

Office of the City Manager  
Neighborhood Services-Enforcement Division

April 16, 2015

40 Acres Farms  
1510 Ashby Avenue  
Berkeley, CA 94703

Edwin H. Liu  
1522 Hamlin St. NE  
Washington DC 20017

Christopher Smith  
1510 Ashby Avenue  
Berkeley, CA 94703

Aaron Glotzer  
K&S Company, Inc.  
1035 San Pablo Ave, Suite 12  
Albany, CA 94706

Via Certified and First Class Mail and Posting

Subject: **NOTICE OF PUBLIC NUISANCE PURSUANT BERKELEY MUNICIPAL  
CODE (BMC) SECTION 1.24.030 AT 1510 ASHBY AVENUE AND ORDER  
TO IMMEDIATELY CEASE OPERATIONS**

Dear Mr. Liu, Mr. Glotzer and Mr. Smith:

I am writing to notify you that the City has observed evidence that an illegal cannabis operation is being conducted out the property at 1510 Ashby Avenue, Berkeley, California (the Property).

**A Residential Cannabis Collective Is Prohibited Pursuant to BMC § 12.26.030.D**

On February 15, 2012, Mr. Christopher Smith filed a Business License application for a "medical marijuana collective" to be operated at the Property. (Attachment 1.) Mr. Smith represented under penalty of perjury in this application that he established the collective on January 8, 2012.

On February 16, 2012, Mr. Smith emailed Ms. Elizabeth Greene inquiring about the status of this business license application. Ms. Greene responded that because the Property is located in both a commercial zoning district (CS-A) and a residential zoning district (R-2A), a cannabis

collective is prohibited because BMC § 12.26.030.D mandates that “[m]edical cannabis collectives shall not be located in commercial or manufacturing districts.” (Attachment 2.)

On February 28, 2012, Mr. Smith then submitted a second business license application and a Zoning Certificate application for a “medical marijuana service” to be operated at the Property. This time, Mr. Smith stated under penalty of perjury that he established the business on August 13, 2009 and submitted a statement claiming it was a pre-existing non-conforming entity. (Attachment 3.)

On March 15, 2012, Ms. Greene notified Mr. Smith that his February 28, 2012, application for a cannabis collective at the Property was being denied. (Attachment 4.) Ms. Greene indicated that the “application was denied because the property is zoning both residential (R-2A) and commercial (C-SA) . . . . As explained in response to the first application, a collective . . . shall not be in a commercial district.” Ms. Greene also rejected Mr. Smith’s legal non-conforming argument.

Nonetheless, apparently as a result of the Superior Court’s denial of Mr. Smith’s Petition for Writ of Mandate challenging Resolution No. 66,911-N.S. (Attachment 5) which ordered Mr. Smith’s illegal cannabis operation at 1820/1828 San Pablo Avenue enjoined and terminated, Mr. Smith has now “relocated” that illegal cannabis operation to the Property.

City staff has obtained a copy of a flyer which was observed being distributed to Mr. Smith’s customers at the San Pablo Ave property. (Attachment 6). This flyer indicates that the dispensary was relocated to the Property. In addition, staff observed that the webpage paid for and maintained by Mr. Smith on Weedmaps.com changed the address of the dispensary from the San Pablo address to 1510 Ashby Avenue and includes the following announcement:

FOR IMMEDIATE RELEASE! As of Saturday April 11, 40 Acres Collective has relocated to our new location in Berkeley, 1510 Ashby Ave. We are near the corner of Sacramento St. Our new location is a short walk from the Ashby BART Station and is also easily accessible by bus as 2 AC Transit routes (#49 and #88) stop near our new location. Please call us @ 510-845-4040 for any questions, delivery requests. THANKS!

This same announcement is repeated on the dispensary’s Facebook page. (Attachment 7.) In addition, neighbors of the Property have contacted the City to complain about the existence of the dispensary stating that there is a steady stream of traffic in and out of the Property which was observed as late at 10:30pm on a weeknight.

Surveillance by City staff has confirmed this level of activity. In addition, as was the case at the illegal dispensary at the San Pablo address, staff observed that the door to the Property remains wide open, individuals other than Mr. Smith are stationed inside the Property and these individuals check the identification of those seeking to enter the Property prior to admitting them entry.

### **A Cannabis Dispensary is Prohibited Pursuant to BMC §§ 12.26.030.F and 12.26.130**

Thus, it is the City’s position that Mr. Smith has relocated his illegal cannabis dispensary previously located at the San Pablo Avenue property to this Property. As Mr. Smith is fully

aware, operation of a fourth dispensary is prohibited because: 1) the Property is partially zoned residential and dispensaries are prohibited from operating in a residential zoning district per BMC § 12.26.030.F; and 2) since the City capped the allowable cannabis dispensaries to the three existing dispensaries in 2004, pursuant to BMC § 12.26.130 a fourth dispensary is only permitted via the licensing process established in BMC Chapter 12.27 and Mr. Smith does not have a license to operate a dispensary.

### **The Cannabis Operation Is Not Legal Non-Conforming**

However, even if Mr. Smith claims he is operating a residential collective rather than a commercial dispensary, this is also prohibited for the reasons set forth in Ms. Greene's 2012 correspondence to Mr. Smith as set forth above. Moreover, in addition to the bases articulated by Ms. Greene in that same correspondence, there is no basis to claim a lawful non-conforming status for either a dispensary or a collective at the Property since all evidence establishes that this cannabis operation is "new".

### **The Cannabis Operation Is In Violation of Chapter 12.27**

In addition, if Mr. Smith claims that his cannabis operation is a residential collective, it is in violation of the operating standards for collectives set forth in BMC § 12.27.120 because it has generated more than 5 member trips per day, has had member trips to obtain cannabis after 9pm and has impacted adjoining properties beyond those that are normal for residential use.

### **ORDER TO CORRECT**

Based upon the violations of BMC Chapters 12.26 and 12.27 as described above, continued operation of a cannabis operation at 1510 Ashby Avenue is a **Public Nuisance** pursuant to BMC §§ 12.26.150 and 12.27.160 and is subject to further action to compel compliance by the City of Berkeley if you do not comply with the following Order:

**YOU ARE HEREBY ORDERED TO** cease and desist all cannabis operations at 1510 Ashby IMMEDIATELY.

### **CITATION**

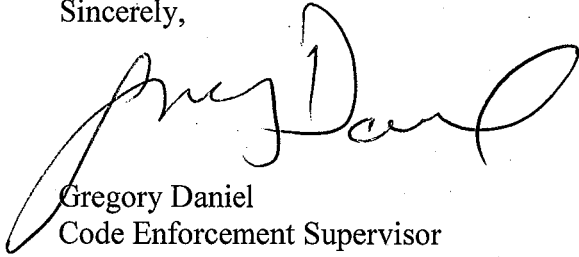
If you do not IMMEDIATELY cause the cannabis operation at the Property to cease as required by this Order, you may be cited for violations of the Berkeley Municipal Code.

The administrative penalties for violation of the Berkeley Municipal Code can be as much as **\$2,500 per violation** or **\$10,000 per violation if an injury results**. You may be cited for a separate violation for each day and the penalties for subsequent violations may be increased.

If you fail to pay the citations issued, the total amount plus any late fees will attach to your property as a special assessment lien which shall be collected at the same time and in the same manner as property taxes.

Please contact me at 510-981-2492 within **two days** from the date of this Notice to indicate whether you intend to comply with the Order set forth herein.

Sincerely,

A handwritten signature in black ink, appearing to read "Gregory Daniel". The signature is fluid and cursive, with the first name "Gregory" written in a larger, more prominent script than the last name "Daniel".

Gregory Daniel  
Code Enforcement Supervisor

cc: G. Whitney Leigh, Esq.  
Laura McKinney, Deputy City Attorney

# EXHIBIT

1



Date this business became active under your ownership: 1/8/12

Check here if this business was already active and you are a new owner ☐

Check here if you have an ownership interest in another business in Berkeley ☐

Name/s of other business/es in which you have an ownership interest: \_\_\_\_\_

Rev May 2007

## NEW BUSINESS LICENSE APPLICATION FORM

Please read all instructions on the other side before completing this application and TYPE or PRINT CLEARLY.

Business Type Medical Marijuana Collective  
 Address in Berkeley 1510 ASHBY AVE  
 Business Name (DBA) Forty Acres Medical Marijuana Members Coop Corp.  
 Owner Name: FIRST CHRIS LAST SMITH  
 Mailing Address 1510 ASHBY AVE  
 City, State & Zip Berkeley, CA 94703

For Finance Use Only	
BL #	
NAICS Code	
Tax Code	
Loc. Verified:	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
DI started in Berk.	

Fire \_\_\_\_\_  
 Police \_\_\_\_\_  
 Building \_\_\_\_\_  
 Planning \_\_\_\_\_  
 Health \_\_\_\_\_  
 Toxics \_\_\_\_\_

### PLEASE COMPLETE THE FOLLOWING INFORMATION

- |   |   |
|---|---|
| 1. Business Phone <u>(510) 845-4040</u>   | 8. # of Employees <u>0</u>  |
| 2. Emergency Phone <u>(510) 845-1300</u>  | 9. # of Business Vehicles <u>0</u>  |
| 3. Fed ID or Soc Sec # <u>95-4537010</u>  | 10. Female Owned: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No   |
| 4. <input type="checkbox"/> Partnership <input checked="" type="checkbox"/> Corporation <input type="checkbox"/> Sole Owner | 11. Minority Owned: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No |
| 5. State Seller's Permit/Resale # _____   | 12. Date Fiscal Year Ends <u>12/31</u>  |
| 6. Contractors Lic #/Exp Dt _____   | 13. Email Address <u>HTNN11@yahoo.com</u>   |
| 7. Do you sell tobacco products? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No                        |   |

### COMPUTING THE PAYMENT AMOUNT FOR YOUR NEW BUSINESS LICENSE

14. New Business License Tax: \$51 for most businesses; \$77 for rental property (See note)	\$ <u>77.00</u>
15. New Business License Registration Fee	\$ <u>25.00</u>
16. TOTAL AMOUNT DUE FOR NEW BUSINESS LICENSE	PLEASE REMIT \$ <u>102.00</u>

NOTE: Some businesses require different fees for a new license. Please contact Customer Service for more information.  
 MAKE CHECKS PAYABLE TO: City of Berkeley and mail or deliver to Finance - Customer Service, 1947 Center Street, Berkeley, CA 94704.

Under penalty of perjury, I declare I am authorized to make this application and to the best of my knowledge and belief it is a true, correct and complete statement made in good faith for the purposes stated, in compliance with the provisions of the Berkeley Business License Ordinance.

Signature/Title [Signature] Executive Director Date 2/15/12

See the other side for important information and instructions before completing this application.

Finance Customer Service Center • 1947 Center Street, 1<sup>st</sup> Floor, Berkeley, California 94704  
 Phone: 510.981.7200 • TDD: 510.981.6903 • Fax: 510.981.7210 • Email: [BusLic@ci.berkeley.ca.us](mailto:BusLic@ci.berkeley.ca.us)

Bus. Lic. # \_\_\_\_\_  
 Amount Paid \$ \_\_\_\_\_

RECEIVED  
 FEB 15 2012  
 FINANCE  
 PLANNING

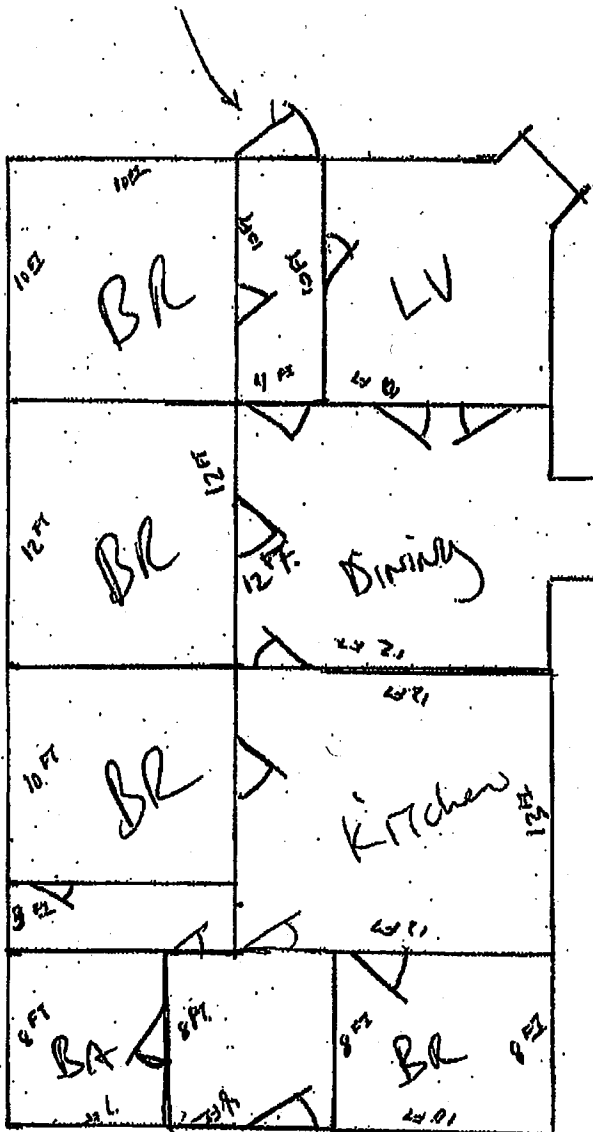
Front Door

Floor Plan  
1510 ASBY

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FEB 15 2012

LAND USE PLANNING



Back Door

1/8 scale



Business Name: FORTY ACRES med. Marijuana Members Coop.

