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MEMORANDUM

TO: WHITTIER CITY COUNCIL

FROM: HOLLY C. WELLS

RE: RESOLUTION NO. 2026-035 AND ORDINANCE NO. 2026-004

CLIENT: CITY OF WHITTIER

CLIENT NO: 507456.96

DATE: JULY 28, 2026

I. INTRODUCTION

Ordinance No. 2026-004 (the "Ordinance") and Resolution No. 2026-035 (the "Resolution") were drafted at the direction of City Council to amend the City's leasing procedures to allow incumbent leaseholders and sublessees on City property to apply for direct negotiations with the City for leasehold interests on property owned or leased by the City. This memorandum summarizes the purpose, intent, and substance of the Ordinance and the Resolution and discusses the laws that govern and inform City Council's consideration of the proposed instruments.

II. SUMMARY AND BACKGROUND

On September 19, 2023, the City of Whittier adopted Ordinance 2023-003, which repealed outdated leasing provisions governing leases and subleases of City property and interests in City property. This ordinance was adopted after the City held three public hearings on the same to ensure maximum public participation, notice, and knowledge of the changes. The City knew any changes to its leasing policies would be highly contentious and of great interest to the community, especially the business community, and the City Administration. City Council wanted to ensure that all voices were heard during that process in 2023. Members of the business community attended these public hearings and shared comments regarding the process. Certain provisions were incorporated into the ordinance that allowed incumbent leaseholders an opportunity to apply for an exemption from competitive bidding. But an application was required to be submitted approximately one year before the expiration of a lease to ensure that a decision would be made regarding the future disposition of the property before the lease expiration. Further lease provisions were drafted to require City Council's approval of any long-term lease award, regardless of whether the lease was disposed of through a lease application process or competitive bidding.

The 2023 lease provisions require City Council to consider and annually update a Land Allocation Plan. The Land Allocation Plan requires City Council to identify City parcels available for lease/sublease and identify the method of disposition of the interest in available parcels. All leases/subleases that are not specifically subject to competitive bidding by City Council are leased through a lease application process. While the application process does not require competition, it does provide a method for City Administration to consider lease applications when more than one lease application was submitted for a single parcel.

On May 26, 2026, City Council adopted Ordinance No. 2026-002 suspending the City's Land Allocation Plan requirement through December 31, 2027. The suspension allowed the City to complete negotiations with the Alaska Railroad Corporation regarding land sales and exchanges that would necessarily affect the parcels addressed in the City's Land Allocation Plan. Although the Land Allocation Plan provisions are suspended, WMC 3.38.330 is still effective:

> Unless dedicated or reserved to another purpose, all real property including tide, submerged or shore lands to which the city has a right, title and interest as owner or lessee, or to which the city may become entitled, may be leased as provided in this chapter. In the case of any conflict between this chapter and any local, state or federal law governing the leasing of city lands, this chapter shall prevail to the greatest extent permitted by law.

However, City Council did not designate which City parcels are available for lease and how these leases will be awarded; yet its right to do so remains.

City Administration consulted with legal counsel on how to navigate expiring leases given the suspension of the Land Allocation Plan and the lack of Council direction on how parcels would be leased in its absence. While the Administration considered simply accepting lease applications on the parcels at issue, the criteria for considering lease applications is established by City Council in the Land Allocation Plan process under WMC 3.38.360. Thus, in light of the suspension of the Land Allocation Plan and the lack of criteria for considering a lease application, the City Manager proposed the use of the competitive bidding process, which has clear criteria identified in the Code that remains in effect despite the suspension of the Land Allocation Plan. In an attempt to address the lease issues as governed by the Code, Administration brought forward resolutions for extensions of all expiring leases, recommending that City Council extend leases where the leaseholder was operating a compliant business on the leased/subleased premises. Administration did not recommend extending leases where parcels were used for storage or where the existing leaseholder subleased property and the sublessee, rather than the current leaseholder, was engaged in business operations. Instead, Administration recommended that those leases expire without renewal, allowing the City to put those parcels out for competitive bid, to ensure the City could consider all options for the lease of such property and apply the criteria under the Code. Administration ultimately proposed that all leases be subject to competitive bidding once the lease, or the lease extension, expired – Legal Counsel confirmed Administration's approach was proprietary.

