



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Nanci Klein

SUBJECT: SEE BELOW

DATE: March 15, 2021

Approved

Date

3/18/2021

SUBJECT: AMENDMENT TO COUNCIL POLICY 7-1 BELOW MARKET RENTAL POLICY FOR USE OF CITY-OWNED LAND AND BUILDINGS BY QUALIFIED ORGANIZATIONS FOR GOVERNMENTAL OR OTHER PUBLIC PURPOSES”

RECOMMENDATION

Adopt a resolution approving revisions to Council Policy 7-1 “BELOW MARKET RENTAL POLICY FOR USE OF CITY-OWNED LAND AND BUILDINGS BY QUALIFIED ORGANIZATIONS FOR GOVERNMENTAL OR OTHER PUBLIC PURPOSES,” as adopted April 13, 1970 and amended on November 29, 1994 and May 23, 2006, modifying the term of 7-1 Policy leases, expanding the definition of qualified organizations, amending reporting requirements for qualified organizations, and making other similar revisions.

OUTCOME

Approval of this recommendation will provide the Office of Economic Development, Real Estate Division, with necessary direction regarding the City’s leasing of facilities to non-profit, charitable or other similar organizations, and/or governmental agencies (“Qualified Organizations”) at below market rates.

BACKGROUND

City Council Policy 7-1 (“Below Market Rental Policy for Use of City-Owned Land and Buildings by Nonprofit or Charitable Organizations or for Governmental or other Public Purposes”) allows Qualified Organizations to occupy City properties for as low as \$1 per month with certain requirements.

On April 13, 1970, the City Council adopted Council Policy 7-1 “Use of City Owned Land and Buildings by Public or Quasi-Public Groups” in order to establish a set of guidelines for the use of City-owned land or buildings being held for but not immediately required for public purposes.

On November 29, 1994, Council approved a revision to Policy Number 7-1, by clarifying its criteria for leasing property for below market rates. Specifically, the revised policy established eligibility and property criteria, and required the administration to perform annual reviews as well as establish terms of tenancy and termination.

On May 23, 2006, Council approved a revision to Policy Number 7-1, by adopting the recommendations of the City Auditor transmitted his report “An Audit of the Property Management Operations of the City of San Jose’s Department of Public Works – Real Estate Division,” which made recommendations concerning annual review of nonprofit leases, establishing a formal application process for nonprofit leases, and directing monitoring of the leases to comply with Council policy.

In November 2008, the City Auditor issued Report #08-04, Oversight of Financial Assistance to Community-Based Organizations. Recommendation #09 from this report directs staff to clarify when the 7-1 policy should apply to leases with community-based organizations (CBOs) in City facilities. Recommendation #08-04 is a currently open item, and implementation of this recommendation requires amending the City’s 7-1 Policy.

ANALYSIS

The 7-1 Policy is intended to establish a set of criteria, guidelines, and requirements for the use of City-owned land or buildings not immediately required for public purposes. Policy 7-1 is a method of giving assistance to Qualified Organizations that may be public, quasi-public, or community-oriented service groups which provide services benefitting the citizens of San José that staff has determined meet the criteria set out in in the Policy. Under the policy, a Qualified Organization or City-sponsored program is charged a nominal rental fee and is obligated to maintain the facilities in exchange for use of the space to provide their services to the community. Through the program, the City is able to create a public benefit from under-utilized facilities that may not be otherwise competitively positioned for Fair Market Value in a cost-neutral manner by partnering with Qualified Organizations providing public services.

When the City Auditor issued Report #08-04, responsibility for management of leases with CBOs was decentralized, and application of Policy 7-1 (which was intended for short-term use of City property) was unclear. Revision and expansion of Policy 7-1 is necessary to reflect the longer-term nature of the leases and to conform the Policy with state law.

The full text of staff’s proposed revised Policy 7-1 is attached to this memo as Exhibit A along with a copy of the proposed revisions redlined against the existing 7-1 policy attached as Exhibit B. An overview of key revisions to the Policy is below.

- Creating a Qualified Organization definition that is inclusive of different groups to streamline and provide flexibility for appropriate use of City facilities and reporting obligations.

