



**Joseph M. Centorino**, Inspector General

TO: Honorable Mayor and Members of the City Commission  
FROM: Joseph Centorino, Inspector General

DATE: November 30, 2023  
PROJECT: Lincoln Place Ground Lease Agreement Compliance Audit  
OIG No. 23-24  
PERIOD: January 1, 2019, through December 31, 2022

An audit was completed by the City of Miami Beach Office of the Inspector General (OIG) that focused primarily on determining the timeliness, accuracy, and completeness of the base rent and percentage rent payments remitted to the City during the audit period related to the Ground Lease Agreement between the City and two tenants at a City-owned property, Lincoln Place, located at 1601 Washington Avenue (see picture below). Additional testing was performed to determine the tenants' compliance with other selected provisions in its Ground Lease Agreement with the City.

During the audit period, Lincoln Place had two successive tenants. The building was occupied by the former Tenant, 16<sup>th</sup> Street Partners, LLC, from the beginning of the audit period on January 1, 2017, until June 30, 2021, followed by the current tenant, NG 1601 Washington Ave. LLC. The OIG Auditor also examined the related performance of the City Fleet and Facilities Management Department Asset Management Division, which is responsible for overseeing the executed agreement and monitoring the tenants' performance pursuant to the Ground Lease Agreement. All provided documents and transactions related to the January 1, 2019, through December 31, 2022 audit period were examined.



## INTRODUCTION

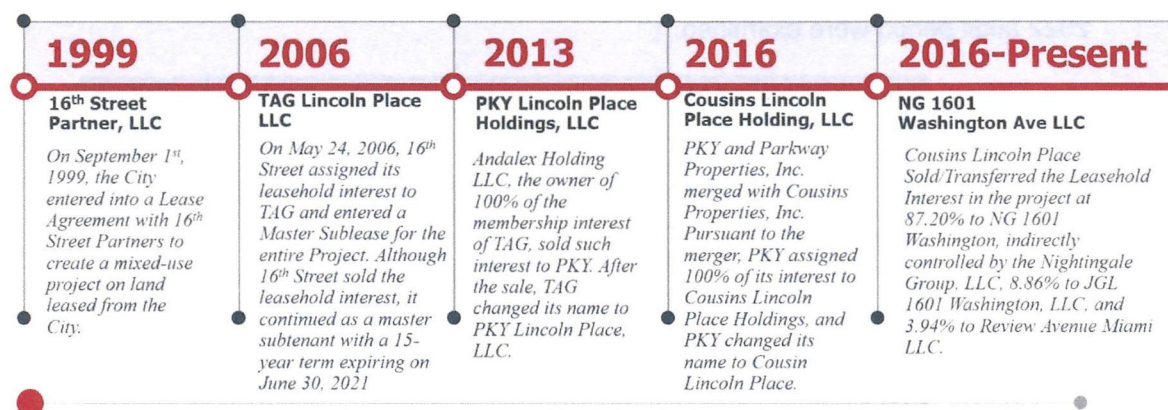
On September 1, 1999, the City entered into a Ground Lease Agreement with 16<sup>th</sup> Street Partners, LLC, to develop and operate a mixed-use project on land leased from the City located at Washington Avenue and 16<sup>th</sup> Street. This project, called Lincoln Place, comprises an eight-story, high-rise building with 111,591 rentable square feet of office space, 28,483 rentable square feet of retail space, and a 493-space parking garage.

16<sup>th</sup> Street Partners, LLC was initially formed by LNR 16<sup>th</sup> Street, Inc. in partnership with Lincoln Place Partners, LLC and Comras 16<sup>th</sup> Street, Inc. Effective May 24, 2006, 16<sup>th</sup> Street Partners, LLC entered into an Assignment and Assumption of Lessee's Interest in Ground Lease Agreement with TAG Lincoln Place LLC, a wholly-owned subsidiary of The Andalex Group, LLC. On December 6, 2013, Andalex Holdings LLC, through the sale of its 100% ownership of TAG membership interest to PKY Lincoln Place Holdings, LLC, entered into a Master Sublease for the entire Project. Pursuant to the Master Sublease, 16<sup>th</sup> Street, as the master subtenant, was responsible for the payment of all obligations of the tenant to the City under the Ground Lease. Subsequently, PKY and Parkway Properties, Inc. merged with Cousins Properties Inc. Pursuant to the merger, PKY assigned 100% of its interest to Cousins Lincoln Place Holdings.

On December 23, 2016, Lincoln Place interest was sold as follows: 87.20% to NG 1601 Washington Ave. LLC, indirectly controlled by The Nightingale Group LLC, a commercial real estate firm; 8.86% to JBL 1601 Washington, LLC; and 3.94% to Review Avenue Miami LLC. As per the Master Lease, 16<sup>th</sup> Street Partners, LLC continues as a master subtenant, leasing all property as part of a sale-leaseback transaction completed in 2006 for a 15-year term that expired on June 30, 2021. A sale-leaseback transaction occurs when an entity sells an asset it owns and immediately leases the asset back from the buyer. The seller then becomes the lessee, and the buyer becomes the lessor.

As 16<sup>th</sup> Street Partners LLC's 15-year master lease term expired on June 30, 2021, NG 1601 Washington Ave. LLC was responsible for the payment of all obligations to the City for the remainder of the audit period.

### Lincoln Place Leasehold Interest Ownership Timeline



The term of the Ground Lease Agreement was from the Commencement Date (September 1, 1999) continuing until the fiftieth (50<sup>th</sup>) anniversary of the September 1, 2002, Delay Date, with

two additional terms providing for 20-year extension options. Given the complexity of the payment calculations and their cumulative nature since the commencement of the Ground Lease Agreement, the OIG Auditor has included below the corresponding amounts due and/or received by the City to provide context:

- The Tenant shall pay the base rent in monthly installments equal to one-twelfth (1/12) of the applicable annual rent, payable in advance on the first day of each calendar month.
- The base rent will be \$250,000 for lease years 1 through 5 (September 1, 2002, through December 31, 2007), increasing to \$300,000 per annum, commencing on the first month of the sixth through the tenth lease years (January 1, 2008, through December 31, 2012).
- The monthly base rent was to be adjusted every five lease years thereafter, starting on January 1, 2013, or lease year 11, based upon the lesser of 12% or the cumulative CPI over the previous five-year period.
- In addition to the monthly base rent payments, the Tenant must also remit annual percentage rent payments to the City for each lease year during the term of the Ground Lease Agreement. This percentage rent payment is equal to 2.5% of the amount of project revenue for each lease year.
- Project revenue is defined as *all revenue, payments, income received, escalation adjustments, rental and operating cost reimbursements reserved under any lease, sublease, concession, license, or other arrangement or from the operation of the Project (including any reimbursements for operating expenses and common area maintenance) and paid to Tenant for the use or occupancy of any portion of the Project.*
- As summarized in Section 4.1 of the Ground Lease Agreement, if the Tenant fails to make any payment of base rent, percentage rent, or other rental and/or imposition within thirty (30) days after the due date, the late payment bears interest from the date due until the date paid at a rate equal to the lesser of (a) four percent (4%) per annum in excess of the prime rate in effect from time to time at Citibank N.A. (or The Chase Manhattan Bank, N.A, if Citibank shall not then have an established prime rate and (b) the maximum interest rate permitted by law. The OIG Auditor determined that interest rates ranged from a high of 9.50% for 2018 to a low of 7.25% for 2021 during the audit period for late payments, which consisted of 4.00% + prime rate in effect %.

The Munis system is the City enterprise resource planning system. The following table, obtained from its General Ledger module, indicates the base rent and percentage rent payments, including penalties and Florida Sales tax, received by the City for each examined lease/calendar year:

Category	2019	2020	2021	2022	Total
Base Rent *	\$372,869.67	\$186,207.69	\$372,048.45	\$372,170.76	\$1,303,296.57
Percentage Rent *	\$175,770.60	\$184,955.88	\$159,938.34	\$176,138.97	\$696,803.79
<b>Total Rent</b>	<b>\$548,640.27</b>	<b>\$371,163.57</b>	<b>\$531,986.79</b>	<b>\$548,309.73</b>	<b>\$2,000,100.36</b>

\* The above figures are based on the month and/or year that the Tenant made the payment while the City recognized the payment in the fiscal year received, so timing differences would exist if this table were reconciled to the lease/calendar year payments. For example, the \$175,770.60 percentage rent payment for the 2018 calendar year was received on April 18, 2019 and was included in the 2019 fiscal year entries. In addition, the base rent payment for the year 2020 is lesser than other years during the audit period since the City Commission granted six months' rent relief due to the economic impact caused by the COVID-19 pandemic.

## OVERALL OPINION

Based upon an examination of the furnished records for the audit period of January 1, 2019, through December 31, 2022, the OIG Auditor identified deficiencies which resulted in total

underpayments to the City of \$58,344.28 (\$9,922.96 finding #1 + \$45,692.14 finding #2 + \$2,729.18 finding #3). Additional amounts may be owed to the City for percentage rent payments occurring during the audit period, but some could not be calculated, as not all the requested records, required by the Ground Lease Agreement, were provided to the OIG despite multiple requests (findings # 4 and 5). The OIG Auditor also encountered difficulties in determining the completeness and verifying the accuracy of the information contained in the Project Revenue per Ground Lease Worksheet due to incomplete supporting documentation. The Asset Management Division staff's inability to previously identify these deficiencies and/or make the proper corrections and the Tenant's failure to provide all the required documentation for review as required per the Ground Lease Agreement, have created a scope limitation and raised concerns regarding other deficiencies that may exist.

