

**PORT ORDINANCE NO. 4442**

**ORDINANCE APPROVING THE FIRST SUPPLEMENTAL AGREEMENT WITH TRAPAC, LLC FOR THE BERTHS 25-33 MARINE TERMINAL, TO MODIFY COMPENSATION, CAPITAL IMPROVEMENT OBLIGATIONS, AND OTHER TERMS, RESULTING IN MINIMUM ANNUAL RENT OF APPROXIMATELY \$17.6 MILLION.**

**WHEREAS**, the Port of Oakland ("Port") entered into that certain Berths 25-33 Non-Exclusive Preferential Assignment Agreement with TraPac, LLC (hereafter, "TraPac") dated for reference purposes as of October 27, 2016 (the "NEPAA") to expand TraPac's previous terminal into Berths 25-26, portions of Berth 24, and portions of Berth 33; and

**WHEREAS**, the Port and TraPac have negotiated certain amendments to the NEPAA in connection with compensation, capital improvements, and other provisions as described in the Agenda Report; and

**WHEREAS**, the Board has reviewed and evaluated Agenda Report Item No. 5.4 (the "Agenda Report") to the Agenda of the September 28, 2017 regular meeting of the Board of Port Commissioners (the "Board") and related agenda materials, has received the expert testimony of Port staff, and has provided opportunities for and taken public comment; and

**WHEREAS**, in acting upon this matter, the Board has exercised its independent judgment based on substantial evidence in the record and adopts and relies upon the facts, data, analysis, and findings set forth in the Agenda Report and in related agenda materials and in testimony received.

**BE IT ORDAINED BY THE BOARD OF PORT COMMISSIONERS OF THE CITY OF OAKLAND AS FOLLOWS:**

**SECTION 1.** The Board hereby finds and determines the following:

A. The Premises were part of tide and submerged lands granted to the City of Oakland ("City") by the California Legislature pursuant to Chapter 654 of the Statutes of 1911 (the "1911 Act"); and

B. The 1911 Act granted such lands to the City for the express purpose of developing and operating wharves, docks, piers, slips, quays, and other utilities, structures and appliances necessary or convenient for the promotion of commerce and navigation and authorized the City to lease such lands for purposes consistent therewith. The lands granted in the 1911 Act were part of the original as well as the current "Port Area" as defined in 725 of the City Charter; and

C. Section 706 of the City Charter gives to the Board the complete and exclusive power and duty for and on behalf of the City to make provisions for the needs of commerce, shipping, and navigation of the Port and to promote the development, construction, and operation of

all water front properties including piers, wharves, sea walls, docks, and other improvements; and

D. The proposed First Supplemental Agreement to the NEPAA (the "1<sup>st</sup> Supp") will (i) facilitate the development and upgrade of certain Port improvements at the TraPac premises which will be beneficial to the Port as well as to the interests of commerce and navigation, (ii) reduce the TraPac premises in order to facilitate other Port improvement activities along Maritime and 7<sup>th</sup> Streets, and (iii) provide the Port with greater assurances for the development and operation of a more modern and expanded maritime container terminal consistent with the Port's duty to manage and administer the Premises in accordance with purposes of the 1911 Act and of Section 706 of the City Charter; and

E. The proposed First Supplemental Agreement is consistent with the Port's duty to use and manage Port property in trust for the State of California (the "Tidelands Trust"), and the private use of Port property pursuant to the First Supplemental Agreement will not interfere with the Tidelands Trust.

**SECTION 2.** The Board further finds and determines as follows:

A. The proposed 1<sup>st</sup> Supp was reviewed in accordance with the requirements of the California Environmental Quality Act ("CEQA"), and the Port CEQA Guidelines.

B. The proposed 1<sup>st</sup> Supp is categorically exempt from CEQA pursuant to Section 15301(p) of the Port CEQA Guidelines, which exempts renewals, extensions or amendments to leases or license and concession agreements or the execution of leases or license and concession agreements where the premises or licensed activity was previously leased or licensed to the same or another person, and involving negligible or no expansion of use beyond that previously existing. The minor boundary alteration to TraPac's premises (to accommodate future roadway improvements) will improve overall seaport-related operations. Furthermore, the modifications to maintenance and capital improvement obligations under the proposed 1<sup>st</sup> Supp are categorically exempt from CEQA pursuant to Section 15301(d), which addresses restoration or rehabilitation of deteriorated or damaged facilities to meet current standards of public health and safety, and Section 15302(c), which addresses replacement or reconstruction of existing utility systems or facilities involving negligible or no expansion of capacity.

