

STAFF REPORT*CITY OF OCEANSIDE*

DATE: January 8, 2014

TO: Honorable Mayor and City Councilmembers

FROM: Property Management

SUBJECT: **APPROVAL OF AMENDMENT 3 TO THE LEASE AGREEMENT WITH RUBY'S OCEANSIDE, LTD.**

SYNOPSIS

Staff recommends that the City Council approve Amendment 3 to the Percentage Lease Agreement with Ruby's Oceanside, Ltd., which provides for an additional lease extension option, construction of additional capital improvements to the building at the end of the Oceanside Municipal Pier, and amends the parking payment validation rent offset language; and authorize the City Manager to execute the amendment.

BACKGROUND

The City of Oceanside and Ruby's Oceanside, Ltd., formerly 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, and a Second Amendment to Lease, executed on July 17, 2008 (collectively the "Lease"). The current term of the Lease expires on June 30, 2018, and provides for one additional five-year option to extend the term of the Lease through June 30, 2023.

Prior to the Lease with Ruby's the City unsuccessfully tried to operate a high-end seafood restaurant at the end of the Oceanside Pier. Through a Request for Proposals process, Ruby's was selected and the Lease was entered into. Due to the risk involved in operating at a previously unsuccessful location, the rental rate for Ruby's was established as a percentage of gross revenue generated at the site, in addition to other incentives such as a parking credit for its patrons to park in the adjacent City parking lots.

Notwithstanding numerous years of slow growth in the Downtown area during its initial Lease term, Ruby's established itself as an "icon" in the City of Oceanside at the end of the Municipal Pier. With the continued changes and growth in the Downtown area and the projected development in the near future, Ruby's has informed the City of its desire to remain at the Oceanside Municipal Pier location.

As part of its decision to stay, Ruby's is desirous of making additional capital improvements to the premises to remain competitive in the marketplace. In order to amortize the proposed additional capital improvements Ruby's has requested one additional five-year option to extend the term of the Lease. The City and Ruby's are also desirous of changing the parking provision in the Lease.

ANALYSIS

Amendment 3 to the Lease provides for one additional five-year option to extend the term of the Lease. This additional five-year option could extend the Lease to June 30, 2028. In consideration for this additional five-year option, Ruby's agrees to provide a minimum of \$100,000 in additional capital improvements to the premises over the next two years. These improvements include, but are not limited to, interior renovations such as adding upstairs dining, downstairs seating area upgrades, bathroom upgrades, and the purchase of new refrigeration equipment and state-of-the-art grease trap system.

Under the current rent structure, in fiscal year 2012-13, as the overall economy improved, Ruby's generated over \$221,000 in rental revenue to the City after generating less than \$175,000 in the prior fiscal year. By making additional capital improvements to enhance the appearance of the building and provide new amenities to its customers, such as renovating the upstairs dining area, Ruby's is anticipating increased revenue, which in turns increases rent to the City over the remaining term of the Lease as well as any future extensions.

Additionally, the original terms of the Lease allows Ruby's to offset against rent, the expense incurred by Ruby's to validate the cost of parking in the City's pay parking lots that is incurred by its patrons in order to dine at the restaurant. Due to the historical data accumulated over the years, in lieu of the parking validation program to determine the rent offset, a flat annual rate will be used. This flat rate credit will save time and effort by staff in not having to monitor the thousands of parking payment stubs that are issued by the pay machines annually and then submitted by Ruby's to reconcile the rent credit.

As a result of replacing the original parking payment validation rent offset language, staff reconciled the parking payment stubs submitted to the City over the years and determined that Ruby's had incorrectly submitted parking payment stubs supporting the rent offset that they were requesting. Upon staff's reconciliation of the submitted parking stubs, Ruby's has agreed to make a one-time payment in the amount of \$10,000 to address some of the incorrect rent offset that they received.

FISCAL IMPACT

At this time there is no direct known additional fiscal impact resulting from the terms of Amendment 3 other than the \$10,000 one-time payment to the City for the parking validation rent offset adjustment. Said amount will be deposited into Tidelands account No. 1101.4351.0004.

Should Ruby's exercise the additional five-year option to extend the term of the Lease, the rent for said period will be increased to the then fair market value. As a result of the additional capital improvements to be constructed by Ruby's over the next two years, the City could receive additional income due to increased percentage rent resulting from an increase in patrons at Ruby's resulting from the enhancement and renovation of the premises. However, at this time, the increase in percentage rent cannot be determined.

INSURANCE REQUIREMENTS

Ruby's will be required to maintain the City's standard insurance requirements 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 Amendment 3 to the Percentage Lease Agreement with Ruby's Oceanside, Ltd., which provides for an additional lease extension option, construction of additional capital improvements to the building at the end of the Oceanside Municipal Pier, and amends the parking payment validation rent offset language; and authorize the City Manager to execute the amendment.

