To: Mayor Farrer and the Honorable Members of the City Council

Prepared by: Elizabeth Shavelson, Assistant to the City Manager

Approved by: Reva Feldman, City Manager

Date prepared: December 17, 2019  Meeting date: January 13, 2020

Subject: Third Amendment to Ground Lease for 3939 Cross Creek Road (Malibu Lumber Yard)

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RECOMMENDED ACTION: Approve Third Amendment to Ground Lease for 3939 Cross Creek Road (Malibu Lumber Yard).

FISCAL IMPACT: The Ground Lease provides a rental income stream to the City. In Fiscal Year 2018-2019, the City received $1,019,813 in revenue from the base rent established in the Ground Lease. Additionally, the City receives a percentage rent equal to 30% of the amount by which site rents exceed $2,268,000. In Fiscal Year 2018-2019, the City received $63,000 in percentage rent. The City uses revenue from the Malibu Lumber Yard and the other commercial tenants for debt service payments applicable to the purchase of the Legacy Park site, maintenance of Legacy Park and high priority water quality projects.

WORK PLAN: This item was not included in the Adopted Work Plan for Fiscal Year 2019-2020. This project is part of normal staff operations.

DISCUSSION: On June 9, 2008, the Council approved the Ground Lease for the former Malibu Lumber Yard site with Malibu Lumber LLC. The Council subsequently approved the First Amendment to the Ground Lease dated September 1, 2009. On June 11, 2012, the Council approved the sale of the ground lessee's leasehold interest in the Malibu Lumber Yard site by Malibu Lumber LLC to Glimcher Properties Limited Partnership, a Delaware Limited Partnership, and the transfer of the leasehold interest to its affiliated entity, Glimcher Malibu LLC, a Delaware Limited Liability Company and authorized the City Manager to execute the Second Amendment to the Ground Lease. On December 8, 2014, the Council approved the transfer of indirect ownership and/or control of the Malibu Lumber Yard Tenant, Glimcher Malibu LLC, a Delaware Limited Liability
Company, resulting from a merger between Washington Prime Group (WPG) and Glimcher Realty Trust.

WPG requested to amend the Ground Lease in order to modify provisions regarding rent, clarify obligations regarding Locally Based Subtenants and to modify and clarify obligations relative to permitted uses of the Leased Premises.

The Council discussed the proposed lease terms in a closed session on August 26, 2019, and directed staff to amend the Ground Lease.

The Third Amendment to the Ground Lease incorporates the following:

- **Percentage Increases of Minimum Rent:** Currently, the minimum rent is set to increase every five years based on the Consumer Price Index at a rate no lower than 5% and no higher than 20%. The amendment establishes that the percentage increases of minimum rent can be no more than 10%.

- **Permitted Uses:** The Ground Lease originally included a provision that the retail center contain a horticultural component featuring the sales of decorative plants while stipulating that the City cannot unreasonably withhold consent to the elimination of the horticultural component if such component becomes uneconomical. The amendment removes references to a horticultural component and includes references to office, medical, personal services and restaurants while noting that all uses are subject to the terms of the lease, the Malibu Municipal Code and the allowable wastewater allocations.

- **Locally Based Subtenants:** The amendment updates the Ground Lease section on locally based subtenants and includes language stipulating that each existing locally based subtenant have the right to remain for the duration of their lease or five years from the date of Third Amendment whichever is later.

The Third Amendment to the Ground Lease will become effective on February 1, 2020.

**ATTACHMENTS:** Third Amendment to the Ground Lease with WPG Malibu, LLC for 3939 Cross Creek Road (Malibu Lumber Yard).
THIRD AMENDMENT TO GROUND LEASE

LANDLORD: THE CITY OF MALIBU, a municipal corporation

TENANT: WPG MALIBU LLC, a Delaware limited liability company

LEASE DATE: June 9, 2008

THIS THIRD AMENDMENT TO GROUND LEASE ("Amendment") is dated, for reference purposes only, as of December 16, 2019, by and between THE CITY OF MALIBU, a municipal corporation ("Landlord") and WPG MALIBU LLC, a Delaware limited liability company ("Tenant"). Landlord and Tenant are sometimes herein referred to individually as a "Party" and collectively as the "Parties."

RECITALS

WHEREAS, Landlord entered into that certain Ground Lease dated June 9, 2008 (the "Lease") with Tenant’s predecessor in interest, MALIBU LUMBER, LLC, a California limited liability company, for certain real property located in the City of Malibu, County of Los Angeles, State of California, commonly known as the Malibu Lumber Yard, and more particularly described in the Lease (the "Leased Premises");

WHEREAS, Landlord and Tenant now wish to enter into this Amendment in order to amend the Lease to modify provisions regarding Rent, clarify obligations regarding Locally Based Subtenants and to modify and clarify obligations relative to permitted uses of the Leased Premises;

NOW, THEREFORE, in consideration of the mutual covenants herein contained and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Landlord and Tenant hereby agree as follows:

