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Office of the City Manager

ACTION CALENDAR

June 11, 2013

To: Honorable Mayor and Members of the City Council

From:  Christine Daniel, City Manager

Submitted by: Gregory Daniel, Code Enforcement Supervisor

Subject: Greenleaf Wellness Group – 1515 Dwight Way - Determination Regarding a Public Nuisance Under BMC Chapter 23B.64

RECOMMENDATION

Adopt a Resolution reflecting the City Council's June 4, 2013 action determining that 1515 Dwight Way, operating as Greenleaf Wellness Group (Greenleaf), is:

1. In violation of: a) BMC Chapter 12.26, The Patients Access to Medical Cannabis Act of 2008; b) BMC Section 23A.12.010; c) Health and Safety Code Section 11362.765(a); 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 June 11, 2013 with a Resolution reflecting its June 4, 2013 action with regard to 1515 Dwight Way, operating as Greenleaf Wellness Group (Greenleaf).

BACKGROUND

Council held a duly noticed public hearing on June 4, 2013 and, after its conclusion, passed a motion determining that 1515 Dwight Way, operating as Greenleaf Wellness Group (Greenleaf) 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 1515 DWIGHT WAY OPERATING AS GREENLEAF WELLNESS GROUP IN VIOLATION OF: 1) BERKELEY MUNICIPAL CODE (BMC) CHAPTER 12.26; 2) BMC SECTION 23A.12.010; 3) HEALTH AND SAFETY CODE SECTION 11362.765(a); AND 4) A PUBLIC NUISANCE UNDER BMC CHAPTER 23B.64 AND ORDERING THE USE ENJOINED AND TERMINATED

WHEREAS, on December 20, 2012 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 January 25, 2013 the ZAB adopted Resolution Number 12-06 recommending that the City Council, after conducting a public hearing, find and determine as follows:

1. 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.”

1515 Dwight Way operating as Greenleaf Wellness Group (Greenleaf) is a public nuisance under Section 23B.64.020.B based upon the following violations which exist at the property:

- A. BMC Section 12.26.030.D prohibits medical cannabis collectives in commercial districts and requires that they be incidental to residential uses only. 1515 Dwight Way is partially located in the C-SA South Area Commercial District and the last legally established use is offices and a training facility. No residential use has ever been legally established at the property.

Moreover, even if the property was wholly located in a residential district and a lawful residential use was established, the collective is not incidental to a residential use. Therefore, if Greenleaf Wellness Group is a medical cannabis collective, it is in violation of this provision of BMC Chapter 12.26; and

- B. 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. The City Council has not adopted a licensing process and standards for medical cannabis dispensaries. Mr. Salvatierra did not establish Greenleaf at 1515 Dwight Way until March 2012. Therefore, if Greenleaf is a medical cannabis dispensary, it is in violation of this provision of BMC Chapter 12.26; and

- C. BMC Section 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 Variance Resolution No. 670 authorized the use of 1515 Dwight Way as an establishment of offices and training facilities and Mr. Salvatierra claims that he is operating a medical cannabis collective incidental to a residential dwelling unit, the use is also in violation of this provision of the Zoning Ordinance.
 - D. Health and Safety Code Section 11362.765(a) prohibits “any individual or group to cultivate or distribute marijuana for profit.” Mr. Salvatierra testified that Greenleaf members provide donations and/or labor in exchange for medical cannabis. However, he further testified that Greenleaf does not maintain any records in order to verify that the donations and contribution of labor it receives reimburses the collective for its reasonable overhead costs and operating expenses. Thus, it is impossible for Greenleaf to establish whether or not it is distributing marijuana for profit in violation of state law.
2. 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.
- A. Neighbors of Greenleaf and a Greenleaf volunteer testified that groups of individuals exiting and entering Greenleaf are loitering in the neighborhood and smoking cannabis.
 - B. Neighbors of Greenleaf and Mr. Daniel testified that patrons of Greenleaf and their associates are driving erratically through the neighborhood and are driving under the influence of cannabis obtained at Greenleaf.
 - C. Neighbors and Mr. Daniel witnessed Greenleaf collective members selling cannabis received from Greenleaf to or sharing with other individuals in the neighborhood.
 - D. Neighbors of Greenleaf have testified that they have either been subject to or witnessed harassment by Greenleaf patrons.

WHEREAS, the Zoning Adjustments Board further recommended that City Council order the use of 1515 Dwight Way by Greenleaf enjoined and terminated; and

WHEREAS, on June 4, 2013, the City Council held a duly noticed public hearing as required by BMC Chapter 23B.64; and

WHEREAS, Mr. Ruben Salvatierra, operator of Greenleaf at 1515 Dwight Way, has claimed that the use is a medical cannabis collective; and

Violation of Berkeley Municipal Code Section 12.26.130

WHEREAS, BMC Section 12.26.030.D prohibits medical cannabis collectives in commercial districts and requires that they be incidental to residential uses only; and

A. Greenleaf is Operating in a Commercial District

WHEREAS, the property is dual zoned and is in the C-SA South Area Commercial District and the R-2 Restricted Two Family Residential District. Therefore, if Greenleaf is a collective, the use is in violation of BMC Section 12.26.030.D because it is partially located in a commercial district; and

WHEREAS, Mr. Salvatierra filed a rezoning application on September 7, 2012 seeking to rezone the parcel from a split zone to solely R-2. However, Mr. Salvatierra withdrew the application on December 12, 2012, the same day as the scheduled Planning Commission meeting; and

B. The Only Legally Established Use at the Property Is Commercial

WHEREAS, there is also no lawfully established residential use at 1515 Dwight Way. 1515 Dwight was constructed in 1955 for use as a medical office building; subsequent uses were medical in nature until 1974. Variance #670 issued to Opportunities Industrialization Center, Inc. (Henry Augustine) on August 27, 1975 approved an office and training facility use. Since then, no other use has been approved by the City. Thus, the last legally established use was offices and a training facility; and

WHEREAS, Use Permit application #12-10000049 to establish a residential dwelling unit at 1515 Dwight Way was submitted on October 22, 2012. However, the City issued multiple incomplete determinations indicating that the applicant would be required to either alter the building itself to create the required open space or apply for a Variance. The applicant failed to respond to the incomplete determinations and application #12-10000049 was returned to the applicant on April 8, 2013. Thus, there is no lawfully established residential use at the property and, if Greenleaf is a collective, the use is in violation of BMC Section 12.26.030.D for this reason as well; and

WHEREAS, Mr. Alfred Antonini and Mr. James Antonini's claims that Variance #670 has "expired" and/or "if not used for a year can be determined as abandoned by BMC 23C.40.030" is incorrect. The BMC section referred to by Mr. Antonini does not exist. However, even if Mr. Antonini had referred to Section 23C.04.030, it does not apply to this property; and