In furtherance of its approach, City Administration developed a comprehensive presentation for Council and the public regarding the proposed competitive bid process. Council members made it clear during Administration's presentation that it did not want to dispose of the properties via competitive bid. Instead, City Council wanted to explore other options that would allow incumbent leaseholders, many of which had built improvements on the leasehold property and had been operating businesses for decades, an opportunity to directly negotiate with the City for a new lease.

City Administration also attempted to allow at least one incumbent leaseholder to apply for an exemption from competitive bidding. Indeed, WMC 3.38.480 allows City Council, "upon written recommendation by the City Manager," to exempt the renewal of a lease from competitive bidding if "Council finds such an exemption serves the City's best interests." City Administration intended to recommend exemption for: (a) the parcels on which the incumbent leaseholders are directly operating businesses, and (b) those businesses were in full compliance with the lease terms, and (c) improvements were constructed and properly maintained. However, Legal Counsel advised Administration that this application process was no longer available because a lessee seeking such an exemption must submit a lease application and written request for a new lease at least one year before the expiration of their lease.

Despite recommendations by the City Manager that were grounded in the actual use and operations of incumbent leaseholders, City Council weighed different factors. City Council ultimately granted the lease extensions recommended by the City Manager as well as other lease extensions that were not recommended by the City Manager. City Council appeared to second-guess its direction regarding lease extensions at a subsequent meeting, passing recommending that the City Manager enter into short-term leases with all incumbent leaseholders to allow City Council to make changes to existing law. At least one Council member implied that Administration would refrain from removing improvements while City Council considered how to move forward. These comments by City Council created confusion among incumbent leaseholders and the Administration, who were unsure what action would be taken under the expired lease terms.

Legal Counsel informed City Council of the available options, including: (a) adopting a law to extend the time period for applying for an exemption from competitive bidding via ordinance; (b) approving the competitive bid process; or (c) approving the lease application process for all parcels. But no City Council member independently requested an ordinance or resolution either adopting an application for direct negotiation process or approving a specific lease disposition method until the June City Council meeting. At the meeting, City Council again discussed the options available to it and directed Legal Counsel to prepare the Ordinance adopting an application that allows incumbent leaseholders and sublessees to apply for direct negotiation and the Resolution suspending long-term leasing on the property until October 2026 unless otherwise approved by Council. The Ordinance and Resolution reflect Legal Counsel's best attempt to capture the objectives of City Council in proposed legislation.

III. SUBSTANCE OF THE ORDINANCE AND RESOLUTION

The following provides a summary of the purpose and substance of the Ordinance and the Resolution.

A. The Ordinance

The Ordinance, as proposed, permits all lessees and sublessees of City property or an interest in City property with long term leases or subleases that expired or expire in 2026 to apply for direct negotiation of a new lease so long as all of the following provisions are met:

A. The applicant was the lessee or sublessee of a lease or sublease on the same property for which the lessee or sublessee is applying for direct negotiation of a new lease.

B. The applicant, if lessee, was in full compliance with the terms of the lease at the time of its expiration.

C. The lease expired in 2026.

D. There are no outstanding payments owed to the City by the applicant.

The Ordinance requires a lessee or sublessee who seeks direct negotiations with the City for a new lease to submit an application within 14 days from the effective date of the Ordinance. The Ordinance also provides specific criteria that must be considered by City Council, which include:

1. Applicant's past capital investment and binding commitment to future capital investment on the property;

2. Applicant's financial condition and prior lease history;

3. The number of persons employed and the prospect for future employment;

4. Tax revenues and other financial benefits to the City anticipated in the future if direct negotiation is permitted and a new lease is executed without the acceptance of other lease applications or competitive bidding;

5. Consistency of past use and intended future use with all applicable laws, including land use codes and regulations, the comprehensive plan, and overall economic development plan;

6. Other opportunities for use of the property that may provide greater benefit to the public; and

7. Other social, policy, and economic considerations as determined by City Council.

The criteria provided mirror the criteria in WMC 3.38.480, as that criteria was adopted by Council after careful consideration and three public hearings and ensures that the Ordinance does not deviate from the intent and purpose of the City's existing leasing policies. City Council may not approve an application for direct negotiation unless it finds that doing so serves a legitimate public purpose and all of the criteria weigh in favor of granting the application. The Ordinance also permits City Council to impose any conditions on approval that City Council finds are necessary to serve the public interest.