Business Address: 1510 ASHBY AVENUE

Type of Business: ☒ Collective ☐ Dispensary

## Submittal Form: Medical Cannabis Criteria and Requirements

Thank you for obtaining a City of Berkeley Business License. Obtaining a business license is required by Chapter 9.04, Business Licenses, of the Berkeley Municipal Code, with additional requirements regarding cannabis businesses in Section 9.04.136, Cannabis Businesses. However, a business license does not give your use legal status. The following information is provided to ensure that you are aware of other City requirements that may apply to your business.

**NOTE:** Collectives must submit a scaled, dimensioned and accurate floor plan showing the area to be used for cultivation as part of the business license application. Plans should be drawn to architect's or engineer's scale, as appropriate (architect's scale must be 1/8" = 1'; engineer's scale must be 1" = 10'). The scale, as well as the property address and name/contact information of the person preparing the plan, should be included on the plan.

### CRITERIA - ALL MEDICAL CANNABIS USES

Section 12.26 of the Berkeley Municipal Code includes the following criteria for medical cannabis uses:

- Membership in a medical cannabis collective must be restricted to qualified patients and their primary caregivers. Primary caregivers shall not be allowed to obtain cannabis for their own personal use. A primary caregiver cannot be a member of a medical cannabis collective unless the primary caregiver's qualified patient is also a member. (12.26.040.B)
- Medical cannabis collectives and each member thereof shall not sell, barter, give away, or otherwise distribute cannabis to non-members of the medical cannabis collective. (12.26.040.C)
- Medical cannabis collectives shall not accumulate more cannabis than is necessary to meet the personal medical needs of their qualified patients. (12.26.040.D.1)
- Medical cannabis collectives that cultivate medical cannabis plants outdoors or in any place that is visible with the naked eye from any public or other property, can cultivate only 10 such plants at one time on a single parcel or adjacent parcels of property. This restriction does not apply to plants grown on secure rooftops, balconies, or other locations that are not visible from other buildings or land. (12.26.040.E and 12.26.070.D)
- Collectives are strongly encouraged to consult available cannabis cultivation literature to ensure that medical cannabis cultivated under state law is free of undesired toxins or molds. Collectives are encouraged to use their best effort to determine whether or not cannabis is organically grown. (12.26.060)
- Collectives must maintain contemporaneous financial and operational records sufficient to show compliance with Chapter 12.26 and state law governing medical cannabis. These records are subject to inspection by the City. The records shall protect the confidentiality of the collective's members. (12.26.130)
- Collectives must be in compliance with all other applicable federal, state and local laws. (12.26.140)

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FEB 15 2012

LAND USE PLANNING



Business Address: \_\_\_\_\_

### CRITERIA - COLLECTIVE SPECIFIC

Section 12.26 of the Berkeley Municipal Code includes the following criteria for medical cannabis uses classified as collectives:

- A collective is defined as "a cooperative, affiliation, association or collective of persons comprised exclusively and entirely of qualified patients and the primary caregivers of those patients". (12.26.030.D)
- The purpose of a collective is to provide education, referral, or network services to qualified patients, and to facilitate or assist in the cultivation and manufacture or acquisition of medical cannabis for qualified patients. (12.26.030.D)
- Except as permitted by Section 12.26.130 or Title 23, medical cannabis collectives shall not be located in commercial or manufacturing districts.
- Collectives are only allowed as incidental to residential use. (12.26.030.D)
- Cultivation is limited to the lesser of 200 square feet or 25% of building square footage; area over that is not considered incidental to a residential use and is prohibited. (12.26.040.D.2)

### CRITERIA - DISPENSARY SPECIFIC

Section 12.26 of the Berkeley Municipal Code and Section 23B.16.070 of the Zoning Ordinance include the following criteria for medical cannabis collectives which are also classified as dispensaries. In cases of conflict or inconsistencies between the criteria for collectives and dispensaries, a dispensary shall follow the criteria given for a dispensary.

- A dispensary is defined as "any medical cannabis collective that is allowed under Section 12.26.130 to dispense medical cannabis at a non-residential location". (12.26.030.E)
- A dispensary may not be located within 600 feet of another medical cannabis dispensary or a public or private elementary, middle or high school. (23B.16.070.A.2)
- A dispensary may also provide other services to its members, cultivate, acquire, bake, store, process, test, and transport medical cannabis. (12.26.030.E)
- In dispensing medical cannabis to its qualified patients or their primary caregivers, a dispensary may be reimbursed for the cost of its services and materials. (12.26.030.E)
- No new dispensaries may be approved until the City adopts a licensing process and standards for medical cannabis dispensaries. (23B.16.070.B)

### ADVISORIES - REQUIREMENTS FOR ALL MEDICAL CANNABIS USES

All medical cannabis uses should also be aware of the following permit requirements:

- Building and Fire Safety: It is unlawful for any person, firm or corporation to erect, construct, alter, convert or use, occupy or maintain any building or structure or cause or permit the same to be done in violation of the following Berkeley Municipal Codes:
  - Section 19.28.020 (Building Code);
  - Section 19.30.030 (Electrical Code);
  - Section 19.34.030 (Plumbing Code); and
  - Section 19.48.020/109.1 (Fire Code).

I have received this memo and am aware of the criteria and advisories contained herein.

Business/Organization Name: 40 Acres Medical Marijuana Members Coop Corp

Owner/Representative Name: Christopher Fertig

Owner/Representative Signature: \_\_\_\_\_

Phone number for Owner/Representative: (570) 816-1366

Date: 2/15/12

# **EXHIBIT**

**2**

**Greene, Elizabeth**

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**From:** Greene, Elizabeth  
**Sent:** Friday, February 17, 2012 10:31 AM  
**To:** 'Chris Smith'  
**Subject:** RE: Co-op Business License  
**Attachments:** 1510 Ashby APN map.docx

Hello Chris and Toya --

Berkeley has many parcels that are split between two zones. Usually this happens because the property lines have been modified over time. In this case, the parcels on the western end of the block (closest to Sacramento Street) used to be configured differently. The C-SA (South Area Commercial) district boundary runs along a former property line that is now in the middle of 1510 Ashby. (I've attached the Assessor's Parcel Map for this block: the heavy lines are the current property lines, while the lighter lines are former property lines. The zoning district boundary runs along the light line that goes through the circled 22 and 15; west of the line is zoned C-SA, east of the line is zoned R-2A.)

When a parcel is split into two zoning districts, each part of the lot is subject to the provisions of the district in which it is located. Therefore, the C-SA portion of the lot is subject to the C-SA district regulations, and the R-2A portion of the lot is subject to the R-2A district regulations.

A collective must be in a residential use and shall not be in a commercial district. Since this property is partially in a commercial district, we cannot sign off on the zoning for the business license.

If you find another property that you are interested in, feel free to call me or stop by the planning counter to check the zoning ahead of time.

Sincerely,  
Beth

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**From:** Chris Smith [mailto:htnn11@yahoo.com]  
**Sent:** Friday, February 17, 2012 8:38 AM  
**To:** Greene, Elizabeth  
**Subject:** Re: Co-op Business License

How is that possible? I thought that a parcel could not be both residential and commercial. What is C-SA? Which zoning takes precedence?

Toya

---

**From:** "Greene, Elizabeth" <EGreene@ci.berkeley.ca.us>  
**To:** Chris Smith <htnn11@yahoo.com>  
**Sent:** Thursday, February 16, 2012 11:44 AM  
**Subject:** RE: Co-op Business License

Hello Chris --  
I have been reviewing your application this morning and learned that the parcel is split between two zones -- R-2A (residential) and C-SA (commercial). I am determining what that means for your use. Once I have determined that I will get back to you.  
Sincerely,  
Elizabeth

**From:** Chris Smith [mailto:hnn11@yahoo.com]  
**Sent:** Thursday, February 16, 2012 8:45 AM  
**To:** Greene, Elizabeth  
**Subject:** Co-op Business License

Hi Ms. Green,

I was following up with you regarding the business license my cooperative submitted yesterday February 15th, 2012. I was told that I would hear a response in a couple hours and still haven't heard. Can you please let me know via email the results or if you have any questions or need additional information?

Thanks,  
Christopher Smith

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**From:** "Greene, Elizabeth" <EGreene@ci.berkeley.ca.us>  
**To:** "Greene, Elizabeth" <EGreene@ci.berkeley.ca.us>  
**Sent:** Wednesday, February 8, 2012 5:46 PM  
**Subject:** MCC Cultivation and Dispensary subcommittee meetings, 2-15-12

Good evening -

The agenda packets for the Wednesday, February 15, 2012 Medical Cannabis Commission (MCC) Cultivation subcommittee and Dispensary subcommittee are attached. The packets can also be found on the Commission's website: <http://www.cityofberkeley.info/ContentDisplay.aspx?id=31260>

Remember that the Cultivation subcommittee meeting will start at 1:30 PM, followed by the Dispensary subcommittee at 3:15. There will be a 15 minute break between the meetings.

Thanks,

Elizabeth Ruess Greene, AICP  
Senior Planner  
Secretary to the Medical Cannabis Commission  
City of Berkeley  
Phone - 510-981-7484  
Fax - 510-981-7490

Please Note: The City offices will be closed on the following days:

Friday, February 10 - Cost-saving measure  
Monday, February 13 - Holiday (Lincoln's Birthday)  
Monday, February 20 - Holiday (Presidents Day)  
Friday, February 24 - Cost-saving measure

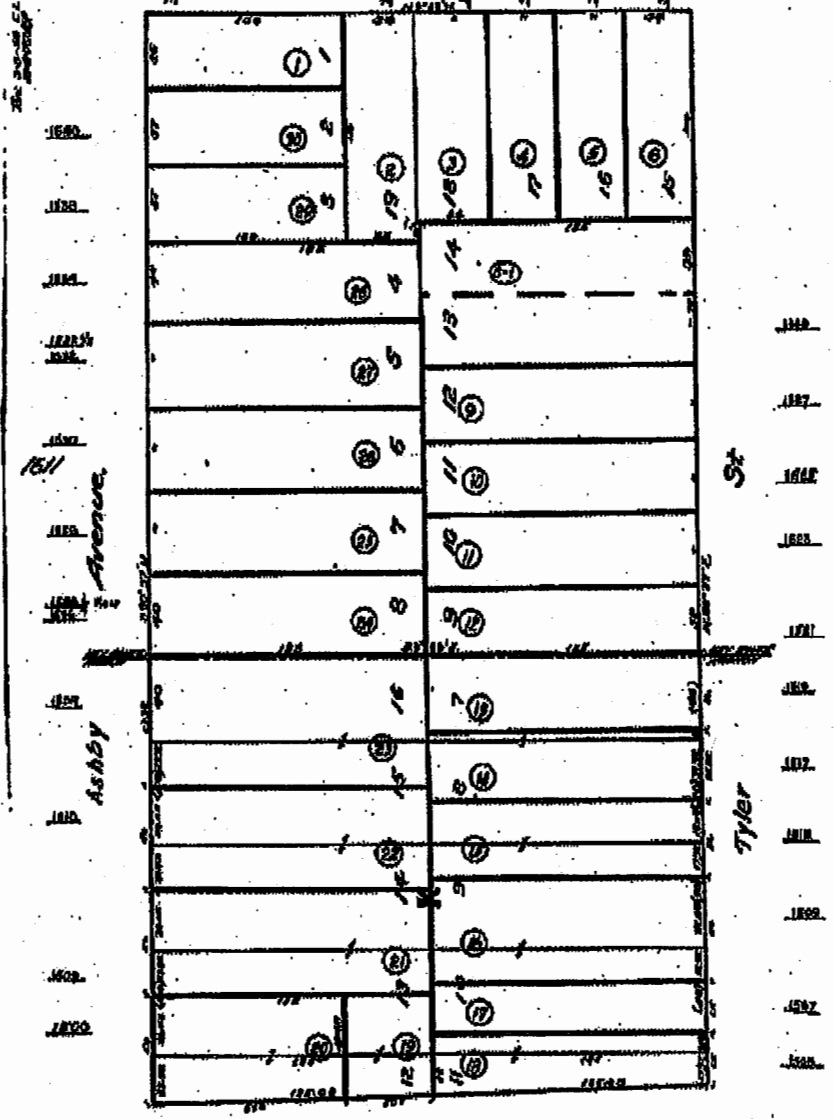
# ASSESSOR'S MAP 53

Code Area No. 18-000

Key Route Station Tract (SK. 21 79. 24)  
 Subdivision Block K, Harmon Tract (SK. 4 79. 25)  
 Scale 1 in = 40 ft.  
 1607

1612

California St



Sacramento (Lowell) Street

1614

# EXHIBIT

3



Date this business became active under your ownership: 8/13/09

Check here if this business was already active and you are a new owner ☐

Check here if you have an ownership interest in another business in Berkeley ☐

Name of other business/es in which you have an ownership interest: \_\_\_\_\_

Rev May 2007

## NEW BUSINESS LICENSE APPLICATION FORM

FEB 28 2012

Please read all instructions on the other side before completing this application AND USE OF PRINT CLEARLY.