WHEREAS, Section 23C.04.030 allows the Board to declare a lawful non-conforming use terminated if it makes particular findings. Variance #670 is not a lawful non-conforming use and this Section is, therefore, inapplicable. Rather, a Variance is an entitlement that runs with the land. Additionally, there is no evidence that the Board

ever acted to declare any use at this property terminated pursuant to Section 23C.04.030; and

WHEREAS, Gelso made the following claims: 1) 1515 Dwight Way is solely located in an R-2 (Restricted Two-Family Residential) district; 2) BMC Section 12.26.030.D only requires that the collective be maintained in a residential district; 3) the City's own website lists 1515 Dwight Way in the R-2 District only and states it is not in a commercial district; 4) a ZAB staff report regarding a project at 2444 Spaulding Ave. indicated that 1515 Dwight Way is a single family residence; and 5) Mr. Salvatierra and Mr. Antonini filed a rezoning application at the suggestion and direction of the City; and

WHEREAS, 1515 Dwight Way is located in both the R-2 and C-SA Districts. City records dating back as far as 1975 clearly indicate that 1515 Dwight Way is divided between zoning districts South Area Commercial District (C-SA) and Restricted Two-Family Residential District (R-2). Indeed, Mr. Antonini admitted that he was apprised of this fact by the City "[S]ome 30 or more years ago when the subject property was first purchased, a commercial applicant was denied by the city, *and we were told by city officials that the property was split zoned ...*" (Emphasis added.) ; and

WHEREAS, at the request of Mr. Antonini, the Zoning Officer issued a determination letter on June 5, 2012 determining that 1515 Dwight Way is located in both districts. Again at the request of Mr. Antonini, on October 9, 2012, Principal Planner Terry Blount issued another determination stating that the property is located in both the C-SA and the R-2 Districts. In both cases the determinations were based on the historical use of the property, permit history and the city's official zoning map; and

WHEREAS, Greenleaf argued that staff has never presented the official zoning map and its statements regarding the zoning of the property are, therefore, without support; and

WHEREAS, staff's determinations were explicitly identified as having reviewed and relied upon the City's Zoning Map; and

WHEREAS, Greenleaf itself has corroborated staff's statements regarding the property's zoning. In support of Greenleaf's application to rezone the property, it submitted a site survey it commissioned by a licensed, registered surveyor, Moran Engineering Inc., which indicates that the property is evenly divided between the R-2 and C-SA districts. Mr. Salvatierra provided this survey once again as an attachment to his declaration as Exhibit A-4(1); and

WHEREAS, Greenleaf argued that Chapter 12.26 only restricts medical cannabis collectives such that they are "incidental to residential use", ignoring the manifest prohibitions in Section 12.26.030 that they are prohibited in commercial districts; and

WHEREAS, BMC Section 12.26.030 clearly prohibits collectives in commercial districts. This section states that collectives "shall not be located in commercial or manufacturing districts, and shall be only allowed as incidental to residential use". Greenleaf's location

at 1515 Dwight Way is partially in the C-SA zoning district, which is a commercial district. Accordingly, it is a prohibited use.

WHEREAS, regardless of the zoning district, the space in which Greenleaf is located is not a legally established residential use. In fact, the City issued a Notice and Order determining that (based on Mr. Antonini and Mr. Salvatierra's claims that they are using the property for residential purposes), it had been converted from commercial to residential use without required permits. Gelso appealed the Notice and Order and the hearing officer upheld it. Gelso failed to challenge this determination further. As a result, it is a final decision of the City; and

WHEREAS, the City's website indicates that the property is located in both the C-SA and R-2 Districts. Gelso attached a print out entitled "Parcel Conditions: 1515 DWIGHT WAY" to support their claim that the City's website indicates that the property is located only in the R-2 District and not in a commercial district. The parcel conditions depicted on the Planning Department's website for the property indicate that the property is in fact located in both the R-2 and C-SA Districts; and

WHEREAS, *even if* the City's website contained incomplete or incorrect information, this does not negate the fact that the Zoning Officer issued a determination based upon her review of the City's official zoning maps that the property is located both in the R-2 and C-SA Districts; and

WHEREAS, Gelso appears to be relying on the reference that the property is not in a "Commercial District with Use Quotas" as support for their position that it is not located in a commercial district. Obviously, this reference is intended to identify whether the commercial district the property is located in *is subject to use quotas or not* and does not equate to a City determination that the property is not located in a commercial district; and

WHEREAS, a staff report involving a proposal for 2444 Spaulding Ave. is not evidence of a City determination regarding 1515 Dwight Way. With respect to the April 12, 2012 Zoning Adjustments Board staff report for consideration of a proposal at 2444 Spaulding, Gelso references the Vicinity Map on page 2 and claims that, because 1515 Dwight Way "is not in a shaded area" that "it is in an R-2 zoning district." However, the shaded areas do not indicate something other than R-2 zoning. Rather, they indicate the general outline of the structures on the property; and

WHEREAS, Gelso further relies on Land Use Information Table (Table 1) on page 6 of the report. This Table is a standard template used by planning staff to provide a general description of surrounding properties and does mention any particular address. Moreover, the staff report does not discuss 1515 Dwight Way in any way nor does the report make any specific determinations with regard to that property. In addition, it refers to the residentially zoned portion of the property because that is the side adjacent to 2444 Spaulding. Therefore, the ZAB staff report for a proposal at 2444 Spaulding

Ave. is irrelevant and obviously does not rebut the Zoning Officer's determination regarding the location of the property in a commercial district; and

WHEREAS, the rezoning application was voluntarily submitted by Mr. Salvatierra *despite* the City's indication that it considered Greenleaf's operation a dispensary and not a collective. Mr. Salvatierra's claim that he filed a rezoning application at the suggestion and direction of the City is false. At no time did the City request or direct anyone to file a rezoning application for the property; and

WHEREAS, Mr. Salvatierra withdrew the application on December 12, 2012 - the day the Planning Commission was scheduled to consider the application. Mr. Salvatierra claimed that he was doing so based upon Mr. Antonini's alleged unavailability on that date. City staff made clear that Mr. Salvatierra could request a continuance from the Planning Commission, but he declined this option and, instead, reiterated his intention to withdraw the application; and