- Reduce reporting obligations for governmental entities and streamline reporting obligations for nonprofits.
- Remove requirements limiting the term of 7-1 leases to allow for long-term occupancy while maintaining the City’s flexibility to change the use of the property with a 90 day no-cause termination notice.
- 7-1 leases may be terminated if the use of the space is no longer providing adequate public services.
- Remove criteria restricting leasing properties that could be declared surplus to the needs of the City.

The proposed changes to Policy 7-1 provide the City the ability to continue ongoing public services in City facilities so long as the facility is not required for other immediate municipal uses. Modified reporting requirements for Qualified Organizations better reflect the different composition of public, quasi-public, or community-oriented service groups and reduces unnecessary reporting that is irrelevant or impractical, such as requiring a governmental organization to submit the composition of its board of directors and provides staff some discretion in the format of reporting. The proposed revised Policy 7-1 ensures that Qualified Organizations report information sufficient for staff to make an informed decision on whether the ongoing use continues to provide a public service and provides flexibility to reclaim the properties when they become necessary for City use. These changes provide staff better flexibility to manage City facilities in compliance with state surplus law.

CONCLUSION

The proposed revisions to Policy 7-1 are required to implement recommendations from Audit Report #08-04, will bring the Policy in line with the practical constraints and requirements of partnering with public, quasi-public, or community-oriented service groups, and allows staff to better leverage the City’s facilities for the public benefit.

EVALUATION AND FOLLOW-UP

Any future or renewed leases with Qualified Organizations for City facilities will contain terms consistent with the modified Policy 7-1. Future annual reporting obligations for the City’s existing 7-1 tenants will be modified to be consistent with Policy 7-1.

CLIMATE SMART SAN JOSE

The recommendation in this memo has no effect on Climate Smart San José energy, water, or mobility goals.

HONORABLE MAYOR AND CITY COUNCIL

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POLICY ALTERNATIVES

Council can reject staff’s recommendation and not adopt the revised policy 7-1. The result of this rejection would be that Policy 7-1 would not be in compliance with the auditor’s recommendation; would require individual exemptions requested for each new lease under the Policy; would not align with the needs of Qualified Organizations or the City’s desired use of its properties, and the Policy may have detrimental effects on the control of city-owned property based on existing state law for surplus property.

PUBLIC OUTREACH

This memorandum will be posted on the City’s Council Agenda website for the March 30, 2021 Council Meeting.

COORDINATION

This memorandum has been coordinated with the City Attorney’s Office, the Office of the City Auditor, the City Manager’s Budget Office, and Planning, Building and Code Enforcement.

COMMISSION RECOMMENDATION/INPUT

No commission recommendation or input is associated with this action.

CEQA

Not a Project, File No. PP17-004, Government Funding Mechanism or Fiscal Activity with no commitment to a specific project which may result in a potentially significant physical impact on the environment and File No. PP17-008, General Procedure and Policy Making resulting in no changes to the physical environment.

/s/
NANCI KLEIN
Director of Economic Development

For questions, please contact Kevin Ice, Senior Manager, Real Estate, at (408) 535-8197.

Attachments

ATTACHMENT A

Revised Policy 7-1

TITLE

BELOW MARKET RENTAL POLICY FOR USE OF CITY-OWNED LAND AND BUILDINGS BY QUALIFIED ORGANIZATIONS FOR GOVERNMENTAL OR OTHER PUBLIC PURPOSES

BACKGROUND

During the normal course of conducting City business, lands or buildings are acquired for public purposes primarily in connection with the Capital Improvement Program. Due to the scheduling of City projects, or as a result of the acquisition process or re-use potential, these real properties can be made available for interim uses.

For such uses, rental contracts should be entered into with third parties to use the property until the public improvements begin, or if the property is a residual parcel after the public improvement has been completed, until the property is required for City use or is sold in accordance with City policy. There have also been occasions when the City has allowed quasi-public, community-oriented service groups to use City-owned property free or at a nominal fee.