Business Type Medical Marijuana Service

Address in Berkeley 1510 ASHLEY AVE BERKELEY CA 94704

Business Name (DBA) Rocky Acres Med Marijuana Collective

Owner Name: FIRST Christopher LAST Smith

Mailing Address 1510 ASHLEY AVE #

City, State & Zip Berkeley, Ca 94702

For Finance Use Only	
BL #	NAICS Code
Tax Code	Log Verified <input type="checkbox"/> Yes <input type="checkbox"/> No
Platified in Park	

Planning  
Fire  
Health  
Police  
Building  
Toxics

### PLEASE COMPLETE THE FOLLOWING INFORMATION

1. Business Phone <u>(510) 845 4040</u>	8. # of Employees <u>2</u>
2. Emergency Phone <u>(510) 845 1306</u>	9. # of Business Vehicles <u>2</u>
3. Fed ID or Soc Sec # <u>27-2139062</u>	10. Female Owned: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
4. <input type="checkbox"/> Partnership <input checked="" type="checkbox"/> Corporation <input type="checkbox"/> Sole Owner	11. Minority Owned: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
5. State Seller's Perm/Resale # <u>101-340 037</u>	12. Date Fiscal Year Ends
6. Contractors Lic #/Exp Dt <u>0</u>	13. Email Address <u>HTW32@yahoo.com</u>
7. Do you sell tobacco products? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	

### COMPUTING THE PAYMENT AMOUNT FOR YOUR NEW BUSINESS LICENSE

14. New Business License Tax: \$51 for most businesses; \$77 for rental property (See note)	\$
15. New Business License Registration Fee	\$ <u>25.00</u>
16. TOTAL AMOUNT DUE FOR NEW BUSINESS LICENSE	PLEASE REMIT \$

NOTE: Some businesses require different fees for a new license. Please contact Customer Service for more information.

MAKE CHECKS PAYABLE TO: City of Berkeley and mail or deliver to Finance - Customer Service, 1947 Center Street, Berkeley, CA 94704.

Under penalty of perjury, I declare I am authorized to make this application and that to the best of my knowledge and belief it is a true, correct and complete statement made in good faith for the period stated, in compliance with the provisions of the Berkeley Business License Ordinance.

Signature/Title \_\_\_\_\_ Date 2/24/12

See the other side for important information and instructions before completing this application.

Finance Customer Service Center • 1947 Center Street, 1<sup>st</sup> Floor, Berkeley, California 94704  
Phone: 510.981.7200 • TDD: 510.981.6903 • Fax: 510.981.7210 • Email: BusLic@ol.berkeley.ca.us

Bus. Lic. # \_\_\_\_\_ Amount Paid \$ \_\_\_\_\_

Forty Acres Medical Marijuana Growers Collective is a non-conforming entity. We were established August 13<sup>th</sup>, 2009 prior to Measure T amending ordinance pertaining to medical cannabls by amending sections 12.26.030, 12.26.040, 12.26.110, 12.26.130, and 23E.16.070 of the Berkeley municipal code and adding sections 12.26.150 and 23E.72.040 to the Berkeley municipal code. Licenses were made unavailable to collectives until January 1<sup>st</sup>, 2012; therefore, Forty Acres Medical Marijuana Growers Collective is a non-conforming entity.

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FEB 28 2012

LAND USE PLANNING





# PLANNING & DEVELOPMENT

Land Use Planning, 2120 Milvia Street, Berkeley, CA 94704

Tel: 510.981.7410 TDD: 510.981.6903 Fax: 510.981.7420 Email: [Planning@pl.berkeley.ca.us](mailto:Planning@pl.berkeley.ca.us)

RECEIVED

FEB 28 2012

## LAND USE PLANNING

### ZONING CERTIFICATE APPLICATION

#### FOR BUSINESS LICENSE APPLICATIONS

Address: 1510 ASHBY AVENUE Suite/Unit #: \_\_\_\_\_  
Applicant Name: Christopher Smith Phone #: (510) 816-1306  
Business Name: Fox Acres Med. Mary. grow coll. Previous business at this location: 6  
Describe products/services provided: Medical Marijuana Service

Has the property owner authorized this business? ☒ Yes ☐ No Lease area (sq. ft.): 2000

Do you intend to: Increase/reduce lease area? ☐ Yes ☒ No Install a new sign? ☐ Yes ☒ No

Hours of Operation: Mon-Thu 9-9(?) Friday 9-9(?) Saturday 9-9(?) Sunday 9-9(?)

Does the business have off-street parking? ☐ Yes ☒ No If yes, how many spaces? \_\_\_\_\_

Location of parking: ☐ Same property ☐ Other location (describe): Street

Will you sell alcoholic beverages? ☐ Yes ☒ No If yes, list ABC license type: \_\_\_\_\_

Will you sell tobacco products? ☐ Yes ☒ No Does the business involve marijuana? ☐ Yes ☒ No

Will you offer live entertainment or music? ☐ Yes ☒ No If yes, describe: \_\_\_\_\_

#### BUSINESSES SERVING FOOD & DRINK ONLY:

Number of seats: \_\_\_\_\_ Busiest days/times: \_\_\_\_\_

Describe smoke and odor controls: \_\_\_\_\_

Alcohol served (check all that apply): ☐ Beer ☐ Wine ☐ Liquor  
☐ Only with meals ☐ Separate from meals ☐ At a bar

Under penalties of perjury, I certify that the above information is true and complete to the best of my knowledge.

Applicant signature [Signature] Date 2/24/12

\*Property owner signature \_\_\_\_\_ Date \_\_\_\_\_

(\* Required for changes of use or reduction of hours, alcohol, entertainment, etc.)

#### - STAFF USE ONLY -

☐ Address in HTE ☐ Complies with quota/node ☐ PD notified of alcohol ☐ Non-conforming use (no expansion)

Attachments: ☐ Floor plan ☐ Site plan ☐ Statement ☐ Other \_\_\_\_\_

District: \_\_\_\_\_ Approved by: \_\_\_\_\_ Ord. Sect. #: \_\_\_\_\_ Date: \_\_\_\_\_

Comments: \_\_\_\_\_



Tel: 510.981.7410 TDD: 510.981.6203 Fax: 510.981.7420 Email: [Planning@cl.berkeley.ca.us](mailto:Planning@cl.berkeley.ca.us)

FEB 28 2012

## LAND USE PLANNING

## LAND USE PLANNING FEE WORKSHEET – FOR INTERNAL USE ONLY

### Project Description

(e.g., "New Building @ 123 Main St")

[illegible]

**Project Type Code:** ZC

[illegible]

## Project Data Maintenance

**Zoning District:**

**Zoning Section: 23E. . . . .080**

Project Fees Maintenance			Provide quantity for all that apply (PLEASE no check marks):	
Quantity	Base Fee	15% Comm. Plan Fee	Sub-Total	Permit Description
<b>900 - ZC - Zoning Certificate</b>				
	\$50	---	\$50	Records Management Fee – Continuation of Existing Use
- OR -				
	\$180	---	\$180	Zoning Certificate – New Use
<b>TOTAL [Amount Paid]</b>				

**g:\Venduse\Forms & Instructions\land use planning forms\fees\2010 Internal fee intake sheets\final\_zo\_fees sheet 2010-08-02.doc**

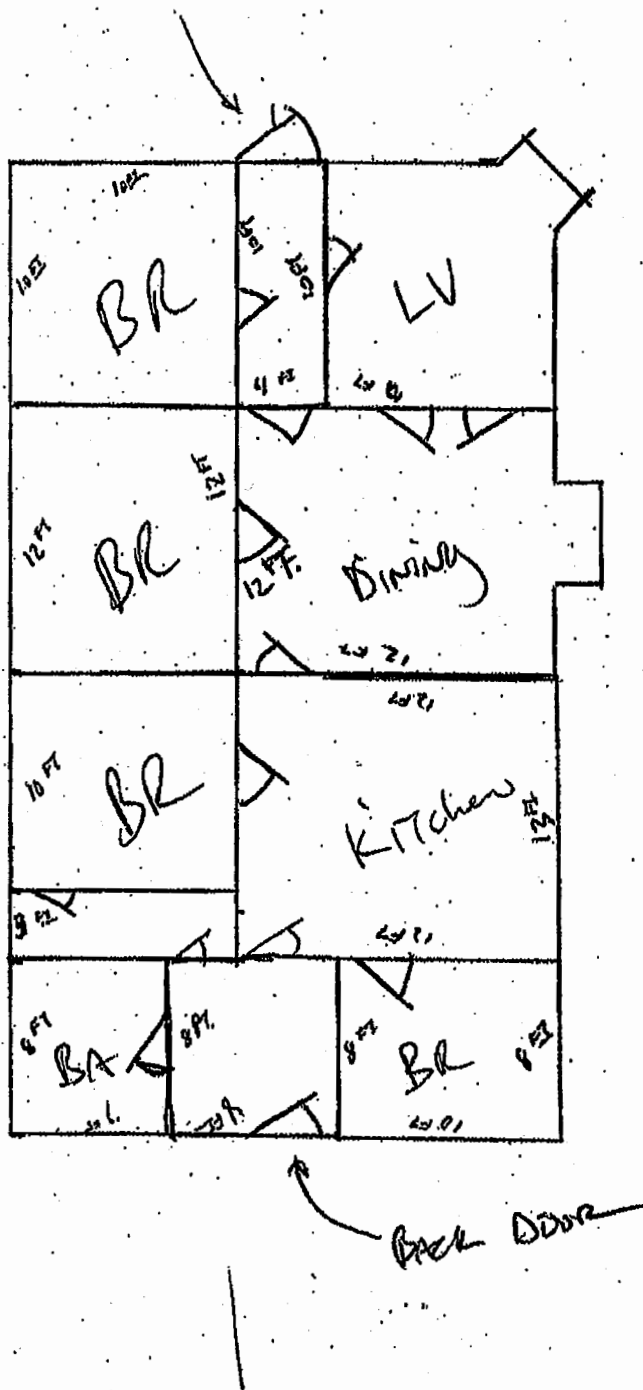
Front Door

Floor Plan  
1510 AMBY

RECEIVED

NOV 15 1981

LAND USE PLANNING



# **EXHIBIT**

**4**



Planning and Development Department

March 15, 2012

Chris Smith  
Forty Acres Medical Marijuana Growers Collective  
1510 Ashby Avenue  
Berkeley, CA 94703

Dear Mr. Smith:

On February 28, 2012, the Planning Department received two applications from the Forty Acres Medical Marijuana Growers Collective for medical cannabis services/collectives: one located at 1820 San Pablo Avenue, Unit 10, and the other located at 1510 Ashby Avenue. In both applications, you state that the businesses were established prior to passage of Measure T, and should therefore be considered non-conforming entities.

In order for a use to be considered legal non-conforming, it must "be established or constructed with the prior approval of, or legalized after the fact by, either a Zoning Certificate or all required Permits" (Zoning Ordinance Section 23C.04.010). While Berkeley Municipal Code Chapter 12.26, Patient's Access to Medical Cannabis Act of 2008, specifies locations for dispensaries and collectives, the Zoning Ordinance has never had an approval process or specified allowable locations for collectives or any medical cannabis uses other than dispensaries. Therefore, collectives and other non-dispensary medical cannabis uses cannot be considered legal, non-conforming uses under the Zoning Ordinance, regardless of when they were established. There is no type of nonconforming status other than as defined in the Zoning Ordinance.

