

Office of the City Manager

SUPPLEMENTAL AGENDA MATERIAL

Meeting Date: October 9, 2007

Item Number: ## 1

Item Description: Adoption of Findings – U-Haul Company, 2100 San Pablo Avenue

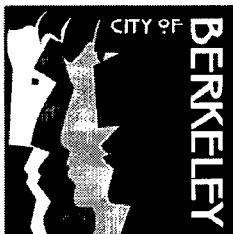
The attached supplemental report and revised resolution were prepared to respond to the October 8, 2007 communication from U-Haul's counsel, Marco Gonzalez.

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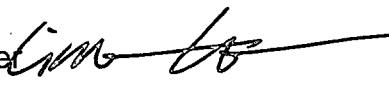
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Office of the City Manager

CONSENT CALENDAR
October 9, 2007

To: Honorable Mayor and
Members of the City Council

From: Lisa Caronna, Acting City Manager 

Submitted by: Manuela Albuquerque, City Attorney

Subject: Supplemental Report - Adoption of Findings To Revoke and
Terminate Use Permit No. 7575 Issued to U-Haul Company,
located at 2100 San Pablo Avenue

RECOMMENDATION

Adopt the attached revised resolution, including findings, that U-Haul, located at 2100 San Pablo Avenue, violated Use Permit No. 7575 and said permit is revoked and terminated, as previously determined by the City Council on September 18, 2007, after a public hearing.

FISCAL IMPACTS OF RECOMMENDATION

None. Existing staff costs of enforcement are already budgeted.

CURRENT SITUATION AND BACKGROUND

This report supplements the earlier report to address the October 8, 2007 letter submitted by Marco Gonzalez, U-Haul's newly retained counsel, in which he presents several arguments against the Council revoking U-Haul's use permit. On September 18, 2007, Council closed the public hearing and the record. U-Haul was given notice of the Council's public hearing and its representative, Jeremy Frank, spoke during the hearing. U-Haul had ample opportunity to submit its arguments to the Council before the public hearing was closed. The October 8th letter and documents are untimely and should not be admitted into the record.

However, even if Mr. Gonzalez' letter had been timely, the arguments against revoking the use permit lack merit. First, as noted in the earlier report, in 2000, U-Haul conceded it was subject to these limitations and in 2006 paid a \$500 penalty, thereby conceding that the 20 trucks and prohibition on parking in the public right of way were conditions of the use permit. Secondly, the Council has the authority

Honorable Mayor and Members of the City Council
Re: Supplemental Report – Adoption of Findings to
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to interpret the Zoning Ordinance and its decision is based upon a far more extensive record and its legislative history in interpreting the Zoning Ordinance. In contrast, the administrative hearing officer is only empowered to rule on the citation that was before her on April 6, 2007. She did not have before her the full administrative record the Council considered on September 18, 2007 or any information on the legislative history of the Zoning Ordinance. Thirdly, the fact that U-Haul has paid taxes is irrelevant to the Council's determination that it violated the conditions of the use permit. Fourthly, there can be no estoppel against the City as it has never made any representations to U-Haul that its conduct was lawful, and, in fact, for numerous years has placed U-Haul on notice that its conduct violates the conditions of the use permit.

The revised resolution is attached. For ease of tracking, the newly added provisions are in underline format.

RATIONALE FOR RECOMMENDATION

This revised resolution embodies the Council's action of September 18, 2007 and addresses the October 8th letter.

ALTERNATIVE ACTIONS CONSIDERED

None were considered in light of the Council's action on September 18, 2007.

CONTACT PERSON

Manuela Albuquerque, City Attorney, 981-6950

Attachment: Resolution

RESOLUTION NO. –N.S.

REVOKING AND TERMINATING USE PERMIT NO. 7575 ISSUED TO U-HAUL COMPANY, LOCATED AT 2100 SAN PABLO AVENUE, FOR VIOLATING THE TERMS OF THE USE PERMIT

WHEREAS, the U-Haul Company (hereafter “U-Haul”) is a truck and trailer rental business located at 2100 San Pablo Avenue, in Berkeley, California, in the West Berkeley Commercial District of South Berkeley; and

WHEREAS, U-Haul has been in operation since July 1975;

WHEREAS, U-Haul International, Inc. in Phoenix Arizona owns the property and Jeff Singleton, U-Haul Marketing Company President, and U-Haul Company of West Sacramento operate the business; and