B. The Resolution

The Resolution provides a declaration of City Council's intent regarding the lease of City property and property interests while the Land Allocation Plan is suspended, at least until October 1, 2026. Specifically, it declares that "no interest in property held by the City shall be available for long-term lease until October 1, 2026 unless otherwise approved by City Council via resolution or ordinance." The Resolution defines "long-term lease" for purposes of the Resolution to include "any lease that is not a short-term lease or lease amendment or extension." It preserves the authority vested in the City Manager to enter short-term leases, execute lease amendments, grant short-term lease extensions, and approve permits on all property in which the City has an interest so long as the action complies with the Whittier Municipal Code. The Resolution also allows the City Manager to accept and evaluate applications for direct negotiations on property in which the City has an interest so long as City Council adopted a law permitting such applications. It also makes clear that the Resolution does not limit the City Manager's authority and duty to exercise custody over all real and personal property of the City, or to supervise enforcement of municipal law under AS 29.20.500 and Whittier Municipal Code. The Resolution does not affect the lease extensions, short term leases, enforcement of holdover provisions under expired leases or any enforcement actions taken by the City Manager under their authority under AS 29.20.500 and Whittier Municipal Code.

IV. NEXT STEPS IF THE ORDINANCE AND RESOLUTION ARE NOT ADOPTED

If the Ordinance and/or the Resolution are not passed by City Council, and the Code is not otherwise amended, we highly recommend that City Council provides City Administration with clear direction on the next steps and that City Council apply its Code provisions in doing so. Without any change to applicable laws, the City Manager will presumably take action to enforce the terms of the expired leases, which is necessary to minimize the City's liability and exposure under those expired leases. While the City Manager has extended leases, permits, and attempted to create clarity on property where leases have expired during City Council's uncertainty, a continued lack of direction puts the City's Administration in an extremely difficult position and prevents any use of the parcels, which directly contradicts the purpose of the City's lease provisions. To that end, if City Council does not adopt the Resolution, we recommend City Council:

1. Adopts a resolution declaring each parcel available for lease and identifying disposal by either lease application or competitive bidding under the Code. If a parcel is subject to lease applications, we recommend City Council identify the criteria to be considered when reviewing a lease application or simply specify the use of criteria in WMC 3.38.380. This process fully complies with existing City Code.

This approach essentially creates a Land Allocation Plan as it applies to the available parcels.

If City Council does not introduce the Ordinance or ultimately fails to adopt it, we again recommend the proposed Resolution above. If the Resolution is adopted but the Ordinance is not, we recommend the adoption of an ordinance amending the Code before October 1, 2026.

V. CRITERIA CONSIDERED IN COMPETITIVE BIDDING AND COMPETING LEASE APPLICATIONS

During Council discussions, there were many expressions of fear regarding the criteria considered when analyzing a lease application or competitive bid for a lease with the City. It is important for City Council to note that the criteria currently adopted in the City Code clearly accounts for consideration regarding many of the unique benefits that incumbent leaseholders may possess. Specifically, this criteria includes, *but is not limited to*:

1. Compatibility with neighboring uses and consistency with applicable land use regulations including the Whittier Comprehensive Plan;

2. The development plan including all phases and timetables;

3. The proposed capital investment;

4. Experience of the applicant in the proposed business or venture;

5. Financial capability or backing of the applicant including credit history, prior lease history, and assets that will be used to support the proposed development;

6. The number of employees anticipated;

7. The proposed rental rate;

8. Other financial impacts such as tax revenues, stimulation of related or spin-off economic development, or the value of improvements left behind upon termination of the lease;

9. Other long-term social and economic development; and

10. The residency or licensure of the applicant in the city and/or the State of Alaska, as identified in the city's request for proposal and permitted under state and federal law.

The above criteria also allows for flexible considerations when determining rental rates, which include not just the appraisal but the highest and best use of the land, existing and planned development, economic development objectives, the location of the property, and even alternative valuation methodologies as negotiated by both parties. *See* WMC 3.38.380(B).

When City Council drafted its lease provisions in 2023, it considered all of the concerns currently reflected by City Council. Council ensured that a lease application award could be based on consideration of the totality of the circumstances and not just on the highest rental rate offered. It carefully crafted criteria to ensure that the value and contributions and value of incumbent leaseholders and longstanding business operations within the City were weighed and reflected in the criteria. Further, the Code ensures that no lease application or competitive bid is awarded without Council approval.