WHEREAS, Gelso made the following additional claims: 1) Variance No. 670 was restricted to the applicant and did not run with the land; 2) the previous lawful use approved by the City was a nursing home and, because this use is allegedly "residential", Gelso is not required to apply for a Use Permit to establish a residential dwelling unit; 3) unnamed City staff informed Mr. Antonini that no Use Permit was required to establish a residential dwelling unit; 4) the City was aware of Gelso's use of the property as a dwelling unit and did not inform it or Mr. Antonini of the need to obtain a Use Permit; 5) the City is estopped from requiring a Use Permit for illegal conversion from commercial to residential use; and 6) the residential use of the property has become a "vested right" ; and

WHEREAS, Variance No. 670 runs with the land and is not restricted to the applicant. Variance No. 670 established a commercial use at 1515 Dwight Way in 1975. No other use has been legally established since that time. In its appeal of the City's October 11, 2012 Notice and Order, Gelso raised this same argument. The City's hearing officer issued her decision on December 21, 2012 and concluded that the Variance had not expired. Gelso has not further challenged the hearing officer's determination and the time to do so has expired. Therefore, this issue has been finally determined; and

WHEREAS, even if the Variance had somehow expired, the Zoning Ordinance in effect in 1962 (the date when the City first required Use Permits to establish a dwelling unit) regulates dwelling units and "family boarding homes for aged persons" separately. As a result, nursing homes were not considered a type of dwelling unit; and

WHEREAS, Gelso has been repeatedly and consistently advised that a Use Permit is required to establish a residential dwelling unit at the property. Evidence submitted by Mr. Antonini himself indicates that he was aware of the Use Permit requirement as early as 1983. In particular, he produced a lease he entered into with a residential tenant for the period between August 14, 1983 and August 31, 1984. The lease agreement states

the following: “*Additional Terms and Conditions: The tenant is aware and agrees to apply to the City of Berkeley for “residential use” permit.*”; and

WHEREAS, the City has consistently indicated in writing that a use permit is required to convert the property to a residential use. For example, in a 1998 Housing Inspection report, Housing Inspector Carlos Romo informed Mr. Antonini that a use permit was require to change from institutional to residential use. Whereas the City is not estopped from enforcing its laws, has not waived its right to enforce its laws and the doctrine of laches does not apply. “No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right.” (Civil Code § 3490) “Neither prescriptive rights, laches nor the statue of limitations is a defense against the maintenance of a public nuisance.” (*City of Turlock v. Bristow*, 103 Cal.App. 750, 756 (1930).); and

WHEREAS, not only are all the traditional elements of equitable estoppel absent, a public entity may not be estopped where doing so would effectively nullify “a strong policy adopted for the benefit of the public.” (*City of Long Beach v. Mansell*, 3 Cal.3d 462, 493 (1970).); and

WHEREAS, no vested right exists for a residential use at the property. The Planning Department conducted extensive research at the request of Mr. Antonini regarding whether there was ever a period of time that a residential use of the property could have been lawfully established without a permit; and

WHEREAS, a residential use could have only been established without a Use Permit prior to 1962 on the C-SA portion of the lot and prior to 1978 on the R-2 portion of the lot. Gelso has submitted no evidence to establish that the property was converted to a residential use prior to 1962. Instead, the permit indicates that the approved commercial use of the property from 1958 through 1975 was a nursing home; and

WHEREAS, even according the Greenleaf’s own account of the location of its “collective” on the marked up surveyor map submitted as Exhibit A-4(1) to Mr. Salvatierra’s declaration, with which the City disagrees, it indicates that the “collective” is located in the commercially zoned portion of the property; and

C. Greenleaf is Not Incidental to a Residential Use

WHEREAS, even if the property was rezoned and a residential use was legally established, the whole of the evidence indicates that Greenleaf is the primary use of the property; and

WHEREAS, although Mr. Salvatierra has submitted a declaration signed under penalty of perjury indicating that he currently resides at 1515 Dwight Way, the City finds this self-serving statement not credible in light of the testimony as a whole; and

WHEREAS, Mr. Salvatierra’s declaration makes evident that he sought to rent a location in Berkeley not because he sought to reside in Berkeley, but in order to open a

Berkeley branch of his multiple medical cannabis dispensaries. In particular, he states that he read Berkeley's medical cannabis ordinance, decided to open a collective in Berkeley and then commenced to search for a property which he believed could accommodate the collective; and

WHEREAS, Lee Burghardt testified that "the people I've been able to identify as staff by virtue of their daily presence do not leave their cars in the neighborhood overnight, and so apparently do not live there. This applies to the owner of Greenleaf (Mr. Salvatierra)."; and

WHEREAS, Dan Feinberg testified that "Mr. Salvatierra has not been living in that house. He may have staged a sort of camp out there for purposes of this hearing, but he has not been living there. The people in the neighborhood know the car he drives. They know when he's around. They see him come and go on rare occasions. And he's not been part of our neighborhood for the last year or so. He owns three homes. He's got three properties in San Francisco. He's an entrepreneur who's done dispensaries in Pacifica and Vallejo."; and

WHEREAS, Paul Andres testified that he lives next door to Greenleaf and he has "not seen Mr. Salvatierra there frequently."; and

WHEREAS, Holly Scheider testified that "I never met Mr. Salvatierra nor did anybody else until he showed up with his prior lawyer at a community meeting to which he was not invited. And I've only seen him in these sorts of contexts since then."; and

WHEREAS, a member of Greenleaf, Mr. Eric Anderson, corroborated the neighbors' testimony by testifying that the "dispensary" "seems like a house", but that the "staff is inside the door" and "you're greeted upon pressing a doorbell."; and

WHEREAS, there was no evidence of residential use during all 3 staff inspections; and

WHEREAS, Mr. Daniel observed the commercial cannabis use of the property as evidenced by the cannabis display and sales room and the video surveillance and recording equipment; and

WHEREAS, when Mr. Daniel attempted to ask Mr. Salvatierra about his residential use of the property (i.e. watching sports and cooking), Mr. Salvatierra's attorney directed him not to respond. Staff's observations are supported by the Weedmaps reviews which further indicate the property is being operated as "a club" and not a residence; and

WHEREAS, Gelso made the following claims based upon a video it provided: 1) 1515 Dwight Way is replete with residential furniture and household items; 2) Mr. Daniel should have observed living room furniture, television, beds, dressers, clothes in dresser drawers, refrigerated food, dry goods, cooking utensils, cleaning supplies,

toiletries, towels and a dog; and 3) Mr. Daniel gave false and misleading testimony to the Zoning Adjustments Board; and

WHEREAS, the video provided by Mr. Antonini and Mr. Salvatierra substantiates the that 1515 Dwight Way is not being used as a residence. The video shows the bar and wall mounted tables in the smoking lounge. The video shows that what is being referred to as a bedroom is actually appointed as an office. The video confirms that, despite the presence of slacks in the closet, the third room is being operated as a video surveillance room; and