WHEREAS, in May 1975, U-Haul submitted a use permit application and site plan that stated that there would be approximately twenty trucks and thirty trailers stored on the site, the hours of operation would be 8:00 a.m. to 7:00 p.m. and there would be four off-street parking spots on the U-Haul lot; and

WHEREAS, in June 1975, the Zoning Adjustments Board (hereafter “Board”) granted U-Haul Use Permit No. 775 based on its application that the use will include approximately twenty trucks and thirty trailers; and

WHEREAS, in September 1975 the City conducted an inspection and determined that U-Haul had constructed a building partially in the right of way. The City ordered U-Haul to submit an application for a revocable encroachment permit, which was granted by City Council Resolution No. 47,702 N.S.; and

WHEREAS, since 1997 U-Haul has repeatedly violated the conditions of Use Permit No. 7575 by greatly exceeding the number of trucks allowed on the property and using the public right of way to store additional vehicles; and

WHEREAS, in September 1997, the Zoning Compliance Officer issued U-Haul a First Notice and Order to Correct, in which U-Haul was specially warned that Use Permit No. 7575 allowed staging on the property only and that it was in violation of eight design review conditions placed on Use Permit No.7575. In October 1997, U-Haul submitted a written response to the First Notice stating that (a) incoming trucks and trailers would be referred to the new Emeryville dealership when the Berkeley location is full; (b) premiums would be increased on one-way rentals; and (c) customers renting from Berkeley would be referred to other locations for returns; and

WHEREAS, on May 17, 2000, the City received a complaint from a neighborhood resident that U-Haul was using Addison Street, Tenth Street and Allston Way to store its vans. The resident complained to U-Haul and was told by U-Haul it had no room on its lot to store all the vehicles; and

WHEREAS, on June 14, 2000, in response to the May 17, 2000 citizen complaint, Code Enforcement Officer Maurice Norrise contacted U-Haul Assistant Manager Randy Hessler regarding the complaint and on June 16, 2000 issued U-Haul a Courtesy Follow Up Notice notifying U-Haul that it was unlawfully using the public right of way to store vehicles; and

WHEREAS, on August 21, 2000 the Code Enforcement Officer issued a criminal citation to Randy Hessler for illegally parking U-Haul trucks in the public right of way; and

WHEREAS, on September 14, 2000, Code Enforcement received a letter from Jim Buell, U-Haul Marketing Company President, stating that U-Haul would comply with its use permit in part, that all trucks parked by customers in the public

right of way after hours would be removed by 10:00 a.m. the next day, and that U-Haul would apply for a variance to reduce the number of trailers and increase the number of trucks. However, U-Haul never filed any such application; and

WHEREAS, on August 23, 2004, in response to community complaints, Code Enforcement Officer Roy Phelps contacted Jeff Singleton, the new U-Haul Marketing Company President, regarding U-Haul's violating the conditions of the use permit by parking its trucks in the public right of way; and

WHEREAS, on September 15, 2004, the Code Enforcement Officer Roy Phelps issued a Notice of Violation to U-Haul manager Emerson Payumo because U-Haul continued to park its trucks in the public right of way despite prior warnings; and

WHEREAS, in May 2006, neighbors again complained that U-Haul was parking trucks on the street and blocking driveways. During the period from May 2006 and June 2006, Code Enforcement Officer Roy Phelps monitored U-Haul activity and warned U-Haul Manager Mike Neville that he would be cited if U-Haul continued to park trucks in the public right of way; and

WHEREAS, on June 13, 2006, after repeated inspections and warnings, the Code Enforcement Officer issued a \$500 administrative citation (No. 0023) to U-Haul Manager Mike Neville for parking trucks on the public right of way. U-Haul did not appeal administrative citation No. 0023 and the \$500 penalty was paid on August 31, 2006; and

WHEREAS, on August 23, 2006, Code Enforcement staff met with Jeff Singleton regarding U-Haul's unlawful practice of parking its trucks on the public right of way, and during this meeting staff pointed out to Mr. Singleton that the site

plan posted in U-Haul's office was in violation of Use Permit No. 7575 because it showed U-Haul storing fifty trucks on the lot; and