The following shortcomings were noted during the audit period:

1. The City was underpaid \$9,922.96 in base rent including \$488.20 in Florida Sales tax due to incorrect calculations involving the cumulative CPI adjustments pursuant to Section 3 of the Ground Lease Agreement.
2. Florida Sales tax on commercial rent was not correctly applied to the percentage rent payments received resulting in a \$45,692.14 underbilling which includes \$2,048.42 due to the State.
3. Percentage rent payments were remitted to the City after the due dates specified in the Ground Lease Agreement, but late fees were not accurately charged, resulting in \$2,729.19 due, which includes \$642.89 in Florida Sales tax.
4. The Tenant did not submit all the required reports for the percentage rent payments by the designated due dates specified in the Ground Lease Agreement.
5. Percentage rent payments could not be verified due to insufficient supporting documentation to meet the requirements of the Ground Lease Agreement.
6. The Tenant was not compliant with some insurance requirements under to Article 7 of the Ground Lease Agreement.

In addition, the OIG has suggested the following opportunities for improvement:

1. Accounting method inconsistencies between the computation of project revenue on a cash basis and the preparation of financial statements for audit on an accrual basis hindered the reconciliation process.
2. The executed Ground Lease Agreement does not provide any specific consequence/penalty for not timely submitting all required reports.

## **SCOPE, OBJECTIVES, AND METHODOLOGY**

The primary scope of this audit was to determine whether the Tenant complied with selected terms of the Ground Lease Agreement, including accurately calculating and timely remitting base rent and percentage rent payments due to the City of Miami Beach related to the Lincoln Place project during the specified audit period.

The audit focused on the following general objectives:

- To determine whether the Tenant timely submitted to the City all reports and records required in the Ground Lease Agreement.
- To determine whether Facilities and Fleet Management Department Asset Management Division staff accurately billed the Tenant pursuant to the Ground Lease Agreement.

- To determine whether the Tenant timely and fully remitted all tested payments due to the City. If not, were the appropriate late charges timely and accurately billed to the Tenant?
- To determine whether the Tenant maintained the required insurance coverage.
- To determine whether the Tenant complied with other selected provisions of the Ground Lease Agreement.
- To determine whether examined payments received were accurately recorded in the City Financial System.
- Other audit procedures as deemed necessary.

The audit methodology included the following:

- Reviewed the executed Ground Lease and Settlement Agreements between the City and the Tenant;
- Interviewed and made inquiries of City and Tenant staff to gain an understanding of internal controls, assess control risk, and plan audit procedures;
- Performed substantive testing consistent with the audit objectives, including, but not limited to, examination of applicable transactions and records;
- Drew conclusions based on the results of testing with corresponding recommendations and obtained auditee responses and corrective action plans; and
- Performed other audit procedures as deemed necessary.

## **FINDINGS, RECOMMENDATIONS, AND RESPONSES**

1. ***THE CITY WAS UNDERPAID \$9,922.96 IN BASE RENT INCLUDING \$488.20 IN FLORIDA SALES TAX DUE TO INCORRECT CALCULATIONS INVOLVING THE CUMULATIVE CPI ADJUSTMENTS PURSUANT TO SECTION 3 OF THE GROUND LEASE AGREEMENT.***

Section 3.2(c) of the Ground Lease Agreement entitled "Rent After the Delay Date" states: *Tenant shall pay Owner annual rent for each Lease Year, including any adjustments thereto (the "Base Rent"), during the Term commencing on the Delay Date. The initial Base Rent shall be Two Hundred Fifty Thousand Dollars (\$250,000), and shall be increased as described in Sections 3.2(d), 3.2(e), and 3.2(f) hereof, until the Expiration of the Term. In no event shall Base Rent during an adjustment period be less than the Base Rent during any prior period.*

Section 3.2 (d) "Adjustments to Base Rent" states: *(i) The Base Rent shall be increased to Three Hundred Thousand Dollars (\$300,000) per annum, commencing on the first month of the sixth (6th) Lease Year, and (ii) the Base Rent shall be further increased by the lesser of twelve percent (12%) or the cumulative CPI over the previous five (5) year period and shall be adjusted commencing with the first (1st) month of the eleventh (11th) Lease Year and every five (5) Lease Years thereafter.*

Section 3.2 (g) "Payment of Rent and Base Rent" states: *On and after the Possession Date, rent and Base Rent shall be paid in monthly installments equal to one-twelfth of the then applicable annual rent and Base Rent and shall be paid in advance, on the first day of each and every calendar month thereafter during the Term. All rent and Base Rent which is due for any period of less than a full month or a full calendar year shall be appropriately apportioned.*

In sum, the total annual base rent due to the City was \$267,500.00 for lease years 1 through 5 (September 1, 2002, through December 31, 2007), which was comprised of \$250,000.00 in annual base rent plus \$17,500.00 in Florida Sales tax ( $\$250,000.00 \times 1.07$ ). Consequently, the Tenant was to remit monthly base rent of \$22,291.67 ( $\$267,500.00/12$  months) during this five-year period.

For lease years 6 through 10 (January 1, 2008 through December 31, 2012), the annual base rent due increased to \$321,000.00 ( $\$300,000.00$  base rent  $\times$  1.07 Florida Sales tax), which equals \$26,750.00 per month ( $\$321,000.00/12$  months).

Testing determined that Asset Management Division staff had accurately billed the Tenant through lease year 10, as no differences were found. However, starting on January 1, 2013, the rent was to be adjusted, and every fifth lease year after that, based upon the lesser of 12% or the cumulative CPI over the previous five-year period.

The OIG Auditor noted that, starting on January 1, 2013, Asset Management Division staff incorrectly applied a cumulative CPI increase of 8.487%. As a result, the Tenant's annual base rent payments due increased to \$348,243.27 ( $\$300,000.00 \times 1.08487$  CPI  $\times$  1.07 Florida Sales tax) for lease years 11 through 15 (January 1, 2013, through December 31, 2017), which equals \$29,020.27 per month ( $\$348,243.27/12$  months). However, the OIG Auditor determined that the cumulative CPI was 9.315% as reported for the same period using data from Consumer Price Index for All Urban Consumers for the United States, all items, index base period 1982-84=100 (commonly referred to as CPI-U) as required per the Ground Lease Agreement. Consequently, the monthly base rent due starting on January 1, 2013, and ending on December 31, 2017, was \$29,241.78 ( $(\$300,000.00 \times 1.09315$  CPI  $\times$  1.07 Florida sales tax)/12 months) or \$350,901.37 annually.

As a result the OIG Auditor calculated that annual base rent was underpaid by \$2,658.10 annually ( $\$350,901.37 - \$348,243.27$ ), including 7% Florida Sales tax, for a total of \$13,290.52 ( $\$2,658.10 \times 5$  lease years) from January 1, 2013, through December 31, 2017. This underbilling occurred prior to the designated audit period and is important to note because it affects prospective base year calculations.

For lease years 16 through 20 (January 1, 2018, through December 31, 2022), Asset Management Division staff correctly calculated that the cumulative CPI increased by 7.371%. However, the increase is cumulative and since the prior years were calculated incorrectly, the base rent was understated. As a result, the Tenant's annual base rent starting in January 2018 (lease year 16) increased to \$373,219.19 ( $\$325,467.24 \times 1.07371$  CPI  $\times$  1.068 Florida Sales tax) or \$31,101.60 per month including a 6.8% Florida Sales tax.

Thereafter, the Florida Sales tax due for commercial rental was reduced to 6.7% for 2019 and 6.5% for 2020. Consequently, the 2019 annual base rent (lease year 17) decreased to \$372,869.73 or \$31,072.48 per month ( $\$325,467.24 \times 1.07371$  CPI  $\times$  1.067 Florida Sales tax)/12 months). For the lease years occurring January 1, 2020, through December 31, 2022, the annual base rent decreased to \$372,170.82 annually or \$31,014.24 per month ( $\$325,467.24 \times 1.07371$  CPI  $\times$  1.065 Florida Sales tax)/12 months).

The OIG Auditor computed the base rent for lease years 16 through 20 (January 1, 2018, through December 31, 2022) using the CPI increase of 7.371%. It was concluded that the monthly base rent payments due starting on January 1, 2018, for lease year 16 should

have been \$31,338.39 (\$327,945.21 x 1.07371 CPI x 1.068 Florida Sales tax)/12 months) or \$376,060.72 annually including 6.8% Florida Sales tax, instead of the \$373,219.19 charged to the Tenant. For lease year 17 starting on January 1, 2019, the base rent payment due decreased because of the lower effective Florida Sales tax rate to \$31,309.05 (\$327,945.21 x 1.07371 CPI x 1.067 Florida Sales tax)/12 months) or \$375,708.60 annually, instead of \$372,869.73. For lease years 18 through 20 covering January 1, 2020, through December 31, 2022, the base rent payment due decreased to \$31,250.36 per month (\$327,945.21 x 1.07371 CPI x 1.065 Florida Sales tax)/12 months) or \$375,004.37 annually, instead of \$372,170.82.

It was also determined that the cumulative CPI calculation for lease years 21 through 25 (January 1, 2023, through December 31, 2027) was 20.393%, more than 12%. As a result, the Tenant's annual base rent should only increase by 12% starting in January 1, 2023 to \$35,000.41 per month (\$352,116.78 x 1.12 CPI x 1.065 Florida Sales tax)/12 months) or \$420,004.90 annually.