WHEREAS, the video also depicts the following: 1) multiple security cameras mounted throughout the building; 2) bathroom doors with commercial male/female “restroom” signs installed on the door; 3) rooms doors including the kitchen, janitors closet, supply room, and rooms purported to be bedrooms have commercial “private” signs installed; 4) security camera cables routed throughout the building and terminating in the security surveillance room; 5) two large gun safes in a storage room next to the security surveillance room; 6) walkie-talkies in the cannabis sales room; 7) an exit door secured with a drop-bar and a “no” sign; and 8) a shower that was not being used as a shower, but was being occupied as storage space; and

WHEREAS, the video and the screen shots substantiate, Mr. Daniel accurately testified that he observed the following during his inspection of the property:

- The smoking lounge that Mr. Daniel observed on March 20, 2012 was now made to look like a living room. The previously observed tables and chairs were removed. A modular couch was placed against the walls in an attempt to cover the drop-down folding tables which were still attached to the walls. Also, a large six foot wide and four foot tall brown wooden bar was situated against the north wall of the smoking lounge.
- Although the cannabis display cases in the sales room were present, all cannabis products were removed. There were two signs on the walls in the cannabis sales room warning customers that, if they were caught selling their medicine, they would be banned.
- One room which Mr. Antonini claimed to be a bedroom contained a twin sized mattress on a frame, but no other bedroom furnishings, personal items or clothing were present. The closet contained no clothing, shoes, jackets or other personal items and was being used, instead, for storage of miscellaneous items.
- The second room Mr. Antonini claimed to be a bedroom also contained a twin sized mattress on a frame, but again, no other bedroom furnishings, personal items or clothing were present. The closet also contained no clothing, shoes, jackets or other personal items and was, instead, being used to house video surveillance and recording equipment. A video surveillance monitor was mounted on the wall above other computer and electronic equipment in the room.
- The two bathrooms contained no personal hygiene items, toiletries, towels, or towel racks whatsoever; and

1) Multiple Non-Residents Present During Inspections

WHEREAS, during Mr. Daniel's March 20, 2012 inspection, he encountered 4 non-residents who, in addition to Mr. Salvatierra, blocked his further entrance past the interior hallway. He also observed 4 individuals smoking in the smoking lounge; and

WHEREAS, during his November 15, 2012 inspection, he encountered the same non-resident answering the door as he did in March. In addition, he was asked to leave by 2 additional non-residents who emerged from the surveillance room. Mr. Daniel also observed 3 individuals smoking in the smoking lounge that day. Despite all the activity, neither Mr. Salvatierra nor any other alleged resident was present during this inspection; and

WHEREAS, Gelso made the following claims: 1) Non-residents are allowed at Mr. Salvatierra's residential dwelling during the day and; 2) Mr. Salvatierra is not required to be present at his residential dwelling at all hours; and

WHEREAS, this claim is unresponsive to the facts that, during two inspections conducted by Mr. Daniel on March 20 and November 15, 2012, he observed a total of 14 (fourteen) non-residents present at the property who were either engaged in operating the illegal cannabis dispensary or smoking cannabis; and

2) Greenleaf Has a Large Volume of Traffic Associated with its Operation

WHEREAS, the volume of traffic observed by Mr. Daniel on August 29, 2012, namely 15 people entering in only 24 minutes, corroborates neighbors observations which describe a constant, steady stream of individuals visiting Greenleaf as well as the resulting strong cannabis smoke odors, loud noise, loitering, traffic congestion and public urination. In addition, Greenleaf has received over 10,000 hits since December 2011 on Weedmaps.com; and

WHEREAS, the City finds Mr. Salvatierra's testimony that the Greenleaf is a "fairly small" collective not credible based on: 1) the fact that he was unable to actual specify Greenleaf's membership; and 2) because neighbors of Greenleaf and Mr. Daniel testified to the large volume of business it conducts. Specifically:

- Holly Scheider testified that "A lot of people come in and out of there. The only person I recognize is the person who stands out in front as the security guard."
- Paul Andres testified that Greenleaf has "hundreds of people that come through on a daily basis. I know their collective has to have in the thousands of people."
- Lee Burghardt testified that "I can second the comments others have made about individuals and groups of people coming and going all day and late into the evening. The activity never really ceases – they are open for business seven

days a week. Business at Greenleaf is particularly booming on weekend evenings when finding a place to park my car anywhere near my home becomes a challenge.” She further testified that “given the crowds entering and leaving the facility and long hours of operation, the marijuana business is anything but incidental.”

- Steve Lautze testified that “on a regular basis since GWG landed in the neighborhood, I have noticed cars parking on Spaulding for 30 to 60 minutes, almost always driven by apparently able-bodied young men in their 20’s, who park and go around the corner to GWG.” He further testified that “during a 75 minute stretch one Sunday afternoon, November 11, 2012, while I was doing work in my front yard, I saw no less than 5 vehicles from outside the neighborhood park on Spaulding for 30 minutes or less, go to GWG, and then return and drive away. These vehicles contained a total of 9 men under 30 (by my estimation); sometimes all of the men would go to GWG, other times some would wait behind.”
- Benjamin Pineda testified that “I moved in over there, in 2001. But I've been living in Berkeley for almost 27 years. I never seen such a thing happening in Berkeley. And I've been watching, how this traffic has been increasing for the last, say four months. It's a lot of vans, a lot of cars, with youngsters inside. There's no parking spaces, when they come. There's tons and tons of drivers, especially nighttime, Friday, Saturday, Sunday. People you don't recognize. I feel unsafe over there.”
- Edith Rivas Plata testified that “I have observed tremendous number of people walking into the Greenleaf and then coming back out.”; and

WHEREAS, Gelso made the following claims: 1) it currently has very few collective members come by on any given day; and 2) traffic has reduced due to permanently closing the lounge, closing for nearly two weeks in December for improvements and because a dispensary open nearby; and

WHEREAS Greenleaf's proposal that they be allowed 49 visits per day is not “small” or “incidental to residential”, and is far more than proposed in the amendments to Chapter 12.26 to be considered by the City Council shortly which limits collectives to no more than 10 member visits per day.

WHEREAS, the statement regarding Greenleaf's “current” volume is wholly unsupported and fails to contradict the overwhelming evidence provided by City staff and neighbors which was the basis of the ZAB's recommendation regarding the heavy volume of Greenleaf's operation which, as one neighbor testified, “never really ceases”; and

WHEREAS, the only nearby collective was 3PG which closed November 14, 2012; and

WHEREAS, A&B Construction, the contractor hired by Gelso to correct building code and fire code violations at 1515 Dwight Way, stated to staff that Greenleaf continued operating and selling cannabis during the two week construction period. Mr. Stephens, a representative of A&B Construction, stated to Mr. Daniel that, at his request, Mr.