PREPARED BY:



Douglas E. Eddow
Real Estate Manager

SUBMITTED BY:

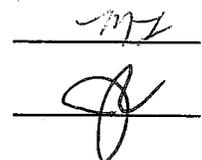


Steven R. Jepsen
City Manager

REVIEWED BY:

Michelle Skaggs Lawrence, Deputy City Manager

James R. Riley, Financial Services Director



Attachments: Amendment 3 to Percentage Lease Agreement

THIRD AMENDMENT TO LEASE

This Third Amendment to Percentage Lease Agreement (“Third Amendment”) dated January 8, 2014, is made by and between the City of Oceanside (“City”) and Ruby’s Oceanside, Ltd., a California limited partnership, (“Lessee”).

RECITALS

WHEREAS, City and Ruby’s Diner, Inc., a California corporation (“Original Tenant”) entered into that certain Percentage Lease Agreement for the city-owned building located at the end of the Oceanside Pier, executed on March 20, 1996, amended by the First Amendment to the Percentage Lease Agreement, dated June 5, 1996, and amended by the Second Amendment to Lease, dated July 16, 2008 (hereinafter collectively the “Lease”). Lessee has succeeded to the interest of Original Tenant;

WHEREAS, pursuant to Section 2.02 of the Lease, Lessee has two (2) five-year options to extend the term of the Lease and has exercised one of such options to extend the term of the Lease through June 20, 2018;

WHEREAS, Lessee is requesting one (1) additional five-year option to extend the term of the Lease and is desirous of making additional capital improvements to the PREMISES (fully and/or initially capitalized terms used in this Amendment and not defined herein shall have the meaning assigned thereto in the Lease); and

WHEREAS, in consideration of adding to and amending certain provisions of the Lease, the City is agreeable to granting Lessee one (1) additional five-year option 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 2: Term, Subsection 2.01 Commencement.** This subsection is deleted in its entirety and is replaced with the following:

The original term of the Lease commenced on July 1, 1996 and expires at 11:59 p.m. on June 30, 2018.”

2. **Section 2: Term, Subsection 2.02 Renewal Options.** This subsection is deleted in its entirety and is replaced with the following:

Lessee shall have two (2) remaining consecutive five-year options to extend the term of this Lease provided that Lessee is not in default of the Lease at the time of exercise of any such option. Occupation of the PREMISES under any option period shall be under the same terms, covenants and conditions as applicable to the original term except that the rent shall be determined pursuant to paragraph 3 of this Amendment below.

In order to exercise an option, Lessee must provide City written notice which must be received by the City Manager no later than one hundred eighty (180) days prior to the expiration of the then existing term. Lessee shall have no right to exercise an option if, at the time Lessee attempts to exercise the option, Lessee is in default and does not cure the default within thirty (30) days or Lessee fails to notify City as provided above. Lessee waives all subsequent options if any prior option is not exercised. The options granted in this section are personal to Lessee (and approved assignees of Lessee) and may not be exercised or be assigned, voluntarily or involuntarily, by or to any other person or entity other than Lessee, the options are not assignable separate and apart from the Lease.

3. **Section 2: Term**, shall be amended by adding the following **Subsection 2.02B Rent for Renewal Terms**.

a. **Rent until end of First Option to Extend Period.** The Minimum Annual Rent and Percentage Rent through June 30, 2023 shall be the same as the existing Minimum Annual Rent and Percentage Rent amounts as set forth in the Lease.

b. **Rent for Second Option to Extend Period.** Upon providing City with its written request for the second option to extend the term of the Lease (i.e., through June 30, 2028), no later than thirty (30) days from the receipt thereof, the City Manager shall in writing provide Lessee with the City's calculated fair market rent which the City is willing to accept for the PREMISES. No later than thirty (30) days after the City Manager provides Lessee with the City's fair market rental rate Lessee shall provide City with its determination of acceptance or rejection of the City's calculated fair market rent. In the event the parties cannot agree on the fair market rent, each party shall select an MAI appraiser, which appraisers shall select a third MAI appraiser who will make a determination of the fair market rent for the PREMISES, which rent shall be the recalculated Minimum Annual Rent for the PREMISES for the applicable extension term; provided, however, in no event shall the rental rate be less than that required during the immediate preceding renewal term. The City and Lessee shall split the cost of the appraisal for the recalculated fair market rent, if required.

4. Additional Lease Language. **Grease Maintenance**.

As a result of the fats, oils and grease ("FOG") created by Lessee at the PREMISES, which FOG is subsequently deposited into the City's sewer lift station located at the base of the Municipal Pier ("Lift Station"), the Water Utilities Department of the City of Oceanside ("Water Utilities") is required to expend additional time and incur additional maintenance costs to regularly maintain the Lift Station under said circumstances. As part of this ongoing regular maintenance performed by the Water Utilities, Lessee agrees

to pay Water Utilities, on a monthly basis, in arrears, a share of such regular maintenance cost caused by Lessee's deposit of its FOG into the Lift Station, which cost shall be reasonably determined by Water Utilities. Notwithstanding the above, said regular maintenance by Water Utilities shall in no way relieve Lessee of its responsibility and liability regarding the remove of FOG from the PREMISES and the maintenance of Lessee's grease trap and other facilities at the PREMISES, pursuant to the terms of the Lease.

