



Office of the City Manager

CONSENT CALENDAR  
June 27, 2023

To: Honorable Mayor and Members of the City Council

From: Dee Williams-Ridley, City Manager

Submitted by: Liam Garland, Director, Public Works

Subject: Ground Lease Agreement – RM Ventures LLC, d.b.a *In the Wood* Grill and Bar for Nonexclusive Use of Elmwood Parking Lot Pedestrian Paseo

RECOMMENDATION

Adopt the first reading of an Ordinance authorizing the City Manager to execute a ground lease agreement with RM Ventures LLC d.b.a., *In the Wood* Grill and Bar for the nonexclusive use of a portion of the Elmwood Parking Lot Pedestrian Access Path (“Paseo”), a City-owned midblock pedestrian path connecting the City’s Elmwood Parking Lot to College Avenue in the Elmwood Neighborhood Shopping District, for an initial term of ten (10) years with one optional ten (10) year lease extension.

FISCAL IMPACTS OF RECOMMENDATION

This land lease agreement for nonexclusive use of 557 square feet anticipates total revenue of \$19,156 for the initial ten (10) year term. The initial monthly price per square foot is \$0.25 with an annual adjustment of 3% beginning the second year after the Commencement Date of the lease. The tenant is also required to maintain the entire width and length of the Paseo, including the pedestrian path, clean and free of trash on a daily basis. Rent will be deposited into the Off-Street Parking Fund for Surface Parking Lot Revenue.

CURRENT SITUATION AND ITS EFFECTS

Prospective tenant, RM Ventures LLC, d.b.a, *In the Wood*, a restaurant located at 2930 College Avenue currently uses a portion of the Elmwood Parking Lot Paseo, a midblock paved pedestrian path connecting the City’s Elmwood Parking Lot to College Avenue in the Elmwood Neighborhood Shopping District to serve food and drinks, including beer and wine. Owners of *In the Wood* Grill and Bar recently applied and had approved a Planning Use Permit to add license for service of distilled spirits, in addition to beer and wine at the restaurant and outdoor dining area. Approval of this lease will correct a prior incorrect determination that the area is public right of way, ensure tenant has sufficient liability insurance coverage for the nonexclusive use of the property, and ensure conformance with an existing easement requiring a pedestrian access path at all times.

BACKGROUND

In 2022, RM Ventures applied for a Planning Use Permit to add license for service of distilled spirits at *In the Wood Grill and Bar*, a restaurant with outdoor dining area. During the application review process, City staff determined that previous approvals for the outdoor dining area incorrectly categorized the area as public right of way and issued approval for the use with a sidewalk café permit. Sidewalk café permits are only for public right of way.

The area is the Elmwood Parking Lot Paseo and is private property owned by the City of Berkeley. It consists of a portion of two parcels (APNs 052-156800700 and 052-156800601) that combined with six other parcels are the City's Elmwood Parking Lot. The portion of interest is a midblock, paved passageway between the parking lot and College Avenue. The Planning Use Permit (ZP2022-0139) to add a license for distilled spirits included Outdoor Dining Conditions and was approved February 23, 2023 and the outdoor dining area is shown in Exhibit A (Premises). With input from the City Attorney's Office it was determined that a land lease granting nonexclusive use of the Paseo to RM Ventures, LLC is the solution that ensures appropriate liability protections and a fair rent is collected by the City.

If approved, the restaurant's use of the area is nonexclusive because during nonoperational hours *In the Wood Grill and Bar* will remove all tables and chairs in the outdoor dining area and store them in a 60 square foot area at the west end of the Paseo. To ensure conformance with the existing easement agreement, the potential tenant and Public Works will work together to clearly mark the limits of the patio dining area to ensure no encroachment into the six-foot wide public access path at all times. This ensures adjacent business owners and operators, their customers, City maintenance staff, and the general public will have a generous access path at all times as required by the easement. The storage area and pedestrian path are shown in Exhibit A (Premises).

ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

None.

RATIONALE FOR RECOMMENDATION

The Elmwood Parking Lot Paseo is not public right of way. Approval of this lease will correct a prior incorrect determination that the area is public right of way, ensure tenant has sufficient liability insurance coverage for the nonexclusive use of the property, and ensure conformance with an existing easement requiring a pedestrian access path at all times.

ALTERNATIVE ACTIONS CONSIDERED

None.

CONTACT PERSON

Dionne Early, Community Development Project Coordinator, Public Works Department,  
(510) 981-6453

Attachments:

1: Ordinance

    Exhibit A: Ground Lease

        Exhibit A: Premises

        Exhibit B: Term and Payment

        Exhibit C: Use Permit

ORDINANCE NO. -N.S.

LAND LEASE AGREEMENT BETWEEN CITY OF BERKELEY AND RM VENTURES,  
LLC D.B.A., IN THE WOOD GRILL AND BAR

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. FINDINGS:

The City owns six parcels upon which the Elmwood Parking Lot and Paseo, a midblock pedestrian pathway is located. The Paseo (located on APNs 052-156800700 and 052-156800601) connects visitors from the parking lot to College Avenue and back. Additionally, an easement established when the City purchased the property guarantees access through the Paseo and throughout the parking lot for all property and business owners adjacent to the Lot. The City previously, and incorrectly, issued a sidewalk café permit agreement for partial use of the Paseo for dining and flower sales. The City and tenant, RM Ventures, LLC d.b.a., *In the Wood Grill and Bar* agreed to enter into this nonexclusive use land lease agreement which replaces the previous sidewalk café permit and designates 497 square feet along the southern property line of 2930 College be used as an outdoor dining area, 60 square feet be used for storage of outdoor furniture during restaurant closures, and the remainder to be a minimum six-foot-wide pedestrian path maintained at all times. The initial term of the new agreement shall be for an initial ten-year term with an option to extend for one additional ten-year term. The total revenue for the initial ten-year term of the agreement will be \$19,156 which will be entered into Off-Street Parking Fund account code 627-54-622-6665-3004-000-000462110 for Surface Parking Lot Revenue.

Section 2. AUTHORIZATION FOR CITY MANAGER TO ENTER INTO NONEXCLUSIVE USE LAND LEASE AT APNs 052-156800700 and 052-156800601 as set forth in Exhibit A.

The City Manager is hereby authorized to enter into a ten-year lease agreement with the option for a 10-year extension with RM Ventures, LLC d.b.a., *In the Wood Grill and Bar* for real property located on parcels designated sections of APNs 052-156800700 and 052-156800601. Such lease shall be on substantially the terms set forth in Exhibit A.

Section 3. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

**GROUND LEASE BETWEEN  
THE CITY OF BERKELEY AND  
RM VENTURES, LLC D.B.A., IN THE WOOD GRILL & BAR**

This lease is made retroactively effective on March 1, 2023 the CITY OF BERKELEY ("Landlord"), a Charter City organized and existing under the laws of the State of California and RM Ventures LLC ("Tenant"), a limited liability corporation d.b.a., *In the Wood Grill and Bar*, a restaurant who agree as follows:

*This lease is made with reference to the following facts and objectives:*

A. Landlord is the owner of the real property assessor parcel numbers (APN) 052-156800700 and 052-1568601, adjacent to the property line of 2930 College Avenue, Berkeley, California, ("premises") as further described in Exhibit A, attached to and made a part of this lease.

B. Tenant is willing to accept a nonexclusive use lease of the premises from Landlord pursuant to the provisions stated in this lease.

C. Tenant wishes to lease the premises for the purpose of using 497 square feet of land as outdoor dining patio during *In the Wood Grill and Bar's* hours of operation and using an additional 60 square feet of space for storage of outdoor dining furniture during hours of nonoperation.

D. Tenant has examined the premises and is fully informed of the condition thereof.

**1. DESCRIPTION OF PREMISES**

Landlord leases to Tenant and Tenant leases from Landlord the premises described as: Approximately 557 square feet ("Premises") of paved land owned by the Landlord, located within the midblock access path connecting the City's Elmwood Parking Lot to College Avenue between Russell Street and Ashby Avenue in the northwest corner of the neighborhood shopping district in Berkeley, California and commonly known as the Elmwood Parking Lot pedestrian access alley ("Paseo"), as shown outlined on Exhibit A - Premise, attached hereto and made a part of this Lease.

**2. TERM**

The term of this lease shall commence retroactively on March 1, 2023. The effective date of the ordinance provides and shall be for a period of ten (10) years. Lease includes one (1) optional ten (10) year extension as shown in Exhibit B – Term and Rent, attached hereto and made a part of this Lease. In order to exercise this option, Tenant must give written notice of its election to do so to Landlord at least 180 days, but not more than one year, prior to the expiration date of the initial lease term. Tenant shall have no other right to extend the term beyond the option period.

**3. RENT**

Tenant shall pay to Landlord as annual rent, without deduction, setoff, prior notice, or demand, the sum of \$1,671.00 for the first year of the initial term within 30 days of approval and execution of the lease. Thereafter, annual rent will be due on the first day of each term year commencing on the date the term commences, and continuing during the term. Annual rent for the first year shall be paid on the day the term commences (March 1<sup>st</sup>). All rent shall be paid to Landlord at the address to which notices to Landlord are given.

**4. PERIODIC RENT INCREASES**

The monthly rent shall be increased at the commencement of the second year of the term and each year thereafter ("the adjustment date") by three percent (3%). The following table list the amount due for each year of the initial term:

	<u>TIME PERIOD</u>	<u>ANNUAL RENTAL</u>
Year 1	March 1, 2023 – February 29, 2024	\$1,671.00
Year 2	March 1, 2024 – February 28, 2025	\$1,721.13
Year 3	March 1, 2025 – February 28, 2026	\$1,772.76
Year 4	March 1, 2026 – February 28, 2027	\$1,825.95
Year 5	March 1, 2027 – February 29, 2028	\$1,880.73
Year 6	March 1, 2028 – February 28, 2029	\$1,937.15
Year 7	March 1, 2029 – February 28, 2030	\$1,995.26
Year 8	March 1, 2030 – February 28, 2031	\$2,055.12
Year 9	March 1, 2031 – February 29, 2032	\$2,116.77
Year 10	March 1, 2032 – February 28, 2033	\$2,180.28

Rent shall be payable in advance on the first (1<sup>st</sup>) day of the month of each year of the Term of this Lease and paid to City of Berkeley at the address to which notices to Landlord are given.

**5. SECURITY DEPOSIT**

The lease is for nonexclusive use of the Premises, a paved outdoor space open to inspection by the Landlord at any and all times. No security deposit for the Premises is requested or required by the Landlord.