WHEREAS, at the August 23, 2006 meeting with Mr. Singleton, Code Enforcement staff gave Mr. Singleton a 30-day moratorium on further enforcement action and advised Mr. Singleton to do all the following: (1) submit an application to modify the current use permit; (2) schedule a meeting with the surrounding residential and commercial neighbors to discuss current and previous community concerns; (3) do not park U-Haul trucks on the public right of way; and (4) reduce the number of trucks on the lot to 20 trucks; and

WHEREAS, on September 21, 2006, Code Enforcement delivered to U-Haul Field Relief Manager Adam Craig a written notice for Mike Neville and Jeff Singleton that advised the City's 30-day moratorium on enforcement would expire on September 23, 2006, warned U-Haul that it must reduce the number of trucks it had on the lot (fifty-one at that time) to no more than twenty trucks, and requested that Mr. Neville or Mr. Singleton contact the Planning Department regarding their use permit violations; and

WHEREAS, on October 5, 2006, Code Enforcement Supervisor Gregory Daniel issued a citation warning letter to Mike Neville and Jeff Singleton in which he chronicled U-Haul's repeated violations of Use Permit No. 7575 and warned that because of U-Haul's history of non-compliance with the use permit that U-Haul would be cited for all violations to the full extent allowed under law; and

WHEREAS, on November 16, 2006, U-Haul submitted by facsimile an application to modify Use Permit No. 7575 which was incomplete as it did not include the requisite fees, applicant statement, site photographs, vicinity map, site

plan or the Zoning Use questionnaire and it did not comply with Planning Department procedures because facsimile applications are not accepted. On December 13, 2006, staff issued U-Haul a letter advising it that the modification application was incomplete and giving it ten days to file a completed application. U-Haul never completed the application; and

WHEREAS, on February 20, 2007, Peter Onken of U-Haul Company of West Sacramento, submitted another application to modify Use Permit No. 7575. Staff again determined that the application was incomplete in that it failed to address at least fourteen substantive issues regarding U-Haul's operation. On March 16, 2007 staff notified U-Haul its application was incomplete U-Haul never responded nor submitted a revised application; and

WHEREAS, Code Enforcement has issued U-Haul nine separate citations between June 13, 2004 and February 13, 2007 for violations of Berkeley Municipal Code (BMC) 23B.56.010A, which prohibits any use or activity not proposed in the use application and BMC 23B.56.020A.8, which requires a modification for any change that expands, intensifies or substantially changes the use; and

WHEREAS, on August 21, 2006 Code Enforcement issued U-Haul Administrative Citation No. 0046 for violation of BMC Section 23B.56.020.A.8 for parking thirty-two (32) U-Haul trucks in the public right of way. The penalty was \$200 per truck for a total citation of \$6400. The citation was upheld on appeal to the City's administrative hearing officer, but has been appealed by U-Haul to the Alameda County Superior Court; and

WHEREAS, on September 25, 2006, Code Enforcement issued U-Haul Administrative Citation No. 0025 for violation of BMC Section 23B.56.020.A.8 for

parking twenty-three (23) excess trucks on the U-Haul lot and imposed a penalty of \$100 for each excess truck for a total citation of \$2,300. U-Haul failed to appeal the citation and the penalty remains outstanding; and

WHEREAS, on October 2, 2006, Code Enforcement issued U-Haul Administrative Citation Nos. 2390 and 0049 for violations of BMC Section 23B.56.020.A.8. Citation No. 2390 was issued to U-Haul for parking two (2) U-Haul trucks in the public right of way. The penalty imposed was \$300 for each truck parked in the right of way for a total penalty of \$600. Citation No. 0049 was issued to U-Haul for the twenty (20) excess trucks it had parked on the U-Haul lot. The citation imposed a \$200 per truck penalty for each truck in excess of the 20 allowed under the use permit, for a total penalty of \$4,000. U-Haul failed to appeal either citation and the penalties remain outstanding; and

WHEREAS, on October 11, 2006, Code Enforcement issued Administrative Citation No. 2391 for violations of BMC Sections 23B.56.010.A, 23B. 56.020.A.8, 23B.56.030, and 23B.56.040 for parking 38 excess trucks on the U-Haul lot. The citation imposed a \$100 per truck penalty for each truck in excess of the 20 allowed under the use permit, for a total penalty of \$15,200. U-Haul failed to appeal the citation and the penalty remains outstanding; and

WHEREAS, on October 11, 2006, Code Enforcement also issued Administrative Citation No. 2392 for violation of BMC Section 23B.56.020.A.8 for parking two (2) U-Haul trucks in the public right of way. The penalty was \$200 per truck for a total penalty of \$400. U-Haul failed to appeal the citation and the penalty remains outstanding; and