Since a collective cannot be considered legal non-conforming, then it must be in compliance with the current Municipal Code and Zoning Ordinance. According to Berkeley Municipal Code Section 12.26.030.D, collectives have the following restrictions:

- They shall not be located in commercial or manufacturing districts; and
- They shall only be allowed as incidental to residential use.

The 1820 San Pablo site is located in a commercial district, C-W (West Berkeley Commercial District). Unit 10, along with other units on the second floor of the building, was inspected by the City of Berkeley's Code Enforcement Division in January 2012. The inspection determined that the medical cannabis use was not incidental to a residence, and it was located in a commercial district. Additionally, the units that did exist were illegally created — the approved use of the second floor was commercial, not residential. Neither building permits nor zoning permits were issued that would have legally established the units on the second floor as residential units.

The 1510 Ashby application is a follow-up to an application received on February 15, 2012. That application was denied because the property is zoned both residential (R-2A) and commercial (C-SA), with the majority of the house on the commercial side of the line dividing the two districts. As explained in the response to the first application, a collective must be in a residential use and shall not be in a commercial district. Since this property is partially in a commercial district, staff cannot sign off on the zoning for the business license.

Based on the information submitted, staff cannot approve business licenses for medical cannabis collectives at either 1820 San Pablo or 1510 Ashby. If you have any questions or need additional information, please contact me at 510-981-7484 or [egreene@cityofberkeley.info](mailto:egreene@cityofberkeley.info).

Sincerely,



Elizabeth Greene, AICP  
Secretary to the Medical Cannabis Commission

cc: Chris Smith, Forty Acres Medical Marijuana Growers Collective, 1820 San Pablo Avenue, Berkeley, CA 94703

# **EXHIBIT**

**5**

RESOLUTION NO. 66,911-N.S.

DECLARING THE PROPERTY AT 1820/1828 SAN PABLO AVENUE OPERATING AS AN UNLAWFUL CANNABIS USE IN VIOLATION OF BERKELEY MUNICIPAL CODE (BMC) CHAPTERS 12.26 AND 12.27 AND THE ZONING ORDINANCE (SECTIONS 23B.56.010.A, 23B.56.020, 23E.16.070, 23A.12.010, AND 23E.64.060); AND IS A PUBLIC NUISANCE UNDER BMC CHAPTER 23B.64; AND (2) ORDERING THE UNLAWFUL CANNABIS USE ENJOINED AND TERMINATED AND THE UNLAWFUL CONVERSION OF THE PROPERTY INTO 11 TENANT SPACES REMOVED

WHEREAS, on November 6, 2014 the Zoning Adjustments Board (ZAB) held a duly noticed public hearing as required by Berkeley Municipal Code (BMC) Section 23B.64.030; and

WHEREAS, on November 13, 2014 the ZAB adopted Resolution Number 14-01 recommending that the City Council, after conducting a public hearing, find and determine as follows: that 1820/1828 San Pablo Avenue a public nuisance pursuant to BMC Section 23B.64.020 and order the unlawful medical cannabis use enjoined and terminated and the 11 separate tenant spaces removed; and

WHEREAS, although the property owner has consented to the ZAB's recommendation, Mr. Smith has not; and

WHEREAS, on January 20, 2015, the City Council held a duly noticed public hearing as required by BMC Chapter 23B.64; and

WHEREAS, on October 14, 2014, the City Attorney advised Mr. Christopher Smith's counsel that, per the City's standard procedure, the Board would not be advised by its own attorney in this proceeding. However, Mr. Smith's counsel waited until the afternoon of the November 6 hearing to provide his objections to this procedure; and

WHEREAS, Mr. Smith's counsel claimed that "by refusing to provide the ZAB with independent counsel, the City Attorney places the ZAB in the position of naturally deferring to the legal pronouncements of the City Attorney, and to treat its analysis as that of the Board"; and

WHEREAS, under BMC Chapter 23B.64, the ZAB acts as an advisory body to the City Council and not a decision making body in this proceeding. On its recommendation, the Council conducts a de novo hearing. For that reason, the same Due Process principles that apply to a decision making body do not apply to the ZAB; and

WHEREAS, *even if* the ZAB were a decision making body in this proceeding, no law requires that it be advised by its own counsel. Instead, the Supreme Court ruled in *Morongo Band of Indians v. State Water Resources Bd.* 45 Cal.4th 731 that Due Process was not violated by one attorney appearing before it in a prosecutorial role (as the Deputy City Attorney did here) and another attorney advising the decision maker (as occurred when Council considered the Board's recommendation). In fact, the Supreme



Court found in that case that it would not violate Due Process for the *same lawyer* to serve as a prosecuting attorney and advisor to the Board on an unrelated matter; and

WHEREAS, the Court held "any tendency for the agency to favor an agency attorney acting as prosecutor because of that attorney's concurrent advisory role in an unrelated matter is too slight and speculative to achieve constitutional significance" (*Id.* at 737.); and

WHEREAS, based on that authority and its advisory role in these proceedings, the Council finds there was no constitutional requirement that the ZAB be advised by its own independent counsel; and

WHEREAS, Mr. Smith's counsel also claimed at the November 6 hearing that the City argued to the Superior Court the week prior that his Motion to Quash evidence from an inspection warrant would be decided by Board and, thus, the Board must rule on the Motion. However, the City actually argued Mr. Smith's Motion to Quash was moot because the "City no longer intends to rely on evidence gathered a year ago because, frankly, it is stale"; and

WHEREAS, although Mr. Smith's counsel claimed at the November 6 hearing that he had provided the Board "with a motion to quash certain of the evidence that was received here" "because the City is relying substantially on evidence that we contend was unlawfully seized", he failed to identify *any evidence* relied upon by staff that was subject to his Motion to Quash; and

WHEREAS, in fact, the ZAB staff report, the staff presentation to ZAB at the November 6 hearing and ZAB Resolution Number 14-01 all did not rely on any evidence generated from the October 2013 inspection; and

WHEREAS, the Council staff report and the staff presentation to Council at the January 20 hearing also did not rely on any evidence generated from the October 2013; and

WHEREAS, based on the foregoing, the Council finds that the ZAB was not and it is not required to make a determination on Mr. Smith's Motion to Quash because no evidence subject to it was before it; and

WHEREAS, Mr. Smith insists that he be accorded the same process as was used for the two other illegal dispensaries. Consistent with the ZAB's and Council's procedures, both of those prior proceedings did not involve cross-examination of witnesses; and

WHEREAS, the City Attorney reiterated to Mr. Smith's counsel in June 2014 that it was the Board's standard practice to not allow cross-examination of witnesses and attempted to understand whether Mr. Smith would argue that this standard practice would not accord Mr. Smith due process. In particular, the City Attorney stated in an email to Mr. Smith's counsel "I understand your answer to be that if the City were to

proceed by way of a hearing before the ZAB, you would insist that, for instance, ... cross-examination be allowed"; and

WHEREAS, Mr. Smith's counsel responded "[t]o be clear, we have never insisted that cross-examination ... is required for due process". The City Attorney then stated in reply "If I understand you correctly, you agree that the fact that the ZAB/City Council nuisance abatement proceedings under BMC 23B.64 do not include cross-examination ... does not result in a denial of due process"; and

WHEREAS, Mr. Smith's counsel responded "we request that you confirm that Mr. Smith made no demand for the right to cross-examination ... " and the City Attorney replied "what I can confirm is that until now neither you nor Mr. Smith has stated that you or he would *not* demand ... cross-examination in the ZAB/City Council process. Indeed, at one point you characterized my request to confirm that you were not making these demands as a request that you 'waive' due process rights." Having concluded that Mr. Smith's counsel was finally indicating that Mr. Smith would not insist that cross-examination was required in order to comply with due process in a proceeding pursuant to BMC Chapter 23B.64, the City Attorney then stated "[w]e will issue a revised and superseding notice under Chapter 23B.64"; and

WHEREAS, nonetheless, Mr. Smith's counsel submitted a brief to the ZAB on the afternoon of the November 6 hearing that asserted "the failure to allow cross-examination where the facts establish the need for such examination is an abuse of process." He then characterized the City Attorney's request to simply understand whether Mr. Smith intended to argue that the ZAB's standard procedures were in violation of his due process rights as a "demand for waiver of Mr. Smith's due process rights" and, as such were allegedly "contrary to public policy and unenforceable" and then "insist[ed] on the right to confront the City's witnesses" "because under the circumstances presented, cross-examination is necessary in order to have a fair hearing"; and

WHEREAS, Mr. Smith's counsel already cross-examined the City witnesses when the matter proceeded in front of the hearing officer pursuant to BMC Chapter 1.24. However, Mr. Smith was not satisfied with that process and insisted that his case be prosecuted before the Board as the other two illegal dispensaries had been; and

WHEREAS, Mr. Smith's counsel pointed out that the authority relied upon by staff in the staff report (*Mohilef v. Janovici* 51 Cal.App.4th 267 (1996)) involved a case where limited cross-examination was allowed. However, the Court did not restrict its holding to the fact that limited cross-examination was allowed or indicate that, where limited cross examination was not allowed in a public nuisance hearing, that Due Process would be violated; and

WHEREAS, the Court instead found that requiring cross-examination would strip the process of its informality, would lengthen hearings and either encourage witnesses to hire counsel or not testify at all. (*Id.* at 301.); and

WHEREAS, in response to Board member Tregub's questions about why Mr. Smith was demanding a hearing pursuant to 23B.64 which may not involve cross-examination when the City had proceeded pursuant to Chapter 1.24 which did allow cross-examination, Mr. Smith's counsel claimed "the cross examination could not take place before the hearing officer. He had just been disqualified. And so the cross examination that we sought was to not just cross examine him regarding in a vacuum, but cross examine him before a body"; and

WHEREAS, staff explained that the City had offered to allow Mr. Smith's counsel to conclude his cross-examination of the only remaining witness before the hearing officer was dismissed and submit the transcript to another hearing officer, but Mr. Smith's counsel declined that offer; and

WHEREAS, Mr. Smith's counsel explained his desire to cross-examine Mr. Daniel at the ZAB hearing as follows "[o]ne of the critical issues in this case is that the city has engaged in an extensive effort to prevent my client and the other from rehabilitating the facilities at this location. And Mr. Daniels [sic] is one of the people, for example, who although the City, one of our key issues is that the City took the position that they would overtly invite the homeowner to take one of three options to either remove the existing facilities or to repair them, to bring them into compliance. Meanwhile Mr. Daniels [sic] privately told the homeowner don't bring them into compliance"; and

WHEREAS, Mr. Gregory Daniel responded to this accusation and stated: "The attorney for Mr. Smith repeatedly stated that I discouraged Mr. Soe from making any -- correcting any of the violations. That's absolutely not true. In your packet is a notice of violation, we issued in January, 2012. In that notice of violation, it gives you three specific options. In each of those options Mr. Soe is ordered to submit the appropriate application to planning. Code enforcement doesn't make determinations on what you can or cannot correct. We just give you the options. Remove it, legalize it, prove that it existed"; and

WHEREAS, the ZAB had an opportunity to consider the charge against Mr. Daniel by Mr. Smith's counsel, hear Mr. Daniel's response, observe both individuals demeanor and weigh the credibility of their statements; and

WHEREAS, the Council finds that allowing cross-examination would strip the process of its informality, would lengthen hearings and either encourage witnesses to hire counsel or not testify at all and, in light of the fact that Mr. Smith's counsel already cross-examined the City's witnesses and he was offered an opportunity to complete his cross-examination of the only remaining witness, Mr. Daniel and Mr. Daniel responded to Mr. Smith's attorney's accusation regarding the alleged statement he made to Mr. Soe, the Board and Council are not required to deviate from the standard practice of not allowing cross-examination at public nuisance hearings in this matter; and

WHEREAS, although Mr. Smith claims he wanted a process like the other illegal dispensaries, he objected to the entire ZAB staff report as a "flood of hearsay assertions"; and

WHEREAS, the staff report explains that hearsay is admissible in administrative nuisance abatement proceedings and Mr. Smith's counsel did not provide any contrary authority; and

WHEREAS, the staff report is largely a summary of documentary evidence which is attached as exhibits the majority of which are either not hearsay or fall within exceptions to the hearsay rule; and

WHEREAS, according to City records, 1820/1828 San Pablo Avenue (the Property) is the second floor of a two-story commercial building located in the C-W District which is a commercial zoning district. The Property is owned by Clarence Soe/Soe Group and FJSC Soe Group (collectively "the owner"). The last legal use of the Property was a modern dance studio per Use Permit No. 6894 issued in 1972. Since then, no other use has been approved by the City; and

WHEREAS, because the only lawful use of the Property from 1972 until today has been a commercial use as a modern dance studio pursuant to Use Permit No. 6894, no lawful residential use has ever been established at the Property; and