**6. LATE CHARGES**

Tenant acknowledges that late payment by Tenant to Landlord of rent and other

sums due hereunder will cause Landlord to incur costs not contemplated by this lease, the exact amount of which will be extremely difficult to ascertain. Therefore, if any installment of rent or any other sum due from Tenant is not received by Landlord within ten (10) days after such amount is due, then, without any requirement for notice to Tenant, Tenant shall pay to Landlord a late charge equal to ten percent (10%) of such overdue amount. The parties agree that this late charge represents a fair and reasonable estimate of the costs that Landlord will incur by reason of late payment by Tenant. Acceptance of such late charge by Landlord shall in no event constitute a waiver of Tenant's default with respect to such overdue amount, nor prevent Landlord from exercising any of the other rights and remedies available to it.

**7. USE OF PREMISES; OPERATION**

a. Tenant agrees and understands the premises is lease in its "AS IS" condition and that use of the premises is nonexclusive.

b. Tenant will use the premises for the purpose of outdoor dining including service of beer, wine, and spirits as detailed in approved Use Permit #ZP2022-0139 for the restaurant located at 2930 College Avenue and storage of furniture used for that outdoor dining area and agrees to continuously and uninterruptedly occupy and use the entire leased premises for said purpose and to maintain adequate personnel for the efficient service of clients or customers. Tenant shall not use nor permit the use of the whole or any part of the premises for any other purpose without the Landlord's prior written consent.

b. Business may be conducted with the public on the leased premises at any time on any day, provided that, to do business after 10:00 p.m. on any day Tenant shall have obtained any permit required by federal, state or local law. Tenant shall operate the outdoor dining area with sufficient staff to serve patrons and only during the hours of operation of the associated restaurant and in conformance with any and all permits required by federal, state, or local law. Tenant shall serve beer, wine, and spirits in conformance with City of Berkeley Use Permit #ZP2022-0139 for a Type 47 ABC license.

c. In addition to Tenant's agreement to abide by all other restrictions on Tenant's use, Tenant shall maintain at all times a minimum six-foot wide pedestrian path parallel to the outdoor dining and storage area to ensure a midblock pedestrian path to and from the Elmwood Parking Lot and College Avenue is continuously maintained in the Paseo. Tenant agrees that any violation of this use restriction shall constitute a default by Tenant under the lease, and that Landlord's notice to Lessee of this specific use restriction shall not be deemed a waiver by Landlord of any other use restriction imposed on the Tenant for the use of the demised premises.

**8. TAXES AND ASSESSMENTS**

a. Tenant understands that because this lease is for the nonexclusive use of land owned and operated by the City of Berkeley no possessory interest in the property will be created

and therefore the tenant will not be subject to property tax, assessments or utility taxes for the ground leased to the tenant.

b. Tenant shall pay all taxes on its personal property, fixtures and on its leasehold or possessory interest in the leased premises and any other assessment that may be lawfully levied.

**9. UTILITIES**

Tenant agrees to pay any and all charges for electricity, gas, heat, cooling, telephone, sewer use, water, refuse collection and other utilities used in the premises. Tenant shall arrange for refuse collection services by the City of Berkeley. Landlord is responsible for the pedestrian lighting and utilities associated with pedestrian lighting in the Paseo.

**10. MAINTENANCE AND REPAIR**

a. Tenant is responsible for ensuring that the premises meet all applicable City of Berkeley codes prior to occupancy under this lease.

b. Tenant shall keep and maintain in good order, condition and repair (except for reasonable wear and tear) all portions of the premises including without limitation, sewage facilities serving the leased premises, landscaping, and the sidewalk adjacent to the premises.

c. Tenant shall make all required repairs upon demand by Landlord. Failure to make such repairs within thirty (30) days of the Landlord's demand shall constitute a default by Tenant.

**11. IMPROVEMENTS**

a. Tenant shall not erect additions or structures nor make nor cause to be made any alterations, improvements, additions, or fixtures that affect the premises, nor shall Tenant mark, paint, drill or in any way deface any floors, walls, or partitions of the premises without first providing thirty (30) days' written notice to Landlord. If Landlord raises no objections within thirty (30) days after receipt of such notice, Tenant may proceed.

b. Tenant shall require all contractors to provide a labor and materials bond for the full amount of the contract. Tenant shall pay, when due, all sums of money that may be due or become due for any labor, services, materials, supplies or equipment furnished to or for Tenant, in, at, upon or about the leased premises and which may be secured by any mechanic's, materialmen's or other lien against the premises or Landlord's interest therein.

c. All alterations, improvements or additions that are now or in the future



attached permanently to the premises shall be the property of Landlord and remain with the premises at the termination of this lease, except that Landlord can elect within thirty (30) days of the termination of the lease to require Tenant, at its cost, to remove any alterations, improvements or additions Tenant has made to the premises.

**12. INDEMNIFICATION**

Tenant shall indemnify, defend and hold Landlord, its officers, agents, volunteers and employees harmless from: 1) all claims of liability for any damage to property or injury or death to any person occurring in, on, or about the premises; 2) all claims of liability arising out of Tenant's failure to perform any provision of this lease, or any act or omission by Tenant, its agents, contractors, invitees or employees; and 3) all damages, liability, fines, penalties, and any other consequences arising from any noncompliance or violation of any laws, ordinances, codes, or regulations, including but not limited to the Occupational Safety and Health Act of 1979 and the Americans with Disabilities Act of 1990. Except, however, that Landlord shall hold Tenant harmless from all claims of liability for damage resulting from the acts or omissions of Landlord or its authorized representatives.

**13. INSURANCE**

a. Tenant at its cost shall maintain public liability and property damage insurance with a single combined liability limit of \$2,000,000 and property damage limits of not less than \$200,000 insuring against all liability of Tenant and its authorized representatives arising out of and in connection with Tenant's use or occupancy of the premises. All such insurance shall insure performance by Tenant of the preceding indemnity provisions. All insurance shall name the City of Berkeley, its officers, agents, volunteers and employees as additional insureds and shall provide primary coverage with respect to the City.

b. If the insurance referred to above is written on a Claims Made Form, then following termination of this lease, coverage shall survive for a period of not less than five years. Coverage shall also provide for a retroactive date of placement coinciding with the effective date of this lease.

c. Tenant at its cost shall maintain on all its personal property, tenant's improvements, and alterations, in on, or about the premises, a policy of standard fire and extended coverage insurance, with vandalism and malicious mischief endorsements. This coverage shall be considered primary, and the proceeds from any such policy shall be used by Tenant for the replacement of personal property or the restoration of tenant's improvements or alterations.

d. If Tenant employs any person, it shall carry workers' compensation and employer's liability insurance and shall provide a certificate of insurance to the Landlord. The workers' compensation insurance shall: provide that the insurance carrier shall not cancel,

terminate, or otherwise modify the terms and conditions of said insurance except upon thirty (30) days prior written notice to the Landlord; provide for a waiver of any right of subrogation against Landlord to the extent permitted by law; and be approved as to form and sufficiency by the Landlord's Risk Manager.

e. Tenant shall forward all insurance documents to: Real Property, Department of Public Works, 1947 Center Street, Fifth Floor, Suite 521, Berkeley, California, 94704.

#### **14. COMPLIANCE WITH LAW AND SAFETY**

a. Tenant shall observe and comply with all applicable laws, ordinances, codes and regulations of governmental agencies, including federal, state, municipal and local governing bodies having jurisdiction over any or all of the Tenant's activities, including all provisions of the Occupational Safety and Health Act of 1979 and all amendments thereto, and all applicable federal, state, municipal, and local safety regulations. All Tenant's activities must be in accordance with these laws, ordinances, codes, and regulations.

b. If a death, serious personal injury, or substantial property damage occurs in, on, or about the premises, Tenant shall immediately notify the Landlord's Risk Management Office by telephone. If any accident occurs on the premises, Tenant shall promptly submit a written report to Landlord, in such form as Landlord may require. This report shall include the following information: 1) name and address of the injured or deceased person(s), (2) name and address of Tenant's contractor, if any, (3) name and address of Tenant's liability insurance carrier, and (4) a detailed description of the accident.

c. If a release of hazardous materials or hazardous waste that cannot be controlled occurs on the premises, Tenant shall immediately notify the City of Berkeley Police Department and the City's Emergency and Toxics Management Office. Tenant shall not store hazardous materials or hazardous waste on the premises without a proper permit from the City.

#### **15. NON-DISCRIMINATION AGAINST PERSONS WITH DISABILITIES**

a. If Tenant provides any aid, service or benefit to others on the City's behalf, Tenant shall, in the provision of such aid, service or benefit, observe and comply with all applicable provisions of Title II of the Americans with Disabilities Act of 1990 and any amendments thereto. Tenant shall further observe and comply with all applicable federal, state, municipal and local laws, ordinances, codes and regulations prohibiting discrimination against individuals with disabilities or ensuring that individuals with disabilities are not excluded from participating in or receiving benefits, services or activities of the City.

b. If Tenant is or becomes a "public accommodation" as defined in Title III of the Americans with Disabilities Act of 1990, Tenant shall observe and comply with all applicable provisions of the Act and any amendments thereto, and all applicable federal, state, municipal

and local laws, ordinances, codes and regulations prohibiting discrimination on the basis of disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations offered by the Tenant. All Tenant's activities must be in accordance with these laws, ordinances, codes, and regulations, and Tenant shall be solely responsible for complying therewith.

**16. CITY NON-DISCRIMINATION ORDINANCE**

Tenant agrees to comply with the provisions of Berkeley Municipal Code Chapter 13.26 as amended from time to time. In the performance of this lease, the Tenant agrees as follows:

a. The Tenant shall not discriminate against any employee or applicant for employment because of race, color, religion, ancestry, national origin, age (over 40), sex, pregnancy, marital status, disability, sexual orientation or AIDS.

b. The Tenant shall permit the Landlord access to records of employment advertisements, application forms, EEO-1 forms, affirmative action plans and any other documents which, in the opinion of the Landlord, are necessary to monitor compliance with this non-discrimination provision, and will, in addition, fill-out in a timely fashion, forms supplied by the Landlord to monitor these non-discrimination provisions.

**17. NUCLEAR FREE BERKELEY**

Tenant agrees to comply with Berkeley Municipal Code Chapter 12.90, the Nuclear Free Berkeley Act, as amended from time to time.

