



# CITY OF PORTLAND

Office of City Auditor LaVonne Griffin-Valade

## Hearings Office

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## HEARINGS OFFICER'S ORDER

### APPEAL OF CARY PAUL LUNDGREN

CASE NO. 3120413

[Police Bureau Case No. 10-069375]

PROPERTY: 4005 NE 15<sup>th</sup> Avenue

DATE OF HEARING: October 16, 2012

### APPEARANCES:

Mr. Scott Moede, Attorney for the City

Mr. Robert Yamachika, Attorney for the City

Mr. Charles Denkers, Attorney for Appellant

Mr. Cary Lundgren, Appellant

HEARINGS OFFICER: Ms. Kimberly M. Graves

Mr. Cary Paul Lundgren ("Lundgren") appeared at the hearing with his attorney, Mr. Charles Denkers ("Denkers"). Lundgren testified at the hearing on his own behalf. Attorneys Rob Yamachika ("Yamachika") and Scott Moede ("Moede") appeared at the hearing on behalf of the City Bureau of Police ("Police Bureau"). Detective Robert Hollins ("Hollins"), Officer Scott McCollister ("McCollister"), and Ms. Kris Gates ("Gates") testified on behalf of the Police Bureau. The Hearings Officer makes this decision based upon the testimony of Lundgren, Hollins, McCollister and Gates and the documents admitted into the evidentiary record (Exhibits 1 through, and including, 7, 10 through, and including, 21).

### **Background:**

**Jurisdiction:** Lundgren's appeal was filed pursuant to Oregon Revised Statute 453.876. The parties have agreed that the matter shall be heard by the Hearings Officer, and have agreed that the Hearings Officer has jurisdiction over the appeal.

**Standards of Review:** The standards of review in this appeal case are found in section 453 of the Oregon Revised Statutes ("ORS") and section 333-040 of the Oregon Administrative Rules ("OAR") for the Oregon Health Authority, Public Health Division. The relevant portions of the ORS and OAR are set forth below:

**453.876 Determination that property is not fit for use; appeal; notice to local residents.** "... any law enforcement agency may determine that property is not fit for use pursuant to ORS 105.555, 431.175 and 453.855 to 453.912 and applicable rules adopted by the Oregon Health Authority and may make that determination on site. The determination is effective immediately and renders the property not fit for use."

**453.861 Applicability.** "The provisions of ORS 105.555, 431.175 and 453.855 to 453.912 apply to any property ... for which there are reasonable grounds to believe that the property has been used as an illegal drug manufacturing site."

**453.858 Definitions for ORS 453.855 to 453.912.** "As used in ORS 453.855 to 453.912:

- (1) "Controlled substance" does not include marijuana.
- (2) "Illegal drug manufacturing site" means any property on which there is a reasonably clear possibility of contamination with chemicals associated with the manufacturing of controlled substances and:
  - (a) Where activity involving the unauthorized manufacture of a controlled substance listed on Schedules I and II or any precursor chemical for such substances occurs; or
  - (b) Wherein are kept, stored or located any of the devices, equipment, things or substances used for the unauthorized manufacture of a controlled substance listed on Schedules I and II.
- (3) "Property" means any:
  - (a) Real property, improvements on real property or portions of the improvements;
  - (b) Boat, trailer, motor vehicle or manufactured dwelling; or
  - (c) Contents of the items listed in paragraph (a) or (b) of this subsection."

**Oregon Administrative Rule 333-040-0010 Definitions:**

"(8) **"Reasonable grounds"** -- includes, but is not limited to, the presence of chemicals, substances, apparatus and chemical residues commonly associated with an illegal drug manufacturing site.

**Oregon Administrative Rules 333-040-0050 Determination of Unfitness for Use:**

"(1) The determination that a property is unfit for use applies to any property ... for which there are reasonable grounds to believe that the property has been used as an illegal drug manufacturing site. ... (3) An agency determining property unfit for use shall proceed as follows:

- (a) Notify the owner or agent of the affected property by personal service or by certified mail sent within 3 working days of the determination. Proof of such mailing shall be considered service. Proof of actual delivery is not required. Where the owner of record or the title or certificate holder is not listed in public records or cannot be reasonably notified, service of notice on the registered agent or other designated agent is sufficient;
- (b) Mail a copy of the notice to the owner/agent as required in subsection (3)(a) of this rule to the Division. The Division shall notify the State Building Codes Division, the

Department of Motor Vehicles, the State Marine Board and/or other affected agencies; and

(c) Post a standard warning notice provided by the Division at all entrances to the contaminated property at the time of the determination. Such notice(s) shall be displayed continuously until a Certificate of Fitness has been issued by the Division.