In conclusion, as a result of the OIG Auditor calculations the total base rent underpayment during the January 1, 2019, through December 31, 2022, audit period was calculated to be \$9,922.96 including \$488.20 in Florida Sales tax as shown in the table below:

Year	As Computed By OIG			As Paid in Munis			Differences		
	Base Rent	Sales Tax	Total Rent	Base Rent	Sales Tax	Total Rent	Base Rent	Sales Tax	Total Rent
2019	\$352,116.78	\$23,591.82	\$375,708.60	\$349,456.08	\$23,413.59	\$372,869.67	\$2,660.70	\$178.23	\$2,838.93
2020	\$176,058.39	\$11,443.80	\$187,502.19	\$174,728.04	\$11,479.65	\$186,207.69	\$1,330.35	-\$35.85	\$1,294.50
2021	\$352,116.78	\$22,887.59	\$375,004.37	\$349,456.08	\$22,714.68	\$372,048.45	\$2,783.01	\$172.91	\$2,955.92
2022	\$352,116.78	\$22,887.59	\$375,004.37	\$349,456.08	\$22,714.68	\$372,170.76	\$2,660.70	\$172.91	\$2,833.61
<b>Total</b>	<b>\$1,232,408.73</b>	<b>\$80,810.80</b>	<b>\$1,313,219.53</b>	<b>\$1,223,096.28</b>	<b>\$80,322.60</b>	<b>\$1,303,296.57</b>	<b>\$9,434.76</b>	<b>\$488.20</b>	<b>\$9,922.96</b>

Recommendation(s):

Asset Management Division staff should perform its own calculations and determine whether it agrees with the OIG Auditor's calculations of \$9,922.96 in base rent due to the City for the audit period. Once completed, it should invoice the Tenant accordingly. As the base rent, including Florida Sales tax, is based on the prior years' calculations, the monthly charges invoiced for future lease years starting with January 1, 2023, through December 31, 2023, should be reviewed and adjusted, as needed.

Facilities and Fleet Management Department Response:

The Asset Management Division acknowledges the miscalculation from 2013 that created a domino effect thereafter. As a result, we recalculated and properly adjusted the historical billings from 2013 through 2022, as well as on current billings.

2. **FLORIDA SALES TAX ON COMMERCIAL RENT WAS NOT CORRECTLY APPLIED TO THE PERCENTAGE RENT PAYMENTS RECEIVED RESULTING IN A \$45,692.14 UNDERBILLING INCLUDING \$2,048.42 DUE TO THE STATE.**

Section 3.3 of the Ground Lease Agreement entitled "Percentage Rent" states: *Tenant shall pay the Owner annual percentage rent for each Lease Year (the "Percentage Rent") during the Term in an amount equal to two and one-half percent (2 ½ %) of the amount of Project Revenue for each Lease Year commencing on the earlier to occur of (i) the ninth (9th) Lease Year or (ii) the Sale Date; provided, however, for the initial and final Lease Years, the Percentage Rent shall be prorated according to the actual number of days in such Lease Year.*

- (a) *Payment of Percentage Rent. Tenant shall pay the full amount of Percentage Rent due in annual installments, in arrears, within sixty (60) days after the end of each Lease Year for the preceding Lease Year; provided, however, that in the event that Project Revenue in the ninth (9th) Lease Year is less than Seven Million Eight Hundred Thousand Dollars (\$7,800,000), the Percentage Rent that accrues in the ninth (9th) Lease Year shall be payable in five (5) equal annual installments, without interest. Each of such five (5) annual installments of the Percentage Rent for the ninth (9th) Lease Year shall be paid to Owner at the same time as the Percentage Rent that is due and payable for the tenth (10th) through fourteenth (14th) Lease Years is paid pursuant to this Section 3.3(b). The obligation to pay Percentage Rent shall survive Expiration of the Term as to Percentage Rent which accrued prior to the Expiration of the Term, subject to Article 28.*
- (b) *The following shall, however, be excluded from Project Revenue:*
- (1) *Federal, state and municipal excise, sales, resort, use, and other taxes collected from patrons or guests as a part of or based upon the sales price of any goods or services, including with limitation, gross receipts, room, bed, admission, cabaret, or similar taxes;*

In addition, the 2022 Florida Statutes 212.031-Tax on rental or license fee for use of real property states: (1)(a) *It is declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of renting, leasing, letting, or granting a license for the use of any real property...*

(1)(a)13.(c) *states: For the exercise of such privilege, a tax is levied at the rate of 5.5 percent of and on the total rent or license fee charged for such real property by the person charging or collecting the rental or license fee. The total rent or license fee charged for such real property shall include payments for the granting of a privilege to use or occupy real property for any purpose and shall include base rent, percentage rents, or similar charges.*

(e) *The tax rate in effect at the time that the Tenant or person occupies, uses, or is entitled to occupy or use the real property is the tax rate applicable to the transaction taxable under this section, regardless of when a rent or license fee payment is due or paid. The applicable tax rate may not be avoided by delaying or accelerating rent or license fee payments.*

(2)(a) *The Tenant or person actually occupying, using, or entitled to the use of any property from which the rental or license fee is subject to taxation under this section shall pay the tax to his or her immediate landlord or other person granting the right to such Tenant or person to occupy or use such real property.*

(3) *The tax imposed by this section shall be in addition to the total amount of the rental or license fee, shall be charged by the lessor or person receiving the rent or payment in and by a rental or license fee arrangement with the lessee or person paying the rental or license fee, and shall be due and payable at the time of the receipt of such rental or license fee payment by the lessor or other person who receives the rental or payment. The owner, lessor, or person receiving the rent or license fee shall remit the tax to the department at the times and in the manner hereinafter provided for dealers to remit taxes under this chapter.*



212.055 Discretionary sales surtaxes; legislative intent; authorization and use of proceeds.—It is the legislative intent that any authorization for imposition of a discretionary sales surtax shall be published in the Florida Statutes as a subsection of this section, irrespective of the duration of the levy.

212.055 (1) (b) The rate shall be up to 1 percent.

Florida Administrative Code 12A-1.070 Leases and Licenses of Real Property; Storage of Boats and Aircraft.

(1)(a) Every person who rents or leases any real property or who grants a license to use, occupy, or enter upon any real property is exercising a taxable privilege...

(4)(a) The Tenant or person actually occupying, using, or entitled to use any real property from which rental or license fee is subject to taxation under Section 212.031, F.S., shall pay the tax to his immediate landlord or other person granting the right to such Tenant or person to occupy or use such real property.

(b) The tax shall be paid on all considerations due and payable by the Tenant or other person actually occupying, using, or entitled to use any real property to his landlord or other person for the privilege of use, occupancy, or the right to use or occupy any real property for any purpose.

Florida Sales tax, plus any applicable discretionary sales surtax, is due on the total rent charged for renting, leasing, or granting a license to use commercial real property in Florida. The discretionary sales surtax rate is the tax rate imposed by the county where the real property is located. The total rent charged includes all consideration due and payable by the tenant to the landlord for the privilege or right to use or occupy the real property.

Based on the sales data obtained from the Munis system for the audit period, the OIG Auditor calculated an additional \$45,692.14 in Florida Sales tax due on the following percentage rent paid by the tenants to the City (see the table below):

Calendar Year	Lease Year	Invoice No.	Date Paid	Percentage Rent Paid	Florida Sales Tax Rate	Florida Sales Tax Due
2018	16	19960	4/18/2019	\$175,770.60	6.8%	\$11,952.40
2019	17	26132	4/7/2020	\$184,955.88	6.7%	\$12,392.04
2020	18	30594	3/26/2021	\$159,938.34	6.5%	\$10,395.99
2021	19	38751	8/25/2022	\$168,487.78	6.5%	\$10,951.71
<b>Total</b>				<b>\$689,152.60</b>		<b>\$45,692.14</b>

An examination of the percentage rent invoices determined that the Florida Sales tax paid, as shown in the table below, was deducted from the percentage rent payments received from tenants and paid to the State instead of applying the corresponding Florida Sales tax to the total rental consideration received from tenants.

Calendar Year	Lease Year	Invoice No.	Date Paid	Percentage Rent Paid	Florida Sales Tax Paid	Total Invoice
2018	16	19960	4/18/2019	\$164,271.59	\$11,499.01	\$175,770.60

2019	17	26132	4/7/2020	\$172,855.96	\$12,099.92	\$184,955.88
2020	18	30594	3/26/2021	\$150,176.84	\$9,761.50	\$159,938.34
2021	19	38751	8/25/2022	\$158,204.49	\$10,283.29	\$168,487.78
<b>Total</b>				<b>\$645,508.88</b>	<b>\$43,643.72</b>	<b>\$689,152.60</b>

As shown in the table above, the total amount of Florida Sales tax deducted from the percentage rent payment and remitted to the State was \$43,643.72. As a result, the City's revenue was incorrectly reduced by \$43,643.72 during the audit period and the State of Florida Department of Revenue is due \$2,048.42 (\$45,692.12 – 43,643.72).

Recommendation(s):

The Asset Management Division should examine the OIG's calculations and determine whether they agree with them. Once completed, it should promptly invoice the Tenant accordingly. The difference between the Florida Sales tax paid and the corresponding tax due should be included in the City's next payment to the State of Florida Department of Revenue. Furthermore, Asset Management Division staff should review its general ledger account distributions related to the percentage rent payments outside the designated audit period, and promptly make any needed corrections.

Facilities and Fleet Management Department Response:

The Asset Management Division acknowledges the error and is currently collaborating with the Finance Department to include the difference for Sales Tax in the amount of \$2,048.42 to the State of Florida Department of Revenue. The Asset Management Division identified and had corrected this issue with the 2022 percentage rent payment.