Antonini agreed to halt the cannabis operation until all construction work was completed. However, Mr. Stephens stated that Mr. Antonini failed to halt the cannabis operation as they had agreed upon and, as a result, he worked at 1515 Dwight Way until approximately December 8, 2012, at which time he terminated his agreement with Mr. Antonini. Additionally, Mr. Stephens informed Mr. Daniel that during the construction period, groups of Greenleaf employees would routinely smoke cannabis in the security surveillance room; and

3) The Cannabis Operation Occupies 42% of 1515 Dwight Way

WHEREAS, four of the largest rooms and at least 42% or 720 square feet of the property is being used for sales, display and a smoking lounge of cannabis. The largest room on the property is being used as a cannabis and hash smoking lounge for any person entering the property. The second largest room on the property is being used as a cannabis sales and display area only. The largest purported bedroom is being used as a security and surveillance room; and

WHEREAS, Gelso claimed that 1515 Dwight Way consists of three bedrooms, a living room and a family room; and

WHEREAS, the actual use of these rooms is being re-stated here for comparison purposes.

1. **Living Room:** The largest room in the building measuring 18x15 feet is being used as a smoking lounge where customers can smoke cannabis or smoke at the hash bar as observed by City staff and corroborated by online reviews provided by Greenleaf's customers.
2. **Family Room:** The second largest room measuring 15x12 feet is being used as a cannabis sales and display room.
3. **Rear Bedroom:** The third room measuring 16x10 feet is being used as a security and surveillance room.
4. **Front Bedroom:** The fourth room measuring 11x10 feet is being used as office Space; and

WHEREAS, Gelso made the following further claims: 1) only one room which is less than 200 square feet and less than 20% of the building's interior is being used by the collective for cannabis activities; 2) the smoking lounge is a living room; 3) the surveillance room is a bedroom; and 4) BMC 12.26.040.D.2 only mentions square footage in the context of cultivation of cannabis; and

WHEREAS, this response fails to respond to the observations provided by City staff as well as Greenleaf patron testimonies published in Weedmaps that at least 42% or 720 square feet of the property are being used for sales, display and a smoking lounge for cannabis. In fact, the prior response admits that the "living room" had been used as a smoking lounge until some alleged "permanent closing" of the lounge. In addition, as described above, the video provided by Gelso assists in corroborating staff's observations and the Weedmaps reviews; and

WHEREAS, the video shows: 1) the office at the front of the building; 2) the smoking lounge with wall mounted tables and a bar; 3) the cannabis sales room with glass retail display cases and 4) the security surveillance room with video cables and a monitor. These four rooms total at least 42% of the buildings total square footage; and

WHEREAS, the City does not find a violation of BMC 12.26.040.D.2 and, thus, its reference by Gelso is irrelevant. Rather, the City finds that Greenleaf is operating as an illegal dispensary, and that, even if it were considered a collective, its operation is not “incidental to a residential use” as required by BMC Section 12.26.030.D; and

WHEREAS, Greenleaf makes a similar argument that the language of Section 12.26.030.D is unconstitutionally vague; and

WHEREAS, City uses its discretion, based upon all the evidence presented, to determine whether the use is incidental to a residential use or not given the common usage of the term. The evidence presented has established that Greenleaf is far from incidental to the alleged residential use. Rather, it is the primary use of the property and Gelso and Greenleaf failed to rebut this fact; and

4) Greenleaf Employs a Non-Registered Security Guard, Janitor, Bike Messenger and Various Volunteers

WHEREAS, neighbors have testified that, since October 2012, a security guard has been posted outside the property on the public right of way on a regular basis. Mr. Daniel spoke with an individual identifying himself as Dwayne Adams on November 15, 2012. Mr. Adams admitted that he was employed by Greenleaf as the security guard and that he was not a registered security guard; and

WHEREAS, Edith Rivas Plata testified that “I have also observed and reported to the police a young man on a bicycle who goes in to Greenleaf, he comes back out, rides down the street, usually down Sacramento toward the school, in that area, of our neighborhood, and then he comes back, and then he goes back out again. I believe they're called errand or runners.”; and

WHEREAS, Randy McIntosh testified that he is “a volunteer at Greenleaf”, Anthony Schloss also testified he was “one of the volunteers at Greenleaf” and Matthew Pruitt testified that he was employed as a “janitor” at Greenleaf and further testified that there were “quite a lot” of volunteers working at Greenleaf; and

WHEREAS, the Greenleaf Wellness Group site on Weedmaps is prepared by WSG Collective. WSG also known as Wellness Solutions Group, the name used by Mr. Salvatierra for his cannabis dispensaries in Vallejo and Pacifica. Thus, the evidence mentioned above establishes that Mr. Salvatierra is operating a Berkeley branch of his multiple commercial cannabis operations at 1515 Dwight; and

Violation of Berkeley Municipal Code Section 12.26.130

WHEREAS, Section 12.26.130 allows four medical cannabis dispensaries subject only to licensing requirements established under BMC Section 23E.16.070.A.3 which have yet to be adopted; and

WHEREAS, 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. Salvatierra did not establish Greenleaf at 1515 Dwight Way until March 2012. Therefore, if Greenleaf is operating as a medical cannabis dispensary, it is in violation of this provision of BMC Chapter 12.26; and

Violation of Berkeley Municipal Code Section 23A.12.010

WHEREAS, Section 23A.12.010 limits use of a structure to only what is allowed either by right or by permit under the Zoning Ordinance; and

WHEREAS, since Variance Resolution No. 670 authorized the use of 1515 Dwight Way as an establishment of offices and training facilities and Mr. Salvatierra claims that he is operating a medical cannabis collective incidental to a residential dwelling unit, the use is also in violation of this provision of the Zoning Ordinance; and

Violation of Health and Safety Code Section 11362.765(a)

WHEREAS, during the public hearing, Board member Hahn had the following exchange with Mr. Salvatierra regarding the operation of Greenleaf:

S. Hahn: Do you have -- how many members are in your collective what is the number of members of your collective?

R. Salvatierra: Honestly, I don't know, fairly small. We're not a large collective.

S. Hahn: How do you ascertain if they're qualified patients, what is your method for ascertaining if they are qualified to be members of a collective?

R. Salvatierra: Well, we have -- at the door, if they present want to sign up for the collective, we ask for their doctor's recommendation. California I.D. We'll verify them on the spot. Go on whatever needed website, on the recommendation, to verify that the paperwork is true. And we also check on the California medical board to make sure the doctor is still with good standing, his license is still valid.