(4) The notice required in subsection (3)(a) of this rule shall include all of the specific information in the sample notice available from the Division, but need not be identical in form. This notice shall also include a statement that the owner may obtain a hearing by making a written request to the agency making the determination within 30 days."

To find that the Police Bureau properly designated Lundgren's property as an illegal drug manufacturing site, the Hearings Officer must find, based upon substantial evidence in the record, that the property contained chemicals, substances, apparatus and/or chemical residues commonly associated with contaminated properties which are used for, or store the equipment or substances used for, the production of a Schedule I or II controlled substance and/or its precursors.

**Presentation of Evidence:** The Police Bureau presented their witnesses first. The Hearings Officer summarizes the testimony, including cross examination responses, of each of the Police Bureau witnesses.

Hollins, a 24-year veteran of the Police Bureau, testified that on December 21, 2011, he was participating in the execution of a search warrant at the property located as 4005 NE 15<sup>th</sup> Avenue in Portland, Oregon. Hollins testified that the search warrant was related to a robbery investigation. Hollins testified that during the execution of the warrant, he was called to the basement by a Police Bureau Sergeant to look at "a possible drug lab." Hollins testified that there was a small room within the basement where he found glassware, funnels, tubing and dark liquid in a large glass jug. Hollins testified that he looked at the items for approximately 15 seconds before concluding that they were part of a "boxed lab." Hollins testified that a boxed lab is the term for a lab that is not in use after production of methamphetamine has stopped. Hollins testified that he investigated over 100 methamphetamine labs during his career, and that he notified the drug and vice division that there was a methamphetamine lab contained in the basement of 4005 NE 15<sup>th</sup> Avenue. Hollins testified that a search warrant was obtained by the drug and vice division to search the home. Hollins answered cross examination questions put to him by Denkers. Hollins testified that he only observed the room in the basement for a brief time, and that he did no further investigation beyond his initial observation of the room. Hollins testified that he remembers there being one glass vessel in the basement which contained a brown liquid. Hollins testified that there were other glassware items in the room also.

McCollister, a 12-year veteran of the Police Bureau (5 years in the Drugs and Vice Division), testified that on December 21, 2011, he was the "processing officer" during the execution of a search warrant on 4005 NE 15<sup>th</sup> Avenue to investigate the presence of a suspected drug lab. McCollister testified that while processing a suspected drug lab, the officers would evaluate the items found in the suspected lab, remove items and collect samples of each for testing, and then label the items for destruction. McCollister testified that the following items were collected and processed from the property located at 4005 NE 15<sup>th</sup> Avenue: a jar containing a brown liquid, red and white pills found in Tupperware containers or boxes, white powder found in a box, white powder found in a plastic sandwich bag, paper coffee filters containing a crystal substance, a quart of acetone, a coffee grinder containing white powder, a blender, white pills contained in a plastic sandwich bag labeled "pseudoephedrine," iodine, peroxide, a 5-gallon jug containing a brown liquid, "pH solutions," Red Devil lye, lye, and pH strips. A

