



## Kriss Worthington

Councilmember, City of Berkeley, District 7  
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### CONSENT CALENDAR

February 28, 2017

To: Honorable Mayor and Members of the City Council  
From: Councilmember Kriss Worthington  
Subject: Readopt "Lease Agreement: Friends of DxE for Telegraph of Channing Mall, 2425 Channing Way Suite C" with Minor Amendments

#### RECOMMENDATION:

That the Council authorize the City Manager to enter into an amended, ~~readopt~~ lease agreement ~~for with~~ the Friends of DxE International for the premises at 2425 Channing Way Suite C ~~at the premises~~ for the purposes of operating an office with supporting retail activities to include revised amendments.

#### BACKGROUND:

Previously, the City Council ~~approved the~~ adopted an ordinance authorizing the City Manager to enter into a lease ~~for with~~ Friends of DxE at 2425 Channing Way Mall. DxE, or Direct Action Everywhere, is an organization concerned with saving animals from horrendous abuses. According to the center's website, the location "is a community center organizing free speech and nonviolence trainings for animal rights and social justice advocates." However, attorneys from Burke, Williams & Sorensen LLP expressed concerns that the Friends of DxE are using their location for more than initially agreed upon. For example, DxE members have expanded their services at their location to provide a "communal work area, meeting location, event space, yoga studio [and] art gallery."

In response, members of DxE request ~~revised~~ amendments ~~to to the lease to~~ expand the authorized uses at the premises ~~of the lease~~. Several volunteers explain "the yoga sessions, or actually, simple calisthenics and stretching exercises, several of the volunteers said, help morale and health, and are the common practice of many organizations and businesses." Their proposed changes are attached in the following page.

#### FINANCIAL IMPLICATIONS:

Minimal.

#### ENVIRONMENTAL SUSTAINABILITY:

Consistent with Berkeley's Environmental Sustainability Goals and no negative impact.

#### CONTACT PERSON

Councilmember Kriss Worthington

510-981-7170

## PROPOSED CHANGES

LEASE AGREEMENT: FRIENDS OF DXE FOR TELEGRAPH OF CHANNING MALL, 2425  
CHANNING WAY SUITE C

### Item 7a, Page 5

**Add after “office space and supporting retail” section:** ~~“Tenant may engage in activities pursuant to the business of a nonprofit animal rights center with supporting retail including but not limited to with incidental uses to include~~ speaker series, film screenings, volunteer recruitment and appreciation parties, trainings, art exhibits and auctions, and demonstrations, team-building activities such as exercise and meditation so long as Tenant at all times complies with the occupancy limits as predetermined by the Berkeley Fire Department for each proposed use and confines all activities to the premises (as opposed to the mall’s common areas).”

### Item 7, Section b, Page 5

**Delete and replace with:** “Business may be conducted on the leased premises at any time on any day between the hours of 8 a.m. and 10 p.m. At a minimum, Tenant shall operate the business with sufficient staff to serve the public during the hours of 10 a.m. to 6:00 p.m. Monday through Saturday.” ~~“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.”~~

### Item 7, Section c, Page 5

**Add:** ~~“...as they may be amended by the City from time to time, so as long as the City of Berkeley equally enforces “Rules and Regulations for Shopping Mall” and does not single out tenant.”~~ Change to: “Tenant agrees to abide by all “Rules and Regulations for Shopping Mall,” as they may be amended by the City from time to time, the current version of which is attached hereto as Exhibit B. Landlord agrees not to arbitrarily enforce rules against tenant or, without having a rational basis for doing so.”