**SECTION 3.** The Board hereby authorizes the Executive Director to:

A. Execute on behalf of the Board the 1<sup>st</sup> Supp with TraPac, LLC in accordance with the following key terms and conditions set forth in Attachment A to this Ordinance and with the financial terms set forth in Attachment B to this Ordinance.

B. Make such additions, modifications, or corrections as necessary to implement the NEPAA or to correct errors, subject to the

limitations set forth herein and provided that any such addition, modification or correction does not materially differ from the terms and conditions set forth herein and in the Agenda Report.

**SECTION 4.** This ordinance is not evidence of and does not create or constitute (a) a contract, or the grant of any right, entitlement or property interest, or (b) any obligation or liability on the part of the Board or any officer or employee of the Board. Unless and until a separate written agreement is duly executed on behalf of the Board as authorized by this ordinance, is signed as approved as to form and legality by the Port Attorney, and is delivered to other contracting party, there shall be no valid or effective agreement.

The Board of Port Commissioners, Oakland, California, September 28, 2017. Passed to print for one day by the following vote: Ayes: Commissioners Butner, Cluver, Martinez, Story, Yee and President Colbruno - 6. Excused: Commissioner Hamlin - 1. Noes: 0.

Daria Edgerly  
Acting Secretary of the Board

**Attachment A**

**Comparison of Key Terms Under Current Lease and Proposed First Supplement**

	<b>Current Lease</b>	<b>Proposed First Supplement</b>
<b>Premises</b>	<ul style="list-style-type: none"> <li>Approximately 123 acres of land</li> </ul>	<ul style="list-style-type: none"> <li>Reduction of 0.7 acres with no impact to compensation - new acreage approximately 122.3 acres</li> </ul>
<b>TraPac's Investment &amp; Completion of Capital Improvements</b>	<ul style="list-style-type: none"> <li>TraPac obligated to spend \$23m by April 30, 2018 and \$27.3m by October 31, 2020</li> <li>TraPac must complete certain removal/demolition improvements by October 31, 2017 and all other improvements by April 30, 2018 (except crane raise, which must be completed by October 31, 2020)</li> </ul>	<ul style="list-style-type: none"> <li>TraPac obligated to spend \$32m by June 30, 2018 and \$37m by October 31, 2020</li> <li>TraPac must complete all improvements by June 30, 2018 (except the crane raise, which must be completed by October 31, 2020)</li> <li>Changes to other sections for consistency only with these revised terms.</li> </ul>
<b>Completion of Port's Capital Improvements</b>	<ul style="list-style-type: none"> <li>October 31, 2017</li> </ul>	<ul style="list-style-type: none"> <li>June 30, 2018</li> </ul>
<b>Rent Free Period</b>	<ul style="list-style-type: none"> <li>Through August 31, 2017</li> </ul>	<ul style="list-style-type: none"> <li>Through June 30, 2018</li> </ul>
<b>Annual Fixed (Minimum) Rent After Rent Free Period</b>	<ul style="list-style-type: none"> <li>As shown in table below (Attachment B)</li> </ul>	<ul style="list-style-type: none"> <li>As shown in table below (Attachment B)</li> </ul>
<b>Variable Rent (Annual Activity Breakpoint)</b>	<ul style="list-style-type: none"> <li>CY1: 162,357 full TEUs</li> <li>CY2: 381,954 full TEUs</li> <li>CY3-14: 410,000 full TEUs</li> </ul>	<ul style="list-style-type: none"> <li>CY1: 162,357 full TEUs</li> <li>CY2: 244,893 full TEUs</li> <li>CY3-14: 410,000 full TEUs</li> </ul>
<b>Maintenance</b>	<ul style="list-style-type: none"> <li>Crane bus/electrical trench at Berth 25/26 portion of the Premises is Port's maintenance obligation</li> </ul>	<ul style="list-style-type: none"> <li>Crane bus/electrical trench across the entire Premises is TraPac's maintenance obligation</li> </ul>
<b>Reporting Requirements</b>	<ul style="list-style-type: none"> <li>The Port may only use data collected by TraPac associated with trucks trips at TraPac</li> </ul>	<ul style="list-style-type: none"> <li>The Port may use data collected by TraPac associated with trucks trips at TraPac terminals in</li> </ul>

