

STAFF REPORT



ITEM NO. 7

CITY OF OCEANSIDE

DATE: July 16, 2008

TO: Honorable Mayor and City Councilmembers

FROM: Economic and Community Development Department

SUBJECT: **APPROVAL OF AMENDMENT 2 TO THE LEASE AGREEMENT WITH RUBY'S DINER, INC., AND AUTHORIZATION FOR THE CITY MANAGER TO EXECUTE THE AMENDMENT**

SYNOPSIS

Staff recommends that the City Council approve of Amendment 2 to the Percentage Lease Agreement with Ruby's Diner, Inc., for the use of city-owned real property located at the end of the Oceanside Pier, which among other items extends the term of the lease to expire June 30, 2013, changes the percentage rent structure, and provides for capital improvements to the property; and authorize the City Manager to execute the amendment.

BACKGROUND

The City of Oceanside and Ruby's Diner, Inc. ("Ruby's"), entered into a Percentage Lease Agreement for the building at the end of the Oceanside Pier, effective July 1, 1996, and amended by a First Amendment to the Percentage Lease Agreement, executed on March 20, 1996 (collectively "Lease"). The original term of the Lease was for ten years and expired on June 30, 2007. Ruby's has been occupying the premises on a month-to-month basis since July 1, 2007. Under the terms of the Lease, Lessee has three consecutive five-year options to extend the term of the Lease.

Ruby's has informed the City that they are interested in exercising the first of the three consecutive five-year options to extend the term of the Lease. Due to the slow progress of the redevelopment of the downtown area until recently, together with the age of the building and the need to make capital improvements and repairs, Ruby's also requested a change in some of the terms of the Lease. According to Ruby's these changes are needed to help Ruby's remain competitive in the marketplace until such time as the downtown area begins to reap the benefits of the recent redevelopment activity.

ANALYSIS

The essential terms and conditions of the proposed Amendment 2 to the Lease are as follows:

- 1) Extend the term of the Lease for an additional five years, expiring June 30, 2013.
- 2) Change the Percentage Rent structure as follows:

<u>Gross Sales per Year</u>	<u>Proposed % Rate</u>	<u>Current % Rate</u>
\$0 - \$1,500,000	6%	6%
\$1,500,001 - \$1,750,000	6%	7%
\$1,750,001 - \$2,000,000	6%	8%
\$2,000,001 - \$2,500,000	6%	9%
\$2,500,001 - \$2,750,000	7%	9%
\$2,750,001 - \$3,000,000	8%	9%
\$3,000,001 & above	9%	9%

- 3) Should the City decide to make tram service available on the Pier in the future, the City will provide a tram and Ruby's will provide the personnel, operate the tram service and maintain and repair the tram. The City will reimburse Ruby's for the cost of the personnel to operate the tram estimated at approximately \$13,000 per season.
- 4) Provide for a capital improvement project to the building and a reimbursement plan for a portion of the capital improvements performed by Ruby's.

The changes requested by Lessee will provide some initial rent relief to Ruby's by a change in the Percentage Rent structure and by offsets for reimbursement against the Percentage Rent. These changes are in lieu of having Ruby's leave after the expiration of the initial term of the Lease or provide a reduced level of service. It is anticipated that the capital improvements together with the completion of the recent and proposed redevelopment activity will allow the City to continue to have Ruby's as a tenant while allowing for the potential to collect an increased amount of revenue by restructuring the Percentage Rent language under the Lease.

FISCAL IMPACT

Inasmuch as the Minimum Rent amounts under the Lease will not change, the City will continue to receive at minimum \$87,500 per year through June 30, 2011 and increased to \$95,000 as of July 1, 2011. The five year extension of the Lease provides a total minimum rent amount of \$445,000. The total rental to the City based on percentage rent payments subject to the proposed adjustments thereto, will most likely exceed said amount. This assumption is based on the percentage rent payments made by Ruby's during the initial term of the Lease; however, the exact amount cannot be determined at this time.

INSURANCE REQUIREMENTS

Ruby's will be required to maintain the City's standard insurance requirement over the term of the lease.

COMMISSION OR COMMITTEE REPORT

Does not apply.

CITY ATTORNEY ANALYSIS

The referenced documents have been reviewed by the City Attorney and approved as to form.

RECOMMENDATION

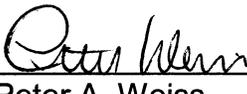
Staff recommends that the City Council approve of Amendment 2 to the Percentage Lease Agreement with Ruby's Diner, Inc., for the use of city-owned real property located at the end of the Oceanside Pier, which among other items extends the term of the lease to expire June 30, 2013, changes the percentage rent structure, and provides for capital improvements to the property; and authorize the City Manager to execute the amendment.

PREPARED BY:



Douglas E. Eddow
Real Estate Manager

SUBMITTED BY:



Peter A. Weiss
City Manager

REVIEWED BY:

Michelle Skaggs Lawrence, Deputy City Manager

Jane McVey, Economic & Community Development Director

Donald L. Hadley, Deputy City Manager







SECOND AMENDMENT TO LEASE

This Second Amendment to Percentage Lease Agreement ("Second Amendment") dated July 16, 2008, is made by and between the City of Oceanside ("City") and Ruby's Diner, Inc., a California corporation, ("Lessee").