### Item 11, Section a, Page 6

**(Leave as is in lease): Delete and Replace (below):** ~~“nor shall Tenant mark, paint or drill or in any way deface any floors, walls, or ceilings or partitions of the premises without first providing 30 (thirty) days’ written notice to the Landlord. If Landlord raises no objections within 20-30 (twentythirty) days after the receipt of such notice, Tenant may proceed.”~~

**Replacement:** ~~“Tenant shall ask the City for authorization to improve interior space and expect the City to give good faith answer within 5 business days, in writing, with an explanation if Tenant is denied the right to make improvements that are permitted to other tenants in mall.”~~

### Item 22, Page 11

**Delete: Leave as is** ~~“Tenant shall not install or letter any signs on the premises without prior consent of Landlord. All signs on the premises shall conform to the provisions of the Berkeley Municipal Code Chapter 20.04.”~~ **And add:** “Landlord’s consent shall not be withheld so long as a proposed sign is consistent with the nature, size and style of the approved signage used by other tenants in the Telegraph Channing Mall.”

Item 1, p. 5, Add as first sentence: “Landlord and Tenant hereby agree that this lease amends, restates and replaces the lease approved by City by Ordinance No. 7,492-NS in its entirety.”

Tenant shall provide proof that it is current in payment of rent to City under the Original lease prior to execution by the City Manager of this restated and amended lease.

Tenant shall provide a certificate of insurance that conforms to the requirements of this restated and amended lease.

ORDINANCE NO. 7,492–N.S.

LEASE AGREEMENT: FRIENDS OF DXE INTERNATIONAL FOR THE TELEGRAPH  
CHANNING MALL, 2425 CHANNING WAY SUITE C

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

Section 1. The City Council finds as follows:

The City owns the Telegraph Channing Mall, and Friends of DxE International, a tax exempt 501(c)(3) corporation, seeks to lease 2425 Channing Suite C at the premises for the purpose of operating an office with supporting retail activities. This lease agreement shall commence on the effective date of the ordinance for an initial five-year term with one five-year optional lease extension. Total anticipated revenue of \$103,210 for the initial five-year term (subject to an estimated annual adjustment of the lesser of 3% or CPI) will be deposited into the Off-Street Parking Fund 835 for Telegraph Channing Mall Rent Revenue; the agreement has been entered into the Contract Management System as CMS No. U2FEX.

Section 2. The City Manager is hereby authorized to execute a lease agreement and any necessary amendments thereto with Friends of DxE International at 2425 Channing Way Suite C, Berkeley, CA at the Telegraph Channing Mall. Such lease shall substantially reflect the terms set forth in Exhibits A and B.

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 Council Chambers at 2134 Martin Luther King Jr. Way. Within 15 days of its adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and its title shall be published in a newspaper of general circulation.

At a regular meeting of the Council of the City of Berkeley held on \_\_\_\_\_, 2017, this Ordinance was passed to print and ordered published by posting by the following vote:

Ayes:

Noes:           None.

Absent:         None.



## AMENDED AND RESTATED TELEGRAPH-CHANNING LEASE

This Amended and Restated lease is made on \_\_\_\_\_, \_\_\_\_\_, between the CITY OF BERKELEY ("Landlord"), a Charter City organized and existing under the laws of the State of California and Friends of DxE International ("Tenant"), a 501(c)(3) tax exempt organization who agree as follows:

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

A. Landlord is the owner of the real property at 2425 Channing Way Suite C, Berkeley, California, ("premises") as further described in Exhibit A, attached to and made a part of this lease.

B. Tenant is willing to lease the premises from Landlord pursuant to the provisions stated in this lease.

C. Tenant wishes to lease the premises for the purpose of operating office space with supporting retail.

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 above. Landlord and Tenant hereby agree that this lease amends, restates, and replaces the lease approved by City by Ordinance No. 7,492-N.S. in its entirety.

### 2. TERM

The term of this lease ~~shall commences on the effective date of the ordinance which authorizes this lease unless the ordinance provides otherwise~~ \_\_\_\_\_ and shall be for a period of five (5) years plus the partial month, if any, immediately preceding the first full calendar month of this lease.