**18. OPPRESSIVE STATES**

a. In accordance with Resolution No. 59,853-N.S., Tenant certifies that it has no contractual relations with, and agrees during the term of this Lease to forego contractual relations to provide personal services to or to purchase, sell, lease or distribute commodities in the conduct of business with, the following entities:

- (1) The governing regime in any Oppressive State.
- (2) Any business or corporation organized under the authority of the governing regime of any Oppressive State.
- (3) Any individual, firm, partnership, corporation, association, or any other commercial organization, and including parent-entities and wholly-owned subsidiaries (to the extent that their operations are related to the purpose of its contract with the City), for the express purpose of assisting in business operations or trading with any public or private entity located in any Oppressive State.

b. For purposes of this lease, the Tibet Autonomous Region and the provinces of Abo, Kham, and U-Tsang shall be deemed oppressive states.

c. Tenant's failure to comply with this section shall constitute a default of this lease and Landlord may terminate this lease pursuant to Section 26. In the event that the City terminates this lease due to a default under this provision, City may deem Tenant a non-responsible bidder for five (5) years from the date this lease is terminated.

## **19. BERKELEY LIVING WAGE ORDINANCE**

a. Tenant agrees to comply with Berkeley Municipal Code Chapter 13.27, the Berkeley Living Wage Ordinance. If Tenant employs six (6) or more part-time, full-time or stipend employees, and generates \$350,000 or more in annual gross receipts, Tenant will be required to provide all eligible employees with City mandated minimum compensation during the term of this lease, as defined in B.M.C. Chapter 13.27, and well as comply with the terms enumerated herein.

b. Tenant shall be required to maintain all reasonable records and documents that would establish whether Tenant is subject to Berkeley's Living Wage Ordinance (LWO). If Tenant is subject to the LWO, as defined therein, Tenant shall be further required to maintain monthly records of those employees located on the leased premises. These records shall include the total number of hours worked, the number of hours spent providing service on the leased property, the hourly rate paid, and the amount paid by Tenant for health benefits, if any, for each of its employees providing services under the lease. The records described in this Section shall be made available upon the City's request. The failure to produce these records upon demand shall be considered a default, subject to the provisions contained in sections 25 and 26 herein.

c. If Tenant is subject to the LWO, Tenant shall include the requirements of the ordinance, as defined in B.M.C. Chapter 13.27, in any and all subleases in which Tenant enters with regard to the subject premises. Subtenants shall be required to comply with this ordinance with regard to any employees who spend 25% or more of their compensated time on the leased property.

d. If Tenant fails to comply with the requirements of this the LWO and this lease, the City shall have the rights and remedies described in this Section, in addition to any rights and remedies provided by law or equity.

Tenant's failure to comply with this Section shall constitute default of the lease, upon which City may terminate this lease pursuant to Section 26.

In addition, at City's sole discretion, Tenant may be responsible for liquidated damages in the amount of \$50 per employee per day for each and every instance of an underpayment to an employee. It is mutually understood and agreed that Tenant's failure to pay any of its eligible employees at least the applicable living wage rate will result in damages being sustained by the City; that the nature and amount of the damages will be extremely difficult and impractical to fix; that the liquidated damages set forth herein is the nearest and most exact measure of damage for such breach that can be fixed at this time; and that the liquidated damage amount is not intended as a penalty of forfeiture for Tenant's breach.

**20. BERKELEY EQUAL BENEFITS ORDINANCE**

a. Tenant hereby agrees to comply with the provisions of the Berkeley Equal Benefits Ordinance, B.M.C. Chapter 13.29. If Tenant is currently subject to the Berkeley Equal Benefits Ordinance, Tenant will be required to provide all eligible employees with City mandated equal benefits during the term of this lease, as defined in B.M.C. Chapter 13.29, as well as comply with the terms enumerated herein.

b. If Tenant is currently or becomes subject to the Berkeley Equal Benefits Ordinance, Tenant agrees to supply the City with any records the City deems necessary to determine compliance with this provision. Failure to do so shall be considered a default, subject to the provisions of Sections 25 and 26 of this lease.

c. If Tenant fails to comply with the requirements of this Section, City shall have the rights and remedies described in this Section, in addition to any rights and remedies provided by law or equity.

Tenant's failure to comply with this Section shall constitute default of the lease, upon which City may terminate this lease pursuant to Section 26.

In addition, at City's sole discretion, Tenant may be responsible for liquidated damages in the amount of \$50.00 per employee per day for each and every instance of violation of this Section. It is mutually understood and agreed that Tenant's failure to provide its employees with equal benefits will result in damages being sustained by City; that the nature and amount of these damages will be extremely difficult and impractical to fix; that the liquidated damages set forth herein is the nearest and most exact measure of damages for such breach that can be fixed at this time; and that the liquidated damage amount is not intended as a penalty or forfeiture for Tenant's breach.

**21. PESTICIDES**

All use of pesticides on the premises shall be in compliance with the City of Berkeley's Pesticide Use Policy as it exists at the time of such use.

**22. SIGNS**

Tenant shall not install or letter any signs on the premises without the prior written consent of Landlord. All signs on the premises shall conform to the provisions of Berkeley Municipal Code Chapter 20.04.

**23. DAMAGE OR DESTRUCTION**

If the premises are totally or partially destroyed from any cause, rendering the premises totally or partially inaccessible or unusable, Landlord may elect to terminate this lease or continue this lease in effect by giving notice to Tenant within thirty (30) days of the date of destruction. If Landlord elects to continue this lease in full force and effect, then Landlord shall restore the premises and the rent shall be abated, from the date of destruction until the date restoration is completed, in an amount proportionate to the extent to which the destruction interferes with Tenant's use of the premises. If Landlord fails to give notice of its decision to terminate or continue this lease within the period stated, Tenant may elect to terminate this lease. Tenant waives the provisions of Civil Code sections 1932(2) and 1933(4) with respect to any destruction of the premises.

**24. EMINENT DOMAIN**

If the whole or any portion of the premises is taken by any paramount public authority under the power of eminent domain, then the rights and obligations of the parties shall be determined as follows: If the premises are totally taken by condemnation, this lease shall terminate on the date of taking. If any portion of the premises is taken by condemnation, Tenant shall have the right to either terminate this lease or to continue in possession of the remainder of the premises under the terms of this lease. Such right to terminate must be exercised by notifying Landlord within thirty (30) days after possession of the part taken by eminent domain. If Tenant does not terminate this lease within the thirty (30) day period, this lease shall remain in full force and effect except that the fixed rent shall be reduced in the same proportion that the square footage of the premises taken bears to the square footage of the premises immediately before the taking. All damages awarded for such taking shall belong to and be the property of Landlord; provided, however, that Landlord shall not be entitled to any portion of the award made for loss of business and of business installations or improvements made by Tenant in accordance with this lease.

**25. DEFAULT BY TENANT**

a. The occurrence of any of the following shall constitute a default by Tenant:

1. Failure to pay rent when due, if the failure continues for 10 days after notice has been given to Tenant.

2. Abandonment and vacation of the premises (failure to occupy and operate the premises for 14 consecutive days shall be deemed an abandonment and vacation).

3. Failure to perform any other provision of this lease if the failure to perform is not cured within 30 days after notice has been given to Tenant. If the default cannot reasonably be cured within 30 days, Tenant shall not be in default of this lease if Tenant commences to cure the default within the 30-day period and diligently and in good faith continues to cure the default.

b. Notices given under this paragraph shall specify the alleged default and the applicable lease provisions, and shall demand that Tenant perform the provisions of this lease or pay the rent that is in arrears, as the case may be, within the applicable period of time, or quit the premises. No such notice shall be deemed a forfeiture or a termination of this lease unless Landlord so elects in the notice. The purpose of the notice requirements set forth in this section is to extend the notice requirements of the unlawful detainer statutes of California.

## **26. LANDLORD'S REMEDIES**

Landlord shall have the following remedies if Tenant commits a default. These remedies are not exclusive; they are cumulative in addition to any remedies now or later allowed by law.

a. Tenant's Right to Possession Not Terminated. Landlord can continue this lease in full force and effect, and the lease will continue in effect as long as Landlord does not terminate Tenant's right to possession, and Landlord shall have the right to collect rent when due. During the period Tenant is in default, Landlord can enter the premises and relet them, or any part of them, to third parties for Tenant's account. Tenant shall be liable immediately to Landlord for all costs Landlord incurs in reletting the premises. Reletting can be for a period shorter or longer than the remaining term of this lease. Tenant shall pay to Landlord the rent due under this lease on the dates the rent is due, less the rent Landlord receives from any reletting. No act by Landlord allowed by this paragraph shall terminate this lease unless Landlord notifies Tenant that Landlord elects to terminate this lease. After Tenant's default and for as long as Landlord does not terminate Tenant's right to possession of the premises, Tenant shall have the right to assign or sublet its interest in this lease if Tenant obtains Landlord's consent, but Tenant shall not be released from liability.

If Landlord elects to relet the premises as provided in this paragraph, rent that Landlord receives from reletting shall be applied to the payment of: first, any indebtedness from Tenant to Landlord other than rent due from Tenant; second, all costs, including for maintenance, incurred by Landlord in reletting; third, rent due and unpaid under this lease. After

deducting the payments referred to in this paragraph, any sum remaining from the rent Landlord receives from reletting shall be held by Landlord and applied in payment of future rent as rent becomes due under this lease. In no event shall Tenant be entitled to any excess rent received by Landlord. If, on the date rent is due under this lease, the rent received from the reletting is less than the rent due on that date, Tenant shall pay to Landlord, in addition to the remaining rent due, all costs, including for maintenance, Landlord incurred in reletting that remain after applying the rent received from the reletting as provided in this paragraph.

b. Termination of Tenant's Right to Possession. Landlord can terminate Tenant's right to possession of the premises at any time. No act by Landlord other than giving notice to Tenant shall terminate this lease. Acts of maintenance, efforts to relet the premises, or the appointment of a receiver on Landlord's initiative to protect Landlord's interest under this lease shall not constitute a termination of Tenant's right to possession. On termination, Landlord has the right to recover from Tenant:

i. The worth, at the time of award, of the unpaid rent that had been earned at the time of termination of this lease;

ii. The worth, at the time of award, of the amount by which the unpaid rent that would have been earned after the date of termination of this lease until the time of award exceeds the amount of the loss of rent that Tenant proves could have been reasonably avoided;

iii. The worth, at the time of award, of the amount by which the unpaid rent for the balance of the term after the time of award exceeds the amount of the loss of rent that Tenant proves could have been reasonably avoided; and

iv. Any other amount, and court costs, necessary to compensate Landlord for all detriment proximately caused by Tenant's default.