RECITALS

WHEREAS, City and Lessee entered into that certain Percentage Lease Agreement on City-owned Real Property Located at the end of the Oceanside Pier, executed on March 20, 1996, and amended by the First Amendment to the Percentage Lease Agreement, dated June 5, 1996 (hereinafter collectively the "Lease");

WHEREAS, Pursuant to Section 2.02 of the Lease, Lessee was granted three (3) consecutive five (5) year options to extend the term of the Lease;

WHEREAS, the original term of the Lease expired on June 30, 2007, and Lessee has been occupying the Premises as a month-to-month tenancy;

WHEREAS, Lessee has notified City that it is desirous of exercising the first of the three (3) consecutive five (5) year options to extend the term of the Lease; and

WHEREAS, City and Lessee are desirous of amending certain provisions of the Lease as part of Lessee's exercise of the first of the three (3) consecutive five (5) year options to extend the term of the Lease.

NOW, THEREFORE, in consideration of the covenants and conditions contained herein, the parties hereto agree as follows:

AGREEMENT

1. SECTION 1: USES, Subsection 1.02 Uses. The following language is added after the first sentence in said Subsection:

"The City is agreeable to allowing Lessee to utilize a portion of the second floor space for additional storage, provided Lessee prepares a detailed diagram and description of the use of the space for City's prior written approval. Lessee will comply with all applicable ordinances and regulations."

2. SECTION 2: TERM, Subsection 2.01 Commencement. This subsection is deleted in its entirety and is replaced with the following:

“The original ten (10) year term of the Lease commenced on July 1, 1996 with an original expiration date of June 30, 2007, which was extended on a month-to-month basis from July 1, 2007 to June 30, 2008. The term of the Lease is hereby extended an additional five (5) years, expiring at 11:59 p.m. on June 30, 2013.”

3. SECTION 2: TERM, Subsection 2.02 Renewal Options. This subsection is amended by deleting the first sentence in its entirety and replacing the same with the following:

Lessee shall have two (2) remaining consecutive five (5) year options to extend the term of this Lease provided that Lessee is not in default of this Lease at the time of exercise of any such option.

All other terms of Subsection 2.02 shall remain in full force and effect, except that the reference to “third option” in the third paragraph of Section 2.02 is hereby changed to “final option.”

4. SECTION 3: RENT, Subsection 3.02 Rent. Subsection c is hereby deleted in its entirety and replaced with the following:

“c. Percentage Rent. Beginning July 1, 2008, during the term of this Lease and any extension thereof, Lessee shall pay to City monthly, per the Lease, Percentage Rent equal to the percentage rate set forth below multiplied by the corresponding level of Gross Income (as defined in Subsection 3.02d below) for the prior month, less Minimum Rent paid for such prior month. Lessee shall pay Percentage Rent commencing when Lessee is open for business.

<u>Gross Sales per Year</u>	<u>Percentage Rate</u>
\$2,500,000 and below	6%
\$2,500,001 - \$2,750,000	7%
\$2,750,001 - \$3,000,000	8%
\$3,000,001 and above	9%”

5. SECTION 7: SPECIAL PROVISIONS, Subsection 7.11 Tram. This Subsection is deleted in its entirety and replaced with the following:

“7.11 Tram.

“a. Tram Service. If and when the City decides, in its sole discretion, to make tram service available, City may ask Lessee to provide the tram service, and Lessee shall provide tram service on the pier to transport Lessee’s patrons and other persons using the pier in accordance with the terms and conditions set forth herein. City shall, at no charge to Lessee, provide Lessee with one (1) tram in good condition and repair for such purpose. City shall also, at no charge to Lessee, provide an area adjacent to the pier, which location does not cause the tram to travel on public streets in which to store the tram during non-operating hours. The tram shall operate only on the pier and not on

public streets. Lessee agrees to comply with all applicable ordinances, rules and regulations.

“b. Related Expenses. All other costs to operate the tram shall be the responsibility of the Lessee, which costs shall include, but not be limited to, employing the operators of the tram, maintaining and servicing the tram, and providing insurance for tram operations. City shall reimburse Lessee (via a rent credit as set forth below) for the hourly labor cost to operate the tram (defined as a base wage plus all related benefits and costs, including without limitation, Workers’ Compensation Insurance, taxes, benefits, etc.), which total cost shall not exceed Fifteen and No/100 Dollars (\$15.00) per hour for the period ending June 30, 2009, plus annual increases, which Lessee shall make commercially reasonable efforts in its labor negotiations to minimize; provided, however, with respect to each twelve (12) month period following June 30, 2009, in no event shall reimbursement by City for such labor costs exceed an amount equal to Seventeen and No/100 Dollars (\$17.00) per hour plus the increase in the Consumer Price Index (“CPI”) since July 1, 2008. The CPI shall be the Consumer Price Index published for the San Diego Metropolitan Area. Each month Lessee shall deduct from Minimum Rent coming due the total labor costs incurred by Lessee to operate the tram during the prior month, provided Lessee submits to City a written report which itemizes the hourly labor costs incurred for said previous month. For purposes of calculating Percentage Rent, any such deduction from Minimum Rent shall be deemed Minimum Rent paid.