WHEREAS, in 2004, Berkeley Municipal Code (BMC) Section 12.26.130 (formerly Section 12.26.110) imposed a cap on the number of medical cannabis dispensaries that may operate in Berkeley at any one time. Mr. Smith's cannabis operation was not one of the three authorized dispensaries in existence at that time; and

WHEREAS, BMC Section 12.26.130 now allows four medical cannabis dispensaries, with the fourth to be selected in 2015 through a competitive selection process. Thus, at present, only three dispensaries are allowed in Berkeley; and

WHEREAS, Mr. Smith has claimed that he is not operating a dispensary. Rather, he has claimed that he is operating a "collective" (Berkeley ordinances do not limit the number of collectives allowed), but collectives are prohibited in commercial zoning districts pursuant to BMC Section 12.26.030.D, which states "[m]edical cannabis collectives shall not be located in commercial or manufacturing districts, and shall only be allowed in residential districts, and only to the extent they are incidental to residential use"; and

WHEREAS Mr. Smith has further claimed that his alleged collective has "legal non-conforming" status because it was established in 2009, before the adoption of Measure T in 2010; and

WHEREAS, at the November 6, 2014, hearing, Mr. Smith admitted that he no longer occupies the units at the Property where he operated his alleged collective in 2009

because he was evicted from that space; now, he instead operates out of different units at the Property: "Well, part of my house was taken apart because I got evicted from part of my house. At first I had one set of rooms then I had all of the rooms, then I had less than half the rooms. So my rooms and my bedrooms have been changing just like that. Over the past few years. So, I go from certain number of units, I go for more units, all of the time I ask for permits and I get nothing . . . . Now I got to get out of those units. Now I got to reduce everything here"; and

WHEREAS, in order for a use to be considered legal non-conforming, it must "be established or constructed with the prior approval of, or legalized after the fact by, either a Zoning Certificate or all required Permits" (BMC § 23C.04.010.); and

WHEREAS, while BMC Chapter 12.26 specifies allowable locations for dispensaries and collectives, the Zoning Ordinance has never had an approval process or specified allowable locations in commercial districts for collectives or medical cannabis uses other than dispensaries. (BMC § 23E.16.070.) Therefore, collectives and other non-dispensary medical cannabis uses cannot be considered legal, non-conforming uses under the Zoning Ordinance regardless of when they were established; and

WHEREAS, since there is no recognized non-conforming status in the BMC (including Chapter 12.26) except as defined in the Zoning Ordinance, a collective could never achieve a legal non-conforming status. The City communicated this to Mr. Smith when it denied his two business license applications in March, 2012; and

WHEREAS, even if BMC Chapter 12.26 authorized legal non-conforming collectives (which it does not), at the time Mr. Smith claims his cannabis collective was established, BMC Section 12.26.030.E defined a "medical cannabis dispensary" as "any person or entity that dispenses, cultivates, stores or uses medical cannabis except *where such cultivation, storage or use is by a patient or that patient's caregiver, incidental to residential use by such patient, and for the sole use of the patient who resides there.*" (emphasis supplied.) Thus, any cannabis use other than by a patient and that patient's caregiver in that patient's lawful residence was considered a dispensary between 2004 and 2010; and

WHEREAS, this fact was highlighted when staff presented the City Council with proposed amendments to Chapter 12.26 in May, 2010. The staff report explains "the Ordinance currently defines a Dispensary very broadly in BMC 12.26.030(E). For instance, a Dispensary includes not only the three authorized Dispensaries in Berkeley, but also any entity that cultivates or dispenses medical marijuana for its qualified patient members. This definition of Dispensary is so broad that it unintentionally includes a small Collective of only three qualified patients that cultivate collectively and allocate the marijuana only amount themselves. The Ordinance currently prohibits such a group due to the 3-Dispensary cap rule"; and

WHEREAS, at the administrative nuisance hearing before the hearing officer, Ms. Toya Groves was called as a witness by Mr. Smith and she testified under oath that the "collective" she and Mr. Smith co-founded had "thousands" of members; and

WHEREAS, at the November 6, 2014 hearing, Ms. Groves further testified "there is (sic) a lot of members" of the "collective." When asked if there were 2,000 members, she explained, "We have grown from what started out as a small group of people; it has gotten bigger"; and

WHEREAS, consistent with that testimony, Berkeleyside also reported on September 29, 2011 that "in the 21 months since it opened, the Forty Acres Medical Marijuana Growers Collective has seen its membership jump to more than 7,000 people ...."; and

WHEREAS, Mr. Smith was interviewed by the New York Times for an article that was printed on June 5, 2010 and it states that "40 Acres Collective consists of about 100 growers and users who gather to share pot, money and plants"; and

WHEREAS, because the only authorized use of the Property since 1972 is a commercial use as a modern dance studio pursuant to Use Permit No. 6894, no residential use of the Property has ever been legally established. Therefore, even if the BMC recognized a non-conforming collective (which it does not) and even if the collective at the Property consisted of only "a patient or that patient's caregiver ... for the sole use of the patient who resides there" in 2009 pursuant BMC Section 12.26.030.E (which it did not), because no lawful residential use of the Property was ever established, the collective could never have been "incidental to residential use" as further required by BMC Section 12.26.030.E in effect in 2009; and

WHEREAS, without actually explaining how BMC Section 12.26.040 effective in 2009 assists Mr. Smith's claim, Mr. Smith's counsel directed the ZAB to "take a good look" at this provision and alleged that "City's contention as to what the law states is not accurate"; and

WHEREAS, BMC Section 12.26.040 effective in 2009 does not alter the definition of a "dispensary" present in BMC Section 12.26.030.E and has no as relevance to whether the cannabis operation at the Property was considered a dispensary pursuant to this definition or not; and

WHEREAS, Mr. Smith's cannabis operation would have been considered a dispensary in 2009 pursuant to BMC Section 12.26.030.E. Since dispensaries were capped at 3 in 2004, Mr. Smith's dispensary was unlawful at its inception and remains so today; and

WHEREAS, although Mr. Smith has previously claimed that he is not operating either a dispensary or a collective because no distribution of medical cannabis occurs at the Property, at the November 6, 2014 hearing, Board member Williams asked Mr. Smith "At one point you claim that you regularly invite patients and other activists to the property to socialize, fundraise and organize around medical marijuana policy. Is that

how you operate now, when previously were you operating as a nonprofit medical marijuana dispensary -- collective?" and he responded "I may have been reiterating a possible social interaction."; and

WHEREAS, Board member Williams then asked "But you're claiming you are still operating as a collective, the issue is whether you're legal because of nonconforming status?" and Mr. Smith responded "Oh no, I'm definitely a legal medical marijuana collective"; and

WHEREAS, at the November 6, 2014, hearing Mr. Ralph Walker, the sole witness who testified in support of Mr. Smith's dispensary, other than Ms. Groves, testified that Mr. Smith was selling marijuana at the property: "The way police describe his operation sounds like a crackhouse; he's not selling crack, he's selling marijuana"; and

WHEREAS, at the November 6, 2014, hearing Ms. Groves acknowledged that the cannabis operation is an ongoing business enterprise, asserting, "we do pay state taxes, would love to pay city taxes but we can't get the business license"; and

WHEREAS, neighbors also testified that the operation had increased in intensity within the last year -- the year during which the City was conducting its nuisance abatement proceeding. Such comments included:

- "They've been around for years back, but this year is the worst year."
- "I notice a lot of smoke daily and the smell, pretty strongly, end of last month, till today. It's getting more constant."
- "I been living there for two years, it wasn't like that two years ago. But it concerns me. . . . I don't know if it's coming from that place but I know it's there, the smoke started. But I started noticing it recently. And I hope it stops. Because it wasn't like that two years ago."
- "So starting this year, this thing start getting more aggressive and more people in front of it."
- "I want to reiterate what the other speakers were saying, the last few years at the corner of San Pablo and Tenth has become a real problem."
- "[It] is obviously a cannabis dispensary that has been operating in full force for years now. Probably, I thought it was about three years and it's good, I learned something here tonight, that it's been going on even longer than that but it keeps getting bigger and bigger," and

WHEREAS, at the November 6, 2014, hearing, Mr. Smith alleged that he attempted to hold a community meeting to discuss the increased impact of his business on the neighborhood, but nobody showed up: "And most of all, about a year ago, I set out a



community meeting and I put one on every door in the neighborhood. And we met at Casa Latina, nobody showed up"; and

WHEREAS, Mr. Smith further claimed he was unaware of the neighbors concerns about his dispensary operation and that he wanted to change the operation to address their concerns: "I want to say I never knew, you know, I've asked people in the neighborhood about what they felt, and no one has ever told me." "I want to know, I want y'all to know, that's not how it's supposed to be. So I'm surprised. I have to talk to y'all;" and

WHEREAS, consistent with Mr. Smith's statements at the ZAB that he wanted to modify his dispensary operation to decrease the impact on the neighbors, a neighbor of the Property found a notice on the street outside the Property shortly after the ZAB hearing which references the "recent" and "numerous" neighbor complaints and announces a "Good Neighbor Policy" to be implemented by its customers as a result of these complaints. The policy described on the notice is the following:

- PLEASE DO NOT PARK IN NEIGHBORS DRIVEWAYS!
- PLEASE DO NOT SMOKE IN ANY AREAS OF THE NEIGHBORHOOD!
- PLEASE NO LITTERING! TAKE YOUR TRASH WITH YOU!
- NO LOITERING (HANGING OUT AROUND THE NEIGHBORHOOD)!
- PLEASE RESPECT THE NEIGHBORS! (Id.)

WHEREAS, Mr. Smith pays monthly for a webpage to advertise his dispensary at the Property and the website is continually updated with advertisements, announcements, specials and customer reviews. The customer reviews describe the operation of the dispensary in great detail and identify many employees by name. Customer reviews have also been posted on Yelp.com and the dispensary's Facebook page recently; and

WHEREAS, the webpage includes many different types of cannabis products for sale with a description, the cost and photographs of the products and these are continually updated as well; and

WHEREAS, the dispensary also maintains two Facebook and Instagram profiles where photographs and a video of the interior of the dispensary are posted depicting the products offered for sale, promotions and various other offerings. The photos and videos are consistent with the observations of the interior of the dispensary made by the confidential informant(s) and the property owner as discussed further below. Also, dispensary employees have tagged themselves and posted photos of the dispensary while working at the Property on Instagram as recently as December 12, 2014; and

WHEREAS, various cannabis product websites advertise that the products are available for purchase at the Property and one even announced an event at the Property on August 1, 2014 for a demonstration of its products; and

WHEREAS, Mr. Smith advertised "lab tested" cannabis by SC Labs on his website and SC Labs' website confirms that it had tested various strains of cannabis from Mr.



Smith's dispensary on May 11, 2014 and April 19, 2014. The cannabis strains listed as having been tested on SC Labs website match those advertised on Mr. Smith's webpage. SC Labs website also indicated that it had tested cannabis from CSCC previously on December 28, 2013, December 5, 2013, October 24, 2013, October 8, 2013 and September 26, 2013; and

WHEREAS, as recently as February 18, 2014, Mr. Smith obtained a seller's permit to sell medical marijuana at the Property for the entity doing business as "CSCC" from the California Board of Equalization (BOE). The BOE confirmed that this seller's permit is current and active; and

WHEREAS, Officer Kassebaum testified that on March 23, 2014 at approximately 11:30 a.m. a dispensary member called BPD for assistance claiming she had come to the dispensary to see her boyfriend, Mr. Greer, who was employed as "a security guard at the marijuana club," but he would not speak to her and instead she was "picked up, thrown down the stairs, hit kicked, et cetera" by other club staff; and

WHEREAS, Officer Kassebaum, one of the responding officers, testified that he interviewed the self-identified "staff" present at the time of the incident, which included another security guard in addition to Mr. Greer and Mr. Sims, who introduced himself as the "manager" of the dispensary. The staff claimed that they worked there as security guards and that she grabbed the metal detector wand hanging by the guard's station outside of Unit 1 and began swinging it over her head when her boyfriend wouldn't see her. They claim they removed her from the dispensary based on these actions and "physically carried her down the stairs"; and

WHEREAS, Officer Kassebaum testified hearing that he asked to see the top of the stairs where the incident occurred and the manager complied. At the top of the stairs, he saw the door to the Unit 1 was open and he saw several people inside smoking and smelled burning cannabis coming from the Unit. He further testified that the dispensary manager quickly closed the door to Unit 1 after he arrived at the top of the stairs. Despite the presence of numerous staff and other individuals at the Property on this Sunday at 11:30 a.m., Mr. Smith was not present; and

WHEREAS, Officer Kassebaum testified hearing that "as a patrol Officer driving around I constantly see the flow of human traffic . . . standing at the doors talking to security guards"; and

WHEREAS, Officer Kassebaum testified hearing that the police have been called to the Property on other occasions as well; and