"The worth, at the time of award," as used in i and ii of this section, is to be computed by allowing interest at the maximum rate an individual is permitted by law to charge. "The worth, at the time of award," as referred to in iii of this section, is to be computed by discounting the amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of the award, plus 1%.

c. Appointment of Receiver. If Tenant is in default of this lease Landlord shall have the right to have a receiver appointed to collect rent and conduct Tenant's business. Neither the filing of a petition for the appointment of a receiver nor the appointment itself shall constitute an election by Landlord to terminate this lease.

d. Landlord's Right to Cure. Landlord, at any time after Tenant commits a default, can cure the default at Tenant's cost. If Landlord at any time, by reason of Tenant's



default, pays any sum or does any act that requires the payment of any sum, the sum paid by Landlord shall be due immediately from Tenant to Landlord at the time the sum is paid, and if paid at a later date shall bear interest at the maximum rate an individual is permitted by law to charge from the date the sum is paid by Landlord until Landlord is reimbursed by Tenant. The sum, together with interest on it, shall be additional rent.

**27. ASSIGNMENT AND SUBLETTING**

Tenant shall not voluntarily assign or encumber its interest in this lease or in the premises, or sublease all or any part of the premises, or allow any other person or entity (except Tenant's authorized representative) to occupy or use all or any part of the premises, without first obtaining Landlord's consent in writing with signature from City of Berkeley City Manager. Any assignments, encumbrance, or sublease without Landlord's consent shall be voidable and, at Landlord's election, shall constitute a default. No consent to any assignment, encumbrance, or sublease shall constitute a further waiver of the provisions of this paragraph.

**28. ENTRY**

Landlord and its authorized representatives shall have the right to enter the premises at all reasonable times for any of the following purposes: to determine whether the premises are in good condition and whether Tenant is complying with its obligations under the lease; to do any acts that may be necessary to protect Landlord's interest in the premises; or to perform Landlord's duties under this lease. Landlord shall not be liable in any manner for any inconvenience, disturbance, loss of business, nuisance, or other damage arising out of Landlord's entry on the premises as provided in this section, except damage resulting from the acts or omissions of Landlord or its authorized representatives.

**29. NOTICES**

A written notice is deemed served when a party sends the notice in an envelope addressed to the other party to this lease and deposits it with the U.S. Postal Service, registered mail, postage prepaid. For purposes of this lease, notices shall be addressed as follows, as appropriate:

To the Landlord:      Real Property Administrator  
                                 Department of Public Works  
                                 1947 Center Street, Fifth Floor, Suite 521  
                                 Berkeley, CA 94704

To the Tenant:         RM Ventures, LLC – In the Wood Gastro Pub  
                                 2930 College Avenue  
                                 Berkeley, CA 94705

**30. WAIVER**

No delay or omission in the exercise of any right or remedy of Landlord on any default by Tenant shall impair such a right or remedy or be construed as a waiver. The receipt and acceptance by Landlord of delinquent rent shall not constitute a waiver of any other default; it shall constitute only a waiver of timely payment for the particular rent payment involved. Any waiver by Landlord of any default must be in writing and shall not be a waiver of any other default concerning the same or any other provision of the lease.

No act or conduct of Landlord, including, without limitation, the acceptance of the keys to the premises, shall constitute an acceptance of the surrender of the premises by Tenant before the expiration of the term. Only a notice from Landlord to Tenant shall constitute acceptance of the surrender of the premises and accomplish a termination of the lease.

Landlord's consent to or approval of any act by Tenant requiring Landlord's consent or approval shall not be deemed to waive or render unnecessary Landlord's consent to or approval of any subsequent act by Tenant.

**31. EXCUSABLE DELAYS**

If the performance of any act required of Landlord or Tenant is prevented or delayed by reason of strikes, lockouts, labor disputes, act of God, acts of the public enemy, fire, floods, epidemics, freight embargoes or other cause beyond the control of the party required to perform an act, the performance of such act shall be excused for the period of the delay and the period for the performance of such act shall be extended for thirty (30) days.

**32. OPTION TO RENEW**

a. Option Period. So long as Tenant is not in default under this lease, either at the time of exercise or at the time the extended term commences, Tenant will have the option to extend the initial term of this lease for an additional period of ten (10) years (the "option period") on the same terms, covenants, and conditions of this lease, except that the initial monthly rent and yearly rent increases during the option period will be determined as described below. In order to exercise this option, Tenant must give written notice of its election to do so to Landlord at least 180 days, but not more than one year, prior to the expiration date of the initial lease term. Tenant shall have no other right to extend the term beyond the option period.

b. Option Period Monthly Rent. For the purposes of this section, the "then-fair market rental value of the premises" means what a Landlord under no compulsion to lease the premises and a Tenant under no compulsion to lease the premises would determine as rents (including initial monthly rent and rental increases) for the option period, as of its

commencement, taking into consideration the uses permitted under this lease, the quality, size, design and location of the premises, and the rent for comparable buildings located in the vicinity of the premises. Except, however, that the initial monthly rent and yearly rent increases for the option period shall not be less than that provided during the initial lease term.

Landlord and Tenant shall have thirty (30) days after Landlord receives the option notice within which to agree on the then-fair market rental value of the premises. If Landlord and Tenant are unable to agree on the then-fair market value of the premises during that period, the then-fair market rental value of the premises shall be determined as follows:

Within seven (7) days after the expiration of the thirty (30) day period set forth in the preceding paragraph, Landlord and Tenant shall each, at their own expense, appoint a real estate appraiser with at least five (5) years' full-time commercial appraisal experience in the area in which the premises are located to determine the then-fair market rental value of the premises. If either Landlord or Tenant does not appoint an appraiser within ten (10) days after receiving notice by the other of the name of its appraiser, the single appraiser appointed will be the sole appraiser and will set the then-fair market rental value of the premises. If two appraisers are appointed, they will meet promptly and attempt to agree upon the then-fair market rental value of the premises.

If the two appraisers are unable to agree within thirty (30) days after the second appraiser has been appointed, they shall attempt to select a third appraiser within ten (10) days after said thirty (30) day period. If they are unable to agree on the third appraiser, either Landlord or Tenant, by giving ten (10) days' prior notice to the other, can apply to the president of the Alameda County Real Estate Board or the American Arbitration Association for the selection of a third appraiser. The third appraiser, however selected, must meet the qualifications stated in this subsection and be a person who has not previously acted in any capacity for either Landlord or Tenant. Landlord and Tenant shall each bear one-half (1/2) of the cost of appointing the third appraiser and of paying the third appraiser's fee.

Within thirty (30) days after the selection of the third appraiser, the appraisers shall attempt to agree upon the then-fair market rental value of the premises. If a majority of the appraisers is unable to so agree, the three appraisals will be averaged and the average shall be the then-fair market rental value of the premises.

### **33. HOLDING OVER**

If Tenant remains in possession of the premises with Landlord's consent after the expiration of the term of this lease without having exercised any option to renew this lease, or after the termination of any such option period, such possession by Tenant shall be construed to be a tenancy from month-to-month, terminable on thirty (30) days' notice given at any time by either party. All provisions of this lease, except those pertaining to term, shall apply to the month-to-month tenancy.

**34. SURRENDER OF PREMISES, REMOVAL OF PERSONAL PROPERTY**

At the termination of this lease, Tenant shall: 1) give up and surrender the premises, in as good state and condition as reasonable use and wear and tear thereof will permit, damage by fire and the elements excepted; and 2) remove all property which is not a fixture of or permanent attachment to the premises and which is owned and was installed by Tenant during the term of this lease.

**35. TERMS BINDING ON SUCCESSORS**

All the terms, covenants and conditions of this lease shall inure to the benefit of and be binding upon the successors and assigns of the parties to this lease. The provisions of this section shall not be deemed as a waiver of any of the conditions against assignment set forth above.

**36. TIME OF ESSENCE**

Time shall be of the essence of each provision of this lease.

**37. COVENANTS AND CONDITIONS**

Each term and each provision of this lease performable by Tenant shall be construed to be both a covenant and condition.

**38. GOVERNING LAW**

The laws of the State of California shall govern this lease.

**39. ENTIRE AGREEMENT, AMENDMENTS**

This lease and all exhibits attached and any documents expressly incorporated by reference contain the entire agreement between the parties regarding the lease of the premises described herein and shall supersede any and all prior agreements, oral or written, between the parties regarding the lease of these premises. This lease cannot be altered or otherwise modified except by a written amendment.

**40. CONSENT OF PARTIES**

Whenever consent or approval of either party is required, that party shall not

unreasonably withhold such consent or approval.

**41. BUSINESS LICENSE**

Tenant certifies that it has obtained or applied for a City of Berkeley business license number as required by Berkeley Municipal Code Chapter 9.04; or Tenant claims that it is exempt from the provisions of B.M.C. Ch. 9.04 and has written below the specific B.M.C. section under which it is exempt.

///

///

IN WITNESS WHEREOF, Landlord and Tenant have executed this lease as of the date written on the first paragraph of this lease.

LANDLORD  
CITY OF BERKELEY

By:

\_\_\_\_\_  
City Manager

THIS CONTRACT HAS BEEN  
APPROVED AS TO FORM BY  
THE CITY ATTORNEY FOR  
THE CITY OF BERKELEY  
06/2004

Registered on behalf  
of the City Auditor by:

\_\_\_\_\_  
Finance Department

Attest by:

\_\_\_\_\_  
City Clerk

TENANT

By:

\_\_\_\_\_

Printed Name:

Richard Tapp  
\_\_\_\_\_

Title:

Managing Member of RM

Berkeley Business

Ventures LLC dba In the Wood  
\_\_\_\_\_

License No.:

BL-008950  
\_\_\_\_\_

568

The Berry-Bangs Tract Map No. 3 < Bk. 13 Pg. 78 >

Scale: - 1" = 40'

BOOK 53

TR. 5130 140/95 P.M. 7212 234/43

P.M. 6655 223/95 P.M. 7160 236/88

TR. 7453 246 / 63

3-17-84 B.C.S.  
5-24-86 B.V.  
9-02-88 L.G.B.  
1-13-89 P.B.  
3-9-00 P.B.  
11-3-00 P.B.