### 3. RENT

Tenant shall pay to Landlord as monthly rent, without deduction, setoff, prior notice, or demand, the sum of \$1,620.00 per month in advance on the first day of each month, commencing on the date the term commences, and continuing during the term. Monthly rent for the first month or portion of it shall be paid on the day the term commences. Monthly rent for any partial month shall be prorated at the rate of 1/30th of the monthly rent per day. All rent shall be paid to Landlord at the address to which notices to Landlord are given.

### 4. PERIODIC RENT INCREASES

a. The monthly rent shall be increased at the commencement of the second year of the term and each year thereafter ("the adjustment date") to the Ordinance No. ~~7,492~~-N.S.

greater of: 1) the monthly rent in effect immediately preceding the adjustment date plus three percent (3%); or 2) the monthly rent as adjusted for the change in the Consumer Price Index (CPI), as calculated below.

b. The base for computing the CPI adjustment is the Consumer Price Index for all Urban Consumers (base years 1982-1984 = 100) for San Francisco-Oakland-San Jose, published by the U.S. Department of Labor, Bureau of Labor Statistics ("Index"), which is in effect on the date of the commencement of the term ("Beginning Index"). The Index published most immediately preceding the adjustment date in question ("Extension Index") is to be used in determining the amount of the CPI adjustment. If the Extension Index has increased over the Beginning Index, the CPI adjustment shall be calculated by multiplying the monthly rent by a fraction consisting of the Extension Index as the numerator and the Beginning Index as the denominator. If the Index is discontinued or revised during the term, such other government index or computation with which it is replaced shall be used in order to obtain substantially the same result as would be obtained if the Index had not been discontinued or revised.

## 5. SECURITY DEPOSIT

a. As security for the full and faithful performance by Tenant of each and every term, provision, covenant, and condition of this lease, Tenant shall deposit with Landlord cash in an amount equal to one month's payment of rent (\$1620.00). Such security shall be deposited on or before the effective date of the ordinance authorizing this lease.

b. If Tenant defaults in respect to any of the terms, provisions, covenants and conditions of this lease, including but not limited to the payment of rent, Landlord may use the security deposit or any portion of it to cure the default or compensate the Landlord for all damage sustained by Landlord resulting from Tenant's default. If Landlord so uses any portion of the security deposit, Tenant will restore the security deposit to its original amount within ten (10) days after written demand from Landlord.

c. Landlord will not be required to keep the security deposit separate from its own funds and Tenant shall not be entitled to interest on the security deposit. The security deposit will not be a limitation on Landlord's damages or other rights under this lease, or a payment of liquidated damages, or an advance payment of the rent. If Tenant pays the rent and performs all of its other obligations under this lease, Landlord shall return the unused portion of the security deposit to Tenant within sixty (60) days after the end of the term; however, if Landlord has evidence that the security deposit has been assigned to an assignee of the Tenant, Landlord shall return the security deposit to the assignee. Landlord may deliver the security deposit to a purchaser of the premises and be discharged from further liability with respect to it.

## 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 will use the premises for the purpose of office space and supporting retail with incidental uses to include speaker series, film screenings, volunteer recruitment and appreciation parties, trainings, art exhibits and art auctions, team building activities such as exercise and mediation so long as Tenant at all times complies with occupancy limits as determined by the Berkeley Fire Department prior to each and any proposed use and confines all activities to the premises (as opposed to the mall's common areas) 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 between the hours of 8:00 a.m. and 10:00 p.m. on any day Tenant shall have obtained any permit required by federal, state or local law.~~ At a minimum, Tenant shall operate the business with sufficient staff to serve the public during the hours of 10:00 a.m. to 6:00 p.m. Monday through Saturday.

c. Tenant agrees to abide by all "Rules and Regulations for Shopping Mall," as they may be amended by the City from time to time, the current version of which is attached hereto as Exhibit B. Landlord agrees not to arbitrarily enforce rules and regulations against Tenant or without having a rational basis for doing so, as they may be amended by the City from time to time.

d. In addition to Tenant's agreement to abide by all other restrictions on Tenant's use, Tenant hereby covenants that it shall not use the demised premises to engage in the primary business of a flower shop, which shall include engaging in the primary business of selling flowers, plants, or related supplies. 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.

e. Tenant shall follow all environmental rules and regulations as they apply to City agencies. The City adheres to procedures for energy conservation and load curtailment, and sets the thermostat at 68 degrees during occupied hours, and 55 degrees during unoccupied hours.