WHEREAS, Sgt. Murphy testified that Ms. Taylor was dissatisfied with the police response to her March 23 call, so she went to the police department to speak to a supervisor about the incident. Sgt. Murphy testified that Ms. Taylor told her that she was a member of the cannabis club and she had the right to be there and neither the

Manager, Mr. Sims, should have disallowed her from being there nor removed her from the property; and

WHEREAS, the Zoning Ordinance declares the "[v]iolation of any provision of [Chapter 23]" to be a public nuisance, (BMC § 23B.64.020(B)) and Chapter 23 specifies that "[n]o commercial use shall operate except between the hours of 7:00 a.m. and 11:00 p.m. unless a Use Permit is obtained" (BMC § 23E.64.060(A).); and

WHEREAS, Detective Rodrigues testified at the November 6, 2014, hearing that she has conducted surveillance of the Property on September 19, 2014, October 17, 2014 and October 22, 2014. On each of these dates, she conducted surveillance for one hour. On September 19, 2014 from 10:15 p.m. to 11:15 p.m., she "saw that the door was wide open, the lights were on, and within the first five minutes, [she] observed 10 people leave the Property." She also saw a "security guard standing at the door who required each person seeking to enter to show identification." Over the course of the hour she was there, she observed another 31 people enter and then leave ten to fifteen minutes later; and

WHEREAS, on October 17, 2014, between 10:00 p.m. and 11:00 p.m., Detective Rodrigues testified that she observed the same conditions of the door wide open, lights on and security guard standing on the sidewalk near the front door. This time, she observed 29 people enter and then exit within fifteen minutes. Each person was again required to show identification to the security guard; and

WHEREAS, on October 22, 2014, between 9:30 p.m. and 10:30 p.m., Detective Rodrigues testified that she observed the same conditions at the Property except that, at 10pm, the security guard moved into the Property and shut the door. After that, she observed several people approach the closed door and then be greeted by the security guard who again checked their identification and then let them in. On this evening, Detective Rodrigues observed 35 people enter and shortly exit the Property in the hour; and

WHEREAS, at the November 6, 2014, hearing, a neighbor confirmed the volume of traffic observed by the police by testifying that the "police were estimating 35 people an hour, I thought it was at least 25, just because now and then I'll walk out there and watch. Because I just couldn't believe, they operate so openly. And with no concern about the impact on the neighborhood"; and

WHEREAS, at the November 6, 2014 hearing, Detective Rodrigues testified that she has facilitated a purchase of cannabis products from the Property by a confidential informant. Within 72 hours of February 5, 2014, Detective Rodrigues searched the confidential informant and found him/her not to be in possession of any money or contraband. She then gave the confidential informant money to purchase cannabis from the Property. She observed the informant as he/she entered and exited the Property a few minutes later. The informant and Detective Rodrigues met up at a pre-determined location and, after the informant handed her 5.91 grams of cannabis, she

searched the informant again and did not find him/her in possession of any money or contraband; and

WHEREAS, Detective Rodrigues testified that the informant observed several people inside the dispensary smoking cannabis, described that he/she waited in line to purchase cannabis with several other people, that he/she saw a digital price board that was located above the counter which indicated different types of cannabis available for purchase with the associated prices per weight and that, behind the counter, there were numerous clear jars of cannabis that were available for purchase. Detective Rodrigues then tested the cannabis and it tested presumptive positive for cannabis; and

WHEREAS, Detective Rodrigues testified that she then caused the cannabis purchased by the informant on this occasion to be delivered to the Alameda County Sheriff's Office Crime Laboratory for testing on February 13, 2014. The lab results identified that the substance purchased by the confidential informant was, in fact, cannabis; and

WHEREAS, Detective Rodrigues testified that, within 72 hours of April 13, 2014, she searched a confidential informant and found him/her not to be in possession of any money or contraband. She then gave him/her money to purchase cannabis from the Property. She observed the informant as he/she entered and exited the Property a few minutes later. The informant and Detective Rodrigues met up at a pre-determined location and, after the informant handed her 5.03 grams of cannabis in a baggie with a sticker on it that read, "Not for sale, for medical use only, Health and Safety Code 11362.7.", she searched the informant again and did not find him/her in possession of any money or contraband; and

WHEREAS, Detective Rodrigues testified that the informant observed "several people inside the dispensary smoking cannabis" and that he/she saw "a digital price board that different types of cannabis available for purchase and the price per weight and that behind the counter there were a lot of clear jars with cannabis available for purchase." Detective Rodrigues then tested the cannabis that the informant had purchased and it tested presumptive positive for cannabis; and

WHEREAS, Detective Rodrigues testified that she caused the cannabis purchased by the informant on this occasion to be delivered to the Alameda County Sheriff's Office Crime Laboratory for testing on May 23, 2014. The lab results identified that the substance purchased by the confidential informant was, in fact, cannabis; and

WHEREAS, Detective Rodrigues testified that, within 72 hours of August 22, 2014, she conducted another controlled purchase "in the same manner that the other two previous controlled purchases were conducted." On that date, the informant purchased 5.07 grams of cannabis, which later tested presumptive positive for cannabis. The cannabis was then taken to the crime lab and tested positive for cannabis; and

WHEREAS, Detective Rodrigues submitted a police report which described her conversation with the informant who stated that he/she purchased the cannabis from

two employees that stood behind a glass counter. The glass counter displayed glass cannabis smoking pipes and other smoking paraphernalia that were for sale. Behind the glass counter, the informant observed dozens of glass jars that contained different strains of cannabis that were available for sale. The informant again observed several other customers in line to purchase cannabis and a digital price board to the left of the glass counter which was affixed to the wall and indicated different types of cannabis available for purchase. Officer Rodrigues then tested the cannabis and it tested presumptive NIK E positive for cannabis; and

WHEREAS, Detective Rodrigues testified that she then caused the cannabis purchased by the informant on this occasion to be delivered to the Alameda County Sheriff's Office Crime Laboratory for testing on August 26, 2014. The lab results identified that the substance purchased by the confidential informant was, in fact, cannabis; and

WHEREAS, Detective Rodrigues submitted a police report which stated that, within 72 hours December 22, 2014, she conducted another controlled purchase in the same manner that the other three previous controlled purchases were conducted. On that date, the informant purchased 1.81 grams of cannabis, which later tested presumptive positive for cannabis. The cannabis was then taken to the crime lab and tested positive for cannabis; and

WHEREAS, Detective Rodrigues' police report described her conversation with the informant who stated that he/she walked past the security guard and entered the business without showing any type of identification or medical marijuana documents, that he/she observed the security guard checking other customers for their identification or medical marijuana documents, that he/she did not have a medical marijuana recommendation and is not a member of the dispensary. The informant also told Detective Rodrigues that nobody offered to sign him/her up as a member of the dispensary after he/she entered. The informant also told Detective Rodrigues that he/she purchased the marijuana from an employee behind a counter and behind the counter there were glass jars filled with marijuana with stickers indicating the price per gram. The informant also noticed a digital price list for the different types of marijuana and several other customers in line to purchase marijuana. Officer Rodrigues then tested the cannabis and it tested presumptive NIK E positive for cannabis; and

WHEREAS, Detective Rodrigues then caused the cannabis purchased by the informant on this occasion to be delivered to the Alameda County Sheriff's Office Crime Laboratory for testing on December 22, 2014. The lab results identified that the substance purchased by the confidential informant was, in fact, cannabis; and

WHEREAS, staff testified that they found a notice regarding a "medical marijuana event" scheduled for October 30, 2014 at the Property on the Facebook page of a group called Bay Area Urban Artists and that 277 people were invited; and

WHEREAS, during the November 6 hearing, the Property owner's representative testified he visited the Property on approximately August 7, 2014 at approximately

10am. He walked into the Property and noticed a podium approximately 4 feet north of Unit 1. At the podium was a security guard who, upon viewing him, asked him to wait, but then allowed him to proceed after he recognized who he was. The owner's representative testified that he entered Unit 1 which was open and observed a glass counter along the north wall displaying cannabis smoking pipes and other smoking paraphernalia; and

WHEREAS, the owner's representative testified he saw a woman was working behind the counter and she asked if she could help him. Before he could answer, the guard told the employee that he was the building owner. The owner's representative observed cannabis plants through the window located in Unit 1 that connected to Unit 3. He also observed the digital display board mounted on the wall that displayed prices of cannabis offered for sale. He did not observe any residential furniture or other evidence of residential use in Unit 1; and

WHEREAS, the owner's representative stood at the doorway and observed office furniture including desks, computers, office chairs and membership intake forms on a podium. Again, he did not observe any residential furniture or other evidence of residential use in Unit 11. Rather it appeared to him to be organized in a similar manner as a doctor's office; and

WHEREAS at the November 6, 2014 hearing, the owner's representative testified that there is evidence Mr. Smith may live at a property on Ashby Avenue, not at the Property: "The owner has believed that for a long time, long before 2009, Chris Smith has been living in a house on Ashby Avenue. He has signed a lease with K&S realty for a house on Ashby Avenue; that's his home;" and

WHEREAS, at the November 6 hearing, Mr. Smith indicated his home address was 1510 Ashby Ave. on the speaker card he completed; and

WHEREAS, Mr. Smith's explanation that he lives at the Property is not credible given the weight of the contrary evidence and his following explanation: "How do I sleep there? Well, part of my house was taken apart because I got evicted from part of my house. At first I had one set of rooms then I had all of the rooms, then I had less than half the rooms. So my rooms and my bedrooms have been changing just like that. Over the past few years. So, I go from certain number of units, I go for more units, all of the time I ask for permits and I get nothing. I go up to the whole floor, everything is moved around. There's sinks and stuff, there's a bigger kitchen area over here, everything moves. Yeah, I changed things around. Everything moves. Now I got to get out of those units. Now I got to reduce everything here. Wow. I have fold up beds, I've had no beds, I've slept on sofas, I have had king beds, I have had a baby in there. I've done everything"; and

WHEREAS, neighbors of the Property testified to seeing a large amount of traffic coming and going from the Property and observing the security guard sitting on a chair outside the Property, identifying the club members and then admitting them entrance.

They also describe observing selling and buying of cannabis in the surrounding neighborhood outside the Property. They further describe observing individuals leave from the Property and then roll cannabis cigarettes and either smoking them in the neighborhood or selling them to others; and

WHEREAS the Zoning Ordinance declares the facilitation of "disturbances of the peace" to be a public nuisance (BMC § 23B.64.020(A).); and

WHEREAS, at the November 6, 2014, hearing, nine of eleven speakers testified that the neighbors were afraid of the dispensary customers and staff. Such comments included:

- A fear of testifying in front of the Board or gathering evidence of illegal activity: "[W]e have received many complaints from our residents in the building, not one of which felt comfortable coming here tonight to speak about what they've seen." "I don't take a picture of these people because I know what it means. You take a picture that mean you attacking them."
- A fear of walking along San Pablo Avenue, a public sidewalk, in front of the entrance to the Property: "People are afraid to walk in that area." "It's been over a year that I haven't passed by on the side where they are crossing, usually I walk the kids around the block. It's been a year since I haven't been there, because I saw security telling this other guy that he could not walk in front of the place. I was scared myself to walk there, too." "This I have to say is a little less intimidating than what often goes on. You come by that particular area and as other people have said, you're not -- people coming to get marijuana, these are young strong people, rather intimidating, honestly, to other people in the neighborhood.... my daughter who is not young like these kids here, in her 20s, my wife and I said we get nervous when she wants to walk around that area. It's intimidating."
- A fear of the health effects of the marijuana smoke emanating from the Property: "Where am I going to be safe with my kids, being exposed to smoke or this kind of thing? I just don't know what to do."
- A fear of the customers of Mr. Smith, who buy marijuana at the Property then smoke it in the neighborhood and respond aggressively to requests to stop smoking or move their cars: "My concern is every time we tell them they can't be over there smoking pot, they get aggressive. We cannot say anything because we are afraid that they're going to come by or do a shoot up."
- "And I'm very concerned about our safety. Our family, our kids. As a matter of fact last night, within the time of 30 minutes more than five cars blocked my driveway. My husband, I asked one of them to please move and they, like, they don't pay attention to me. I asked my husband to come out with me. He came out. We ask them properly to please move off the driveway. They got very aggressive with us. Like very aggressive. I called the police, but I was told that



they were gone, they can't do anything. The police advised me not to confront them, just call the police every time that happens. So if I were to call the police every time that this thing is happening I would be calling the police at least three or four times a day. Maybe more than four or five times a day. This always happens I would say after 8:00. As soon as it gets dark it gets very bad. The area is so bad..."