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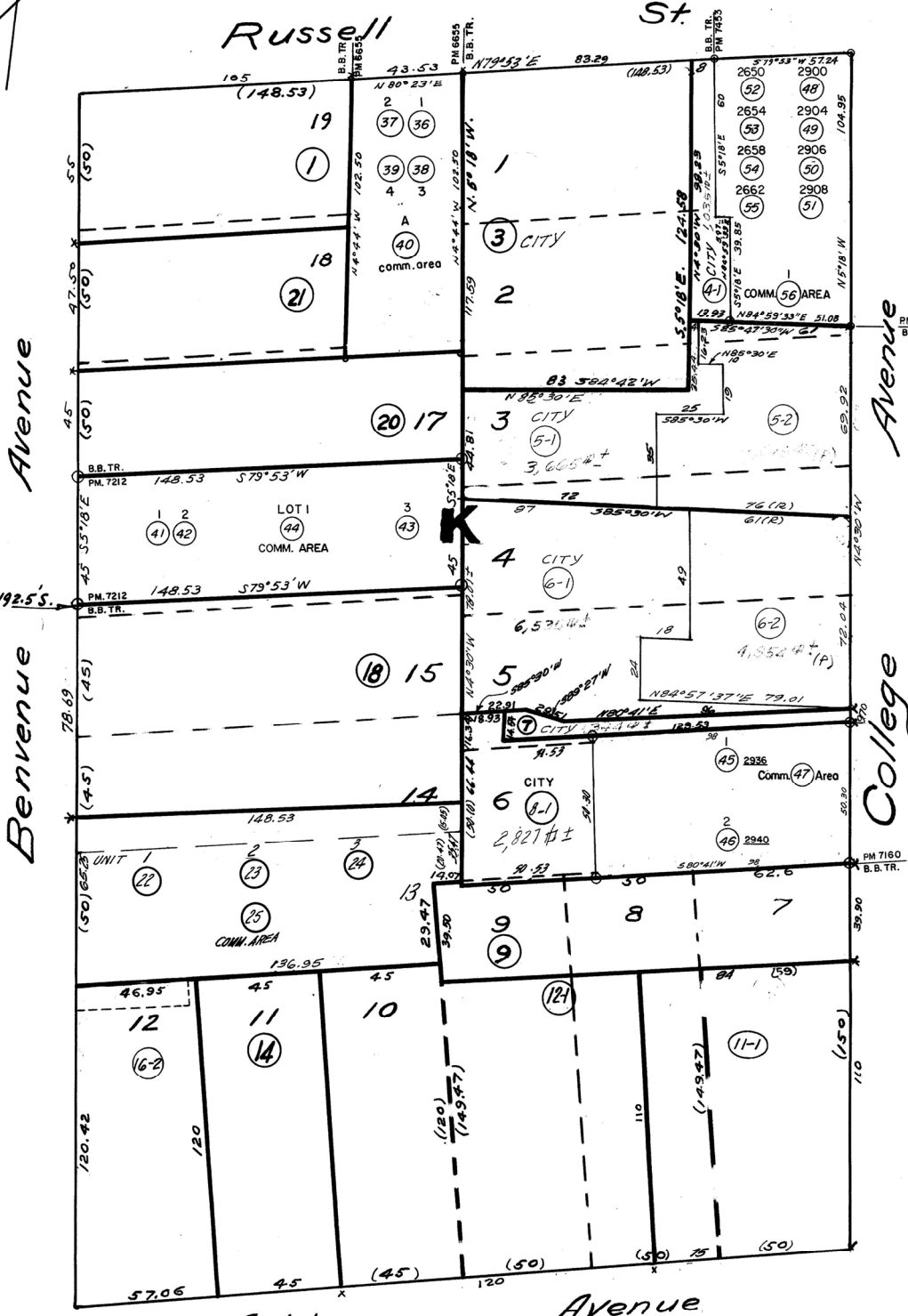
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College

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HPN- 56

**EXHIBIT B TO THE LEASE:**  
PAYMENT, TERM AND DATES

**LEASE PAYMENT SCHEDULE FOR ELMWOOD PASEO CAFÉ SPACE**

	YEAR	1	2	3	4	5	6	7	8	9	10
MONTH	1	\$ 139.25	\$ 143.43	\$ 147.73	\$ 152.16	\$ 156.73	\$ 161.43	\$ 166.27	\$ 171.26	\$ 176.40	\$ 181.69
MONTH	2	\$ 139.25	\$ 143.43	\$ 147.73	\$ 152.16	\$ 156.73	\$ 161.43	\$ 166.27	\$ 171.26	\$ 176.40	\$ 181.69
MONTH	3	\$ 139.25	\$ 143.43	\$ 147.73	\$ 152.16	\$ 156.73	\$ 161.43	\$ 166.27	\$ 171.26	\$ 176.40	\$ 181.69
MONTH	4	\$ 139.25	\$ 143.43	\$ 147.73	\$ 152.16	\$ 156.73	\$ 161.43	\$ 166.27	\$ 171.26	\$ 176.40	\$ 181.69
MONTH	5	\$ 139.25	\$ 143.43	\$ 147.73	\$ 152.16	\$ 156.73	\$ 161.43	\$ 166.27	\$ 171.26	\$ 176.40	\$ 181.69
MONTH	6	\$ 139.25	\$ 143.43	\$ 147.73	\$ 152.16	\$ 156.73	\$ 161.43	\$ 166.27	\$ 171.26	\$ 176.40	\$ 181.69
MONTH	7	\$ 139.25	\$ 143.43	\$ 147.73	\$ 152.16	\$ 156.73	\$ 161.43	\$ 166.27	\$ 171.26	\$ 176.40	\$ 181.69
MONTH	8	\$ 139.25	\$ 143.43	\$ 147.73	\$ 152.16	\$ 156.73	\$ 161.43	\$ 166.27	\$ 171.26	\$ 176.40	\$ 181.69
MONTH	9	\$ 139.25	\$ 143.43	\$ 147.73	\$ 152.16	\$ 156.73	\$ 161.43	\$ 166.27	\$ 171.26	\$ 176.40	\$ 181.69
MONTH	10	\$ 139.25	\$ 143.43	\$ 147.73	\$ 152.16	\$ 156.73	\$ 161.43	\$ 166.27	\$ 171.26	\$ 176.40	\$ 181.69
MONTH	11	\$ 139.25	\$ 143.43	\$ 147.73	\$ 152.16	\$ 156.73	\$ 161.43	\$ 166.27	\$ 171.26	\$ 176.40	\$ 181.69
MONTH	12	\$ 139.25	\$ 143.43	\$ 147.73	\$ 152.16	\$ 156.73	\$ 161.43	\$ 166.27	\$ 171.26	\$ 176.40	\$ 181.69
<b>ANNUAL TOTAL:</b>		<b>\$ 1,671.00</b>	<b>\$ 1,721.13</b>	<b>\$ 1,772.76</b>	<b>\$ 1,825.95</b>	<b>\$ 1,880.73</b>	<b>\$ 1,937.15</b>	<b>\$ 1,995.26</b>	<b>\$ 2,055.12</b>	<b>\$ 2,116.77</b>	<b>\$ 2,180.28</b>
										<b>TEN YEAR TOTAL: \$ 19,156.14</b>	

<b>PREMISES AREA (SQFT):</b>	557
<b>MONTHLY RATE PER SQFT:</b>	\$ 0.25
<b>INITIAL MONTHLY RENT:</b>	\$ 139.25
<b>ANNUAL INCREASE:</b>	3.00%
<b>LEASE START DATE:</b>	March 1, 2023
<b>INITIAL TERM:</b>	120 MONTHS
<b>INITIAL TERM TERMINATION DATE:</b>	February 28, 2033
<b>NOTIFY LANDLORD FOR OPTION BY:</b>	September 1, 2032
<b>OPTION START DATE:</b>	March 1, 2033
<b>OPTION TERM:</b>	120 MONTHS
<b>OPTION TERMINATION DATE:</b>	February 28, 2043

Payments must name the **CITY OF BERKELEY** as the payee.

Please include the follow **ACCOUNT NUMBER** in the notes section of checks, money orders, or other payments made to CITY OF BERKELEY:

627-54-622-6665-3004-000-000-462110-

Please send lease payments to the following **ADDRESS:**

**City of Berkeley**  
**Public Works Real Property**  
**1947 Center Street, 5th Flr, Suite 521**  
**Berkeley, CA 94704**



# ATTACHMENT 1

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## FINDINGS AND CONDITIONS

FEBRUARY 23, 2023

### 2930 College Avenue

**Use Permit #ZP2022-0139 to add the service of distilled spirits under a new Type 47 ABC license, expand the existing outdoor seating area by 239 square feet on private property, and allow indoor unamplified live music at an existing full-service restaurant.**

#### PERMITS REQUIRED

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- Use Permit, pursuant to Berkeley Municipal Code (BMC) Section 23.310.020, to add distilled spirits under a new Type 47 ABC license.

#### I. CEQA FINDINGS

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1. The project is categorically exempt from the provisions of the California Environmental Quality Act (CEQA, Public Resources Code §21000, et seq. and California Code of Regulations, §15000, et seq.) pursuant to Section 15301 of the CEQA Guidelines (“Existing Facilities”). The project meets all of the requirements of this exemption, as follows:
  - A. The project is consistent with the applicable General Plan designation and policies, and with the applicable zoning designation and regulations.
  - B. The project occurs within the Berkeley City limits on a project site of no more than five acres, and is surrounded by urban uses.
  - C. The parcel within the project site have previously been developed and have no value as habitat for endangered, rare or threatened species.
  - D. The project would not result in any significant effects relating to traffic, noise, air quality or water quality. City Standard Conditions would address potential impacts related to traffic, noise, air quality, and water quality.
  - E. The site can be adequately served by all required utilities and public services.
2. Furthermore, none of the exceptions in CEQA Guidelines Section 15300.2 apply, as follows: (a) the site is not located in an environmentally sensitive area, (b) there are no cumulative impacts, (c) there are no significant effects, (d) the project is not located near a scenic highway, (e) the project site is not located on a hazardous waste site pursuant to Government Code Section 65962.5, and (f) the project would not affect any historical resource.