3. **PERCENTAGE RENT PAYMENTS WERE REMITTED TO THE CITY AFTER THE DUE DATES SPECIFIED IN THE GROUND LEASE AGREEMENT, BUT LATE FEES WERE NOT ACCURATELY CHARGED, RESULTING IN \$2,729.19 DUE, WHICH INCLUDES \$642.89 IN FLORIDA SALES TAX.**

The City and PKY Lincoln Place, LLC and 16<sup>th</sup> Street Partners, LLC executed a Settlement Agreement effective September 16, 2015. Among other agreed upon provisions, Section 5 entitled "Percentage Rent Payment/Additional Documentation" states: *...effective as of the 2015 calendar year, through the end of the Master Lease Term, solely, the process for submitting the Percentage Rent payment, as required under Section 3.3(b) of the Ground Lease, shall be modified as follows: 16th Street Partners shall submit an estimated Percentage Rent payment, along with the back-up information, within sixty (60) days from the end of each Lease Year, subject to finalizing the audited financial statement for said particular Lease Year, with the adjusted/final payment due within one hundred fifty (150) days from the end of each Lease Year. As long as 16th Street follows this modified procedure, no penalties shall accrue to PKY under the Ground Lease.*

Section 4.1 "Late Charges" states: *If Tenant shall fail to make any payment of Base Rent, Percentage Rent, or other Rental and/or Impositions within thirty (30) days after the same shall be due, the late payment shall bear interest from the date due until the date paid at a rate (the "Late Charge Rate") equal to the lesser of (a) Four Percent ( 4%) per annum in excess of the prime rate in effect from time to time at Citibank, N .A. ( or The Chase Manhattan Bank, N .A., if Citibank, N .A. shall not then have an established prime rate; or the prime rate of any major banking institution doing business in New York City, as selected by Owner, if none of the aforementioned banks shall be in existence or have an established prime rate) and (b) the maximum interest rate permitted by law. All interest*

*payable under this Section 4.1 shall be deemed Rental (but shall not be compounded) and shall be due and payable by Tenant on fifteen (15) days demand. The collection by Owner of any interest under this Section 4.1 shall not be construed as a waiver of Tenant's default or of Tenant's obligation to perform any term, covenant or condition of this Lease nor shall it affect any other right or remedy of Owner under this Lease.*

Florida Statute 212.031 (3) - Tax on rental or license fee for use of real property states: *The tax imposed by this section shall be in addition to the total amount of the rental or license fee, shall be charged by the lessor or person receiving the rent or payment in and by a rental or license fee arrangement with the lessee or person paying the rental or license fee, and shall be due and payable at the time of the receipt of such rental or license fee payment by the lessor or other person who receives the rental or payment. The owner, lessor, or person receiving the rent or license fee shall remit the tax to the department at the times and in the manner hereinafter provided for dealers to remit taxes under this chapter.*

Examination of the Munis system indicated that the Tenant remitted the following percentage rent payments after the established due dates resulting in late charges due to the City of \$9,737.48 (see the table below):

Calendar Year	Lease Year	Percentage Rent Paid	Payment Due Date	Payment Date	Number of Days Late	Interest Rate	Late Charges Due
2018	16	\$175,770.60	03/01/2019	04/18/2019	48	9.50%	\$2,195.93
2019	17	\$184,955.88	02/29/2020	04/07/2020	38	8.75%	\$1,684.87
2020	18	\$159,938.34	03/01/2021	03/26/2021	25	7.25%	\$0.00
2021	19	\$168,487.78	03/01/2022	08/23/2022	175	7.25%	\$5,856.68
<b>Total</b>		<b>\$689,152.60</b>					<b>\$9,737.48</b>

The late payments ranged from 25 to 175 days; however, late charges are only imposed when the Tenant fails to make any payment within thirty days after the designated due date. Therefore, there is no late charge for the percentage rent payment received for the 2020 calendar year (lease year 18), as it was received 25 days after the due date.

In addition, the Ground Lease Agreement specifies that late payments shall bear interest from the date due until the date paid at a rate equal to (a) the lesser of four percent per annum in excess of the prime rate in effect and (b) the maximum interest rate permitted by law. For 2018, the OIG Auditor calculated that a 9.50% interest rate was applicable, consisting of 4.00% + 5.50% prime rate. It was also determined that a 7.25% interest rate was applicable for the 2020 and 2021 calendar years, which consisted of 4.00% + 3.25% prime rate in effect from time to time at JP Morgan Chase & Co.

The former Tenant, 16<sup>th</sup> Street Partners, LLC, was not billed late charges of \$2,195.93 and \$1,684.87 related to its 2018 and 2019 percentage rent payments respectively. Conversely, the current Tenant, NG 1601 Washington Ave. LLC, was mistakenly overbilled a net late charge fee of \$1,794.51 (\$7,651.19 billed - \$5,856.68 late charge due) related to the 2021 calendar year. The audit period total net late charge of \$2,086.29 is currently due to the City (\$2,195.93 + \$1,684.87 - \$1,794.51).

Florida Sales tax is due on the total rental, lease, or license fee paid for the right to use or occupy the real property. It is imposed not only on percentage rent payments, but also on any additional rent or any consideration required to be paid by the tenant as a condition of occupancy. Examination of the Munis system indicated that the City did not charge or

remit Florida Sales tax to the State of Florida Department of Revenue on any late charges paid by the Tenant during the audit period. As a result, Florida Sales tax of \$642.89 is also due on the late charges (see the table below):

Calendar Year	Lease Year	Late Charges Due	Florida Sales Tax Rate	Florida Sales Tax Due on Late Charges
2018	16	\$2,195.93	6.8%	\$149.32
2019	17	\$1,684.87	6.7%	\$112.89
2021	19	\$5,856.68	6.5%	\$380.68
<b>Total</b>		<b>\$9,737.48</b>		<b>\$642.89</b>

Recommendation(s):

The Asset Management Division should ensure that future percentage rent payments are remitted timely pursuant to the Ground Lease Agreement. If not, the specified late charges should be promptly and accurately billed.

The Asset Management Division should review the OIG calculations, and if it agrees, credit the current Tenant in the amount of \$1,413.83 (\$7,651.19 billed - \$5,856.68 due - \$380.68 Florida Sales tax due) related to its 2021 calendar year payment and remit \$380.68 to the State related to the percentage rent late fee collected during the audit period. In addition, the Asset Management Division should invoice the former tenant, 16<sup>th</sup> Street Partners, LLC, for the identified late charges plus Florida Sales tax of \$2,345.25 for 2018 and \$1,797.76 for 2019.

Facilities and Fleet Management Department Responses:

The current Asset Management Division staff has no history of the previous management company (LNR) to confirm if those late fees were waived by the City. Since LNR is no longer managing this property, the Asset Management Division does not agree with back billing these late fees. On August 25, 2022, the Asset Management Division billed and collected the late fee for the 2021 period where the Tenant was 175 days late in the amount of \$7,651.19. However, in reviewing the late fee charged, it was not calculated correctly. The Asset Management Division also reviewed the OIG's calculation, and after consulting with the City Attorney's Office as well as the Finance Department, it was determined the OIG based the prime interest rate calculation solely on the rate in effect on the first day the payment was late. However, in accordance to section 4.1 "Late Charges", "...the late payment shall bear interest from the date due until the date paid at a rate (the "Late Charge Rate") equal to the lesser of (a) Four Percent ( 4%) per annum in excess of the prime rate in effect from time to time..." Since the prime rate changed four (4) times over the 175 days the Tenant was late, the amount due by Tenant would be \$6,629.88 plus sales tax of \$430.94, for a total of \$7,060.82. This would leave the Tenant a net credit of -\$590.37. See chart below:

Finance Calculation - Late Charge										
<b>\$168,487.78</b>										
Prime Rate (PR) range	# of Days in PR range	PR plus 4%	Per Anum	Late Fee	Sales Tax %	Sales Tax Due	Total Late Fee Due	Payment of 8/25/22	Balance Due	
03/01/22 03/16/22	15	0.0725	365	502.00	6.50%	32.63	534.63			
03/17/22 05/04/22	49	0.0750	365	1,696.42	6.50%	110.27	1,806.69			
05/05/22 06/15/22	42	0.0800	365	1,551.01	6.50%	100.82	1,651.83			
06/16/22 07/27/22	42	0.0875	365	1,696.42	6.50%	110.27	1,806.69			
07/28/22 08/23/22	27	0.0950	365	1,184.03	6.50%	76.96	1,260.99			
				<b>\$6,629.88</b>		<b>\$430.94</b>	<b>\$7,060.82</b>	<b>(\$7,651.19)</b>	<b>(\$590.37)</b>	

4. **THE TENANT DID NOT SUBMIT ALL THE REQUIRED REPORTS FOR THE PERCENTAGE RENT PAYMENTS BY THE DESIGNATED DUE DATES SPECIFIED IN THE GROUND LEASE AGREEMENT.**

Section 3.3 entitled "Percentage Rent" of the Ground Lease Agreement states:

- (a) "Tenant shall pay Owner annual percentage rent for each Lease Year (the "Percentage Rent") during the Term in an amount equal to two and one-half percent (2 ½ %) of the amount of Project Revenue for each Lease Year commencing on the earlier to occur of (i) the ninth (9th) Lease Year or (ii) the Sale Date; provided, however, for the initial and final Lease Years, the Percentage Rent shall be prorated according to the actual number of days in such Lease Year."

Settlement Agreement dated September 16, 2015, Section 5 - Percentage Rent Payment/Additional Documentation states: ...effective as of the 2015 calendar year, through the end of the Master Lease Term, solely, the process for submitting the Percentage Rent payment, as required under Section 3.3(b) of the Ground Lease, shall be modified as follows: 16th Street Partners shall submit an estimated Percentage Rent payment, along with the back-up information, within sixty (60) days from the end of each Lease Year, subject to finalizing the audited financial statement for said particular Lease Year, with the adjusted/final payment due within one hundred fifty (150) days from the end of each Lease Year. As long as 16th Street follows this modified procedure, no penalties shall accrue to PKY under the Ground Lease.

