



Office of the City Manager

ACTION CALENDAR
November 27, 2012

To: Honorable Mayor and Members of the City Council
From:  Christine Daniel, City Manager
Submitted by: Gregory Daniel, Code Enforcement Supervisor
Subject: Perfect Plants Patient Group – 2840-B Sacramento Street - Determination Regarding a Public Nuisance Under BMC Chapter 23B.64

RECOMMENDATION

Adopt a Resolution reflecting the City Council’s November 13, 2012 action determining that 2840-B Sacramento Street, operating as Perfect Plants Patient Group (3PG), is:

1. In violation of a) BMC Chapter 12.26 The Patients Access to Medical Cannabis Act of 2008; b) BMC Section 23E.16.070 Medical Cannabis Uses; c) BMC Section 23A.12.010; and
2. A Public Nuisance under BMC Section 23B.64.020 and ordering the use enjoined and terminated.

FISCAL IMPACTS OF RECOMMENDATION

None.

CURRENT SITUATION AND ITS EFFECTS

The Council directed staff to return on November 27, 2012 with a Resolution reflecting its November 13, 2012 action with regard to 2840-B Sacramento Street, operating as Perfect Plants Patient Group (3PG).

BACKGROUND

Council held a duly noticed public hearing on November 13, 2012 and, after its conclusion, unanimously passed a motion determining that 2840-B Sacramento Street, operating as Perfect Plants Patient Group (3PG) is: 1) In violation of a) BMC Chapter 12.26 The Patients Access to Medical Cannabis Act of 2008; b) BMC Section 23E.16.070 Medical Cannabis Uses; c) BMC Section 23A.12.010; and 2) a public nuisance under BMC Section 23B.64.020 and ordering the use enjoined and terminated.

RATIONALE FOR RECOMMENDATION

Adoption of the Resolution will provide a clear written record of the Council’s determination and the bases therefore.

ALTERNATIVE ACTIONS CONSIDERED

None.

CONTACT PERSONS

Gregory Daniel, Code Enforcement Supervisor, 981-2482

Attachments:

1: Resolution

RESOLUTION NO. ##,###-N.S.

DECLARING 2840-B SACRAMENTO STREET OPERATING AS PERFECT PLANTS PATIENT GROUP (3PG) IN VIOLATION OF: 1) BERKELEY MUNICIPAL CODE (BMC) CHAPTER 12.26; 2) BMC CHAPTER 23E.16; and 3) BMC SECTION 23A.12.010; AND 4) A PUBLIC NUISANCE UNDER BMC CHAPTER 23B.64 AND ORDERING THE USE ENJOINED AND TERMINATED

WHEREAS, on September 27, 2012 the Zoning Adjustments Board held a duly noticed public hearing as required by Berkeley Municipal Code (BMC) Section 23B.64.030; and

WHEREAS, the Zoning Adjustments Board recommended that the City Council find and determine as follows:

2840-B Sacramento Street operating as Perfect Plants Patient Group (3PG) is a public nuisance under BMC Section 23B.64.020.B based upon the following BMC violations which exist at the property:

- 12.26.030.D which prohibits medical cannabis collectives in commercial districts and requires that they be incidental to residential uses only; and
- BMC Section 12.26.130 adopted on December 7, 2010 capped the number of authorized dispensaries at three and only allows a fourth dispensary after the City Council adopts a licensing process and standards for medical cannabis dispensaries. Mr. Thomas did not establish 3PG at 2840-B Sacramento until September 2011. Therefore, if 3PG is a medical cannabis dispensary, it is in violation of this provision of BMC Chapter 12.26; and
- 23E.16.070.A.2 which prohibits a dispensary within 600 feet of a school; and
- 23A.12.010 which limits use of a structure to only what is allowed either by right or by permit under the Zoning Ordinance; and

WHEREAS, the Zoning Adjustments Board further recommended that the City Council consider all the evidence presented to the Board and seek additional information including, but not limited to, police reports and further public testimony with regard to the following potential finding pursuant to BMC Section 23B.64.020.A:

2840-B Sacramento Street is a public nuisance under BMC Section 23B.64.020.A based upon the fact that the property has been operated to facilitate: illegal drug activity and excessive littering:

- **Illegal drug activity** - Neighbors of the property testified that they have witnessed “numerous street drug sales associated with the operation of 3PG over the last year on our walks to the grocery store. We saw money and drugs exchange hands between 3PG staff and people in parked cars and out on the sidewalks around the corner from the dispensary.” They also testified that they have seen “kids who should be in school either hangout out at the park smoking [cannabis] or walking down the street smoking.” They further

testified that “people are often smoking pot in cars on [the] corner” outside 3PG. Another neighbor also testified that she had seen “packs of teenagers walking right in front of my house with a cloud of marijuana smoke around them.”

