OP distinguished itself on the marine issues.

First, OP brings its own cruise ship business to Portland. It proposes to operate a cruise port facility and expects to integrate operations with the Ocean Gateway terminal. With operations in other northern ports, there is good reason to believe that the cruise business would be reasonably successful. OP claims its relationships with major cruise ship operators will assist it in maintaining a steady and growing cruise ship port of call business.

Second, OP has resolved many of the conflicts on the eastern pier edge among vessels and with public access by a more limited program of access and by proposing to construct a new “tug boat” pier²¹ to serve the tug boat fleet and its proposed intercoastal fast ferry.

²⁰ I presume this is true because the cost of the structural support for the pier is no longer included in the construction cost of the buildings, which are now closer to Commercial Street.

²¹ When the CDC was conducting hearings on the zoning changes early last year, some of the tug boat company operators testified that they believed (1) it was not practical to relocate the tug boat fleet “down river” to other possibly available

Third, the fast ferry as intercoastal transportation and the whale watching businesses, which reflect similar OP operations in other ports, bring new business life to the marine economy. The investments in these new businesses are said to be substantial and in addition to the funding identified in the OP proposal.

Finally, in counterpoint, I repeat the criticism made of the TOC compliance plan for the 50% rule, which applies in equal force to the OP proposal. Hopefully the continuing development of plans by either proposer will seek better marine business development solutions to honor both the spirit and the letter of that rule, and to provide new strength to the Portland working waterfront economy.

Public Access. The OP plan shows public access, both passive and active, in a vein similar to the TOC proposals. Public use by visitors and residents can be expected at the parks at Commercial Street and in Compass Park and at an esplanade extending atop the existing shed building. The active uses include the fast ferry and whale watching businesses, a farmer's and fisherman's coop, a museum and other uses which are likely to attract wider public use of the pier.

berthing, and (2) they hoped to seek a public/private agreement to construct a pier so that congestion at the Maine State Pier berth could be resolved.