



CITY OF PORTLAND

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Hearings Office

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HEARINGS OFFICER'S ORDER

CITY OF PORTLAND, Petitioner, vs. NORTHWEST ARBOR-CULTURE INC., Respondent

CASE NO. 2110009

[Bureau Case No. 11-161342-PF]

PROPERTY: Sidewalk of the Unitas Plaza Block
SW 5th Avenue, SW 6th Avenue, SW Jefferson Street, and SW Columbia Street

LEGAL DESCRIPTION:

City of Portland, Multnomah County, Oregon

DATE OF HEARING: November 22, 2011, and January 3, 2012

APPEARANCES:

Mr. Chris Nash, on behalf of Respondent

Mr. Lou Phemister, on behalf of the City

HEARINGS OFFICER: Mr. Gregory J. Frank

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Mr. Chris Nash ("Nash") appeared at the November 22, 2011, hearing ("1st Hearing") and the January 3, 2012, hearing ("2nd Hearing") on behalf of Respondents. Mr. Lou Phemister ("Phemister"), City of Portland Urban Forestry Inspector, appeared at the 1st Hearing and 2nd Hearing as the City of Portland representative.

Nash, at the 1st Hearing, requested the Hearings Officer to remove his name as a listed Respondent. The Hearings Officer concurred.

Nash, at the 1st Hearing, advised the Hearings Officer that he received the Notice of Hearing only a few days before the 1st Hearing and was unable to consult with an attorney and/or be properly prepared to defend himself. Nash indicated that he desired to discuss the case with his attorney and he expected that his attorney would request permission to seek tissue samples from one or all of the seven trees that the City alleged were the subject of improper arboricultural practices. The Hearings Officer granted a continuance of the hearing until 9:00 a.m. on January 3, 2012.

Nash, at the 2nd Hearing, was not accompanied by an attorney. Nash expressed, at the 2nd Hearing, some confusion with respect his right to secure the services of an attorney for the 2nd Hearing. The Hearings Officer offered to continue the hearing once again if Nash still desired to be represented by an attorney. Nash informed the Hearings Officer that he really couldn't afford an attorney for this case and requested the Hearings Officer provide legal counsel for Respondent. The Hearings Officer informed Nash that the present case is civil in nature and the City does not provide legal counsel to respondents. Nash, following the above discussion, expressed his desire to proceed with the 2nd Hearing and represent Respondent.

Documents Admitted into the Evidentiary Record

The Hearings Officer, during the course of the 2nd Hearing, admitted Exhibits 1 through and including 14 into the evidentiary record. All exhibits admitted were done so without objection of either the City or Nash, excepting Exhibit 14.

Phemister offered Exhibit 14 for the purpose of providing evidence of proper arboricultural practices. Phemister represented Exhibit 14 as being published by the International Society of Arboriculture ("ISA") under the "auspices of ANSI" and a "companion publication to ANSI A300." Nash objected to the admission of Exhibit 14 on the basis that Exhibit 14 may not represent the industry standards related to the alleged violations in this case. Nash argued that ISA is merely a trade organization and that it is not certified by any governmental body.

Portland City Code ("PCC") 22.03.080 addresses evidentiary matters associated with Code hearing cases. PCC 22.03.080 A. states:

"Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. Erroneous rulings on evidence shall not preclude action by the Code Hearings Officer on the record unless shown to have substantially prejudiced the right of a party. All other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs shall be admissible. The Code Hearings Officer shall give effect to the rules of privilege recognized by law. Objections to evidence may be received in written form."

Portland Policy Document ADM 9.01, the Rules of the City of Portland Code Hearings Officer, in section 12, also applies. ADM 9.01 section 12 basically restates the language contained in PC 22.03.080 A.

The Hearings Officer finds that Phemister, during his testimony in the 2nd Hearing, referenced Exhibit 14 as representing the arboricultural industry standards for cutting and pruning trees. The Hearings Officer finds that Exhibit 14 is relevant to the case at hand. The Hearings Officer shall, in making a decision in this case, consider both Phemister's and Nash's arguments related to whether or not Exhibit 14 should be considered, in part or whole, in determining if Respondent used proper arboricultural practices in pruning trees identified in Exhibits 1, 5 and 6. As in all Code Hearing cases, the Hearings Officer shall assess the credibility of testimony and documents admitted into the record, in reaching a decision.

Summary of City Code Violation Complaint

The City filed a City Code Violation Complaint (Exhibit 1). Exhibit 1 sets forth allegations which, if proven true, allow the Hearings Officer to impose a civil penalty; the City has requested the Hearings Officer assess a \$700.00 civil penalty. Paragraph 2 of Exhibit 1 sets forth the alleged violation:

"Improper arboricultural procedure in violation of City Code 20.40.080 B. and as stated within Street Tree Pruning Permit # 11-161342-PF requiring proper arboricultural pruning practice. Violation occurred between the issuance of the permit on 7/26/11 and when first noticed on 8/9/11."

Relevant City Code Laws/Rules

Respondent is alleged, by the City, to have violated PCC 20.40.080 B. This section of the PCC states:

"It is the duty of every owner of property adjacent to which or in front of which any tree is standing on any street and of every owner of property upon which any tree is standing which projects into the street to maintain and prune such tree using proper arboricultural procedures, according to the requirements for tree branch clearance over street and sidewalk areas and signs as set forth in Title 16, 17 and 20 of the Code of the City of Portland. The Forester shall give, with each permit printed, standards for proper arboricultural procedures."