PURPOSE

The purpose of this policy statement compliments the Below Market Rate Rental Policy and is intended to establish a set of criteria, guidelines and requirements for the use of City-owned land or buildings not immediately required for public purposes. The Below Market Rate Rental Policy was established as a method of giving assistance to Qualified Organizations that may be public, quasi-public, or community-oriented service groups which provide services to the citizens of San José that staff has determined meet the criteria set out in Section. B, below. Under the policy, a Qualified Organization or City-sponsored program is charged a nominal fee as space rent for services provided to the community. Through the program, the City is able to utilize facilities that may not be competitively positioned for Fair Market Value in a cost-neutral manner by partnering with Qualified Organizations providing public services.

BELOW MARKET RATE RENTAL POLICY

It is the policy of the City of San José that approval for requests for preferential rates and use of City lands not immediately needed for public purposes will meet the following criteria, guidelines or requirements:

A. Property Criteria

The lands and buildings, which will be made available for use by Qualified Organizations (defined below in Section B), will meet the following criteria:

1. The land or building is not immediately needed for public purposes but will be retained for a future public purpose;
2. The date of future City use has been estimated or established to be far enough into the future to justify an interim use;

3. The source of funding used for the original acquisition does not preclude the facility or property from legally being leased at less than fair market rate;
4. Property is reasonably suited for the intended use.

B. Qualified Organization Criteria

Non-profit, charitable, other similar organization, including governmental agencies, may rent property in compliance with Section A, above, from the City at reduced rental rates if they meet the qualifying criteria, stated below in Section B, approved by the City Council. City staff shall evaluate, based upon staff review of the criteria stated below and supplied by the applicant organization(s), and make a final determination as to whether the applicant organization meets or exceeds the qualifications and is a "Qualified Organization" for the purposes of this policy.

The criteria under which non-profit or charitable organizations will be evaluated for consideration for below market rents is as follows:

1. A City department must submit the Qualified Organization's request for space.
2. The Qualified Organization must perform a definitive community service provided primarily to citizens of San José and substantiate that a continuing public need exists for the services being provided.
3. The Qualified Organization must be designated, or in the process of requesting designation as a "non-profit" by the California State Board of Equalization (specified in Section 23710(d) of California Revenue and Taxation Code), hold tax exempt status from the Internal Revenue Service, and/or be a public or quasi-public governmental agency. Proof of said non-profit or governmental status shall be provided for review and verification by the Department administering the lease/property use agreement.
4. The Qualified Organization must be governed by a Board of Directors, if the organization is a not a governmental agency.
5. The City will not enter into leases or property use agreements at below market rates to organizations engaged in political activities or to religious organizations that would use the leased premises to promote sectarian, political or religious purposes.

C. Criteria for Public Benefit Use of Space:

To initially request the use of space, the non-profit or charitable organization must submit an outline of their program and organization ("Application") to the City, for evaluation by the Department of Public Works and/or other City departments, as affected by the particular requested use of space, which shall include but not be limited to the following:

1. The program's objective and a time frame for completion if applicable.
2. A profile of the clientele being served.
3. Projected staff and/or facilities expansion plans, if any, and other similar plans.
4. A current certified financial statement including sources of funding and any constraints applied to funds.
5. Evidence of adequate public liability insurance and property damage for nonprofits or charitable organizations contents at proposed public facility and/or other insurance as determined by the City's Risk Manager.

6. A list by address and monthly rental rate of any other real property rented by the non-profit or charitable organization and/or affiliated groups.
7. An evaluation of the non-profit or charitable organization program conducted by another governmental agency may be included if one exists.
8. City staff shall review all received Applications and make a determination, in its reasonable discretion, as to whether the proposed program conforms to Policy 7-1.
9. City staff shall be under no obligation to advance an application to Council should they determine that an application or applicant does not conform to Policy 7-1.

D. Annual Review Requirements

The Qualified Organization, except for government must provide the City on an annual basis with the following:

1. An organizational chart of the Qualified Organization along with a list of staff employees (by title) and salary.
2. Names and addresses of current members of the Board of Directors of the Qualified Organization.
3. A schedule of the Qualified Organization's Board of Directors meetings and, upon request, the Board's meeting minutes for the past year.
4. A current certified annual financial report of the Qualified Organization including all expenditures, sources of funding and any constraints on receivable or received funds.
5. Proof that their service is still available and quantitative reports, in a form acceptable to City, of services provided during the preceding year. Any such quantitative reports shall include, but not be limited to, key statistics necessary to demonstrate the breadth and scope of the services provided.