16th Street agrees, for the duration of the Master Lease Term, to include, along with the audited financial statement and each final payment of Percentage Rent (including Percentage Rent from the lease of space to third parties and other parking revenue in accordance with the provisions of the Ground Lease), shall provide the Owner with the following: (i) a report with the floor plans reflecting the total square feet of space in the Project actually occupied and used by 16th Street or its affiliates during the prior Lease Year (which Owner may verify through a site visit); (ii) the actual Third Party Reimbursable Expenses and the 16th Street Reimbursable Expenses, as well as the corresponding reconciliations for said expenses for the prior Lease Year; (iii) the number of monthly parking passes or access cards issued to and actually used by employees of 16<sup>th</sup> Street and its affiliates; (iv) a copy of the insurance bill(s) paid and covering the prior Lease Year; and (v) proof of payment of real estate taxes paid and covering the prior Lease Year.

As part of the Ground Lease Agreement, the Tenant is required to submit audited financial statements along with back-up information in order to calculate the Percentage Rent due to the City pursuant Section 3.3 (b). Timely receipt of these required reports is essential

for City staff to calculate the percentage rent due and to make informed decisions related to the Ground Lease Agreement. Consequently, the OIG Auditor requested the related financial records and reports furnished to the Asset Management Division by the Tenant during the audit period.

The Asset Management Division made the following Tenant provided records available for examination:

- 2019 Project Revenue per Ground Lease Worksheet, Base Rent Calculation, Common Area Maintenance (CAM) Reimbursement Calculation, Parking revenue calculation, and 2019 Trial Balance.
- 2020 Project Revenue per Ground Lease Worksheet with Base Rent Calculation, CAM Reimbursement Calculation, and Parking revenue calculation.
- 2021 Project Revenue per Ground Lease Worksheet and Cash Management Ledger.

None of these reports contained evidence indicating the report issue dates and/or dates received by the Asset Management Division.

Additional details regarding the required supporting documentation for the percentage rent payments under Section 3.3(b) of the Ground Lease Agreement are presented in the following bullets:

- The Audited Financial Statements required pursuant to the Ground Lease Agreement for 2018, 2019, and 2020 were submitted during the audit process. In addition, the 2021 Audited Financial Statements had not been provided to the Asset Management Division, as the current tenant did not issue Audited Financial Statements for The Lincoln Place.
- The 2018 Project Revenue per Ground Lease Worksheet, back-up supporting documentation, and the 2021 Project Revenue per Ground Lease back-up supporting documentation for January 2021 – June 2021 were unavailable for examination.
- The Floor Plans report, copies of the insurance bill, and proof of payment of real estate taxes paid were not furnished to the Asset Management Division for the audit period.

Recommendation(s):

The Tenant should timely submit all required reports to the City Asset Management Division pursuant to the Ground Lease Agreement. All reports should be time/date stamped upon receipt by the City to document whether the Tenant complies with established due dates. If not timely received, the Asset Management Division should document the deficiency, follow up with the Tenant, and implement any enforcement actions available in the Ground Lease Agreement, where applicable.

Facilities and Fleet Management Department Response:

The Asset Management Division has no reason to believe the reports mentioned above were delivered late to the City. The current Asset Management team has been maintaining time/date stamps on received documents, despite it not being a lease requirement. The team follows up with tenants for their deliverables and implements the appropriate enforcement per the lease. Asset Management follows-up with Tenants consistently to ensure the delivery of timely documents and lease requirements.

OIG Response:

The documentation received from the Asset Management Division, along with the responses obtained from its key staff members, was used to support this finding. As such, OIG's finding #4 is based on evidence and is sufficiently supported and can be viewed upon request. Except for the 2018 and 2020 Audited Financial Statements signed and dated by the independent accounting firm and 2019 Trial Balance showing report run date/time, which does not necessarily represent the date received by the City, none of the other reports and worksheets provided to the OIG Auditor were time/date stamped or contain other evidence indicating the report issue and/or receipt dates.

The OIG Auditor sent emails dated 10/26/2022, 11/30/2022, 12/06/2022, 12/23/2022, 01/18/2023, and 02/23/2023, requesting documentation needed from the Asset Management Division to complete the audit. Although some was subsequently provided, the following requested records were not made available by the Asset Management Division to the OIG Auditor for examination during the audit process despite multiple requests:

- The 2018 Project Revenue per Ground Lease Worksheet and backup supporting documentation.
- The 2021 Project Revenue per Ground Lease backup supporting documentation for January 2021 – June 2021.
- The 2021 Audited Financial Statements.
- 2018 through 06/2021 Tenant Rosters showing the detailed rent (period, rate, square feet) collected from subtenants and affiliate occupancy.
- The Floor Plans report, copies of the insurance bill, and proof of payment of real estate taxes paid for the entire audit period.

In response to the missing documentation requested in the earlier mentioned emails, Asset Management staff responded indicating that they are "*working on getting these documents*", "*are unable to locate*" and "*have not*" received the outstanding items requested by the OIG Auditor. Based on these documented email responses and the failure to provide the requested documents to the OIG Auditor during the audit process and prior to the issuance of the draft report, one would safely assume that the Asset Management had not received these records. Furthermore, the missing documents were also not provided to the OIG Auditor during the 30-working day response period pursuant to City Code Section 2-256(h), or as of the issuance of this audit report, which further supports the OIG's previous assumption, and is contrary to the response received above from the City Asset Management Division.

5. ***PERCENTAGE RENT PAYMENTS COULD NOT BE VERIFIED DUE TO INSUFFICIENT SUPPORTING DOCUMENTATION AS REQUIRED PER THE GROUND LEASE AGREEMENT.***

Section 3.3 of the Ground Lease Agreement states:

*(a) "Tenant shall pay Owner annual percentage rent for each Lease Year (the "Percentage Rent") during the Term in an amount equal to two and one-half percent (2 ½ %) of the amount of Project Revenue for each Lease Year commencing on the earlier to occur of (i) the ninth (9th) Lease Year or (ii) the Sale Date; provided, however, for the initial and final Lease Years, the Percentage Rent shall be prorated according to the actual number of*

days in such Lease Year.”

(b) “Payment of Percentage Rent. Tenant shall pay the full amount of Percentage Rent due in annual installments, in arrears, within sixty (60) days after the end of each Lease Year for the preceding Lease Year.”

Meanwhile, the Settlement Agreement dated September 16, 2015, Section 5 - Percentage Rent Payment/Additional Documentation, states: ...effective as of the 2015 calendar year, through the end of the Master Lease Term, solely, the process for submitting the Percentage Rent payment, as required under Section 3.3(b) of the Ground Lease, shall be modified as follows: 16th Street Partners shall submit an estimated Percentage Rent payment, along with the back-up information, within sixty (60) days from the end of each Lease Year, subject to finalizing the audited financial statement for said particular Lease Year, with the adjusted/final payment due within one hundred fifty (150) days from the end of each Lease Year. As long as 16th Street follows this modified procedure, no penalties shall accrue to PKY under the Ground Lease.

The Munis system indicated that the Tenant remitted the following total percentage rent payments to the City during the audit period:

Calendar Year	Lease Year	Payment Date	Percentage Rent Paid
2018	16	04/18/2019	\$175,770.60
2019	17	04/07/2020	\$184,955.88
2020	18	03/26/2021	\$159,938.34
2021	19	08/23/2022	\$168,487.78
<b>Total</b>			<b>\$689,152.60</b>

During the audit period, Lincoln Place was occupied by two tenants, the former, 16<sup>th</sup> Street Partners, LLC, and the current Tenant, NG 1601 Washington Ave. LLC. The percentage rent payments for the 2018 through 2020 calendar years were remitted by 16th Street Partners, LLC, the former Tenant. Meanwhile, the 2021 percentage rent payment was remitted to the City by NG 1601 Washington Ave. LLC; however, it included monies owed by former Tenant 16th Street Partners, LLC during the first half of 2021 (January 1, 2021, through June 30, 2021).

As noted in Finding #4, the Tenant did not submit some of the required financial statements and back-up reports required in the Ground Lease Agreement to the City Asset Management Division related to the percentage rent payment calculations. In its absence, the OIG Auditor requested the required missing documentation from the Tenant. 16th Street Partners, LLC, the former Tenant that occupied the property from the beginning of the audit period until June 30, 2021, has not responded to requests to provide the back-up documentation regarding the figures reported for the Project Revenue Worksheet calculation. In addition, 16th Street Partners, LLC supposedly did not provide the current Tenant with any financials and back-up documentation when NG 1601 Washington Ave. LLC took control of Lincoln Place on July 1, 2021.

Although the annual percentage rent calculations as per the Project Revenue per Ground Lease Worksheets provided by 16th Street Partners, LLC was consistently calculated by the Tenant, the Asset Management Division did not have the necessary supporting documentation to validate the amounts paid to the City. The Audited Financial Statements required pursuant to the Ground Lease Agreement for 2018, 2019, and 2020 were submitted. However, the supporting documentation, such as the floor plans report, copy of the insurance bill, proof of payment of real estate taxes paid, 2018 Project Revenue per



Ground Lease Worksheet, and back-up documentation, were not furnished for examination.

The current Tenant, NG 1601 Washington Ave. LLC, provided supporting documentation to verify the percentage rent payment for the second half of 2021 (July through December). However, as stated by the Tenant, it did not issue audited financial statements for this property; instead it issued internally prepared Unaudited Financial Statements.