complete list of the items taken from the property can be found in Exhibit 4. McCollister testified that the coffee grinder and blender were collected because they are appliances which can be used during the initial steps of making methamphetamine. McCollister testified that the pH solutions and strips were collected because when making methamphetamine, the pH of the drug must be tested. McCollister testified that the process of making methamphetamine creates a very acidic compound. McCollister testified that lye is typically added to the compound to make the compound more basic. McCollister testified that test strips are typically used to test to ensure that the compound is basic enough for consumption. McCollister responded to cross examination questions put to him by Denkers. McCollister testified that he did not know why the crime lab report was dated April 3, 2012. McCollister testified that he did not conduct field testing on any of the items taken from 4005 NE 15<sup>th</sup> Avenue. McCollister testified that field testing is not conducted at manufacturing sites, and that field testing of liquids is never done. McCollister testified that the crime lab tests showed that the pills and powders taken from the home were pseudoephedrine. McCollister testified that since 2005, a prescription is required to possess pseudoephedrine. McCollister was asked by Denkers where the acetone was found within the basement. McCollister testified that the acetone was located in the basement bathroom. Denkers showed McCollister a photo, Exhibit 15, and asked whether the acetone was found within the area depicted in the photo. McCollister responded that he did not recall if the acetone was in the area depicted in Exhibit 15. McCollister testified that no samples were taken from the blender or coffee grinder. McCollister testified that "residual items" cannot be tested. Denkers asked whether there was powder or a metallic substance inside the blender. McCollister testified that the substance was metallic, and that metals are used in the process of making methamphetamine. McCollister was asked to describe the area where the items listed in Exhibit 4 were collected. McCollister testified that the items were in the southwest corner of the basement in a medicine cabinet and the surrounding area. Denkers offered Exhibit 16, a property receipt, into the evidentiary record. Denkers asked McCollister about why the receipt listed the cabinet as being in the northwest corner of the basement. McCollister testified that he could not describe the exact location of the cabinet. McCollister testified that he does not recall any "lockers" in the basement. McCollister testified that he does not recall calling the "bomb squad" to the location to investigate any suspicious items. McCollister testified that he was at the location for "several hours."

Gates, a Forensic Scientist with the Oregon State Police Crime Lab, testified that she tests and reports on substances submitted to her by police agencies. Gates testified that the items in this case came to her with the question, "Are these items part of a drug lab?" Gates testified that Exhibit 6 is a copy of the lab report she wrote based on her testing of items collected from 4005 NE 15<sup>th</sup> Avenue. Gates testified that she tested a brown liquid which was collected from two different glass vessels seized at the property. Gates testified that no controlled substances were found within the liquid. Gates testified that the liquid smell "yeasty," but that the liquid was not tested for the presence of alcohol. Gates testified, with regard to the other items seized, that there was no methamphetamine found, but that the precursors to methamphetamine were present. Gates testified that most of the items tested were "pharmaceutical medications" containing pseudoephedrine. Gates testified that a total of 986 pills were submitted to the lab for testing. Gates testified that 986 pills contain a total of 33 grams of pseudoephedrine. By way of illustration, Gates testified that it is lawful to possess up to 6 grams of pseudoephedrine. Exhibit 17 was submitted on behalf of the Police Bureau to illustrate more clearly the number and type of pills submitted for testing. Gates testified that in addition to the whole pills containing pseudoephedrine, items 6, 7 and 8 in her lab report also contained pseudoephedrine. Gates testified that the process of manufacturing methamphetamine requires the extraction of pseudoephedrine from the pills which contain a mixture of pseudoephedrine and binding agents. Gates testified that the process of extraction typically involves crushing the pills either mechanically or by hand and then soaking the pills in a

solvent. Gates testified that soaking the pills in the solvent separates out the binders into a paste-like substance and leaves the pseudoephedrine behind in a crystallized form. Gates testified that the substance listed as #6 in her lab report is a white granular substance which contained pseudoephedrine. Gates testified that the substance listed as #7 in her lab report is the paste-like substance which contained pseudoephedrine, and appeared to be the substance left behind during the extraction process. Gates testified that the item listed as #8 in her lab report was a paper filter containing a crystalline residue which tested positive for pseudoephedrine. Exhibit 18 was submitted on behalf of the Police Bureau to further illustrate the process undertaken to produce methamphetamine. Exhibit 18 breaks the process of making methamphetamine into 10 steps. Gates testified that the items seized are consistent with the first two steps necessary to produce methamphetamine. Gates testified that marked on Exhibit 18 are the items necessary to make methamphetamine, which were seized from 4005 NE 15<sup>th</sup> Avenue. Gates testified that she concluded, based on the totality of the items seized, that methamphetamine production was being undertaken. Gates indicated that the "key" items in her mind were items 7 and 8 which indicate that someone has extracted pseudoephedrine from pills. Gates answered cross-examination questions put to her by Denkers. Gates testified that she did not receive any fluids in this matter that were consistent with methamphetamine production. Gates agreed that in the past, when clandestine drug labs were much more prevalent, liquids involved in the production of methamphetamine would often be submitted for testing. Gates testified that in this matter the "reaction" had not yet started, so the liquid previously seen did not yet exist. Gates testified that no glassware consistent with methamphetamine production was submitted.