- A fear of rising violence in the neighborhood: "... we have 25 names here from people, some of whom are here tonight, who are concerned about these issues as well. The noise, the discussions, the arguing sometimes that occurs." "So starting this year, this thing start getting more aggressive and more people in front of it."
- "I came home a couple of weeks ago and found a car completely blocking our driveway with the trunk wide open and the driver standing by the trunk selling from open, reeking bags of marijuana to a young woman who looked to be around 12 years old. He was completely blocking my ability to get by with my bicycle, so I said, "do you realize you're in our driveway?" He immediately turned to me and threatened to kill me at the top of his lungs, walking toward me emphasizing that he would bash my head in, etc., until he realized he was leaving his marijuana behind in a wide open trunk. He continued threatening me while closing his trunk and driving off. This was in broad daylight with a street full of people. But most of those people were marijuana customers, and seemed unconcerned."
- "as someone who has lived in the neighborhood for decades I can assure you that the phenomenon of blatant, all-day, all-night open drug sales, fights, and drug-buy-related double parking and sidewalk partying coincided with the opening of 40 Acres."
- A fear of the image portrayed to children in the neighborhood: "...the 40 Acres crew does not seem to care about the effect on the residents, school children, and local workers who have to put up with the exposure, noise, congestion, fights, and sights like people bent over retching in the street. I ran to help the latter, and he told me that he was alright, just had had "too much dab" and wanted to just remain on all fours retching on the sidewalk in front of 40 Acres rather than have me call an ambulance."
- "I am not opposed to the recreational use of marijuana for those who choose to use it, but the free-for-all party zone being imposed on our neighborhood comes with fights, threats, guns, violence, dual use of tobacco and other addictive drugs;" and

WHEREAS the Zoning Ordinance declares the facilitation of "noxious smells or fumes" to be a public nuisance (BMC § 23B.64.020(A)); and

WHEREAS, at the November 6, 2014, hearing and in correspondence to the ZAB, neighbors testified that the use of the Property produced a noxious odor that interfered with the quiet enjoyment of their homes and the neighborhood. Such comments included:

- "... people smoke right in front of my house, around 6:00, 7:00 until 3:00 or 2:00 in the morning. I cannot open the windows."
- "I notice a lot of smoke daily and the smell, pretty strongly, end of last month, till today. It's getting more constant. And I have my kids playing on the back patio. I mean eventually it's going to get in there. My point is, if it was banned to smoke around public places, you know, now it's getting to the residential places. What is the point of banning it in public places if it gets to the neighborhood where my kids are playing?" "Where am I going to be safe with my kids, being exposed to smoke or this kind of thing? I just don't know what to do. I been living there for two years, it wasn't like that two years ago. But it concerns me. Because my kids' health, I cannot risk that. If I cannot send them outside to play what am I going to do with them? I have the freedom to send them out and have fresh air."
- "... we have been having smelling this for a while, it's bad for our health and the kids' health, too."
- "... my concern is that before we can let kids walk around the yard, in the backyard, but now it's hard. In the front yard it smells like marijuana. We go in the back, it smells marijuana. We can't take them to the park, close to the house, because it's full of homeless. So where are we going to take our kids to play?"
- "... we have dance class, and there's people sitting over there smoking and I have to come and personally tell them to leave. I don't be too aggressive, I ask them, will you please leave from here, go smoke another place. Why don't you just go to home, to your house and smoke there, why you have to smoke in front of people's house?"
- "And it's surrounded by not just cannabis smokers but tobacco smokers." "There are people who walk out with their classic brown paper bag which is what you get if you buy cannabis there and they smoke everywhere. They roll and smoke all over. That property and up and down the block. So it's become a party zone."
- "It apparently cannot keep its employees from smoking both marijuana and tobacco in what is under the law a smoke-free commercial zone, or it just doesn't care. Its clients who don't drive can be found sitting smoking marijuana and tobacco openly in front of 40 Acres or on the wall at the used car lot next door, around the corner on the wall in front of Finn Hall, or next to the car they drove to get there, in a neighborhood which has two schools and a YMCA Head



Start program within two blocks. It is not unusual to see people with the characteristic brown bag they're given with their weed at 40 Acres rolling joints and smoking all up and down our block, making it impossible to come and go without getting exposed."

- "Those of us who live and work on San Pablo Avenue can't leave our homes without getting exposed to both tobacco and marijuana, which may be a low police priority but is deadly for people with cardiovascular and respiratory issues. We can't run out into the street to avoid exposure, and the 40 Acres crew does not seem to care about the effect on the residents, school children, and local workers who have to put up with the exposure..."
- "I support medical marijuana, which is a personal choice for many who, like me, are cancer patients. I appreciate that some people find it useful in alleviating certain symptoms. But nobody should be obligated to be exposed, as we are in our neighborhood. Marijuana, especially smoking marijuana, is not every cancer patient's choice, I can assure you, especially people with severe respiratory issues. Marijuana is listed along with tobacco as a carcinogen on the State of California's Public Health web site. Under the law we are supposed to be protected from tobacco or marijuana exposure while trying to do errands or simply walk to work in the neighborhood, but the volume of sales and sampling both on and off the street make it impossible to simply take a walk to get a breath of fresh air," and

WHEREAS, at the November 6, 2014, hearing, Mr. Smith admitted that his use of the Property produced the marijuana smoke the public was complaining about, asserting that the public comments only demonstrated that they wanted him to change the dispensary's operation: "They don't necessarily want me gone. What they don't want is they don't want to smell the smoke"; and

WHEREAS the Zoning Ordinance declares the facilitation of "excessive noise (particularly between the hours of 11:00 p.m. and 7:00 a.m.)" to be a public nuisance (BMC § 23B.64.020(A).); and

WHEREAS, at the November 6, 2014, hearing, neighbors testified that the use of the Property produced excessive noise that interfered with the quiet enjoyment of their homes and the neighborhood. Such comments included:

- "People talking all night, so loud . . ."
- "People screaming all night. Last week, I have to get up one time at 3:00 in the morning, second time at 2:00 in the morning, because people are screaming so much, like fighting, ladies asking for help. I called the police - - actually, I see one officer there, and I ask him, what we can do. He said call the police department, 911. If we do that we have to be up all night."

- "And a dramatic increase in car traffic and car noise and car radios that are played so loud you can actually hear them vibrating in your house. And also as has been mentioned, people who hang out in front of our house laughing and distributing marijuana to their friends . . . ."
- "The noise, the discussions, the arguing sometimes that occurs"; and

WHEREAS the Zoning Ordinance declares the facilitation of "excessive littering" to be a public nuisance (BMC § 23B.64.020(A).); and

WHEREAS, at the November 6, 2014, hearing in front of the Board, neighbors testified that the use of the Property produced excessive littering. Such comments included:

- "People talking all night, so loud, drinking beer, eating food, McDonald's, Jack in the Box, Popeye's, all of the garbage is on the street. I hate to see that, so every morning, I try to pick it up, same like my other neighbors."
- "But there has been very noticeable increase in the amount of trash that is left on the streets in front of our homes. Bottles, cans, empty cigarette packs, plastic food wrappings, sandwich bags, bags used for the sale of pot, plastic bags"; and

WHEREAS, at the November 6, 2014, hearing and in correspondence to the Board, neighbors testified that the use of the Property produced excessive traffic and illegal parking in the surrounding neighborhoods. Such comments included:

- "[T]raffic is out of control in there. . . ."
- "On top of that, like we mentioned already, traffic is bad. Sometimes cars go over there and park using two spaces, block the driveway. . . ."
- "And a dramatic increase in car traffic . . . ."
- "There is zero parking . . . I've seen this, openly drug dealing in front of Forty Acres but also around the corner, because there's no parking. This is a really, really busy neighborhood where they'll double park if they have to. And I've seen that in the middle of San Pablo Avenue."
- "As a matter of fact last night, within the time of 30 minutes more than five cars blocked my driveway. My husband, I asked one of them to please move and they, like, they don't pay attention to me. I asked my husband to come out with me. He came out. We ask them properly to please move off the driveway. They got very aggressive with us. Like very aggressive. I called the police . . . The police advised me not to confront them, just call the police every time that happens. So if I were to call the police every time that this thing is happening I would be calling the police at least three or four times a day. Maybe more than

four or five times a day. This always happens I would say after 8:00. As soon as it gets dark it gets very bad. The area is so bad."

- "It offers no parking for a clientele it boasts is in the thousands, easily 25 people an hour who often block driveways or simply double-park half a block from one of the busiest, most crowded intersections in Berkeley."
- "... as someone who has lived in the neighborhood for decades I can assure you that the phenomenon of blatant, all-day, all-night open drug sales, fights, and drug-buy-related double parking and sidewalk partying coincided with the opening of 40 Acres"; and

WHEREAS, the Zoning Ordinance declares the facilitation of "illegal drug activity including sales" to be a public nuisance (BMC § 23B.64.020(A).); and

WHEREAS, at the November 6, 2014 hearing and in correspondence to the Board, the neighbors testified that the use of the Property facilitated illegal drug activity, including sales. Such comments included:

- "And we have what I would describe as residual drug dealing that occurs. We have two interested parties looking to rent [empty retail space at 1800 San Pablo], they spend time in the area, they observe who is coming and going in that particular neighborhood, and they see the drug dealing occurring on the corner. I cannot confirm directly that it is directly related to Forty Acres but can I tell that you there is a stream of traffic that comes out of the door from that operation, comes down the street around the corner in front of our place and then conversations and other activities occur."
- "... the other thing what we see, is people have plastic bags, paper bags, and passing to other people waiting in the dark. One person goes to get -- I mean they have doctor prescription or something. They can remove to it something else. I don't think everybody can have a permit to buy that. But they have permit, they share it, they say they can't make money but I don't think it's free. Because they pass it to 3, 4 people on the street. That area is out of control now."
- "It's all over the neighborhood now. . . . I've seen this, openly drug dealing in front of Forty Acres but also around the corner."
- "And also as has been mentioned, people who hang out in front of our house laughing and distributing marijuana to their friends, typically a car load of four guys will come down and the guy who has the card which allows him to purchase will go and get it, and then he'll bring it down and divvy it up with his friends. I've even seen people, one guy, had four plastic cups that he put on the back of his car. Put marijuana in each of them then walked to different cars that were parked on the street and handed grass."

- "I came home a couple of weeks ago and found a car completely blocking our driveway with the trunk wide open and the driver standing by the trunk selling from open, reeking bags of marijuana to a young woman who looked to be around 12 years old. He was completely blocking my ability to get by with my bicycle, so I said, "do you realize you're in our driveway?" He immediately turned to me and threatened to kill me at the top of his lungs, walking toward me emphasizing that he would bash my head in, etc., until he realized he was leaving his marijuana behind in a wide open trunk. He continued threatening me while closing his trunk and driving off. This was in broad daylight with a street full of people. But most of those people were marijuana customers, and seemed unconcerned."
- "... as someone who has lived in the neighborhood for decades I can assure you that the phenomenon of blatant, all-day, all-night open drug sales, fights, and drug-buy-related double parking and sidewalk partying coincided with the opening of 40 Acres"; and

WHEREAS, at the November 6, 2014, hearing, the Property owner's representative testified that "there was a unanimous verdict with finding of the jury was that Chris Smith and his pot club were operating illegally and also as a nuisance in the neighborhood" and Mr. Smith failed to rebut this; and

WHEREAS, a neighborhood business owner also described heavy foot traffic in and out of the Property all the time with individuals leaving with brown paper bags and the security guard's constant presence. The business owner also explained that an individual named Cam Bailey described himself as an employee of the dispensary and came into his business during the week of October 13<sup>th</sup>. Mr. Bailey was complaining to the business owner about the City's nuisance abatement action; and

WHEREAS, Mr. Daniel spoke with Mr. Paul Pinguelo who was involved in the March 23, 2014 incident involving Ms. Daujenique Taylor and described himself to BPD Officers as security guard for the dispensary. Mr. Pinguelo was also identified as a witness to an auto accident that occurred outside the Property on June 13, 2014. The accident involved a City refuse truck and the refuse truck driver, Mr. Gayton, indicated that he sees Mr. Pinguelo at the entrance to the Property each week when he drives his route; and

WHEREAS, Mr. Pinguelo spoke with Mr. Daniel on October 22, 2014 and stated that he helps out a lot at the Property because people need their medication and it is wrong that the City is taking away medication from people who have legal prescriptions for it. Mr. Daniel asked him how he "helped out" and Mr. Pinguelo responded that sometimes he stands guard in the hallway and sometimes he escorts patients to the office. He also testified that Mr. Pinguelo stated that Mr. Smith is doing a good job of providing medication to people who can't afford it. Mr. Pinguelo also said "the alcohol they sell

downstairs does more damage than the medication being dispensed" at the Property; and