In addition, the current Tenant expressed concern about which accounting basis to follow regarding the provision of required reports due to accounting method inconsistencies between the computation of project revenue on a cash basis and the preparation of financial statements for audit on an accrual basis as required per the Ground Lease Agreement. Audited financial statements prepared by an independent CPA firm would increase the City's confidence that the reported figures in the Project Revenue Worksheets are complete and accurate.

NG 1601 Washington Ave. LLC had a net lease with the prior Tenant, 16th Street Partners, LLC, through June 30, 2021, where 16th Street Partners, LLC was responsible for directly paying all obligations, including percentage rent and providing the required documentation to the City. The current Tenant's Vice President of Accounting told the OIG Auditor they were unaware of the existence of any financial or Tenant rosters from 16th Street Partners, LLC, while they occupied the property. Also, their lease with 16th Street Partners, LLC, supposedly did not require their tenant to provide them with management reports as landlords. In addition, they have communicated with their contact at 16th Street Partners, LLC, and they claim that no response has been received. The missing supporting documentation was not furnished as of the completion of this report.

Recommendation(s):

The Tenant should timely submit all required financial statements and back-up documentation to the Asset Management Division under the executed Ground Lease Agreement. In addition, the Asset Management Division should validate the corresponding figures as per the supporting documentation to those reported in the annual percentage rent calculations provided by the Tenant. If the documentation still needs to be received as part of submitting the percentage rent payments, the Asset Management Division should promptly notify the Tenant of the deficiency in writing and implement any disciplinary actions available in the Ground Lease Agreement.

Facilities and Fleet Management Department Response:

These processes and procedures have been in effect since 2022, which is prior to the commencement of this audit. Unfortunately, we cannot comment on anything prior.

6. **FINDING: TENANT WAS NOT COMPLIANT WITH ALL INSURANCE REQUIREMENTS PURSUANT TO ARTICLE 7 OF THE GROUND LEASE AGREEMENT FOR MOST OF THE AUDIT PERIOD.**

Section 7.1 "Insurance Requirements" states:

*(a) Liability Insurance. At all times during the Term, Tenant, at its sole cost and expense, shall carry or cause to be carried insurance against liability with respect to the Premises and the operations related thereto, whether conducted on or off the Premises in an amount of not less than Twenty-Five Million Dollars (\$25,000,000) per occurrence, subject to adjustment for inflation, combined single limit, and designating Tenant as a named*

insured, and Owner and, if required by Recognized Mortgage, a Recognized Mortgagee as additional insureds. Such insurance shall meet all of the standards, limits, minimums and requirements described in Section 7.7.

(b) *Property Insurance.* At all times during the Term, Tenant at its sole cost and expense, shall carry or cause to be carried "All Risk" (or its equivalent) property damage insurance protecting Tenant, Owner and any Recognized Mortgagees as their interests may appear against loss to the Premises and Improvements and meeting all of the standards, limits, minimums and requirements described in Section 7.8.

(c) *Other Insurance.* At all times during the Term, Tenant shall procure and carry insurance meeting all of the standards, limits, minimums, and requirements described in Section 7.9.

(d) *Construction Insurance.* Prior to the commencement of any Construction Work, Tenant shall procure or cause to be procured, and after such dates shall carry or cause to be carried, until final completion of such work, in addition to and not in lieu of the insurance required by the foregoing subsections (a), (b), and (c), the insurance described in Section 7.10.

(e) *Garage Liability/Garage keeper's Liability Insurance.* From and after the CO Date, Tenant shall procure or cause to be procured, and after such date shall carry or cause to be carried with respect to the Garage, Garage keeper's legal liability coverage in an amount not less than Five Million Dollars (\$5,000,000), subject to adjustment for inflation, per occurrence, with a deductible determined by Owner, but not more than Fifty Thousand Dollars (\$50,000) per loss subject to adjustment for inflation; and (ii) automobile liability insurance covering any automobile owned, non-owned or hired in an amount not less than Twenty-Five Million Dollars (\$25,000,000), subject to adjustment for inflation, per occurrence, with a deductible determined by Tenant of not more than Ten Thousand Dollars (\$10,000) per loss, subject to adjustment for inflation.

#### *Section 7.6 Blanket or Umbrella Policies.*

The insurance required to be carried by Tenant pursuant to the provisions of this Lease may, at Tenant's election, be effected by blanket, wrap-up and/or umbrella policies issued to Tenant covering the Premises and other properties owned or leased by Tenant or its Affiliates, provided such policies otherwise comply with the provisions of this Lease and allocate to the Premises the specified coverage, including, without limitation, the specified coverage for all insureds required to be named as insureds or additional insureds hereunder, without possibility of reduction or coinsurance by reason of, or because of damage to, any other properties named therein. If the insurance required by this Lease shall be effected by any such blanket or umbrella policies, Tenant shall furnish to Owner, upon Owner's request, certificates of insurance and copies (certified by Tenant to be true, complete and correct) of such policies as provided in Section 7.3(c), together with schedules annexed thereto setting forth the amount of insurance applicable to the Premises.

#### *Section 7.8 Property Insurance Requirements.*

The insurance required by Section 7.1(b) shall consist at least of property damage insurance under an "All Risk" policy or its equivalent covering the Premises and all Improvements with replacement cost valuation and an Agreed Amount Endorsement (to be effective not later than promptly following the CO Date) in an amount not less than the

full Replacement Value ( determined in accordance with Section 7.12) and including the following coverages or clauses:

- (a) coverage for physical loss or damage to the Improvements;
- (b) a replacement cost valuation without depreciation or obsolescence clause;
- (c) debris removal coverage;
- (d) provision for a deductible determined by Tenant, but not more than Fifty Thousand Dollars (\$50,000) per loss (for other than flood or windstorm, with regard to which the deductible shall be a commercially reasonable amount), subject to adjustment for inflation;
- (e) contingent liability from operation of building laws;
- (f) demolition cost for undamaged portion coverage;
- (g) increased cost of construction coverage;
- (h) an Agreed Amount Endorsement (to be effective not later than promptly following the CO Date) in an amount not less than the full Replacement Value negating any coinsurance clauses;
- (i) flood coverage
- (j) windstorm coverage
- (k) coverage for explosion caused by steam pressure-fired vessels (which coverage may be provided under a separate policy reasonably approved by Owner);
- (l) business interruption coverage in accordance with Section 7.9;
- (m) a clause designating Owner and a Recognized Mortgagee as additional insureds, as their interests may appear; and
- (n) contain no exclusions unless approved in writing by Owner, other than the industry standard exclusions for projects of similar size and location.

Tenant shall be named insured, and Owner and any Recognized Mortgagee shall be additional insureds, as their interests may appear. The Recognized Mortgagee or Owner shall be designated loss payee on such "All Risk" policy for the benefit of Owner, Tenant and any Recognized Mortgagee. If not included within the "All Risk" coverage above, Tenant shall also carry or cause to be carried coverage against damage due to (i) water and sprinkler leakage and collapse, which shall be written with limits of coverage of not less than the full Replacement Value per occurrence, with a deductible of not more than Fifty Thousand Dollars (\$50,000), subject to adjustment for inflation and (ii) flood, which shall be written with limits of coverage of not less than Twenty-Five Million Dollars (\$25,000,000), with a deductible of not more than Two Hundred Fifty Thousand Dollars (\$250,000), subject to adjustment for inflation, to the extent available at commercially reasonable rates and deductibles.

If Tenant elects to insure Tenant's personal property used in connection with the Premises, the replacement value of such personal property shall be added to the amount of insurance required by this Section.

For the purposes of this Section 7.8, any rate, limit or deductible shall be "commercially reasonable" if such rate, limit or deductible is comparable to the rates, limits or deductibles in the insurance carried by similar projects in South Florida of a size, nature and character similar to the size, nature and character of the Project.

#### Section 7.9 Other Insurance Requirements.

The insurance required by Section 7.1(c) shall consist at least of the following:

- (a) Business Interruption Insurance to include Rent Insurance on an "All Risk" basis in an amount equal to (i) prior to the CO Date, not less than the annual Base Rent and (ii)

*following the CO Date, not less than the aggregate amount of annual Rental and/or Impositions. The insurance specified in this subsection shall:*

- (i) provide coverage against all reasonably insurable risks of physical loss or damage to the Improvements;*
  - (ii) Extra Expense coverage, with a limit of at least One Million Dollars (\$1,000,000), adjusted for inflation, to cover overtime and other extra costs incurred to expedite repairing or rebuilding the damaged portion of the Premises;*
  - (iii) provide for coverage through the attainment of pre-existing business levels;*
  - (iv) contain flood and windstorm coverage to the extent available at commercially reasonable rates, limits, and deductibles;*
  - (v) contain explosion caused by steam pressure fired vessels coverage (which coverage may be provided under a separate policy reasonably approved by Owner);*
  - (vi) provide for a deductible determined by Tenant, but for not more than Fifty Thousand Dollars (\$50,000) per loss (other than for flood or windstorm, with regard to which the deductible shall be a commercially reasonable amount), subject to adjustment for inflation;*
  - (vii) designate Owner, Tenant and any Recognized Mortgagee as loss payee but shall be payable only to Tenant with respect to Business Interruption proceeds not exceeding One Hundred Thousand Dollars (\$100,000), subject to adjustment for inflation, per occurrence; and*
  - (viii) contain no exclusions, unless approved by Owner, other than industry standard exclusions for projects of similar size and location.*
- (b) Statutory Workers' Compensation and any other insurance required by law covering all employees of Tenant or any entity performing work on or for the Premises or the Improvements (unless and to the extent provided by such other parties), including Employers Liability coverage, all in amounts not less than the statutory minimum, except that Employers Liability coverage shall be in an amount not less than One Million Dollars (\$1,000,000), subject to adjustment for inflation.*
- (c) After CO Date, Boiler and Machinery Insurance, covering the entire heating, ventilating and air-conditioning systems, in all its applicable forms, including Broad Form, boiler explosion, extra expense and loss of use in an amount not less than the replacement cost of such heating, ventilating and air conditioning systems, located on any portion of the Premises and other machinery located on any portion of the Premises, which shall designate Tenant as named insured and loss payee and designate Owner and any Recognized Mortgagee as additional insureds.*
- (d) Automobile liability insurance covering any automobile or other motor vehicle used in connection with the Project in an amount not less than Twenty-Five Million Dollars (\$25,000,000), subject to adjustment for inflation, per occurrence, with a deductible determined by Tenant of not more than Ten Thousand Dollars (\$10,000) per loss, subject to adjustment for inflation.*

The City entered into a Master Customer Agreement with Exigis LLC (Exigis) on July 14, 2018, to use its RiskWorks software, a proprietary web-enabled Risk Management Operating System comprising a suite of configurable web-enabled risk, insurance, and treasury "Application Modules". One of the software's stated benefits is to centralize the administration and automate the request, follow-up, processing, auditing, and tracking of Certificates of Insurance.