The City also requested the Hearings Officer take notice of PCC 20.40.215 A. PCC 20.40.215 A. states:

"Any person who cuts or removes any trees that is subject to the provisions of this Chapter, or who contracts for, pays for or otherwise allows or suffers such cutting or removal, if such cutting removal is undertaken without a permit, shall be subject to a civil penalty as provided in this Section. For purposes of this Section, each tree shall constitute a separate violation, and each day that a person fails to obtain a permit or remains in non-compliance with a permit shall also constitute a separate violation. The Forester, or the Forester's designee, is authorized to initiate proceedings before the Code Hearings Officer, pursuant to the procedures in Title 22 of this Code, to enforce the provisions of this Section.

1. For each separate violation, a civil penalty of up to \$1,000 may be assessed.
2. In determining the amount of any civil penalty to be assessed, the Code Hearings Officer will consider the following:
 - a. The nature and extent of the responsible party's involvement in the violation;
 - b. The benefits, economic, financial or otherwise, accruing or likely to accrue to the violator as a result of the violation;
 - c. Whether the violation was isolated and temporary, or repeated and continuing;
 - d. The magnitude and seriousness of the violation;
 - e. The City's cost of investigation and remedying the violation;
 - f. Any other applicable facts bearing on the nature and seriousness of the violation."

The City's primary argument, in this case, focused on Respondent's actions at the City of Portland block bounded by SW 5th, SW 6th, SW Jefferson and SW Columbia (hereafter the "Unitas Block"). In particular, the City argued that Respondent violated PCC 20.40.080 B in that Respondent's tree pruning activities under Street Tree Pruning Permit # 11-161342-PF (the "Permit") failed to utilize "proper arboricultural procedures." The Hearings Officer finds that the phrase "proper arboricultural procedures" is not a defined term in PCC 20.40.020. As such, the Hearings Officer shall look to either the dictionary definitions of the words used in the phrase, or in the alternative, look to recognized industry standards.

Interpretation of "Proper Arboricultural procedures"

The last sentence of PCC 20.40.080 B. states that the City Forester "shall give, with each permit printed, standards for proper arboricultural procedures." There is no evidence in the record that Respondent was provided, with the Permit, standards for proper arboricultural procedures. The Hearings Officer takes note that the Permit itself (Exhibit 4), in the Comments section, states that "only proper arboriculture pruning is permitted: topping, branch stubbing, heading, and pollarding are not permitted." The Hearings Officer finds, for the purposes of this case, that "proper arboricultural procedures" is defined as prohibiting "topping, branch stubbing, heading, and pollarding."

Summary of Evidence

Both Phemister and Nash expended considerable time presenting documents, testimony and argument as to how "proper arboricultural procedures" should be interpreted by the Hearings Officer in this case. However, as determined above, "proper arboricultural procedures" shall be defined to only prohibit "topping, branch stubbing, heading and pollarding." The Hearings Officer is fully aware that in the arboricultural industry "proper arboricultural procedures" may include many other directions and prohibitions. In this case, PCC states that the City Forester will provide, with each street tree permit "standards for proper arboricultural procedures." The Hearings Officer finds that the City, in this case, did just that. The Hearings Officer, therefore, must disregard all of Phemister's and Nash's references to ANSI 300 A and ISA Best Management Practices.

The Hearings Officer's review of the testimony and documents indicates that Respondent likely used, on seven trees on the Unitas Block that were subject to the Permit, some sort of "irons" in climbing those trees. The Hearings Officer's review of Phemister's testimony indicated that he (Phemister) may have observed some "improper cuts" but he (Phemister) was not alleging those "improper cuts" were violations in this case. The Hearings Officer finds no evidence in the record that Respondent, at the Unitas Block tree cutting under the Permit, engaged in topping, branch stubbing, heading or pollarding.

The Hearings Officer finds that the City has failed to carry its burden of persuasion that the alleged violations arising from tree cutting at the Unitas Block under the Permit occurred. The Hearings Officer finds the City's request for civil penalties cannot be approved by the Hearings Officer.

ORDER AND DETERMINATION:

1. The City of Portland allegations of violations in Exhibit 1 are denied; no civil penalties are assessed.
2. This order has been mailed to the parties on January 9, 2012, and shall become final and effective on January 23, 2012. Any objections to this order must be in writing and received by the Code Hearings Office prior to the effective date. This case will be closed on January 24, 2012.
3. This order may be appealed to a court of competent jurisdiction pursuant to ORS 34.010 et seq.

Dated: January 9, 2012

GJF:rs/jeg



Gregory J. Frank, Hearings Officer

Enclosure

Exhibit #	Description	Submitted by	Disposition
1	Complaint	Phemister, Lou	Received
2	Mailing List	Phemister, Lou	Received
3	Appeal form page 1	Phemister, Lou	Received
4	Appeal form page 2	Phemister, Lou	Received
5	8/12/11 letter, Rob Crouch to Nash	Phemister, Lou	Received
6	Street Tree Pruning Permit	Phemister, Lou	Received
7	10/6/11 Tree Report	Phemister, Lou	Received
8	Photos	Phemister, Lou	Received
9	Mailing List	Hearings Office	Received
10	Hearing Notice	Hearings Office	Received
11	Notice of Rights and Procedures	Hearings Office	Received
12	ANSI Standards	Northwest Arbor-Culture Inc.,	Received
13	Occupational Safety and Health Standard	Northwest Arbor-Culture Inc.,	Received
14	ISA Publication	Phemister, Lou	Received