The Ordinance allows City Council to essentially extend the application for direct negotiation currently reflected in its Code, and otherwise preserves the integrity of the lease provisions as adopted.

City Council is afforded substantial flexibility in considering lease applications for City-owned or leased property, but the City Council does have limitations on its considerations placed upon it by the Equal Protection Clause of the Alaska and United States Constitutions. Further, the City has obligations to the voters and the public as it essentially holds public property in trust for the public. Thus, City Council must consider and weigh criteria and determine that any lease awarded serves a legitimate *public* purpose. An award of a lease to an incumbent leaseholder simply because that leaseholder had it previously would not constitute a legitimate public purpose. The criteria outlined in the Ordinance and the criteria included in the Code are designed to ensure that both the City Council and the City Manager consider criteria that satisfies the constitutional requirements and also satisfies the obligations Council has to its constituents and the public at large.

Like the City Council, the City Manager also has a duty to consider criteria to ensure a legitimate public purpose in granting interests in City property. For this reason, it is imperative that the City Council respect the City Manager’s decisions regarding whether to grant short-term leases based upon the interests of the public in the property at issue. The City Manager consistently and diligently tried to apply the Code in her decisions and she sought legal counsel regarding the legal compliance of those decisions. The only action Legal Counsel advised against was the City Manager’s attempt to extend the application for exemption process to an incumbent leaseholder despite their failure to meet the deadline. In all other cases, the City Manager objectively weighed criteria when making permitting and lease extension recommendations.

VI. CONFLICTS OF INTEREST

Finally, when considering the proposed Ordinance and Resolution, we recommend that Council member Denmark and any other City Council member with an interest in a lease or sublease with the City disclose a conflict of interest and refrain from participating in discussions and decisions regarding any lease provision or practice. In a small area like the Whittier waterfront, the businesses awarded leases and the terms of those leases all impact one another. The adoption of an application for direct negotiation now provides a basis for demanding such an application process later. Competitive bidding on lease parcels near a Council member's leased parcels may bring unknown competition. Or, an incumbent leaseholder may have preestablished relationships or benefits from an existing leaseholder. While Council member Denmark declared his conflict of interest at the last meeting, City Council rejected his disclosure and required him to participate in motions and discussions regarding lease provisions and practices. While there was little harm in that participation, provided there was no ordinance or resolution before City Council at that time, there will be substantial risk of a violation if City Council again requires Council member Denmark's participation or vote. Whittier Municipal Code Chapter 3.38 governing City leases was adopted without Council member Denmark's participation, which preserved the integrity of those provisions. We highly recommend that City Council afford that same integrity to all ordinances and resolutions regarding leases in the harbor area going forward.

Similarly, to the extent Mayor Shen feels that his father's leasehold interest makes it difficult to objectively take action that directly affects his father's leasehold interest, we recommend that Council member Shen declare the conflict of interest under Alaska common law and that Council declare a common law conflict of interest and allow or require Mayor Shen to abstain from participation in actions and discussions directly pertaining to his father's leasehold interest. When considering conflicts of interest, it is necessary to consider both the City's conflict of interest provisions and the court's consideration of conflicts of interest under common law. Under common law, the Alaska Supreme Court previously found that a City Council member has a "substantial financial interest" when his or her property value or tax base would be impacted by an official action. In so finding, the Alaska Supreme Court did not rely upon a monetary threshold (i.e., more than $500). Instead, it applied the intangible concept of "substantial financial interest". *See Griswold v. City of Homer*, 925 P.2d 1015, 1031 (Alaska 1996).

For this reason, and especially in light of the emotionally charged discussions surrounding Mr. Shen's lease with the City, we recommend City Council and its members consider conflicts of interest carefully both under common law and City Code. It is worth noting that while a common law conflict of interest would likely not exist when considering certain leasehold decisions, such as assignments, the refusal to grant an application for direct negotiation or to enforce or take action under a lease, for example, may trigger a common law conflict of interest. While a bright line rule for Council to follow similar to the substantial financial interest provision in the Code is ideal, it is important that Council consider the reality of conflicts under both common law and Code, especially when navigating an issue that incited extreme reactions from Council members, members of the public, and Administration.

VII. CONCLUSION

This memorandum provides City Council with an introduction to the Ordinance, the Resolution, and general considerations surrounding the lease provisions and potential actions facing City Council. We are available in person to discuss this memo and the proposed legislation with Council at its upcoming meeting.