E. Terms of Tenancy

The terms under which below market or subsidized lease/property use agreements will be granted are as follows:

1. City staff will recommend to council for approval all rental agreements of City owned facilities or property.
2. The minimum rent shall be one dollar per month, which may be paid monthly or annually.
3. No alterations or improvements shall be made to the facility or site without the prior written approval of the City.
4. All repairs and maintenance of the leased site or facility shall be the responsibility of the tenant. City staff may inspect the property, at City's discretion, to ensure that it is being properly maintained.
5. Any change in the type or level of services provided may result in a termination of the tenancy.
6. The non-profit or charitable organization shall provide all necessary proof of insurance coverages as set and required by the City's Risk Manager prior to occupancy, during term of lease/property use agreement and at renewal of lease/property use agreement. The City, in its sole discretion, may change required insurance coverage amounts at any time.

7. The Qualified Organization shall not be entitled to relocation benefits as a result of its tenancy in the City-owned facility or property, unless such benefits are required by law.
8. The non-profit or charitable organization will be responsible for paying any and all taxes, including but not limited to possessory interest tax, which may be due as a result of the tenancy.
9. The facilities shall be for the exclusive use of the designated group and may not be sublet without the written consent of the City Manager.
10. The lease, property use agreement, rental agreement, or other similar agreement issued by the City will include a clause providing for revocation without cause, with the understanding that the Qualified Organization will vacate the premises upon 90-days' notice, at their own expense.
11. The City may require, prior to and during the lease, property use agreement, rental agreement, or other similar agreement, the submission of such additional information as may be needed.
12. A written agreement shall be prepared by the sponsoring department and submitted for review to the Public Works Department and approved as to form by the City Attorney's Office, setting forth the specific terms and conditions for each individual below market rental agreement. Nothing in these guidelines shall be construed as to limit the terms of any specific agreement.
13. The City Council will approve all lease, property use agreement, rental agreement, or other similar agreements, unless authority to approve the lease/property use agreements has been delegated to the City Manager either in the Municipal Code or by other Council action. The City Manager will comply with the terms of the delegation and shall report such agreements to the City Council.

F. Termination

A below market lease, property use agreement, rental agreement, or other similar agreement may be terminated by the City at any time for any of the reasons established in the lease/property use agreement, including, but not limited to the following:

1. The property or facility is required for the specific purpose or project for which it was originally purchased.
2. The property or facility is required for some other government purpose.
3. It is determined by the City Council that the facility or site being rented should be sold as surplus property.
4. It is determined by the City that the services provided by the non-profit or charitable organization are no longer necessary or adequate to justify the below market rent.
5. It is determined by the City that the Qualified Organization is not providing the services proposed or is providing unapproved alternative services.
6. Inspection of the property reveals that the property or facility is not being properly maintained.
7. The non-profit or charitable organization fails to provide proper liability insurance at any time during the term of the agreement.
8. It is no longer economically feasible or beneficial for the City.

ATTACHMENT B

TITLE

BELOW MARKET RENTAL POLICY FOR USE OF CITY-OWNED LAND AND BUILDINGS BY ~~NONPROFIT OR CHARITABLE~~QUALIFIED ORGANIZATIONS ~~OR~~ FOR GOVERNMENTAL OR OTHER PUBLIC PURPOSES

BACKGROUND

During the normal course of conducting City business, lands or buildings are acquired for public purposes primarily in connection with the Capital Improvement Program. Due to the scheduling of City projects, or as a result of the acquisition process or re-use potential, these real properties can be made available for interim uses.

~~Wherever possible, short-term~~ For such uses, rental contracts ~~are~~ should be entered into with ~~private individuals~~ third parties to use the property until the public improvements begin, or if the property is a residual parcel after the public improvement has been completed, ~~until the property is required for City use or is sold at public auction. There have also been occasions~~ until the property is required for City use or is sold in accordance with City policy. There have also been occasions when the City has allowed quasi-public, community-oriented service groups to use City-owned property free or at a nominal fee.