“c. Other. Lessee may charge for the tram service on the pier (which amount shall be subject to City’s prior reasonable approval) and Lessee shall be entitled to keep all revenue generated from the operation of the tram service on the pier to help defray Lessee’s cost to maintain and service the tram. Lessee shall provide a detailed monthly report to City, which report shall set forth the daily number of users of the tram service and the revenue related thereto. The hours of operation for the tram service shall be at the sole but commercially reasonable discretion of City, provided, however, (i) Lessee shall not be obligated to operate the Tram during any part of January, February, March, April, October, November, December, the period from May 1 through the Friday immediately preceding Memorial Day, and the period starting with the day immediately after Labor Day and ending September 30 and (ii) should City decide that the tram service needs to be operated by Lessee during the period beginning with the Saturday immediately preceding Memorial Day and ending Labor Day, the City shall do so based on a specific number of consecutive days of the week during said period and the hours of each day, but no less than an eight (8) hour continuous time period on any given day. The intent of selecting the period of operation by such criteria is to give Lessee sufficient opportunity to staff the operation of the tram, allow the City and Lessee to budget accordingly and to provide ample time to notify the users of the tram service of its availability. The City shall give Lessee at least thirty (30) days written notice prior to the beginning of said period in each lease year of its decision to have the tram operational. Revenue related to tram operations shall not be Gross Income.”

6. Additional Lease Language. The following is added to SECTION 7: SPECIAL PROVISIONS:

“7.14 Capital Improvements.

“a. Capital Improvement Requirements. Lessee has performed, or shall perform within the next twelve (12) months, the following capital improvements and/or replacements to the Premises: roof repair/replacement; rebuild/replace flooring & subfloor; repair/replace HVAC system; repair/replace water and wastewater related items; and repair/replace other items at the Premises to operate and maintain said Premises in a reasonable condition similar to other Ruby’s Restaurant location on piers (collectively, “Capital Improvements”). Lessee shall provide to City a detailed list of the scope of Capital Improvements that Lessee has performed or will perform and the related cost thereof for City’s prior written approval. Lessee shall perform said work in compliance with all applicable ordinances, rules and regulations.

“b. Capital Improvement Reimbursements. Upon written approval of the scope of the Capital Improvements (and the related costs thereof), and upon the completion of said work to City’s reasonable satisfaction, City shall reimburse Lessee the following, but in no event more that the Reimbursement Maximum for each category of Capital Improvements:

<u>“Capital Improvement Item</u>	<u>Reimbursement Maximum</u>
Roof repair/replacement	\$18,000
All other Capital Improvements	\$20,000

“c. Reimbursement Procedure. The costs of each Capital Improvements, as limited by Subsection b above, shall be amortized on a straight-line basis without any interest (i) over five (5) years as to expenditures incurred prior to July 1, 2008, and (ii) over the remainder of the extension period (defined as July 1, 2008 through June 30, 2013) as to expenditures made on or after July 1, 2008. During the extension period Lessee shall offset said amortized amount against the monthly Percentage Rent due”.

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7. All other terms, conditions, covenants and provisions of the Lease shall remain in full force and effect.

IN WITNESS WHEREOF, the parties hereto for themselves, their successors and assigns do hereby agree to all of the terms, covenants, conditions and provisions as set forth herein as of the date first written above.

“CITY”

City of Oceanside

By: _____
City Manager

APPROVED AS TO FORM

By:  _____, ASST.
City Attorney

“LESSEE”

Ruby’s Diner, Inc.
a California corporation

By:  _____

Name: Douglas S. Cavanaugh

Title: President

By:  _____

Name: Ralph L. Kosmides

Title: Secretary

NOTARY ACKNOWLEDGEMENT OF LESSEE’S SIGNATURE(S) MUST BE ATTACHED

Certificate Of Acknowledgment

State of California

County of Orange

On June 26, 2008, before me, Genel McLaughlin
(name and title of the officer)

personally appeared Douglas S. Cavanaugh

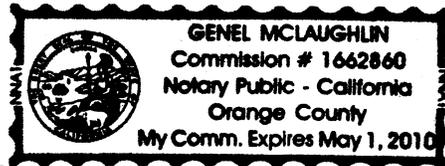
who proved to me on the basis of satisfactory evidence to be the person(s) whose name is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature *Genel McLaughlin*

(Seal)



ALL-PURPOSE ACKNOWLEDGMENT

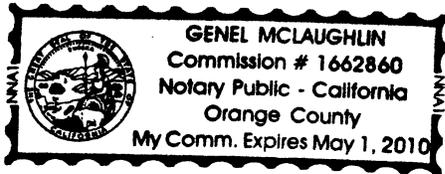
State of California

County of Orange

On June 27, 2008, before me, Genel McLaughlin, Notary Public,
personally appeared Ralph L. Kosmides, who proved to me on the basis

of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.



WITNESS my hand and official seal.

Genel McLaughlin
Notary Signature