- **Excessive Littering** - Neighbors of the property described their small children and themselves repeatedly finding the bags used to provide medical cannabis with 3PG’s logo on them in their gardens and yards. The neighbors also describe finding “drug paraphernalia” in their yards as well. Neighbors also testified that they see “nothing but trash and garbage” outside of the dispensary; and

WHEREAS, the Zoning Adjustments Board further recommended that City Council order the use of 2840-B Sacramento by Perfect Plants Patient Group (3PG) enjoined and terminated; and

WHEREAS, on November 13, 2012 the City Council held a duly notice public hearing as required by BMC Section 23B.64.050; and

WHEREAS, 2840-B Sacramento Street is a single-story commercial building owned by Lian Rui Tan. The property is located in the C-SA, South Area Commercial District; and

WHEREAS, Zoning Certificate #08-90000346 issued to Ibrahim Obeid on May 29, 2008 approved 2840-B Sacramento as a clothing retail establishment. Since then, no other use has been applied for or approved by the City; and

WHEREAS, in November 2011, the City’s Code Enforcement Unit (CEU) received a number of complaints from citizens, merchants and the Berkeley Police Department regarding an illegal cannabis operation at 2840-B Sacramento Street; and

WHEREAS, in response to these complaints, on December 6, 2011, Code Enforcement officer Nathan Dahl and Code Enforcement Officer Gerald Love attempted to conduct a site inspection at 2840-B Sacramento Street. At that time, Mr. Dahl and Mr. Love observed a window sign stating that 2840-B Sacramento Street was “Perfect Plant Patients Group (3PG).”; and

WHEREAS, during the site visit, Mr. Dahl and Mr. Love identified themselves to the person standing inside the metal security door and requested permission to enter the property. The individual standing inside the metal security door would not allow Mr. Dahl and Mr. Love to enter the property. The individual informed Mr. Dahl and Mr. Love that they would have to speak with the manager; and

WHEREAS, Mr. Eric Thomas held the metal security door slight ajar and introduced himself as the owner and operator of Perfect Plant Patient Group. When Mr. Dahl and Mr. Love made a second request to enter the property, Mr. Thomas also refused; and

WHEREAS, Mr. Thomas was informed that Code Enforcement had received complaints that he was operating an illegal cannabis dispensary. Mr. Thomas stated that he was running medicinal cannabis collective and not a dispensary; and

WHEREAS, Mr. Dahl informed Mr. Thomas that, pursuant to BMC Chapter 12.26, which prohibits collectives in commercial districts, Mr. Thomas would receive a notice regarding the illegal cannabis operation. Mr. Thomas responded: "Do what you have to do." Mr. Thomas also stated the he would have to talk with his attorney; and

WHEREAS, based on the fact that Mr. Thomas admitted that he was operating an illegal medical cannabis operation, the business owner and owner of the property were issued separate letters on December 8, 2011, informing them that they were in violation of BMC Chapters 12.26 and 23E.16 and were ordered to immediately cease operations; and

WHEREAS, since both Mr. Thomas and Mr. Lian Rui Tan failed to comply with the December 8, 2011 notice to cease the illegal operation, both Mr. Thomas and Mr. Tan were issued a Citation Warning Letter on December 22, 2011; and

WHEREAS, both Mr. Thomas and Mr. Tan were ordered to contact the CEU by January 21, 2012 to schedule an inspection so that the CEU could confirm that the unlawful cannabis establishment had ceased operations; and

WHEREAS, on January 18, 2012, Code Enforcement Supervisor Gregory Daniel received a letter from the Law Offices of Steve Whitworth. Mr. Whitworth indicated that he has been retained as counsel for Mr. Thomas and Perfect Plant Patient Group. Mr. Whitworth stated in the letter that Mr. Thomas would immediately move to ameliorate any potential problems with the situation; and