PURPOSE

The purpose of this policy statement compliments the Below Market Rate Rental ~~policy~~ Policy and is intended to establish a set of criteria, guidelines and requirements for the use of City-owned land or buildings not immediately required for public purposes. The ~~below-market rate rental policy~~ Below Market Rate Rental Policy was established as a method of giving assistance to ~~non-profit organizations~~ Qualified Organizations that may be public, quasi-public, or community-oriented service groups which provide services to the citizens of San José; ~~that staff has determined meet the criteria set out in Section B, below.~~ Under the policy, a ~~qualifying non-profit organization~~ Qualified Organization or City-sponsored program is charged a nominal fee as space rent for services provided to the community. Through the program, the City is able to utilize facilities that may not be competitively positioned for Fair Market Value in a cost-neutral manner by partnering with Qualified Organizations providing public services.

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A. Property Criteria

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2. The date of future City use has been estimated or established to be far enough into the future to justify an interim use;

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3. The source of funding used for the original acquisition does not preclude the facility or property from legally being leased at less than fair market rate.
4. Property ~~or facilities are not scheduled to be surplus~~ is reasonably suited for the intended use.

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B. ~~Non-Profit or Charitable~~ Qualified Organization Criteria:

~~Non-profit or charitable organizations, other similar organization, including governmental agencies,~~ may rent ~~non-operating~~ property in compliance with Section A, above, from the City at reduced rental rates if they meet the qualifying criteria, stated below in Section B, approved by the City Council. City staff shall evaluate, based upon staff review of the criteria stated below and supplied by the applicant organization(s), and make a final determination as to whether the applicant organization meets or exceeds the qualifications and is a "Qualified Organization" for the purposes of this policy.

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The criteria under which non-profit or charitable organizations will be evaluated for consideration for below market rents is as follows:

1. A City department must submit the ~~non-profit or charitable organization~~ Qualified Organization's request for space.
2. The ~~non-profit or charitable organization~~ Qualified Organization must perform a definitive community service provided primarily to citizens of San José, and substantiate that a continuing public need exists for the services being provided.
3. The ~~non-profit or charitable organization~~ Qualified Organization must be designated, or in the process of requesting designation as a "non-profit" by the California State Board of Equalization (specified in Section ~~23710d~~ 23710(d) of ~~the State~~ California Revenue and Taxation Code) ~~and~~, hold tax exempt status from the Internal Revenue Service, ~~and/or be a public or quasi-public governmental agency.~~ Proof of said non-profit or governmental status shall be provided for review and verification by the Department administering the lease/property use agreement.
4. The ~~non-profit or charitable organization~~ Qualified Organization must be governed by a Board of Directors, if the organization is a not a governmental agency.
5. The City will not enter into leases or property use agreements at below market rates to organizations engaged in political activities or to religious organizations that would use the leased premises to promote sectarian, political or religious purposes.

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C. Criteria for Pubic Benefit Use of Space:

To initially request the use of space, the non-profit or charitable organization must submit an outline of their program and organization ("Application") to the City, for evaluation by the Department of Public Works ~~Department~~ and/or other City ~~Department Heads~~ departments, as affected by the particular requested use of space ~~use~~, which shall include, but not be limited to the following:

1. The program's objective and a time frame for completion if applicable.
2. A profile of the clientele being served.
3. Projected staff and/or facilities expansion plans, if any, and other similar plans.

4. A current certified financial statement including sources of funding and any constraints applied to funds.
5. Evidence of adequate public liability insurance and property damage for nonprofits or charitable organizations contents at proposed public facility and/or other insurance as determined by the City's Risk Manager.
6. A list by address and monthly rental rate of any other real property rented by the non-profit or charitable organization ~~an~~and/or affiliated groups.
7. An evaluation of the non-profit or charitable organization program conducted by another governmental agency may be included if one exists.

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~~6. The City will not enter into leases or property use agreements at below market rates to organizations engaged in political activities or to religious organizations that would use the leased premises to promote sectarian or religious purposes.~~

8. City staff shall review all received Applications and make a determination, in its reasonable discretion, as to whether the proposed program conforms to Policy 7-1.
9. City staff shall be under no obligation to advance an application to Council should they determine that an application or applicant does not conform to Policy 7-1.