The OIG Auditor examined Lincoln Place, LLC's insurance profile in the Exigis software and identified the following discrepancies:

- a) The evaluations by Exigis of the Certificates of Insurance provided by the tenants for the stated periods comprising April 1, 2018, through April 1, 2021, were deemed non-compliant due to the following:
- Evaluation #27668, with an effective date of April 1, 2018, through April 1, 2019, was deemed non-compliant as the Tenant did not maintain the required Commercial General Liability insurance and did not provide proof of Workers' Compensation coverage.
  - Evaluation #36312, with an effective date of April 1, 2019, through April 1, 2020, was non-compliant as the Tenant did not provide proof of Workers' Compensation coverage.
  - Evaluation #58117, with an effective date of April 1, 2020, through April 30, 2020, was non-compliant as the Tenant did not provide proof of Workers' Compensation coverage.
  - Evaluation #60388, with an effective date of April 1, 2020, through April 1, 2021, was non-compliant as the Tenant did not provide proof of Workers' Compensation coverage and did not satisfy the Excess/Umbrella Liability requirement.

Regarding the Workers' Compensation coverage for the period of April 1, 2020, through April 1, 2021, the Asset Management Director stated that although the Tenant did not provide proof of Workers' Compensation coverage for evaluation, the Certificate of Liability Insurance provided to comply with this requirement for the subsequent calendar year 2022 (01/01/2022 through 01/01/2023) shows Workers Compensation and Employer's Liability policy number WC020734148 covering year 2021 (January 1, 2021 – January 1, 2022).

- b) Even though Evaluation #79345, with an effective date of January 1, 2022, through December 31, 2022, is listed as compliant with the Exigis parameters, the parameters set and reviewed by Exigis were not fully aligned with the requirements in the Ground Lease Agreement. Consequently, the listed Exigis profile may not accurately reflect whether the Certificate of Insurance was fully compliant with all contractual requirements.

Inquiries found that Exigis staff evaluated compliance based on the parameters established for Type 5 – Leases entered into its software by the City. Type 5 - Leases parameters are not aligned with the agreement requirements. The following are the parameters set in the Exigis software for Lincoln Place's Certificate of Insurance evaluation:

Commercial General Liability:

- Financial Strength Rating must be greater than or equal to B+
- Financial Size Category must be greater than or equal to VI
- Per Occurrence Limit must be greater than or equal to \$1,000,000
- City of Miami Beach shown as an additional insured with respect to this coverage
- Certificate Holder name must contain City of Miami Beach

Workers Compensation/Employer Liability:

- Financial Strength Rating must be greater than or equal to B+
- Financial Size Category must be greater than or equal to VI
- Statutory Limit as required by applicable law.

-Certificate Holder name must contain City of Miami Beach

A comparison between the above Exigis parameters and the insurance requirements set in Article 7 of the Ground Lease Agreement resulted in the following discrepancies:

- The parameter for Commercial General Liability is greater than or equal to \$1,000,000; however, the Liability Insurance requirement in the agreement is not less than \$25,000,000 per occurrence.
- The parameters do not include all the insurance requirements in the agreement, such as Automobile Insurance coverage of at least \$25,000,000, Garage Keeper Liability of not less than \$5,000,000, Business Interruption Liability of \$100,000, Proceeds of Casualty Insurance of \$1,000,000, Flood coverage for not less than \$25,000,000, Boiler and machinery insurance, and the Business Interruption for one year's rental and/or imposition; for extra expense coverage, the limit of \$1,000,000.

The OIG Auditor sent emails on December 20, 2022, and February 1, 2023, requesting the Risk Management Division Director to review the Certificates of Insurance downloaded from Exigis to determine their compliance with the Ground Lease Agreement.

At a February 9, 2023, meeting, the Risk Management Division Director stated that although the Certificates of Insurance (COI) show a General Liability of \$1,000,000 per each occurrence, less than the \$25,000,000 required per the agreement, the \$75,000,000 per each occurrence that the COI provides as Umbrella Liability satisfied the General Liability in accordance with Section 7.6 of the Ground Lease Agreement allows that this coverage could be obtained through wrap/Excess/Umbrella Liability insurance coverage. In addition, the Risk Management Division Director expressed the necessity of a reasonable appraisal of the property to update the value for adequate insurance coverage.

Recommendation(s):

The responsible City staff should revise the Exigis software parameters related to Lincoln Place to mirror the insurance requirements listed in Article 7, Insurance, of the Ground Lease Agreement. Asset Management Division staff should ensure that the Certificate of Insurance is fully compliant with the Ground Lease Agreement and consult with Risk Management Division staff to answer any questions regarding insurance compliance. In addition, the Asset Management Division should periodically review Exigis software to validate that the Tenant complies with the related insurance requirements.

Facilities and Fleet Management Department Responses:

The Asset Management Division verifies the received certificates of insurance in accordance with the lease requirements. This recommendation comes up on all audits during the same period. Prior to the first finding of this discrepancy (for the current Asset Staff), the Asset Management staff had no knowledge that Exigis parameters would not necessarily mirror the lease requirements. This has been corrected and continues to be reviewed regularly. Risk Management confirmed that tenant is in compliance with Insurance requirements. The OIG has also brought this up to Risk Management during several audits.

Risk Management Division Responses:

Because each lease agreement has varying insurance requirements, Risk Management has not assigned a boilerplate insurance requirement type for compliance purposes with 'EXIGIS'. This has been a recurring issue and the Risk Management office has decided

to track all lease agreements in-house for insurance compliance. The Risk Management staff will perform similar services as 'EXIGIS to track compliance for all lease agreements. Moving forward, the OIG should contact the Risk Management office upon their audit of all lease agreements for insurance compliance reporting.

To address the specific concern noted in the audit report (page 21 of 26), the \$1,000,000 primary liability limit and \$75,000,000 excess liability limit that was provided to satisfy the \$25,000,000 liability requirement is an acceptable form for satisfying the insurance requirement. It is a common and acceptable practice to provide primary and excess coverage to satisfy limits that are required in contract agreements.

The Asset Management Division consults with the Risk Management staff to answer any questions regarding insurance requirements and compliance.

For future audits, the Asset Management Division will include the Risk Management staff, as all lease agreements will be maintained by this office to track compliance with insurance requirements.

#### **OIG SUGGESTED OPPORTUNITY FOR IMPROVEMENT**

Regardless of the level of oversight exercised by the Asset Management Division staff and the current Tenant, NG 1601 Washington Ave. LLC, opportunities for improvement may always be explored, which is a benefit of an independent audit. The following points are presented for evaluation purposes:

1. ***ACCOUNTING METHOD INCONSISTENCIES EXIST BETWEEN THE COMPUTATION OF PROJECT REVENUE ON A CASH BASIS AND THE PREPARATION OF FINANCIAL STATEMENTS ON AN ACCRUAL BASIS.***

Section 1.1, entitled "Definitions", states: *Accounting Principles" means generally accepted accounting principles as promulgated by the American Institute of Certified Public Accountants, except as otherwise provided by this Lease, with such changes as Owner and Tenant shall mutually agree are consistent with this Lease in order to reflect technologies and methodologies not addressed in the Accounting Principles.*

Section 3.3. (c) "Definition" states: *"Project Revenue" means (without duplication): (i) all revenue, payments, income received, escalation adjustments, rental and operating cost reimbursements reserved under any lease, sublease, concession, license, or other arrangement or from the operation of the Project (including any reimbursements for Operating Expenses and common area maintenance) and paid to Tenant for the use or occupancy of any portion of the Project; provided, however, that for purposes of calculating Project Revenue (i) if any space in the Project other than the Project management office (which shall be limited to a maximum of one thousand (1,000) square feet) is leased to, or used by, Tenant, any Affiliate of Tenant, subtenant, or any other Person at a rental which is less than fair market rental value of such space (determined as of the date such lease is signed), the rent shall be increased by an amount equal to the difference between the rent being paid and the fair market rental value; and (ii) if any space in the Project is leased to, or used by Tenant, any Affiliate of Tenant, subtenant, or any other Person on a basis whereby the Tenant pays real estate taxes, common area maintenance charges or operating costs other than utilities directly to the taxing authority or service provider rather than to Tenant, the rent under such leases shall be increased by the amount of such taxes; common area maintenance charges and/or operating costs*

( other than utilities) paid directly to the taxing authority or service provider by the Tenant; and

(ii) all revenue, receipts, or other income derived by Tenant from the Garage or any other parking service, including revenue derived by Tenant from valet service; and

(iii) Proceeds of rental loss insurance to the extent that such proceeds replace items of revenue referenced in (i) and (ii) above. Project Revenue shall be computed on a **cash basis in accordance with the Accounting Principles**.