WHEREAS, Mr. Daniel spoke with Mr. Darro Hudspeth on October 22, 2014. Mr. Hudspeth had previously testified in the Unlawful Detainer Action that he was co-founder of 40 Acres and was responsible for the "day to day" operation as a "director". Mr. Daniel asked Mr. Hudspeth if he was willing to discuss "CSHC" with him and Mr. Hudspeth indicated he was. Mr. Daniel asked him what his involvement with CSHC was and Mr. Hudspeth indicated he was a "volunteer". Mr. Daniel asked Mr. Hudspeth in what capacity he volunteers and Mr. Hudspeth stated that he "helps Chris out with whatever he needs", but did not offer any additional specifics. Mr. Hudspeth then stated "you are trying to shut it down" and "I don't want to speak with you" and ended the conversation; and

WHEREAS, Mr. Smith has claimed that he "regularly invites patients and other activists to his property in order to socialize, fundraise, and to organize around medical marijuana policy" in an attempt to explain the presence of many individuals at the Property. However, Mr. Smith was not present on March 23, 2014 when officers responded to Ms. Taylor's 911 call, yet 3 staff members of the dispensary were on duty and approximately 3 "customers" were observed in a room filled with cannabis smoke. Mr. Smith was also not present on March 26, 2014 when building inspectors attempted to investigate a complaint of illegal construction and they were told by yet another staff member, "Cameron", that he could not allow them to enter, but would give his card to Mr. Smith and they smelled cannabis as well; and

WHEREAS, Mr. Smith was also not present on each of the 4 occasions between February 2014 and December 2014, when a confidential informant purchased cannabis products at the dispensary without having been "invited" by Mr. Smith to "socialize, fundraise and organize around medical marijuana policy". Instead, the informant described a busy cannabis dispensary where he/she had to wait in line with several people in order to purchase cannabis while several other people were smoking cannabis in the lounge; and

WHEREAS, Mr. Smith was also not present when Mr. Soe visited the Property in early August and late October although a security guard another employees working in the smoking lounge were present; and

WHEREAS, Mr. Smith indicated that his address was 1510 Ashby Avenue on the speaker card he filled out at the ZAB hearing; and

WHEREAS, Mr. Smith and his counsel failed to rebut any of the evidence supplied by the City that a dispensary is currently in operation at the Property and, instead, Mr. Smith's counsel limited his claim to the following: "I note the issue that there's been a significant change since 2012. That's when Forty Acres was formally shut down"; and

WHEREAS, Board member Hahn asked the following question of Mr. Smith "if you went to a residential area, if you just moved to a residential zone, you could operate a collective with no permits whatsoever. That's how the law is written, it's very liberal actually in a neighborhood, you could be doing this, with no permits at all. And there are maybe three dispensaries that have licenses right now in Berkeley to operate in commercial and manufacturing areas, non-residential. There will be an opportunity in a year, if I understand correctly, for another application to be set forward. That could be yours. And there are also other communities that have different laws in places around this where you could locate. I would like to understand what is so special about this location, where clearly the landlord would prefer that you were not operating. The City would prefer that you are not operating. The neighbors would prefer that you are not operating. Why is it so important for you to do this here?"; and

WHEREAS, Mr. Smith stated in response to this question that "It's my right" which demonstrates that Mr. Smith's is acting in his own self interest and not that of the community; and

WHEREAS, it is not credible that "the garbage and the traffic is largely due to" the operation of the Albatross Pub as Mr. Smith's counsel claimed since the neighbors testified that they have witnessed the customers of the dispensary entering and exiting the dispensary while double parking, blocking driveways and creating excessive traffic and have witnessed these same customers smoking cannabis they purchased at the dispensary and littering and have identified the trash as trash from the dispensary (i.e. brown paper bags and plastic bags from the dispensary). For example, a neighbor testified that "as someone who has lived in the neighborhood for decades I can assure you that the phenomenon of blatant, all-day, all-night open drug sales, fights, and drug-buy-related double parking and sidewalk partying coincided with the opening of 40 Acres"; and

WHEREAS, the Council of the City of Berkeley has considered the staff report as well as all of the evidence and testimony received at the public hearing; and

WHEREAS, the City Council has evaluated the probative value of all of the 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 Board and the substance of their testimony (e.g., whether it has been consistent over time, is internally consistent, is illogical, etc.).

NOW THEREFORE, BE IT RESOLVED that the Council of the City of Berkeley finds and determines as follows:

I. BMC Section 23B.64.020.B defines a public nuisance as "Any use, event, structure or building, whether non-conforming or otherwise, which ... [is in] violation of any provision of this chapter or any other City, state or federal regulation, ordinance or statute."

1820/1828 San Pablo Avenue and the uses therein are also a public nuisance under Section 23B.64.020.B based upon the following violations which exist at the Property:

**Violation of BMC § 12.26.130**

In 2004, BMC Section 12.26.130 (formerly Section 12.26.110) imposed a cap on the number of dispensaries that may operate in Berkeley at any one time. Mr. Smith's dispensary was not one of the three authorized dispensaries in existence at that time. BMC Section 12.26.130 allows four medical cannabis dispensaries subject only to licensing requirements and Mr. Smith does not possess a license to operate a dispensary.

**Violation of BMC § 12.27.050**

BMC Section 12.27.050 requires that all dispensaries comply with BMC Chapter 12.26 and Title 23. It further requires that dispensaries "comply with the operating standards" set forth in Chapter 12.27. As described above, Mr. Smith's dispensary does not comply with Chapter 12.26 because it is not one of the three authorized dispensaries in existence in 2004 and because it has not been selected to operate as the 4th dispensary. In addition, it does not comply with Title 23 for the reasons set forth in more detail below.

Even if Mr. Smith did have a license for his dispensary, it does not comply with the operating standards in Chapter 12.27. For example, it is incompatible with the neighborhood (12.26.050.F), it allows smoking of cannabis at the dispensary (12.26.050.G) and it is not accessible (12.26.050.H).

**Zoning Ordinance Violations**

On March 14, 1972, Use Permit No. 6894 was approved for operation of a modern dance studio at the property from 10:00 a.m. to 10:00 p.m. only. Consequently, the following provisions of BMC Title 23 (Zoning Ordinance) are also being violated:

**A. Operation of a Use Other Than a Dance Studio in Violation of BMC § 23B.56.010.A**

BMC Section 23B.56.010.A mandates "[a]ny approval permits only those uses and activities actually proposed in the application and excludes other uses and activities."

Since Use Permit No. 6984 permits only the use of the property as a dance studio, operation of a dispensary (or any other use except a dance studio) is prohibited.

**B. Modification of the Property Into 11 Separate Spaces in Violation of BMC § 23B.56.020**

The site plan approved for Use Permit No. 6984 indicates that the Property is to be a completely open floor plan and not divided into any separate spaces or rooms. BMC Section 23B.56.030 mandates that "the site plan ... shall be deemed [a] condition[] of approval."

BMC Section 23B.56.020 prohibits any change "in the use or structure for which a Permit has been issued ... unless the Permit is modified by the Zoning Officer or Board." In particular, Subsection 23B.56.020.A.4 requires a modification to "[i]ncreas[e] the number of ... rooms".

Because the Property has been divided into 11 separate tenant spaces and, therefore, deviates from the approved site plan without approval by the City, it is in violation of BMC 23B.56.020.

#### **C. Operation of a Dispensary in Violation of BMC §23E.16.070**

BMC Section 23E.16.070.A.3 prohibits operation of a dispensary (except for the 3 authorized dispensaries in existence before 2004) unless it has been licensed by the City. As described above, Mr. Smith's dispensary has not been selected as the fourth dispensary.

#### **D. Operation of a Use Other Than a Dance Studio in Violation of BMC § 23A.12.010**

BMC Section 23A.12.010 prohibits any property from being "used, or designed to be used ... except as permitted by this Ordinance, either as of right or by permit."

Because the Property is being used as a dispensary and Use Permit No. 6984 authorizes use of a dance studio only, it is in violation of this provision as well.

#### **E. Operation of a Commercial Use Until Midnight in C-W District in Violation of BMC §23E.64.060**

The Property is located in the C-W District. BMC Section 23E.64.060 prohibits commercial uses from operating after 11:00 p.m. in the C-W District "unless a Use Permit is obtained".

Mr. Smith's dispensary operates until midnight on Friday and Saturday and, in addition to the fact that it is unlicensed and in violation of 23E.16.070 and Chapters 12.26 and 12.27, no Use Permit has been obtained to operate a commercial use past 11:00 p.m.

II. BMC Section 23B.64.020.A defines a public nuisance as "[a]ny use, event, structure or building, whether non-conforming or otherwise, which [is] [m]aint[ained] or operat[ed], by omission or commission in such a way as to result in or facilitate any of the following activities, each of which the City hereby declares to be a public nuisance: disturbances of the peace, illegal drug activity including sales or possession thereof,



public drunkenness, drinking in public, harassment of passers-by, gambling, prostitution, public vandalism, excessive littering, excessive noise (particularly between the hours of 11:00 p.m. and 7:00 a.m.), noxious smells or fumes, curfew violations, lewd conduct or police detention, citations or arrests or any other activity declared by the City to be a public nuisance.

1820/1828 San Pablo Avenue and the uses therein are a public nuisance under Section 23B.64.020.A for facilitating disturbances of the peace, illegal drug activity including sales or possession thereof, excessive littering, excessive noise (particularly between the hours of 11:00 p.m. and 7:00 a.m.), and noxious smells or fumes based on the evidence discussed above.

BE IT FURTHER RESOLVED that the Council declares that each of the bases set forth above is an independent basis upon which the Property is determined to be a nuisance pursuant to BMC Section 23B.64.020 and orders the cannabis use enjoined and terminated.

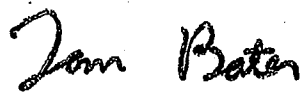
BE IT FURTHER RESOLVED that the Council authorizes all enforcement action appropriate to enforce its determination of a public nuisance including, but not limited to, administrative citations, seeking an injunction, a nuisance abatement warrant or any other available remedy.

The foregoing Resolution was adopted by the Berkeley City Council on January 20, 2015 by the following vote:

Ayes: Arreguin, Capitelli, Droste, Maio, Moore, Wengraf and Bates.

Noes: Anderson and Worthington.

Absent: None.

  
\_\_\_\_\_  
Tom Bates, Mayor

Attest:   
\_\_\_\_\_  
Mark Numainville, City Clerk

# EXHIBIT

6



**40 ACRES FARMS**



**510 845 4040**

**LEARN TO GROW  
BUILD COMMUNITY  
SUPPORT SAFE ACCESS**

IN COMPLIANCE WITH CALIFORNIA H&S  
CODE 11362.5 PROP. 215 COMPASSIONATE  
CARE ACT OF 1996

# EXHIBIT

7





# CSHC (CSCC / House of Compassion)

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**News Feed**  
Forty Acres MMGC  
Posted by Alex J. Martinez · 40 mins ·


FOR IMMEDIATE RELEASE! As of Saturday April 11, 40 Acres Collective has relocated to our new location in Berkeley, 1510 Ashby Ave. We are near the corner of Sacramento St. Our new location is a short walk from the Ashby BART Station and is also easily accessible by bus as 2 AC Transit routes (#49 and #88) stop near our new location. Please call us @ 510-845-4040 for any questions, delivery requests. THANKS!



Open for 12 hours and 16 minutes  
★★★★ 4.1 (170 reviews)



Available Here



Hours & Info

SUNDAY	9:00am - 10:00pm
MONDAY	9:00am - 10:00pm
TUESDAY	9:00am - 10:00pm
WEDNESDAY	9:00am - 10:00pm
THURSDAY	9:00am - 10:00pm
FRIDAY	9:00am - 12:00am
SATURDAY	9:00am - 12:00am

ADDRESS

1510 Ashby Ave  
Berkeley, CA, 94702

EMAIL

40acresmedicalmarijuana@gmail.com

PHONE

510-845-4040

SOCIAL





## Forty Acres MMGC

Alternative & Holistic Health · DJ · Lounge

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MzJane Doe, True Justice and Gremlin Skreallah like this or have been here.

JANE DOE



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#### Forty Acres MMGC

April 11 at 11:57am

40 Acres is temporarily closed today as we move to our new location @ 1510 Ashby Ave in Berkeley.

Like Comment Share

Jordan Es likes this.



Write a comment



#### Forty Acres MMGC

April 11 at 10:54am

FOR IMMEDIATE RELEASE! As of today, Saturday April 11, 40 Acres Collective has relocated to our new location in Berkeley, 1510 Ashby Ave. We are near the corner of Sacramento St. Our new location is a short walk from the Ashby BART Station and is also easily accessible by bus as 2 AC Transit routes (#49 and #88) stop near our new location. Please call us @ 510-845-4040 for any questions, delivery requests. THANKS!

Like Comment Share