WHEREAS, on November 3, 2006 Code Enforcement issued Administrative Citation No. 2651 for parking twenty-seven (27) excess trucks on the U-Haul parking lot. The citation imposed a penalty of \$200 for each truck in excess of the 20 allowed under the use permit, for a total penalty of \$21,600; and

WHEREAS, on November 15, 2006, U-Haul Marketing President Jeff Singleton filed an appeal of Administrative Citations No. 0046 and 2651. U-Haul argued that citation No. 0046 should be dismissed because the City could not regulate U-Haul's use of the public right of way. U-Haul also argued that citation No. 2651 should be dismissed because Use Permit No. 7575 was vague and unenforceable because the application stated "approximately 20 rental trucks and 30 rental trailers" would be stored on the U-Haul lot. The hearing officer upheld citation No. 0046 but overturned citation No. 2651 on the ground that she found the use permit to be ambiguous and insufficiently detailed; and

WHEREAS, on February 13, 2007, Code Enforcement issued U-Haul Manager Mike Neville Administrative Citation No. 2394 for illegal dumping, under BMC 12.40.080. The penalty was \$1,500, which was not appealed by U-Haul and was paid on March 15, 2007; and

WHEREAS, U-Haul appealed to the Alameda County Superior Court the City's Administrative Hearing Officer's decision on citation No. 0046 and has argued that it is not violating Use Permit No. 7575 by expanding its business beyond the property line to the public right of way. Trial is set on this matter for October 15, 2007; and

WHEREAS, on June 28, 2007, based upon U-Haul's numerous violations of Use Permit No. 7575, the Zoning Adjustments Board held a duly noticed

meeting as required by BMC Section 23B.60.020 to determine whether to recommend to the City Council whether U-Haul is in violation of Use Permit No. 7575 and if so, the appropriate remedy; and

WHEREAS, no representative of U-Haul attended the Zoning Adjustment Board's hearing, nor did U-Haul submit any written statement; and

WHEREAS, upon conclusion of the hearing the Zoning Adjustments Board adopted Resolution No. 07-02 and recommended that the City Council revoke Use Permit No. 7575; and

WHEREAS, on September 18, 2007, the City Council held a duly noticed public hearing to consider the recommendation of the Zoning Adjustment Board and any other evidence that the public or concerned parties wished to present; and

WHEREAS, on July 25, 2007, the City Clerk sent to Mike Neville, U-Haul Company Berkeley, Tom Tollison, U-Haul International, Inc., Jeff Singleton, President, U-Haul Marketing Co., and Damien P. Lillis, U-Haul's legal counsel, a letter notifying them of the public hearing, as required by law, and of the procedure that would be followed at the September 18 hearing; and

WHEREAS, Jeremy Frank, U-Haul District Vice President, attended the Council hearing and submitted additional documents. Mr. Frank did not dispute U-Haul's violations of Use Permit No. 7575, and instead specifically acknowledged that the City could regulate U-Haul's use of the public right of way and apologized for U-Haul's violations of Use Permit No. 7575; and

WHEREAS, the City Council has carefully considered all of the evidence before it, including the June 28, 2007 staff report to the Zoning Adjustments

Board, the transcript of the June 28, 2007 Zoning Adjustment Board, subsequent written communications, the staff report prepared for the City Council meeting on September 18, 2007 and the testimony and additional documents submitted at the public hearing on September 18, 2007; and

WHEREAS, no evidence was submitted at the Council hearing refuting Code Enforcement's numerous citations and notices to U-Haul of its violations of Use Permit No. 7575 by parking in excess of 20 trucks on the U-Haul lot and parking U-Haul trucks in the public right of way; and

WHEREAS, on October 8, 2007, after the Council had closed the public hearing, Marco Gonzalez, U-Haul's newly retained counsel submitted a letter with additional documents to Council, arguing that Council should not revoke U-Haul's use permit because 1) it would be an abuse of the Council's discretion; 2) U-Haul is not violating any conditions of the use permit since the City's administrative hearing officer has determined that the use permit was vague as to how many trucks could be parked on the lot and the Council is bound by that decision; 3) U-Haul has not substantially expanded or changed its character; 4) U-Haul is not operating in violation of its use permit; and 5) the use permit conditions are unenforceable under the doctrine of estoppel; and