**II. FINDINGS FOR APPROVAL**

1. As required by Section 23.406.040(E) of the BMC, the project, under the circumstances of this particular case existing at the time at which the application is granted, would not be detrimental to the health, safety, peace, morals, comfort, and general welfare of the persons residing or working in the neighborhood of such proposed use or be detrimental or injurious to property and improvements of the adjacent properties, the surrounding area or neighborhood, or to the general welfare of the City because:
  - A. The project is consistent with all applicable C-E District standards, including use and hours of operation;
  - B. The addition of distilled spirits alcoholic beverage service in the existing restaurant will not expand the footprint of the business. The proposed service will provide an additional option for patrons in the College Avenue area;
  - C. The alcohol service will be incidental to the overall food service use, and as such, alcohol sales will not have detrimental impact on public health, safety, or peace; and
  - D. The permit is subject to the standard conditions for alcohol sales, which will ensure that the restaurant will continue to be a good neighbor.

**III. OTHER FINDINGS FOR APPROVAL**

1. As required by Section 23.204.080(E) of the BMC, the Zoning Adjustments Board finds that:
  - 1) *The proposed use will:*
    - a) *Encourage and maintain the present street frontage and pedestrian orientation of the district;*
    - b) *Be compatible in design and character with the commercial district and the adjacent residential neighborhoods; and*
    - c) *Be compatible with the purposes set forth in Section 23.204.080.A and the existing character of the district.*
  - 2) *The proposed use will not:*
    - a) *Interfere with the continuity of retail or compatible service facilities at the ground level;*
    - b) *Interrupt a continuous wall of building facades;*
    - c) *Generate traffic and parking demand beyond the capacity of the commercial district or significantly increase impacts on adjacent residential neighborhoods;*
    - d) *Result in domination of this district by one type of use; and*
    - e) *Generate objectionable odors nor excessive levels of noise.*
2. As required by Section 23.310.020(D) of the BMC, the Zoning Adjustments Board finds that:
  - A. There are two other Type 47 ABC permits within a 1,000-foot radius of the subject site.
  - B. The proposed establishment of distilled spirits service will promote the City's economic health, contribute to General Plan or Area Plan policies, or further the district purposes because the addition of distilled spirits would mean greater tax revenue for the City of Berkeley, would increase the economic health of the business, whose cuisine offers a unique culinary opportunity for the community, and the additional service would contribute to the cultural, economic, and social opportunities in the Elmwood Commercial District.
  - C. The addition of distilled spirits to the menu would potentially increase the economic success of the business in a way that would likely not be available with just beer and wine service.
  - D. This restaurant, which already exists in this neighborhood, has not been the subject of any State of California violations, and has not had any calls for service from the Berkeley Police Department in the last three years.

- E. There are no public parks or schools within 1,000 feet of the project site.
- F. The Berkeley Police Department has indicated support for the proposed project.

#### **IV. STANDARD CONDITIONS OF APPROVAL FOR ALL PROJECTS**

The following conditions, as well as all other applicable provisions of the Zoning Ordinance, apply to this Permit:

##### **1. Conditions Shall be Printed on Plans**

The conditions of this Permit shall be printed on the *second* sheet of each plan set submitted for a building permit pursuant to this Use Permit, under the title 'Use Permit Conditions'. *Additional sheets* may also be used if the *second* sheet is not of sufficient size to list all of the conditions. The sheet(s) containing the conditions shall be of the same size as those sheets containing the construction drawings; 8-1/2" by 11" sheets are not acceptable.

##### **2. Compliance Required (BMC Section 23.102.050)**

All land uses and structures in Berkeley must comply with the Zoning Ordinance and all applicable City ordinances and regulations. Compliance with the Zoning Ordinance does not relieve an applicant from requirements to comply with other federal, state, and City regulations that also apply to the property.

##### **3. Approval Limited to Proposed Project and Replacement of Existing Uses (BMC Sections 23.404.060.B.1 and 2)**

- A. This Permit authorizes only the proposed project described in the application. In no way does an approval authorize other uses, structures or activities not included in the project description.
- B. When the City approves a new use that replaces an existing use, any prior approval of the existing use becomes null and void when permits for the new use are exercised (e.g., building permit or business license issued). To reestablish the previously existing use, an applicant must obtain all permits required by the Zoning Ordinance for the use.

##### **4. Conformance to Approved Plans (BMC Section 23.404.060.B.4)**

All work performed under an approved permit shall comply with the approved plans and any conditions of approval.

##### **5. Exercise and Expiration of Permits (BMC Section 23.404.060.C)**

- A. A permit authorizing a land use is exercised when both a valid City business license is issued (if required) and the land use is established on the property.
- B. A permit authorizing construction is exercised when both a valid City building permit (if required) is issued and construction has lawfully begun.
- C. The Zoning Officer may declare a permit lapsed if it is not exercised within one year of its issuance, except if the applicant has applied for a building permit or has made a substantial good faith effort to obtain a building permit and begin construction. The Zoning Officer may declare a permit lapsed only after 14 days written notice to the applicant. A determination that a permit has lapsed may be appealed to the ZAB in accordance with Chapter 23.410 (Appeals and Certification).
- D. A permit declared lapsed shall be void and of no further force and effect. To establish the use or structure authorized by the lapsed permit, an applicant must apply for and receive City approval of a new permit.

**6. Permit Remains Effective for Vacant Property (BMC Section 23.404.060.D)**

Once a Permit for a use is exercised and the use is established, the permit authorizing the use remains effective even if the property becomes vacant. The same use as allowed by the original permit may be re-established without obtaining a new permit, except as set forth in Standard Condition #5 above.

**7. Permit Modifications (BMC Section 23.404.070)**

No change in the use or structure for which this Permit is issued is permitted unless the Permit is modified by the Board. The Zoning Officer may approve changes to plans approved by the Board, consistent with the Board's policy adopted on May 24, 1978, which reduce the size of the project.

**8. Permit Revocation (BMC Section 23.404.080)**

The City may revoke or modify a discretionary permit for completed projects due to: 1) violations of permit requirements; 2) Changes to the approved project; and/or 3) Vacancy for one year or more. However, no lawful residential use can lapse, regardless of the length of time of the vacancy. Proceedings to revoke or modify a permit may be initiated by the Zoning Officer, Zoning Adjustments Board (ZAB), or City Council referral.

**9. Indemnification Agreement**

The applicant shall hold harmless, defend, and indemnify the City of Berkeley and its officers, agents, and employees against any and all liability, damages, claims, demands, judgments or other losses (including without limitation, attorney's fees, expert witness and consultant fees and other litigation expenses), referendum or initiative relating to, resulting from or caused by, or alleged to have resulted from, or caused by, any action or approval associated with the project. The indemnity includes without limitation, any legal or administrative challenge, referendum or initiative filed or prosecuted to overturn, set aside, stay or otherwise rescind any or all approvals granted in connection with the Project, any environmental determination made for the project and granting any permit issued in accordance with the project. This indemnity includes, without limitation, payment of all direct and indirect costs associated with any action specified herein. Direct and indirect costs shall include, without limitation, any attorney's fees, expert witness and consultant fees, court costs, and other litigation fees. City shall have the right to select counsel to represent the City at Applicant's expense in the defense of any action specified in this condition of approval. City shall take reasonable steps to promptly notify the Applicant of any claim, demand, or legal actions that may create a claim for indemnification under these conditions of approval.

**V. ADDITIONAL CONDITIONS IMPOSED BY THE ZONING ADJUSTMENTS BOARD**

Pursuant to BMC 23.404.050(H), the Zoning Adjustments Board attaches the following additional conditions to this Permit:

**ALCOHOLIC BEVERAGE SERVICE CONDITIONS (on-site)**

10. The Food Service Establishment shall comply with all applicable regulations of the California Department of Alcoholic Beverage Control (ABC).
11. Alcoholic beverage service shall be "incidental" to the primary food service use, as defined in Zoning Ordinance 23F.04.010. An incidental use shall not exceed 25 percent of the floor area of the primary use, and if it consists of the commercial sales of a different line of products or

- services than the primary use, such incidental use may not generate gross receipts in excess of 33 percent of the gross receipts generated by the primary use.
12. Alcohol beverage service shall be only be allowed as part of a “bona fide eating place” making “actual and substantial sales of meals,” and stringently enforces this requirement as determined and required by the ABC.
  13. The service of alcohol shall be limited to normal meal hours (per ABC) during the restaurant’s hours of operation. Patrons may only purchase food or finish drinks already purchased within the approved service hours. The Zoning Adjustments Board shall approve any change in the hours of restaurant operations and/or alcohol service (except decreased hours in compliance with applicable ABC regulations). Hours of operation are subject to review and amendment by the Zoning Adjustments Board as necessary to avoid detriment to the neighborhood or to achieve conformance with revised City standards or policies.
  14. During operating hours, 100 percent of the service area shall be designed and used for and must possess the necessary utensils, and condiment dispensers with which to serve meals to the public.
  15. The sale of alcoholic beverages for consumption off the premises is prohibited.
  16. There shall be no service or consumption of alcohol on the public right-of-way, unless authorized by a Public Works sidewalk seating permit.
  17. All alcoholic beverages served to patrons must be served in durable restaurant tableware (i.e. cups or glasses). No beer or wine may be distributed in its original bottle or can, or in any other potentially disposable container.
  18. There shall be no bar or lounge area upon the licensed premises maintained for the sole purpose of sales, service or consumption of alcoholic beverages directly to patrons for consumption.
  19. There shall be no exterior advertising or sign of any kind or type, including advertising directed to the exterior from within, promoting or indicating the availability of alcoholic beverages. Neither alcohol-dispensing facilities nor sign(s) advertising alcoholic beverages shall be visible from the public right-of-way. Interior displays of alcoholic beverages or signs which are clearly visible to the exterior shall constitute a violation of this condition.
  20. A Berkeley Police Department Crime Prevention Through Environmental Design (CPTED) survey shall be completed prior to commencing alcohol service.
  21. All employees selling and/or serving alcohol, or directly supervising such sales and/or service, shall complete the Licensee Education on Alcohol and Drugs (LEAD) program, or another equivalent program offered or certified by the California Department of Alcoholic Beverage Control within six months of employment at the establishment. Employees who have completed the course within the last five years shall be exempt from this requirement.
  22. Employees shall not serve alcohol to patrons who appear to be inebriated or otherwise unable to behave in an orderly manner upon consuming alcohol.