S. Hahn: How do you pool the resources of the collective members, are you assessing a monthly fee or is it a one-time pay-in? How do you run your collective?

R. Salvatierra: We don't assess any fees. We don't charge members any sort of fees.

S. Hahn: So they get their medication for free?

R. Salvatierra: They don't get their medication for, necessarily for free. They can put in volunteer hours, they'll make donations for medicine, or do other various activities within the collective to receive their medicine. And there is various, you know, jobs that

they'll do in order to receive their medicine.

S. Hahn: Do you have a book where you record all that? Do you have spreadsheet where you record the names and the documentation and the number of hours they're putting in, and the donations they have made, and the amount of medical cannabis that they would be receiving in exchange for that?

R. Salvatierra: To be honest, no. Mainly we just have, just activities that go on, on a daily basis. I don't necessarily keep that sort of track on patients.

WHEREAS, Health and Safety Code Section 11362.765(a) prohibits “any individual or group to cultivate or distribute marijuana for profit.” Based upon Mr. Salvatierra’s testimony that Greenleaf does not maintain any records in order to verify that the donations and contribution of labor it receives from members reimburses Greenleaf for its reasonable overhead costs and operating expenses, it is impossible for it to establish whether or not it is distributing marijuana for profit in violation of state law; and

WHEREAS, Gelso claims that California law allows members of collectives to charge other members for the value of cultivating and distributing medical cannabis; and

WHEREAS, this response ignores the ZAB’s finding that Health and Safety Code Section 11362.765(a) prohibits “any individual or group to cultivate or distribute marijuana for profit.” Based upon Mr. Salvatierra’s testimony that Greenleaf does not maintain any records in order to verify that the donations and contribution of labor it receives from members reimburses Greenleaf for its reasonable overhead costs and operating expenses, it is impossible for it to establish whether or not it is distributing marijuana for profit in violation of state law; and

WHEREAS, Mr. Salvatierra verifies in his declaration his response to Boardmember Hahn that there was no tracking of volunteer donations was accurate; and

Disturbances of the Peace – Loitering While Smoking Cannabis

WHEREAS, neighbors of Greenleaf testified that groups of individuals exiting and entering Greenleaf are loitering in the neighborhood and smoking cannabis. Specifically:

- Niema Coleman testified that “I have seen this neighborhood go from a quiet neighborhood where we are familiar with most of the people around and about – to this hang out spot with strangers leaving trash, smoking weed and hanging out in their cars. My child who used to play freely outside without apprehension has stopped wanting to be outside and now prefers to stay indoors when we are home. I have witnessed people urinating on our sidewalk... in broad daylight!”
- Holly Scheider described returning home from dining out for lunch with her children ages 7, 10 and 14 last spring and “walk[ing] through a cloud of marijuana smoke” from “a couple of people smoking in front of ... Greenleaf”. She further testified that the “bigger problems have been people loitering, making noise, coming in and out late at night, seeing people walking down the street lighting up.”

- Paul Andres testified that “people congregate around my corner where there are shrubs late and night and they are very scary to me. I have approached those people ... and said ‘I live here. Excuse me, what are you doing here? They said ‘we don’t have to listen to you.’ ‘We are just hanging out here’. I have witnessed people come out of there [and] smoke up.”
- Edith Rivas Plata testified that “one of the things that has been very disturbing to me is that fact that the people who come out light up. We have a karate and ‘classroom matters’, a tutoring place for young people.” “And we have the people from Greenleaf coming out of Greenleaf, lighting up, and smoking in front of these businesses when the children are in their classrooms.”
- Nancy and Bruce Chamberlain testified that “We have witnessed young and healthy looking members of the Greenleaf collective lighting joints on the streets (often in groups) at night a dozen times, predominately on the weekends. The impact is comparable to having a bar open around the corner from our house, with the members outside drinking on the streets. We have walked our child home from dinner at local restaurants through clouds of pot smoke.” Further, Bruce Chamberlain testified the collective is operated “more like a commercial cannabis dispensary replete with litter, noise, parking, traffic hazards and accidents and open drug use.” ; and

WHEREAS, the neighbors’ testimony was corroborated by a Greenleaf volunteer, Anthony Schloss, who testified that “we have had problems with some of the people hanging outside” ; and

Disturbances of the Peace – Greenleaf Patrons Erratic Driving and Driving While Under the Influence of Cannabis

WHEREAS, neighbors of Greenleaf testified that patrons of Greenleaf and their associates are driving erratically through the neighborhood and are driving under the influence of cannabis obtained at Greenleaf. Specifically:

- Steve Lautze testified that, on the afternoon of November 11, 2012, he witnessed a man enter Greenleaf, “return[] to his car, took a few minutes to carefully roll a joint, lit up and drove off.”
- Holly Scheider testified that she has witnessed Greenleaf patrons coming out and “getting into their vehicles and lighting up.” She further testified that “there are a lot of cars that will pull up erratically and they’ll stop and you have like three or four kids, usually in their 20s, get one or two get out, go in, they’ll come back out with a bag.”
- Susan Calico testified that “I’ve noticed there’s been a lot of very unsafe driving in the neighborhood and I have seen as many others have people smoking in their cars or lighting up in their cars and then driving off.” She further testified that “recently, I was on Spalding, [and] I saw someone [who], all of a sudden, made a U-turn in the area of the [Spalding and Dwight] intersection, still going at a pretty fast speed, pull over, grab a parking space right near Greenleaf. So I kind of waited and watched. He got out and went into Greenleaf.”

- Bruce Chamberlain testified that on December 18, 2012 at 9:00pm, he “went to the corner store [and,] on my way back to Spalding, someone came out of Greenleaf right in front of me with a brown bag of medicine, I guess, in hand. He was a white male with a dark hoodie, late 20s, early 30s. He stepped right into traffic and ran across the street causing cars to brake. He hopped in a passenger seat of an older sedan and the driver started the car, turned on to Spalding. By then I was walking down Spalding. He turned into a driveway right in front of me and backed up, and then went back to Dwight.”
- Benjamin Pineda testified that “It’s a lot of vans, a lot of cars, with youngsters inside. So many young people, teenagers. They come up to the hill, they turn on Spalding, like this, one of the neighbors was saying, like this, they turn like this. They don’t want to go and turn around on California. And that happens, you know, throughout the whole day. And I feel unsafe.”
- Lee Burghardt testified that she’s witnessed people exiting Greenleaf and “A number of times I’ve observed people lighting up in their vehicles before driving away. Customers often spend hours at the facility, then get in their cars.”
- Code Enforcement Supervisor Gregory Daniel testified that on August 29, 2012, he observed one individual who, after leaving Greenleaf with a brown paper bag, returned to a grey BMW and began smoking in the car. Mr. Daniel further testified that, after a short period of time, he observed the individual drive westbound on Dwight Way.
- Dan Feinberg testified the neighbors “don’t want to have people doing unsafe driving. There are many young children in the neighborhood who play in the streets. And I fear the day that one of them gets run over by somebody who is driving under the influence.” ; and