WHEREAS, on January 25, 2012, Code Enforcement Supervisor Gregory Daniel issued a letter in response to Mr. Whitworth's January 18, 2012 letter. Mr. Daniel informed Mr. Whitworth that: 1) 3PG is operating as a dispensary as defined by BMC 12.26.030.E, and is prohibited as the potential 4th dispensary under BMC Section 23E.16.070.A.2 since the City has not adopted a licensing ordinance for such a 4th dispensary; 2) based on the City's GIS database, 3PG was less than 600 feet from Longfellow Middle School which would prohibit its location as a dispensary even if the City had adopted a licensing ordinance for the 4th dispensary and; 3) even if 3PG was a collective, it is operating in violation of BMC 12.26.030.D which prohibits collectives in commercial districts and requires that they be allowed only as incidental to a residential use; and

WHEREAS, since 3PG continued to operate despite the City's prior directive to cease operations, Code Enforcement issued two citations on March 27, 2012 to Mr. Thomas and Mr. Tan; and

WHEREAS, Mr. Thomas failed to appeal the administrative citation issued to him in a timely manner and Mr. Tan failed to appeal the administrative citation issued to him; and

WHEREAS, on September 19, 2012, based upon their failure to pay the \$23,300 outstanding administrative citation penalties, Code Enforcement issued a Demand Notice requiring the property owner to remit the penalties within 45 days or the City would proceed to impose a special assessment lien on the property; and

WHEREAS, on October 18, 2012, a neighbor of 3PG, Mr. Ryan Kerian, sent the City a copy of a letter that the Sacramento Street Improvement Association (SSIA) sent to the owner of 2840-B Sacramento on the same day. In the letter Mr. Kerian describes to the property owner the illegal drug operation being conducted from the property. Mr. Kerian also explains that members of the SSIA are willing to testify under penalty of perjury regarding activities such as drug sales, public use of marijuana, vandalism, graffiti and loitering. Mr. Kerian further states that if the property owner does not evict 3PG or otherwise cause the illegal drug operations to cease that members of SSIA will file individual claims with the Superior Court of California; and

WHEREAS, on June 29, 2012, Code Enforcement Staff reviewed the www.weedmaps.com (Weedmaps) website. As stated on its website: " Weedmaps.com is a community where medical marijuana patients connect with other patients in their geographic region to freely discuss and review local cannabis co-operative, dispensaries, medical doctors and delivery services." In addition, Weedmaps states on its website: "We also check to make sure your reviews are coming from real reviews and not fake accounts"; and

WHEREAS, 3PG's Weedmaps' site has received over 21,000 hits since February 2012. In addition, since February 2012, there have been 64 mostly positive reviews posted by patrons of 3PG. However, there were two negative reviews posted in May 2012 that prompted an official response from 3PG; and

WHEREAS, on August 16, 2012, Code Enforcement Staff revisited the Weedmaps website. The most recent reviews posted were for August 12, 2012 and July 31, 2012 where 3PG patrons posted reviews detailing their experiences in order to provide information about services and costs for other potential patrons; and

WHEREAS, on October 22, 2012, an internet search by the Code Enforcement Unit found a Craigslist posting by 3PG claiming to be a "Prop 215 Collective". The posting using the Sacramento Street address: 1) advertised for new members; 2) advertised a 3PG Berkeley Happy Hour 7pm-8pm; 3) offered free delivery for members and 4) claimed that the posting was a legal advertisement for medicinal marijuana; and

WHEREAS, the 3PG Craigslist advertisement contained a link to the new 3PG website (3PG420.org). In addition to the information contained in the Craigslist advertisement, 3PG420.org website contains a: 1) User Comment Page; 2) Posted Reviews Page and 3) Delivery Service Page. 3PG420.org has reviews posted as recently as October 22, 2012; and

WHEREAS, on October 26, 2012 the CEU conducted another internet search and it appears that the 3PG420.org web site was launched on September 27, 2012 at 11:19 p.m., after the Zoning Adjustments Board's public hearing to recommend to the City Council that 3PG be declared a public nuisance. In addition, 3PG420.org is a clear indication that Mr. Thomas and 3PG have no intention of ceasing their operations but, in fact seeks to expand the marijuana operation at 2840-B Sacramento; and

WHEREAS, since the September 27, 2012 ZAB public hearing, Code Enforcement has received no communication from 3PG or the property owner; and

WHEREAS, the neighbors of 3PG have testified to the following:

- Hearing people stand outside 3PG and scream the name at passersby; and
- They and their small children finding empty bags used to dispense cannabis with the 3PG logo on it in their yards and gardens on many occasions; and
- Witnessing hand to hand drug deals on the block that 3PG is located including drug deals between 3PG staff and people in parked cars; and
- Frequently observing people smoking cannabis in cars on the corner outside of 3PG and while they are driving; and
- Witnessing a significant increase in unfamiliar cars driving slowly around the blocks surrounding 3PG with loud music playing and people hanging out on street corners between 3PG and San Pablo Park for extended stretches of time with cell phones "on alert" since 3PG opened; and
- Observing loitering outside 3PG which decreased significantly when 3PG closed for a few days in September; and
- Experiencing an increase in violence in the neighborhood since 3PG opened including a homicide on March 29th and a shooting on June 20th; and
- Mr. Thomas being the victim of a violent robbery at his Vallejo dispensary location; and
- Observing large groups of teenagers smoking cannabis in the vicinity of 3PG since it opened on a daily basis; and
- Other neighbors fear of testifying regarding the illegal drug operation; and
- Local businesses' claim that their customers are repelled by 3PG's operation; and

WHEREAS, Mr. Eric Thomas testified that he had hired a licensed surveyor to measure the distance between 3PG and Longfellow Middle School and that the surveyor's report indicated it was 619 feet from the school; and

WHEREAS, Mr. Thomas did not submit the surveyor's report into the record and, therefore, the City has not had an opportunity to evaluate it; and

WHEREAS, Mr. Thomas further testified that after consulting with his legal advisors, he determined to locate his collective which consists of 3800 members in a commercial

zone because the impact of his operation on a residential zone would have been too great; and

WHEREAS, consistent with that testimony, Berkeleyside.com reported in an article published October 27, 2011 that Mr. Thomas is aware that he is violating Berkeley's zoning laws by operating in a commercial district. In the same article, Mr. Thomas states: "As far as operating out of a commercial building, I made that decision based on one thing," said Thomas. "I didn't want to be disrupting a residential neighborhood. To bring in 100 people into someone's neighborhood throughout the day isn't logical. It puts a strain on the neighborhood"; and

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

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

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

1. 2840-B Sacramento Street operating as Perfect Plants Patient Group (3PG) is a public nuisance under BMC Section 23B.64.020.B based upon the following BMC violations which exist at the property, each of which is a separate and independent basis for the Council's determination that 3PG is a public nuisance:
 - 12.26.030.D, which prohibits medical cannabis collectives in commercial districts and requires that they be incidental to residential uses only. Mr. Thomas claims that 3PG is a medical cannabis collective. It operates from 2840-B Sacramento Street which is in the C-SA South Area Commercial District and has no legally established residential use. Therefore, the use is in violation of this provision of BMC Chapter 12.26; and
 - 12.26.130, which allows four medical cannabis dispensaries under BMC Section 23E.16.070.A.3, subject to licensing requirements established that have yet to be adopted. On December 7, 2010, BMC Section 12.26.130 capped the number of authorized dispensaries at three and only allows a fourth dispensary after the City Council adopts a licensing process and standards for medical cannabis dispensaries. Mr. Thomas did not establish 3PG at 2840-B Sacramento until September 2011. Therefore, if 3PG is operating as a medical cannabis dispensary, it is in violation of this provision of BMC Chapter 12.26 as well; and
 - 23E.16.070.A.2 which prohibits a dispensary within 600 feet of a school. According to the City's GIS database, 3PG is less than 600 feet from

Longfellow Middle School. Therefore, if 3PG is operating as a dispensary, it is in violation of this provision of the Zoning Ordinance as well; and

- 23A.12.010 which limits use of a structure to only what is allowed either by right or by permit under the Zoning Ordinance. Since Zoning Certificate #08-90000346 approved 2840-B Sacramento as a clothing retail establishment and Mr. Thomas claims that he is operating a medical cannabis collective, the use is in violation of this provision of the Zoning Ordinance; and
2. 2840-B Sacramento Street is a public nuisance under BMC Section 23B.64.020.A based upon the fact that the property has been operated to facilitate illegal drug activity:
- **Illegal drug activity** - Neighbors of the property testified that they have witnessed hand to hand drug deals on the block that 3PG is located including drug deals between 3PG staff and people in parked cars. They further testified that they frequently observe people smoking cannabis while they are driving and that they have observed large groups of teenagers smoking cannabis in the vicinity of 3PG since it opened on a daily basis; and

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley that 2840-B Sacramento Street operating as Perfect Plants Patient Group (3PG) is a public nuisance pursuant to BMC Section 23B.64.020 for the reasons set forth above and the operation of 3PG is hereby ordered enjoined and terminated.

BE IT FURTHER RESOLVED that the Council of the City of Berkeley authorizes the City Manager and City Attorney to take all actions required to enforce the terms of this Resolution.