23. Any operator of the licensed establishment shall not have had a prior licensed establishment that was the subject of verified complaints or violations regarding alcohol, public safety or nuisance statutes or regulations to be confirmed by the Zoning Officer prior to issuance or transfer of a business license at this location.
24. Fortified alcohol products (e.g., malt liquor), shall not be sold on the premises.
25. The applicant shall establish cash handling procedures to reduce the likelihood of robberies and theft.
26. At no time shall the operator rent the restaurant space to a third-party promoter.
27. The owner or operator of the establishment shall take reasonable measures to prevent disturbances by patrons in the immediate vicinity. Such measures shall include signs reminding patrons of nearby residences and requests not to congregate or loiter near such residences nor operate vehicles in a noisy manner on residential streets. The operator shall give surveillance to public areas near the establishment, keep such areas free of trash and litter, provide lighting, and otherwise attempt to prevent conduct that might disturb the peace and quiet of residences in the vicinity. Furthermore, the operator shall assume reasonable responsibility for ensuring that patrons do not block the entrance or interfere with pedestrian activity on the adjacent public sidewalk.
28. This Use Permit, including these and all other required conditions, shall be posted in conspicuous location, available for viewing by any interested party.
29. This permit is subject to review, imposition of additional conditions, or revocation if factual complaint is received by the Zoning Officer that the maintenance or operation of this establishment is violating any of these or other required conditions or is detrimental to the health, safety, peace, morals, comfort or general welfare of persons residing or working in the neighborhood or is detrimental or injurious to property and improvements in the neighborhood or to the general welfare of the City.

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### **OUTDOOR DINING CONDITIONS**

30. There shall be no live entertainment in the outdoor seating area.
31. There shall be a signed land lease agreement, approved by Berkeley City Council within 90 days of the issuance of this use permit, for outdoor dining to continue on the City-owned property adjacent to the restaurant. Use of the leased space shall adhere strictly to the conditions of the lease agreement and of this Use Permit.
32. Seating and tables in the outdoor dining area shall not exceed that designated on the approved plans accompanying this permit.
33. Outdoor patrons shall be in sight of, and monitored by, restaurant staff to ensure that alcohol consumption remains within the designated outdoor dining area.

- 34.** The applicant shall provide a means of demarcation of the leased area permitted for outdoor dining in the form of stanchions, railing, or similarly effective visual barriers. The area outside of the leased area shall be kept clear of tables, chairs, and patrons at all times.

**HOURS OF OPERATION**

- 35.** Patrons shall only be permitted on the restaurant site between the hours of 7:00am to 11:00pm, Sunday through Saturday.



Z O N I N G  
A D J U S T M E N T S  
B O A R D  
S T A F F R E P O R T

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FOR BOARD ACTION  
FEBRUARY 23, 2023

## 2930 College Avenue

Use Permit #ZP2022-0139 to add the service of distilled spirits under a new Type 47 ABC license, expand the existing outdoor seating area by 239 square feet on private property, and allow indoor unamplified live music at an existing full-service restaurant.

### I. Background

#### A. Land Use Designations:

- General Plan: NC (Neighborhood Commercial)
- Zoning: C-E (Elmwood Commercial District)

#### B. Zoning Permits Required:

- Use Permit, pursuant to Berkeley Municipal Code (BMC) Section 23.310.020, to add the service of distilled spirits under a new Type 47 ABC license.

**C. CEQA Recommendation:** It is staff's recommendation that the project is categorically exempt pursuant to Section 15301 of the CEQA Guidelines ("Existing Facilities"). The determination is made by the ZAB.

#### D. Parties Involved:

- Applicant: RM Ventures, LLC (In the Wood), 2930 College Avenue, Berkeley, CA 94705
- Property Owners: John and Molly Gordon, 2091 Rose Street, Berkeley, CA 94709



Figure 1: Vicinity Map

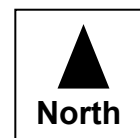
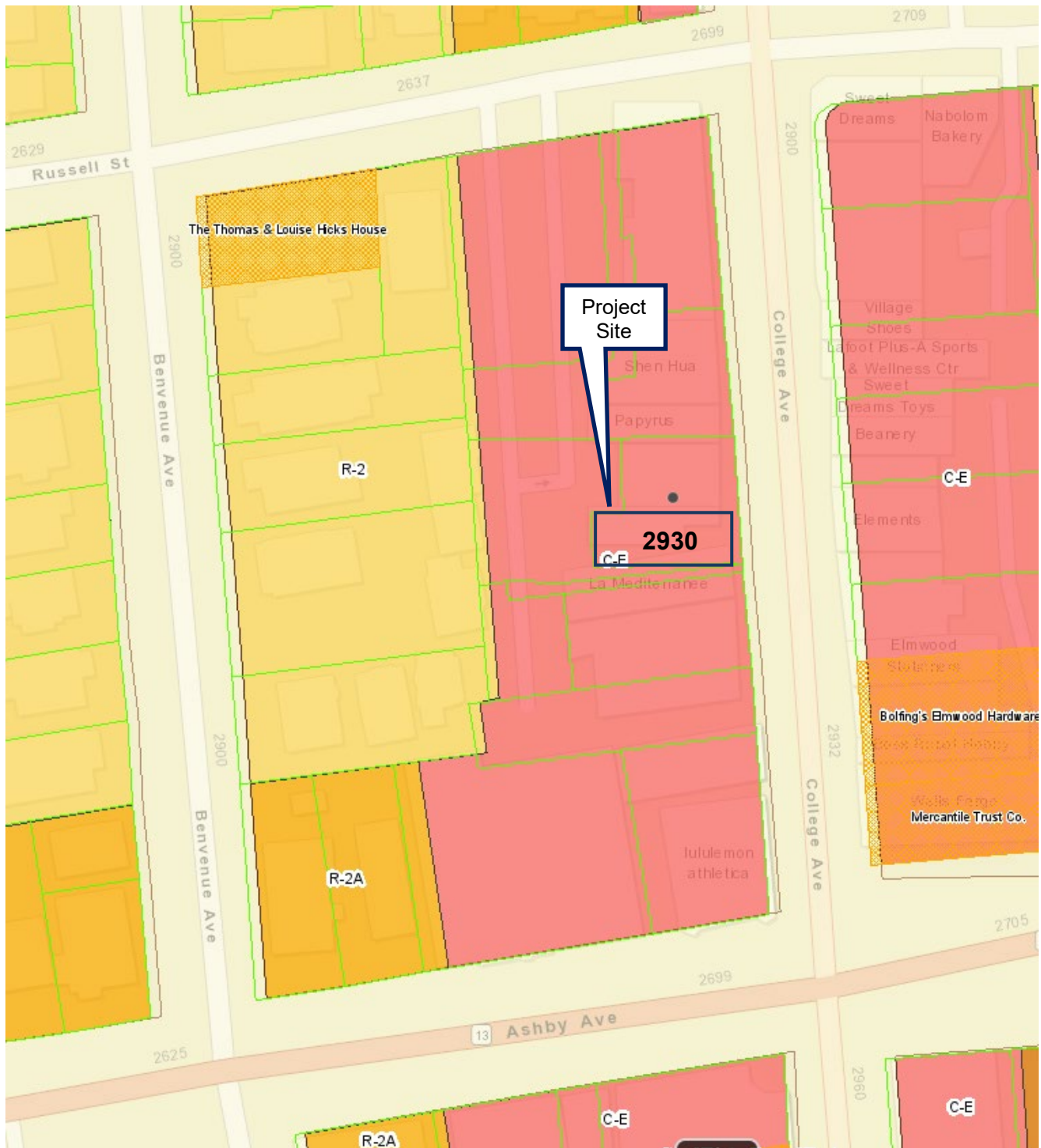


Figure 2: Restaurant Floor Plan

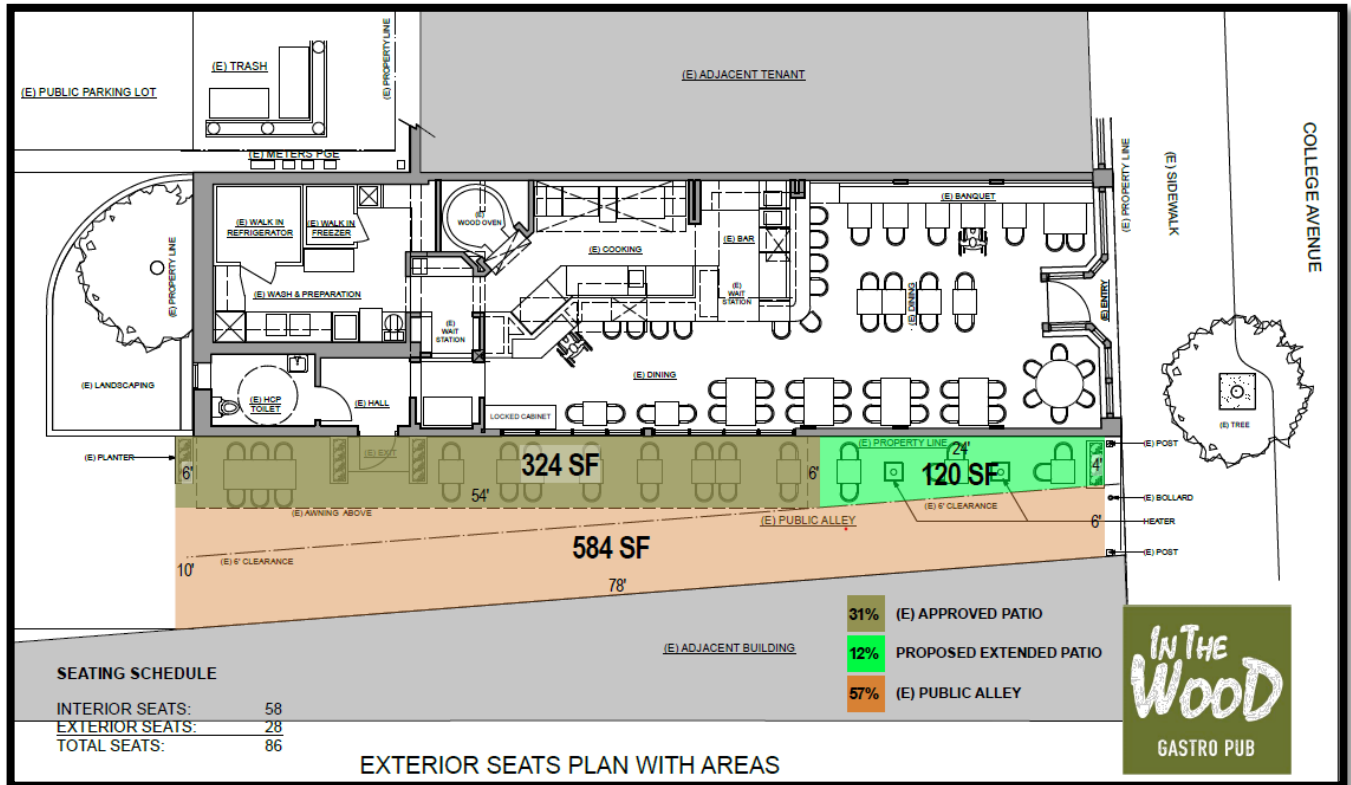


Figure 3: Liquor Licenses within 1,000 feet of the project site



■	20	Off-site beer and wine
▲	42	On-site beer and wine
▲	47	On-site beer, wine, and liquor