WHEREAS, not only is Mr. Gonzalez' October 8th letter untimely, even it had been timely, his arguments lack any merit. Significantly, the administrative hearing officer is only empowered to rule on the citation that was before her. In contrast, the Council has the power under the Zoning Ordinance (BMC 23B.56.030) to determine the conditions of the use permit and whether any have been violated. Further, the record before the Council was far more expansive

than that presented to the administrative hearing officer. The fact that U-Haul paid taxes is irrelevant to the Council's determination that it violated the conditions of the use permit. And, there can be no estoppel as the City has never made any representations to U-Haul that its conduct was lawful and has in fact for numerous years placed U-Haul on notice that it is in violation of the conditions of its use permit; and

WHEREAS, the City Council has evaluated the probative value of all of the above evidence, drawn reasonable inferences there from, and considered the credibility of the various witnesses, based on both their observed demeanor at the public hearing before the City Council and the substance of their testimony (e.g., whether it has been consistent over time, is internally consistent, is illogical, etc.); and

WHEREAS, based on its review of the evidence, the City Council finds as follows:

1. The proceedings before the Zoning Adjustment Board and City Council were conducted under the procedures provided by law.
2. The following are conditions of Use Permit No. 7575:
 - a. No more than 20 trucks and 30 trailers are allowed on the lot at any time.
 - b. No vehicles or equipment shall be staged, stored, repaired or maintained in the public right of way at anytime.
 - c. The hours of operation are 8:00 a.m. to 7:00 p.m. daily.
 - d. Four off-street parking spaces shall be provided for customers at all times.
 - e. U-Haul shall comply with all Use Permit No. 7575 Design Review Conditions no later than 30 days from issuance of the Council's decision.

3. The permitted use has been substantially expanded or changed in character beyond that set forth in Use Permit No. 7575.
4. The U-Haul business at 2100 San Pablo is and has been operating in violation of Use Permit No. 7575.
5. Since 1997, U-Haul has been placed on notice that parking more than 20 trucks and 30 trailers on the U-Haul lot and using the public right of way to store U-Haul trucks violates Use Permit No. 7575.
6. Despite being advised by Code Enforcement how to apply for a modification of its Use Permit, U-Haul has never followed through and submitted a completed application for modification of Use Permit No. 7575.
7. Code Enforcement issued U-Haul nine citations for violation of Use Permit No. 7575 between the period from June 13, 2004 through February 13, 2007, for total penalties of \$52,900.
8. Despite Code Enforcement's attempts during the last ten years to get U-Haul to conduct its business in compliance with Use Permit No. 7575, U-Haul has failed and continues to conduct its business in violation of Use Permit No. 7575.
9. U-Haul's apology at the September 18, 2007 public hearing does not negate its serious violations of Use Permit No. 7575 and is insufficient in light of the evidence which shows U-Haul's longstanding failure to comply with the use permit.

10. Marco Gonzalez' October 8th letter on behalf of U-Haul is untimely since Council closed the public hearing and the record on September 18, 2007, and for that reason it is not admitted into the record.
11. Even if Mr. Gonzalez' October 8th letter had been submitted timely, the Council finds that pursuant to BMC 23B.56.030, the representations made by U-Haul in its use permit application and the lot drawings were conditions of the use permit that U-Haul violated. As noted previously, in 2000, U-Haul conceded it was subject to these limitations and in 2006 paid a \$500 penalty, thereby conceding that this was a condition of the use permit.
12. The Council has independent authority to interpret the Zoning Ordinance and revoke U-Haul's use permit for violations of the use permit pursuant to BMC 23B.060.010 and 23B.060.020, based upon a far more extensive record and its legislative history in interpreting the Zoning Ordinance.
13. The City's administrative hearing officer's April 6, 2007 determination addressed only the administrative citation and she did not have before her the full administrative record the Council considered at its September 18, 2007 public hearing or any information about the legislative history of the Zoning Ordinance in this respect.
14. The City has made no representations to U-Haul that its conduct was lawful and has for many years specifically placed U-Haul on notice that its conduct was in violation of the use permit.

NOW THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF BERKELEY that U-Haul Company, located at 2100 San Pablo Avenue is hereby declared to be in violation of Use Permit No. 7575 under Berkeley Municipal Code 23B.60.020, and said Use Permit is hereby revoked and its operations are ordered to cease forthwith.