Illegal Drug Activity

WHEREAS, neighbors witnessed Greenleaf patrons selling cannabis received from Greenleaf to or sharing with other individuals in the neighborhood. Specifically:

- Jamie Alessio and Kristen Vetterlein testified that they “have witnessed vehicles with 3-5 people parked on Spaulding Ave with one member of the vehicle walking to Greenleaf and returning with several brown paper bags. I have also witnessed exchanges on the corner of Spaulding Ave and Channing Ave.”
- Lee Burghardt testified that “a typical scenario involves young men and women, often three or four in a car, parking along Spaulding at the Dwight intersection while one goes to Greenleaf and comes back with a baggie to share.”
- Paul Andres testified that the “people, I have seen, usually, 90% of the people are in their 20s, groups of men, usually four or so, three or four of them stay in the car, someone goes in, gets the pot, comes out. I’ve seen money exchanged to people.”
- Steve Lautze testified that “consistent with the pattern I’ve seen for months, [Greenleaf patrons] go around the corner, come back within 30 minutes, sit and transact in the car or drive off in different combinations.”

- Mr. Daniel testified that, on August 29, 2012 he observed a group of three young males walking west on Dwight and stop at the tree in front of Greenleaf. He further testified that he observed one of the men go into Greenleaf and return a short time later. Mr. Daniel then testified that he observed this individual reunite with the other two young males at the tree and remove something from his front jean pocket. Mr. Daniel also testified that he observed the three men high-five each other and the man who entered Greenleaf roll a cigarette which the three smoked together while walking eastbound on Dwight Way.
- Mr. Daniel testified that, during his November 15, 2012 site visit, a Greenleaf patron invited him to try the cannabis she was smoking with two other patrons and commented to him that “this is a great place and great stuff”. Mr. Daniel further testified that this offer was overheard by the Greenleaf employee who greeted him upon his entrance, but the employee failed to object to the offer as improper due to Mr. Daniel’s lack of membership as a qualified patient; and

Harrassment of Neighbors

WHEREAS, neighbors of Greenleaf have testified that they have either been subject to or witnessed harassment by Greenleaf patrons. Specifically:

- Holly Scheider testified that “When neighbors have asked the pot smokers to go somewhere else, they have received a belligerent reply.”
- Paul Andres testified that he lives at “2444 Spalding, directly east of the 1515 Dwight Way. I've been in that residence for 20 years. After [Greenleaf] moved in, my house burned down, for unknown reasons. Since that time, I have had two break-ins, that have occurred, at that location. We got a permit for the strip in front of it to try and offload materials, to try to rebuild my house. There were tow-away signs all over. I called and have called the police dozens and dozens of times. I have called, I went to the security guard of Greenleaf and I've asked them to have no one park in front of my driveway. I've talked to the people about parking there. Their reaction is usually very aggressive. I have told somebody that there was a spot right behind that was legal and they parked in my driveway, it's a few feet closer I asked them, please, can you park 20 feet back, that's not in my driveway. They were very aggressive.”
- Further, on June 4, 2013 Mr. Andres testified that his home was broken into again, making it three times that his home has been broken into since the opening of Greenleaf; and

WHEREAS, Gelso claims that: 1) Mr. Daniel “organize[d] and moderated an ultra vires ‘public’ meeting of neighbors; 2) the incident reports from BPD between July 23, 2012 and January 23, 2013 so very little crime was reported within a ten block radius of the property; 3) the neighbors’ testimony was therefore “coached” by Mr. Daniel and not substantiated with calls for service to BPD; and

WHEREAS, Gelso’s claim of an “ultra vires” meeting is untenable. Mr. Daniel appropriately accepted an invitation to a meeting organized by neighborhood residents

who are negatively impacted by Greenleaf. This issue was raised by Gelso/Greenleaf again at the public hearing before ZAB and, in response, a neighbor testified that it was the neighbors who had asked to meet with Mr. Daniel and not the reverse; and

WHEREAS, the claim that Mr. Daniel influenced the testimony of neighbors is patently false. At the community meeting, Mr. Daniel primarily responded to questions raised by community members. Community members asked questions about the rezoning application, enforcement process regarding the Notice and Order and the cannabis operation; and

WHEREAS, Gelso's attempt to discredit the neighbors' specific and detailed testimony regarding their observations and the severe impact Greenleaf's operation have had on them by characterizing the calls for service it alleged requested and received from BPD beginning 4 months *after* the City had initiated its enforcement activity as "very little crime" is unpersuasive; and

WHEREAS, the neighbors of Greenleaf directly rebutted this claim by testifying to the repeated calls they have made to BPD as a result of Greenleaf's activities; and

WHEREAS, Greenleaf's explanation that its negative impact on the community was due to Berkeley Patients Group (BPG) relocation activities is unsupported and unpersuasive. Mr. Salvatierra's claims regarding the impact of the U.S. Attorney's activities on BPG's operations are not based upon his personal knowledge and are pure speculation. He fails to provide any specific facts as to how membership in his collective might have expanded during any period of time that BPG was relocating; and

WHEREAS, even if Mr. Salvatierra's statements could be accepted, he claims that BPG "closed" in May 2012. However, staff and the neighbors have testified that the impact to the community resulting from Greenleaf's operations coincided with Greenleaf's opening in January 2012. In particular, staff has testified that they received complaints regarding the operation as early as March 2012; and

WHEREAS, even if Mr. Salvatierra's statements could be accepted and Greenleaf's membership expanded during BPG's relocation, he has offered no explanation as to why he could not appropriately manage the conduct of Greenleaf's members and the resulting negative impact on the community; and

WHEREAS, one of Greenleaf's members and employees, Matthew Pruitt, testified that "a lot of young kids" worked at Greenleaf "needed support" and are "real crooks"; and

WHEREAS, Greenleaf claims that neighbors who were previously concerned about the nuisance activity have admitted that it has been eliminated; and

WHEREAS, neighbors testifying before the City Council unanimously rebutted this claim. For example:

- Dan Fienberg testified that “the whole idea that neighbors support this retail establishment is simply wrong” ;and
- Paul Andres testified that “the nuisance activity has not stopped. Last week I was trying to get out my house through the gate and several of the people from the medical cannabis collective were blocking the way for me to get out. They refused to leave [and] were smoking there. The activity has not stopped.”; and
- Holly Scheider testified that “it is true that things got quieter over the winter, it also true that it has picked up again and that has been noted to me by a number of neighbors.”; and
- Edith Rivas Plata testified that “we have problems with parking. We have problems with noise. We have problems with smoking.”; and
- Ed Spana testified that “there is no denying that the nuisance is there.”; and

WHEREAS, Gelso and Greenleaf did not request sworn testimony at the public hearing and did not request the ability to cross examine individuals providing testimony and have, therefore, waived any claims of error based upon a lack of sworn testimony or inability to cross examine individuals providing testimony; and

WHEREAS, the City rejects Greenleaf’s request for a continuance of the public hearing and considers it solely a delaying tactic on the following bases:

1) Greenleaf’s continuance request indicates that Greenleaf’s prior counsel, Mr. Alec Adams, was “wholly lacking experience” in an area of alleged relevant law. If that was true, Greenleaf should have sought out other counsel earlier than one week prior to the Council hearing given that the code enforcement process has been ongoing since March 2012. Also, it appears that Greenleaf’s prior counsel continues to assist Greenleaf in this matter given that the “Patient Declarations” submitted with Greenleaf’s current counsel’s brief are provided on Mr. Adams letterhead and the caption describes Mr. Adams as the “Attorney for Greenleaf Wellness Center, Ruben Salvatierra & Juan Gonzalez”; and

2) Despite Mr. Anthony’s claim that he was unable to adequately prepare for the hearing in one week, he was able to: a) present a lengthy oral defense of his client’s case; b) submit a 12 page written brief; c) prepare and submit 30 declarations; and d) a written request for a continuance. Consequently, the City determines that Mr. Anthony had an adequate amount of time to prepare his client’s defense; and

3) Greenleaf provided no explanation for its change of attorneys on May 28, 2013 despite notice of the June 4, 2013 Council hearing being provided to it via first class mail on April 26, 2013 and posted on 1515 Dwight Way on May 8, 2013. Thus, the City considers it an attempt to delay the Council proceedings; and

WHEREAS, the City rejects Greenleaf’s evidentiary objection to its use of “information from the November 2012 inspection” based upon Mr. Salvatierra’s statements in his declaration that Mr. Daniel “entered the collective without consent or a warrant by falsely claiming to be a medical cannabis patient” on the following bases:

- 1) Despite the fact that Mr. Salvatierra executed his declaration under penalty of perjury, he fails to declare that the statements contained therein are based upon his personal knowledge; and
- 2) His statement regarding Mr. Daniel's entry fails to provide any specific facts upon which it can be made including: the date the alleged entry occurred and the individual he allegedly made a false claim to; and
- 3) Mr. Daniel provided testimony to the ZAB that Mr. Salvatierra was not present during the November 15, 2012 inspection and, instead, that the 2 non-residents who asked him to leave indicated that they were "given specific instructions by Mr. Salvatierra that I wasn't allowed in the property." Although both Mr. Salvatierra and his attorney testified after Mr. Daniel made this statement, neither one contradicted Mr. Daniel's account of his entry which is repeated in the quote from the June 4, 2013 staff report below. In fact, this claim has never been raised until the night of the Council hearing; and
- 4) Mr. Salvatierra's factually unsupported statement is directly rebutted by Mr. Daniel's fact-specific statements regarding his November 15, 2012 inspection. In particular, Mr. Daniel, the author of the staff's June 4, 2013 Council report recounts that:

"On November 15, 2012, Mr. Daniel revisited Greenleaf. A male standing outside identified himself as Dwayne Adams and claimed he was employed by Greenleaf as the security guard. Mr. Adams asked Mr. Daniel if it was his first visit to Greenleaf and Mr. Daniel responded that it was not and continued into Greenleaf.

Upon entering Greenleaf, Mr. Daniel was met by an unidentified male and provided him with his City of Berkeley business card. It appeared to Mr. Daniel that this was the same person who greeted him at his March 20, 2012 visit. Mr. Daniel asked the man if he lived at 1515 Dwight Way and he responded that he did not. Mr. Daniel identified himself and asked for permission to look around. Mr. Daniel also asked if Mr. Salvatierra or Mr. Gonzalez was available. The individual stated neither was available, but did authorize Mr. Daniel to enter and inspect the property."; 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.); and

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

1. 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.”

1515 Dwight Way operating as Greenleaf Wellness Group (Greenleaf) is a public nuisance under Section 23B.64.020.B based upon the following violations which exist at the property:

A. BMC Section 12.26.030.D prohibits medical cannabis collectives in commercial districts and requires that they be incidental to residential uses only. 1515 Dwight Way is partially located in the C-SA South Area Commercial District and the last legally established use is offices and a training facility. No residential use has ever been legally established at the property.

Therefore, if Greenleaf Wellness Group is a medical cannabis collective, it is in violation of this provision of BMC Chapter 12.26; and

B. 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. The City Council has not adopted a licensing process and standards for medical cannabis dispensaries. Mr. Salvatierra did not establish Greenleaf at 1515 Dwight Way until March 2012. Therefore, if Greenleaf is a medical cannabis dispensary, it is in violation of this provision of BMC Chapter 12.26; and

C. BMC Section 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 Variance Resolution No. 670 authorized the use of 1515 Dwight Way as an establishment of offices and training facilities and Mr. Salvatierra claims that he is operating a medical cannabis collective incidental to a residential dwelling unit, the use is also in violation of this provision of the Zoning Ordinance.

D. Health and Safety Code Section 11362.765(a) prohibits “any individual or group to cultivate or distribute marijuana for profit.” Mr. Salvatierra testified that Greenleaf members provide donations and/or labor in exchange for medical cannabis. However, he further testified that Greenleaf does not maintain any records in order to verify that the donations and contribution of labor it receives reimburses the collective for its reasonable overhead costs and operating expenses. Thus, it is impossible for Greenleaf to establish whether or not it is distributing marijuana for profit in violation of state law.

2. 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.

- A. Neighbors of Greenleaf and a Greenleaf volunteer testified that groups of individuals exiting and entering Greenleaf are loitering in the neighborhood and smoking cannabis.
- B. Neighbors of Greenleaf and Mr. Daniel testified that patrons of Greenleaf and their associates are driving erratically through the neighborhood and are driving under the influence of cannabis obtained at Greenleaf.
- C. Neighbors and Mr. Daniel witnessed Greenleaf collective members selling cannabis received from Greenleaf to or sharing with other individuals in the neighborhood.
- D. Neighbors of Greenleaf have testified that they have either been subject to or witnessed harassment by Greenleaf patrons.

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