AGREEMENT

1. Percentage Increases of Minimum Rent. The phrase “one hundred and twenty percent (120%)” in the second and third paragraphs of Section 4.1.1.1 of the Lease shall be amended to state “one hundred ten percent (110%) and the phrase “twenty percent (20%) in the final sentence of Section 4.1.1.1 of the Lease shall be amended to state “ten percent (10%). As amended, Section 4.1.1.1 of the Lease shall provide the Minimum Rent following an Adjustment Date shall not be any less than one hundred and five percent (105%) and not more than one hundred ten percent (110%) of the Minimum Rent in effect immediately prior to any applicable Adjustment Date (i.e., as of each Adjustment Date, the Minimum Rent then in effect shall be increased by the percentage increase in the CPI during the prior five (5) year period; provided that, in any event, each such increase shall be not less than five percent (5%) or more than ten percent (10%) of the Minimum Rent in effect prior to such adjustment).
2. **Permitted Uses.** Section 5.1 of the Lease is hereby amended to remove the “horticultural component” of the Center’s operation. Accordingly, the second paragraph of Section 5.1 is deleted in its entirety and replaced with the following:

Notwithstanding anything to the contrary or that appears to be to the contrary in this Lease, including the general provisions of Section 5.1 and the provisions of Sections 5.2 and 5.3 below, Tenant hereby covenants on behalf of itself, and its successors and assigns, which covenants shall run with the land and bind every successor and assign in interest of Tenant, that Tenant and such successors and assigns shall use the Leased Premises solely for the purpose of constructing and operating a retail center, including, without limitation, selling goods, wares, merchandise and services of the type customarily sold in first class retail centers, with uses commonly found in first class retail projects (including office, medical, personal services, and restaurants), in accordance with and of the quality prescribed by this Lease and the Scope of Development; provided, that the foregoing use restriction shall not be construed or understood to limit or restrict in any manner public access to and use of the Leased Premises as contemplated and required by Section 5.5 below. Tenant hereby agrees that such use shall be conducted in compliance with all requirements of and conditions imposed by this Lease, all Governmental Restrictions applicable to the Property (including the City’s Municipal Code and in compliance with allowable wastewater allocation) and any approvals and permits issued by the City in connection with approval of the Improvements, including, without limitation, all conditions of approval or mitigation measures adopted or imposed by the City in connection with approval of the Improvements, which conditions and requirements are hereby incorporated by reference. Except as specifically provided herein, the Leased Premises shall be used for no other purpose without the prior written consent of the Landlord, which consent shall not be unreasonably withheld.

3. **Locally Based Subtenants.** Section 9.2.5 is hereby deleted in its entirety and all references and requirements associated with “Locally Based Subtenants,” “Local Preference Space,” or “Reduced Local Rents” are hereby removed from the Lease.

Notwithstanding the foregoing, Tenant acknowledges that there are two existing subleases between Tenant and Locally Based Subtenants, (1) Dance Star Entertainment, LLC, d/b/a Dance Star, formally d/b/a Malibu Dance Studio and (2) James Perse Enterprises, Inc., and this Amendment shall not terminate any rights an existing Locally Based Subtenant may have under such an existing sublease. Further, unless such Locally Based Subtenant is in default under its existing sublease, each existing Locally Based Subtenant shall have the right to remain in its respective leased premises for the duration of its respective lease, or five (5) years from the date of this Amendment, whichever is later, on the same terms and conditions as currently exist.
under their respective leases. Tenant shall enter into any necessary amendments to such Locally Based Subtenant leases to comply with this Section, and shall provide Landlord with evidence of same, within sixty (60) days of this Amendment. Such amendments shall be subject to Landlord’s approval pursuant to the terms of the Ground Lease.

4. **Integration of this Amendment and the Lease.** This Amendment and the Lease shall, for all purposes, be deemed to be one instrument. In the event of any conflict between the terms and provisions of this Amendment and the terms and provisions of the Lease the terms of this Amendment shall control and prevail. Except as expressly defined herein, all terms which are defined in the Lease shall have the same meaning in this Amendment.

5. **Authority.** Tenant and Landlord each represent and warrant to the other party that each individual executing this Amendment on behalf of Tenant or Landlord, respectively, is authorized to do so.

6. **Effect of Amendment.** Except as expressly modified or amended by this Amendment, the Lease and all terms, covenants, and conditions contained therein shall remain unchanged and in full force and effect.

7. **Entire Agreement.** This Amendment and the Lease, including all previous written amendments and extensions thereto, represent the final and entire agreement between Landlord and Tenant regarding the subject matter hereof and may not be contradicted by evidence of prior, subsequent, or contemporaneous oral communications or agreements of the Parties.

8. **Modification.** No amendment or modification to the Lease, as amended, shall be valid and binding unless in writing and executed by both Parties hereto.

IN WITNESS WHEREOF, the undersigned have executed this Amendment as of the day and year last set forth below.

**LANDLORD:**
CITY OF MALIBU, a municipal corporation

By: ______________________________________
Name: _____________________________________
Its: _________________________________________
Date: _______________________________________

**TENANT:**
WPG MALIBU LLC, a Delaware limited liability company

By: MALIBU LUMBER YARD REIT, LLC, a Delaware limited liability company, its sole member
By: ____________________________
Name: ____________________________
Its: _______________________________
Date: 12-16-19