## 8. TAXES AND ASSESSMENTS

a. Tenant recognizes and understands that this lease may create a possessory interest subject to property taxation and assessment and utility taxation,



and that the Tenant will be responsible for the payment of any property taxes and assessments, and utility taxes levied on such interest.

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.

## **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, all fixtures, interior walls, floors, ceilings, plumbing, glass, roof, heating, ventilating and 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 exterior or interior of the premises, nor shall Tenant mark, paint, drill or in any way deface any floors, walls, ceilings, 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, ~~Corporation Yard, 1326 Allston Way~~2180 Milvia Street, Third Floor, Berkeley, California, 9470410.

e.f. Tenant shall provide a certificate of insurance that conforms to the requirements of this restated and amended lease

**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 Amdo, 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 or full-time employees, and generates \$350,000 or more in annual gross receipts, Tenant Ordinance No. ~~7,492~~-N.S.

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 a 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. Landlord's consent shall not be unreasonably withheld so long as Tenant's proposed signage is consistent with the nature, size and style of the approved signage used by other tenants in the Telegraph Channing Mall.

## 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 or rent-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. 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: City of Berkeley  
Real Property  
Department of Public Works, Facilities Division  
2180 Milvia St.  
Berkeley, CA 94704

With a copy to: MRE Commercial Real Estate  
6001 Shellmound Street, Suite 825  
Emeryville, CA 94608

To the Tenant:

Prior to Occupancy Friends of DxE  
c/o Amy Hsiung, President  
3365 Gross Road  
Santa Cruz, CA 95062

After Occupancy Friends of DxE  
c/o Amy Hsiung, President  
2425 Channing Way, Suite C  
Berkeley, CA 94720

### 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 five (5) 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.

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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 LEASE HAS BEEN  
BY: APPROVED AS TO FORM  
BY THE CITY ATTORNEY  
OF THE CITY OF  
BERKELEY  
6/2004

REGISTERED

City Auditor

ATTEST:

Deputy City  
Clerk

TENANT

Signature

Title President, Friends of DxE International City of Berkeley Business License No.  
BLA-2016-000745

**EXHIBIT B**  
**TELEGRAPH CHANNING MALL RULES & REGULATIONS**

Tenant shall comply with the following Rules and Regulations. Landlord shall not be responsible to Tenant for the failure of any other tenant or occupant of the building to comply with any of these Rules and Regulations:

1. ~~No sign, placard, picture, name, advertisement, or notice visible from the exterior of the premises will be inscribed, painted, affixed, or otherwise displayed by tenant on any part of the shopping mall without the prior written consent of landlord. Landlord will adopt and furnish to tenant general guidelines relating to signs inside the shopping mall. Tenant agrees to comply with those guidelines. All approved signs or lettering on doors will be printed, painted, affixed, or inscribed at the expense of the tenant by a person approved in writing by landlord. Material visible outside the shopping mall will not be permitted.~~
2. ~~The directory of the shopping mall (if any) will be provided for the display of the name and location of tenants, and landlord reserves the right to exclude any other names from the directory. Any additional name that tenant desires to place upon the directory must be first approved by landlord, and, if so approved, a charge will be made for the additional name.~~
3. ~~Tenant shall assume all responsibility for protecting the premises from theft, robbery, pilferage, vandalism, damage, or waste, including keeping doors locked and other means of entry to the premises closed and turning off all water faucets, water apparatus, and utilities. Tenant shall be responsible for any waste or damage to the premises or any injuries sustained by other tenants or occupants of the shopping mall or Landlord for Tenant's negligent or willful acts or omissions in protecting the premises as set forth herein.~~
4. ~~Landlord may waive any one or more of these rules and regulations for the benefit of any particular tenant or tenants, but no waiver by landlord will be construed as a waiver of these rules and regulations in favor of any other tenant or tenants, nor prevent landlord from enforcing any of these rules and regulations against any or all of the tenants of the shopping mall. Any waiver of these rules and regulations by Landlord shall be in writing.~~
5. ~~Landlord reserves the right at any time to change or rescind any one or more of these Rules and Regulations or to make any additional reasonable Rules and Regulations that, in Landlord's judgment, may be necessary for:~~
  - a. ~~The management, safety, care, and cleanliness of the Premises, Building, and Real Property.~~
  - b. ~~The preservation of good order; and~~