	<b>Current Lease</b>	<b>Proposed First Supplement</b>
	terminals in a very limited capacity	more expanded capacity
<b>Value Engineering for TraPac's Capital Improvements</b>	<ul style="list-style-type: none"> <li>• Not specified</li> </ul>	<ul style="list-style-type: none"> <li>• TraPac permitted to design pavement with a useful life of 15-years (vs Port standard of 20-years)</li> <li>• TraPac permitted to transfer 10 reefers racks at B24 (outside its leasehold) to its Premises, at no cost, so long as TraPac incurs all relocation/repair costs. and title remains in Port</li> </ul>
<b>Remedying Sub-standard Improvements</b>	<ul style="list-style-type: none"> <li>• Not specified</li> </ul>	<ul style="list-style-type: none"> <li>• TraPac to replace sub-standard utility vaults it installed on its leasehold at expiration of Lease or when a change in land use occurs</li> </ul>
<b>Environmental Provisions</b>	<ul style="list-style-type: none"> <li>• Not specified</li> </ul>	<ul style="list-style-type: none"> <li>• Clarification that all soil excavated from the leasehold cannot be reused off-site and, if deemed excess, must be disposed at a landfill</li> </ul>
<b>Other Terms</b>	<ul style="list-style-type: none"> <li>• Not applicable</li> </ul>	<ul style="list-style-type: none"> <li>• Correction to TEU definition</li> <li>• Correction to Port's Secondary Use associated with vessel bunkering</li> <li>• TraPac's agrees to waive claims associated with unanticipated field conditions</li> </ul>

**Attachment B**  
**Comparison of Annual Rent under Current Lease and First Supplement**

The table below compares annual Total Rent (Fixed, Variable and Other) under the Lease in its current form and under the proposed First Supplement Agreement.<sup>1</sup> As shown, the biggest impact to the Port is in contract year ("CY") 2, in which the Port would receive approximately \$1.6 million less under the First Supplement in Total Rent. For the remaining term of the Lease, Staff projects that the Port will receive, on average, approximately \$160,000 less annually.

Note that the significant reduction in Fixed Rent in CY 2 under the First Supplement is partially offset by the projected increase in Variable Rent and Other Rent. This is due to the extension of the Rent Free Period under the First Supplement to June 30, 2018, whereby the TEU activity breakpoint is lower compared to the Lease in that year (244,893 TEUs versus 391,954 TEUs), as well as the assumption that TraPac will pay additional Other Rent on acreage at Berths 25/26 that it will use for operations rather than construction during this timeframe.

	Current Lease				First Supplement			
	Fixed	Variable	Other	Total	Fixed	Variable	Other	Total
CY1	\$4,782,419	\$2,312,910		\$7,095,329	\$4,782,419	\$2,312,910		\$7,095,329
CY2	\$13,255,499	\$1,788,057	\$324,783	\$15,368,339	\$7,173,628	\$4,666,347	\$1,948,700	\$13,788,675
CY3	\$14,471,873	\$2,466,282		\$16,938,155	\$14,061,846	\$2,466,282		\$16,528,128
CY4	\$16,601,873	\$2,687,808		\$19,289,681	\$16,221,846	\$2,687,808		\$18,909,654
CY5	\$19,637,398	\$3,146,865		\$22,784,263	\$19,418,241	\$3,146,865		\$22,565,106
CY6	\$19,637,398	\$3,395,778		\$23,033,176	\$19,418,241	\$3,395,778		\$22,814,019
CY7	\$19,637,398	\$3,649,670		\$23,287,068	\$19,418,241	\$3,649,670		\$23,067,910
CY8	\$19,637,398	\$3,908,639		\$23,546,037	\$19,418,241	\$3,908,639		\$23,326,880
CY9	\$19,637,398	\$4,172,788		\$23,810,186	\$19,418,241	\$4,172,788		\$23,591,029
CY10	\$21,328,165	\$4,797,597		\$26,125,762	\$21,315,146	\$4,797,597		\$26,112,744
CY11	\$21,328,165	\$4,797,597		\$26,125,762	\$21,315,146	\$4,797,597		\$26,112,744
CY12	\$21,328,165	\$4,797,597		\$26,125,762	\$21,315,146	\$4,797,597		\$26,112,744
CY13	\$21,328,165	\$4,797,597		\$26,125,762	\$21,315,146	\$4,797,597		\$26,112,744
CY14	\$21,328,165	\$4,797,597		\$26,125,762	\$21,315,146	\$4,797,597		\$26,112,744

<sup>1</sup> "Other" includes rent on the New Premises based on any area that TraPac uses for operations Rent Free Period (in which it will be charged Tariff rates).