**Table 1: Land Use Information**

Location		Existing Use	Zoning District	General Plan Designation
Subject Property		Restaurant	C-E	Elmwood Commercial
Surrounding Properties	North	Restaurant	C-E	
	South	Restaurant	C-E	
	East	Retail	C-E	
	West	Public Parking Lot	C-E	

**Table 2: Special Characteristics**

Characteristic	Applies to Project?	Explanation
Alcohol	Yes	The site currently has approval for on-site incidental service of beer and wine (Type 41 ABC license). The operator has applied to add service of distilled spirits (Type 47 ABC License).
Public Convenience or Necessity	Yes	There are two other Type 47 ABC licenses within 1,000 feet. Therefore, public convenience and necessity findings are required.
Affordable Child Care or Housing Fee for qualifying non-residential projects (Per Resolutions 66,618-N.S. & 66,617-N.S.))	No	The proposed project does not include new floor area or a new use in a space vacant for more than three years; therefore, this mitigation fee payment does not apply.
Creeks	No	No new construction is proposed.
Green Building Score	No	
Historic Resources	No	
Liquefaction (Seismic Hazards Mapping Act)	No	
Oak Trees	No	
Soil/Groundwater Contamination	No	

**Table 3: Project Chronology**

Date	Action
October 11, 2022	Application submitted
January 13, 2023	Application deemed complete
February 9, 2023	Public hearing notices mailed
February 23, 2023	ZAB hearing

## II. Project Setting

**A. Neighborhood/Area Description:** The project site is located on the west side of College Avenue between Ashby Avenue and Russell Street, within the Elmwood Commercial (C-E) District. The C-E District consists primarily of low-rise buildings containing various retail and dining establishments. The surrounding neighborhood consists primarily of a mix of single-family and two-family residences.

**B. Site Conditions:** The project site is located on 4,854 square-foot parcel developed with a 4,331 square-foot single story commercial building. The building includes three individual commercial retail spaces. The existing restaurant, and proposed project, operates in a 1,522 square-foot unit. A public surface parking lot is located directly behind the commercial building.

### III. Project Description

The existing restaurant, In the Wood, is currently permitted to serve beer and wine incidental to food service under a Type 41 ABC license (ZCBL2018-0047). The applicant proposes to add the service of distilled spirits under a Type 47 ABC license. The proposed project would also expand the existing outdoor seating area by 239 square feet on private property, and allow indoor un-amplified live music. The proposed hours of operation are 7 a.m. – 11 p.m., seven days a week. The proposed hours for selling alcoholic beverages are 9 a.m. – 11 p.m., seven days a week. The use of the outdoor dining area will require a land lease agreement with the City of Berkeley, which is expected to go before City Council for approval in March, 2023, and which will be a condition of this use permit.

### IV. Community Discussion

- A. Neighbor/Community Concerns:** A pre-application poster was installed on the building by the applicant in October 2022. On February 9, 2023, public hearing notices were mailed to property owners and occupants within 300 feet of the project site, and to interested neighborhood organizations. The City also posted notices within the neighborhood in three locations. At the time of writing this report, staff has not received any public comment regarding the project.
- B. Committee Review:** This project is not subject to design or landmark review. If exterior changes and/or signage are later proposed as part of the associated tenant improvement(s), they will be evaluated by the applicable land use staff at that time.

**V. Issues and Analysis**

- A. Alcoholic Beverage Service:** The sale and service of distilled spirits incidental to food service is allowed in the C-E District if a Use Permit is granted by the Zoning Adjustments Board (ZAB) in accordance with required findings as specified under BMC 23.310.020.

Alcoholic beverage service is also regulated by BMC 23.310.020(D) for Special Use Standards. This section requires the City to make all of the "Public Convenience or Necessity" findings if an existing establishment has an ABC license of the same type, other than beer and wine service incidental to food service, within a 1,000-foot radius of the project site. As shown in Figure 3, there are two other existing Type 47 ABC licenses within 1,000 feet of the project site, these licenses are held by: Donato & Co. at 2635 Ashby Avenue and King Yen Restaurant at 2995 College Avenue. Therefore, the "Public Convenience or Necessity" findings must be made.

In order to approve the Use Permit, the Board must affirm all of the "Public Convenience or Necessity" findings under BMC Section 23.310.020(D) as follows:

- 1) *The proposed establishment will promote the City's economic health, contribute to General Plan or area plan policies, or further the district purpose.*

Staff Analysis: The proposed addition of distilled spirits service would mean greater tax revenue for the City of Berkeley, with a greater variety of menu options to attract more people. It would also increase the economic health of the business whose cuisine offers a unique culinary opportunity to the community. The additional service would contribute to the cultural, economic, and social opportunities in the C-E District.

- 2) *The economic benefits associated with the establishment could not reasonably be achieved without the proposed alcohol sales.*

Staff Analysis: The addition of distilled spirits to the menu would potentially increase the economic success of the business in a way that would likely not be available with just beer and wine service. Staff notes that the increased business revenue would result in increased tax revenue for the City.

- 3) *If the applicant has operated a licensed establishment that has been the subject of violations regarding alcohol in the State of California, or violations of public safety or nuisance statutes or regulations in the City of Berkeley as verified by the Police Department, the ZAB shall determine whether such violations indicate a high likelihood of further violations and/or detrimental impacts from the proposed establishment. In making this determination, the ZAB may consider the number, frequency, and severity of prior violations, the time elapsed since the last violation, and other relevant factors.*

Staff Analysis: A letter from the Berkeley Police Department, dated January 18, 2023, (Attachment 2) notes that there was an incident in 2019 where an In the Wood

employee was cited for selling alcohol to a minor. However, the letter indicates that this seems to have been an isolated incident.

- 4) *If the proposed establishment is located within 1,000 feet of any public park or Berkeley Unified School District (BUSD) school, the Board shall take into consideration the effect of the proposed establishment upon such sensitive public uses.*

Staff Analysis: The project site is not located within 1,000 feet from a public park or school.

- 5) *The Police Department has reported that the proposed establishment would not be expected to add to crime in the area.*

Staff Analysis: Staff referred this application to the BPD for review and comment. In a letter dated January 18, 2023, the BPD stated that, "We see no reason to believe this business would increase crime or calls for service in the neighborhood, and see no reason it would have an adverse effect on the health, safety, or morals of the people in the area."

**B. C-E District Findings:** To approve a Use Permit in the C-E District, the ZAB must make the following permit findings in accordance with required findings BMC Section 23.204.080(E):

1) *The proposed use will:*

- a) *Encourage and maintain the present street frontage and pedestrian orientation of the district;*
- b) *Be compatible in design and character with the commercial district and the adjacent residential neighborhoods; and*
- c) *Be compatible with the purposes set forth in Section 23.204.080.A and the existing character of the district.*

2) *The proposed use will not:*

- a) *Interfere with the continuity of retail or compatible service facilities at the ground level;*
- b) *Interrupt a continuous wall of building facades;*
- c) *Generate traffic and parking demand beyond the capacity of the commercial district or significantly increase impacts on adjacent residential neighborhoods;*
- d) *Result in domination of this district by one type of use; and*
- e) *Generate objectionable odors nor excessive levels of noise.*

Staff Analysis: This project will not alter the present street frontage and, therefore, is compatible with the pedestrian orientation and character of the district and neighborhood. It may result in a slight increase in customers to the restaurant, but effects on the surrounding neighborhood and businesses would be negligible.

**C. General Non-Detriment Finding:** BMC Section 23.406.040(E) requires that, before the ZAB approves an application for a Use Permit, it must find that the project, under the circumstances of this particular case existing at the time at which the application



is granted, would not be detrimental to the health, safety, peace, morals, comfort, and general welfare of the persons residing or working in the neighborhood of such proposed use and the project must not be detrimental or injurious to property and improvements of the adjacent properties, the surrounding area or neighborhood, or to the general welfare of the City.

Staff Analysis: The alcohol service would be incidental to food service, and due to the incidental nature of the service, as well as the size and location of the restaurant, the addition of distilled spirits would not have a detrimental impact on public health, safety, or peace. The permit is subject to the standard conditions for food and alcohol service (alcohol service will remain incidental to food service, will be limited to normal meal hours of operation, off-site sales of alcoholic beverages will be prohibited, all applicable ABC regulations will be in effect, etc.). The outdoor service area will be demarcated with a physical barrier as a condition of the use permit and in accordance with ABC rules. Restaurant operating hours will comply with those allowed in the C-E zoning district. These factors will ensure that the restaurant tenant is a good neighbor.

**B. General Plan Consistency:** The 2002 General Plan contains a policy applicable to the project:

1. Policy LU-1 Community Character: Maintain the character of Berkeley as a special, diverse, unique place to live and work.

Staff Analysis: The service and sale of distilled spirits at an existing restaurant will enhance the customer experience and help the restaurant continue to promote the character of Berkeley as a special, diverse, and unique place to live and work.

2. Policy LU-26 Neighborhood Commercial Areas: Maintain and improve Neighborhood Commercial areas, such as Elmwood, Solano, and North Shattuck, as pedestrian-friendly, visually attractive areas and ensure that Neighborhood Commercial areas fully serve neighborhood needs.

Staff Analysis: Enhancing the variety of beverages at the existing restaurant will help to maintain and promote the neighborhood character of the College Avenue Commercial Area and attract increased business.

## VI. Recommendation

Because of the project's consistency with the Zoning Ordinance and General Plan, and minimal impact on surrounding properties, staff recommends that the ZAB: **APPROVE** Use Permit #ZP2022-0139 pursuant to Section 23.406.040, subject to the attached Findings and Conditions (see Attachment 1).

### Attachments:

1. Findings and Conditions
2. Berkeley Police Department comment letter dated January 18, 2023
3. Notice of Public Hearing



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