C. Annual Review Requirements

The ~~non-profit or charitable organization~~Qualified Organization, except for government must provide the City on an annual basis with the following:

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1. An organizational chart of the ~~non-profit or charitable organization~~Qualified Organization along with a list of staff employees (by title) and salary.
2. Names and addresses of current members of the Board of Directors of the Qualified Organization.
3. A schedule of the ~~non-profit or charitable organization~~Qualified Organization's Board of Directors meetings and, upon request, the Board's meeting minutes for the past year.
4. A current certified annual financial report of the ~~non-profit or charitable organization~~Qualified Organization including all expenditures, sources of funding and any constraints on receivable or received funds. ~~5. Proof that their service is still available and quantitative reports of services provided during the preceding year.~~
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The terms under which below market or subsidized lease/property use agreements will be granted are as follows:

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1. City staff will recommend to council for approval all rental agreements of City owned facilities or property.
2. The minimum rent shall be one dollar per month, ~~which may be paid monthly or annually.~~
3. No alterations or improvements shall be made to the facility or site without the prior written approval of the City.

4. All repairs and maintenance of the leased site or facility shall be the responsibility of the tenant. City staff may inspect the property, at ~~least semiannually~~ City's discretion, to ~~insure~~ ensure that it is being properly maintained.
5. Any change in the type or level of services provided may result in a ~~reevaluation~~ termination of the tenancy.
6. ~~The non-profit or charitable organizations shall provide all necessary proof~~ The non-profit or charitable organization shall provide all necessary proof of ~~insurance coverages~~ insurance coverages as set and required by the City's Risk Manager prior to occupancy, during term of lease/property use agreement and at renewal of lease/property use agreement. ~~7. The non-profit or charitable organization~~ The City, in its sole discretion, may change required insurance coverage amounts at any time.
7. The Qualified Organization shall not be entitled to relocation benefits as a result of its tenancy in the City-owned facility or property, unless such benefits are required by law.
8. The non-profit or charitable organization will be responsible for paying any and all taxes, including but not limited to possessory interest tax, which may be due as a result of the tenancy.
9. The facilities shall be for the exclusive use of the designated group and may not be sublet without the written consent of the City Manager.
10. The lease/property use agreement ~~or~~ rental agreement, or other similar agreement issued by the City will include a clause providing for revocation without cause, with the understanding that the ~~non-profit or charitable organization~~ Qualified Organization will vacate the premises upon 90-days' notice, at their own expense.
11. The City may require, prior to and during the lease/property use agreement, rental agreement, or other similar agreement, the submission of such additional information as may be needed.
12. A written agreement shall be prepared by the sponsoring department and submitted for review to the Public Works Department and approved as to form by the City Attorney's Office, setting forth the specific terms and conditions for each individual below market rental agreement. Nothing in these guidelines shall be construed as to limit the terms of any specific agreement.
13. The City Council will approve all lease/property use agreement, rental agreement, or other similar agreements, unless authority to approve the lease/property use agreements has been delegated to the City Manager either in the Municipal Code or by other Council action. The City Manager will comply with the terms of the delegation and shall report such ~~lease/property use~~ agreements to the City Council.

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E. Termination

A below market lease/property use agreement, rental agreement, or other similar agreement may be terminated by the City at any time for any of the reasons established in the lease/property use agreement, including, but not limited to the following:

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1. The property or facility is required for the specific purpose or project for which it was originally purchased.
2. The property or facility is required for some other government purpose.
3. It is determined by the City Council that the facility or site being rented should be sold as surplus property.

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4. It is determined by the City that the services provided by the non-profit or charitable organization are no longer necessary or adequate to justify the below market rent.

5. ~~It is determined by the City that the non-profit is not providing the services proposed or is providing~~ It is determined by the City that the Qualified Organization is not providing the services proposed or is providing unapproved alternative services.

6. Inspection of the property reveals that the property or facility is not being properly maintained.

7. The non-profit or charitable organization fails to provide proper liability insurance at ~~all times~~ any time during the ~~lease/property use~~ term of the agreement ~~period~~.

8. It is no longer economically feasible or beneficial for the City.

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