- ~~e. The convenience of other occupants and tenants in the Premises, Building, and Real Property.~~

## EXHIBIT B

### TELEGRAPH CHANNING MALL RULES & REGULATIONS

Tenant shall comply with the following Rules and Regulations. Landlord shall not be responsible to Tenant for the failure of any other tenant or occupant of the Building to comply with any of these Rules and Regulations:

1. No sign, placard, picture, name, advertisement, or notice visible from the exterior of the premises will be inscribed, painted, affixed, or otherwise displayed by tenant on any part of the Building without the prior written consent of landlord which consent shall not be unreasonably withheld so long as the tenant's proposed signage is consistent with the size, style and quality of approved signage used by other tenants in the Building. Landlord may adopt and furnish to tenant written general guidelines relating to signs inside the Building. Tenant agrees to comply with such guidelines. All approved signs or lettering on doors will be printed, painted, affixed, or inscribed at the expense of the tenant by a person approved in writing by landlord. Material visible outside the Building will not be permitted.
2. The directory of the Building (if any) will be provided for the display of the name and location of tenants, and landlord reserves the right to exclude any other names from the directory. Any additional name that tenant desires to place upon the directory must be first approved by landlord, and, if so approved, a charge will be made for the additional name.
3. Tenant shall assume all responsibility for protecting the premises from theft, robbery, pilferage, vandalism, damage, or waste, including keeping doors locked and other means of entry to the premises closed and turning off all water faucets, water apparatus, and utilities. Tenant shall not install or maintain a lockbox within the Building or elsewhere to provide access or a key to the leased premises or any area of the Building. Tenant shall be responsible for any waste or damage to the premises or any injuries sustained by other tenants or occupants of the Building or Landlord for Tenant's negligent or willful acts or omissions in protecting the premises as set forth herein.
4. No bicycles, scooters or motorcycles shall be parked or stored in the leased premises or anywhere in the Building.
5. Any improvements made by Tenant shall comply with all applicable laws and codes, including applicable code requirements for electrical wiring, outlets and switches. Any electrical or other cord used in the leased space must be placed and secured to avoid risks of tripping or other injury or property damage. Electrical and other cords or wires shall not hang down from or extend up to the ceiling.
6. Landlord may waive any one or more of these rules and regulations for the benefit of any particular tenant or tenants, but no waiver by landlord will be construed as a waiver of those rules and regulations in favor of any other tenant or tenants, nor prevent landlord from enforcing any of those rules and regulations against any or all of the tenants of the Building. Any waiver of these rules and regulations by Landlord shall be in writing.
7. Landlord reserves the right at any time to change or rescind any one or more of these Rules and Regulations or to make any additional reasonable

Rules and Regulations that, in Landlord's judgment, may be necessary for:

- a. The management, safety, care, and cleanliness of the Premises, Building, and Real Property.
- b. The preservation of good order; and
- c. The convenience of other occupants and tenants in the Premises, Building, and Real Property.