5. **Section 7: Special Provisions, Subsection 7.10 Parking**. shall be deleted in its entirety and replaced with the following:

Lessee shall be entitled to offset against Rent, the cost of parking paid by its patrons for parking on City controlled public parking lots in the downtown area of the City ("Public Parking Lots"), in the annual amount of Twenty Thousand and No/100 Dollars (\$20,000.00). Said amount is hereinafter referred to as the "Annual Parking Offset". If Lessee desires to reimburse its patrons for parking charges, Lessee shall be solely responsible to implement a system to give parking charge credits to patrons. Provided, however, if Lessee does not reimburse its patrons for parking charges, Lessee shall not be entitled to said Annual Parking Offset. The parking rates paid by Lessee's employees for parking in the Public Parking Lots shall not be included as part of the Annual Parking Offset.

Commencing on the first day of the month following the execution of this Amendment, Lessee may offset said Annual Parking Offset against the Rent that is due for the months of October, November, December and January, in equal installments. Provided, however, in no event shall Lessee be entitled to a Rent credit in the event such Annual Parking Offset is greater than the Rent that is due for said months. Said Annual Parking Offset shall be indexed to the current parking rates at the Public Parking Lots, as reasonably determined by the City of Oceanside. Any such increase in the public parking rates shall increase the Annual Parking Offset by the same percentage (e.g., if the parking rates increase by 3%, the Annual Parking Offset shall be increased by 3% for each applicable one-year period).

The City agrees to provide parking for Lessee, its employees and patrons, at Public Parking Lots, subject to the parking rates charged to the general public and subject to the City's right to relocate or designate new or different parking areas, provided, they are in reasonably close proximity to the Premises.

6. **Additional Lease Language**. Prior to the date of this Amendment, a dispute has arisen between the City and Lessee regarding parking reimbursement offsets. In full and final satisfaction of said dispute, the following **Subsection 7.11 Parking Reimbursement**, is added to **Section 7: Special Provisions** of the Lease:

Lessee and City acknowledge that Lessee owes City an agreed upon amount of Ten Thousand and No/100 Dollars (\$10,000.00) for an overcharge of parking reimbursement offsets in the past. Lessee agrees to pay said amount in four (4) equal installments,

beginning on the fifteenth (15th) of the month following the execution of this Amendment and continuing for the following three (3) months thereafter.

7. Additional Lease Language. The following **Subsection 7.15 Additional Improvements**, is added to **Section 7: Special Provisions** of the Lease:

a. **Additional Improvement Requirements.** Lessee shall spend, within the next twenty-four (24) months following the execution of this Amendment, the minimum amount of One Hundred Thousand and No/100 Dollars (\$100,000.00) for improvements and/or replacements to the PREMISES (the "Additional Improvements"), to include but not be limited to:

1. Renovation of the upstairs dining room to include:
 - Remove the "Tiki Bar" and related motif
 - Installation of an additional 4 – 5 tables for "flex seating"
 - Change décor to traditional "red and white" to match décor downstairs
 - Installation of a serve work/beverage station
2. Upgrade/renovate the hardware on the twenty-two (22) windows on the first floor of the restaurant
3. Replace the awning around the exterior of the restaurant
4. Paint the exterior of the restaurant
5. Selected booth replacement/repairs in the restaurant downstairs
6. Guest bathroom renovations to include:
 - Use of traditional "white" tile work and appearance improvements
 - Modification/replacement of stall doors
7. Upgrade the walk-in cooler
8. Replacement of refrigeration units
9. Installation of a new Thermaco "Big Dipper" IS Point Source Automatic Grease Removal System (W-200 IS) – subject to compliance with all applicable costs and regulations, including but not limited to San Diego County Department of Health

b. **Approval of Additional Improvements.** Lessee shall provide to City a detailed list of the scope of the Additional Improvements that Lessee will perform together with the related estimated cost thereof for City's prior written approval. Lessee shall perform said work in compliance with all applicable rules and regulations.

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8. **Miscellaneous.** From and after the mutual execution and delivery of this Amendment, the term "Lease" as used in the Lease and this Amendment shall mean and refer to the Lease as amended hereby. Except as amended hereby, all other terms, conditions and 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: *Robert Hamilton, ASST.*
City Attorney

"LESSEE"

Ruby's Oceanside, Ltd.,
a California limited partnership

By: Ruby's SoCal Diners, LLC
a Delaware limited liability company,
General Partner

By: Ruby's Diner, Inc.,
a California corporation,
Managing Member

By: *[Signature]*

Name: DOUGLAS S. CAVANAUGH

Title: CEO

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

ACKNOWLEDGMENT

State of California
County of Orange)

On December 24, 2013 before me, Rick Bartlett - Notary Public
(insert 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(s) 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 

(Seal)