Section 28.1 (a) "Books and Records; Audit Rights" states: *Tenant shall at all times during the Term of this Lease keep and maintain (separate from any of Tenant's other books, records and accounts), and shall cause the Project Manager to keep and maintain, accurate and complete records pertaining to the Premises related thereto, including, without limitation, books of account reflecting the Project Revenue of the Acceptable Operator and such other matters referenced in this Lease, **in accordance with the Accounting Principles** with such exceptions as may be provided for in this Lease, and provided that Tenant (and the Acceptable Operator) may make such reasonable modifications in such books of account as are consistent with Acceptable Operator's standard practice in accounting for its operations under management contracts generally. Owner and its representatives shall have, during normal business hours and upon reasonable advance notice, access to inspect the books and records of Tenant and the Acceptable Operator pertaining to the Project Revenue, including, without limitation, books of account properly reflecting the operations of the Premises, which books and records shall be kept at the Premises. Owner shall have the right to cause an audit by Owner's internal auditors (**in accordance with the Accounting Principles**) of such books and records to be made at any time (but not more frequently than one (1) time in any twelve (12) month period and only with respect to Project Revenue), at Owner's expense (a copy of which shall be delivered to Tenant). Such right of inspection and audit may be exercised at any time within three (3) years after the end of the Lease Year to which such books and records relate, and Tenant and Acceptable Operator shall maintain all such books and records for at least such period of time and, if any Dispute between the parties has arisen and remains unresolved at the expiration of such period of time, for such further period of time until the resolution of such Dispute. Notwithstanding anything to the contrary contained herein, at Tenant's option, the audit described in this Section 28.1(a) shall be performed by Owner's external auditors (which shall be a Recognized Accounting Firm), in which case Tenant shall pay the reasonable fees and expenses of said external auditors; and, provided further that in the event that Owner determines to have such audit performed by its external auditors, Owner shall pay the fees and expenses of said external auditors.*

(c) *As soon as available, but in no event later than the date which is one hundred fifty (150) days after the end of each Lease Year, Tenant shall make available at the Premises for inspection and examination (or photocopying) by Owner or its representatives a copy of the annual financial statements (the "Annual Financial Statements") for such Lease Year (which statements shall be audited by any Recognized Accounting Firm) accurately reflecting receipt of Project Revenue prepared and certified by Tenant and such independent certified public accountant **in accordance with the Accounting Principles**.*

The audit and the annual financial statements, as stated above per the Ground Lease Agreement, are to follow Generally Accepted Accounting Principles (GAAP basis/accrual basis), while the Project Revenue is defined as cash receipts/cash basis in accordance with the Accounting Principles. However, this is contradictory because cash basis accounting is not acceptable under Generally Acceptable Accounting Principles (GAAP).



The current Tenant, NG 1601 Washington Ave. LLC, expressed concern to the OIG Auditor about which accounting basis to follow to provide the required reports in the Ground Lease Agreement. Taking into consideration that the Tenant's books are kept on a cash basis under the tax basis of accounting, it did not issue Audited Financial Statements for The Lincoln Place. During a March 9, 2023, Microsoft TEAMS meeting with the Tenant, Asset Management Division staff agreed that the Tenant would provide the supporting documentation for the audit of the 2021 (second half) Project Revenue on a tax basis. However, going forward, some clarity is needed on the reporting requirements as the ground lease had conflicting definitions on whether the Financial Statement and Project Revenue can be issued on an accrual/GAAP basis or cash basis.

Recommendation(s):

It is recommended that the Asset Management Division request a legal opinion from the Office of the City Attorney clarifying the accounting method in which the project revenue and audit should follow to help prevent revenue recognition issues. It is important that the project revenue figures are accurately supported by the Tenant's audited financial statements. In addition, the project revenue and the financial statements should be presented in a form that allows for proper examination by the Asset Management Division staff.

Asset Management Division Response:

The Asset Management Division conferred with the City Attorney's Office (CAO), and the CAO advised the Asset Management Division that the Tenant may use either a cash basis or accrual basis as long as they are consistent within each lease-year term.

2. **THE AGREEMENT DOES NOT PROVIDE AN APPROPRIATE CONSEQUENCE/PENALTY FOR FAILURE TO TIMELY SUBMIT ALL REQUIRED REPORTS.**

As per the Settlement Agreement dated September 16, 2015, Section 5 - Percentage Rent Payment/Additional Documentation states, *effective as of the 2015 calendar year, through the end of the Master Lease Term, solely, the process for submitting the Percentage Rent payment, as required under Section 3.3(b) of the Ground Lease, shall be modified as follows: 16th Street Partners shall submit an estimated Percentage Rent payment, along with the back-up information, within sixty (60) days from the end of each Lease Year, subject to finalizing the audited financial statement for said particular Lease Year, with the adjusted/final payment due within one hundred fifty (150) days from the end of each Lease Year. As long as 16th Street follows this modified procedure, no penalties shall accrue to PKY under the Ground Lease.*

*16th Street agrees, for the duration of the Master Lease Term, to include, along with the audited financial statement and each final payment of Percentage Rent (including Percentage Rent from the lease of space to third parties and other parking revenue in accordance with the provisions of the Ground Lease), shall provide the Owner with the following: (i) a report with the floor plans reflecting the total square feet of space in the Project actually occupied and used by 16th Street or its affiliates during the prior Lease Year (which Owner may verify through a site visit); (ii) the actual Third Party Reimbursable Expenses and the 16th Street Reimbursable Expenses, as well as the corresponding reconciliations for said expenses for the prior Lease Year; (iii) the number of monthly parking passes or access cards issued to and actually used by employees of 16<sup>th</sup> Street and its affiliates; (iv) a copy of the insurance bill(s) paid and covering the prior Lease Year;*

*and (v) proof of payment of real estate taxes paid and covering the prior Lease Year.*

*As per the Ground Lease Agreement: Article 25 - Events of Default, Conditional Limitations, Remedies, Etc.*

*(b) if Tenant shall default in the observance or performance of any term, covenant or condition of this Lease on Tenant's part to be observed or performed (other than the covenants for the payment of Rental and/or Impositions or as expressly set forth below) and Tenant shall fail to remedy such Default within thirty (30) days after notice by Owner of such Default (the "Default Notice"), or if such a Default is of such a nature that it cannot reasonably be remedied within thirty (30) days (but is otherwise susceptible to cure), Tenant shall not (i) within thirty (30) days after the giving of such Default Notice, advise Owner of Tenant's intention to institute all steps ( and from time to time, as reasonably requested by Owner, Tenant shall advise Owner of the steps being taken) necessary to remedy such Default (which such steps shall be reasonably designed to effectuate the cure of such Default in a professional manner), and (ii) thereafter diligently prosecute to completion all such steps necessary to remedy the same;*

*In the event of a Default which with the giving of notice to Tenant and the passage of time would constitute an Event of Default, Owner's notice of such Default to Tenant shall state with specificity the provision of this Lease under which the Default is claimed, the nature and character of such Default, the facts giving rise to such Default, the date by which such Default must be cured, and that the failure of Tenant to cure such Default by the date set forth in such notice will result in Owner having the right to terminate this Lease .*

As stated in Finding #4, the Tenant did not timely submit all the required financials and back-up reports per the Ground Lease Agreement to the City's Asset Management Division as part of the process of submitting the percentage rent payments. The OIG Auditor reviewed the executed Ground Lease Agreement and the Settlement Agreement regarding any consequence/penalty for not timely providing the required back-up documentation related to the annual percentage rent lease payment remitted. No provisions were found in the agreements, as the Ground Lease Agreement only provides penalties for payments that were received late or after the designated due dates.

The required back-up reports validate accuracy and completeness of the percentage rent payments received by the City. These reports must provide sufficient detail for the City to determine the percentage rent due. As per Section 28 of the Agreement, the Tenant is required to keep, maintain, accurate and complete records, and make them available for examination upon request by the City and its representatives.

Although the Agreement provides for termination of the lease as a general remedy in any case of default by a non-compliant Tenant, such action appears disproportionate to the offense of failure to timely file a report and not geared toward efficient resolution of the issue. Therefore, it is recommended that the City closely review the executed Ground Lease Agreement and decide on the optimal approach for the Tenant's failure to comply with the required reports as the agreement does not provide any specific consequence/penalty for not timely submit all required reports to the City's Asset Management Division. Failure to provide all required reports to verify the percentage of rent payments should result in consequences, including fees and other disciplinary actions.

Asset Management Division Response:

This will be reviewed at Lease expiration, which is slated for September 2052.

All management responses received will be included in the final report pursuant to City Code Section 2-256(h).

Respectfully submitted,

  
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Joseph Centorino, Inspector General

11/30/2023  
Date

  
\_\_\_\_\_  
Mark Coolidge, Chief Auditor

11-30-2023  
Date

  
\_\_\_\_\_  
Norman Blaiotta, Deputy Chief Auditor

11/30/23  
Date

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cc: Alina T. Hudak, City Manager  
Eric Carpenter, Deputy City Manager  
Mark Taxis, Assistant City Manager  
Marla Alpizar, Human Resources Department Director  
Elizabeth Miro, Facilities and Fleet Management Department Interim Director  
Jason Greene, Chief Financial Officer

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