The Police Bureau offered Exhibits 1 through, and including, 8, 17 and 18 into the evidentiary record. Exhibit 9 was not offered. Denkers objected to Exhibit 8, which the Hearings Officer found to be irrelevant, and did not include in the evidentiary record. The other exhibits offered by the Police Bureau were admitted without objection. The Police Bureau concluded their case.

Lundgren testified on his own behalf. Lundgren testified that he is the owner of the property located at 4005 NE 15<sup>th</sup> Avenue. Lundgren testified that he has owned the property since 1995. Lundgren testified that on December 21, 2011, there were approximately seven people residing at the home. Lundgren testified that on December 21, 2011, three different "searches" of his home took place; one for a robbery investigation, one regarding a suspected drug lab, and one by the "bomb squad." Lundgren testified that after the searches were concluded, there were yellow signs from the Police Bureau attached to all of the doors to his property. The signs, Lundgren testified, indicated that the property was "uninhabitable." Regarding the condition of his home, Lundgren testified that he purchases the contents of storage units and stores the items he purchases in his basement. Lundgren testified that he then sells any usable items on eBay, and the other items are left in his basement. Exhibit 19 was submitted to further illustrate the condition of the basement on or about December 21, 2011. Lundgren testified that he did not know that there was an "illegal" amount of drugs in his basement. Lundgren testified that the drugs came from one of the storage units that he had purchased, and that the items did not belong to him. Lundgren testified that the liquid seized by police was beer-making "wort" left over from previous batches of beer. Lundgren testified that he had numerous items in his basement bathroom for beer making. Exhibit 20 was submitted to show the beer-making items and their location in the basement bathroom. Lundgren testified that the iodine, peroxide and the lye seized by police were taken from upstairs in his home, not from the basement. Lundgren testified that he kept each of those items for their lawful, intended purpose. Lundgren testified that the muriatic acid was seized from the basement, but that was used for cleaning concrete, not for making drugs. Lundgren testified that the acetone seized from his property belonged to a friend who was living in his basement in December 2011. Lundgren testified that his friend stored his personal items in small plastic storage bins, and that the acetone seized

by the police came from one of the bins. Exhibit 15 was offered to show the type of bin the acetone was taken from, according to Lundgren. Lundgren testified that the "bomb squad" was called to his home because of battery packs that he manufactures in his basement. Lundgren testified that the bomb squad was at his home for over 18 hours, but that he was never charged with any crime. Lundgren testified that he and his family vacated the home on December 21, 2011, based on the instructions in the notices which were taped to the doors by the Police Bureau. Lundgren testified that he received no further contact from the Police Bureau, so after three days had passed, he and his family moved back into the home. Lundgren testified that the next contact he received from the Police Bureau was a letter, Exhibit 21, dated January 4, 2012, indicating that his home had been designated as an illegal drug manufacturing site. Lundgren testified that the letter was sent to him in the mail, and that he was never personally served with any papers from the Police Bureau regarding his home. Lundgren answered cross examination questions put to him by Moede on behalf of the Police Bureau. Lundgren reiterated that the police "trashed" his house during their search and seized items from different locations than were noted on the property receipts. Lundgren testified that he knew that there was pseudoephedrine, "other tablets," and "partial bottles" of pills in his basement. Lundgren testified that the items were not his and that they came from a storage unit that he purchased. Lundgren testified that he was not doing drug extraction and that he has no explanation for how, when or where the extraction was done. Lundgren testified that he does not believe that his friend was doing the extraction. Since the January 4, 2012 letter was received, Lundgren testified that three children have lived in the home. Lundgren testified that the house and/or basement have not been tested for contaminants, but that the children don't go into the basement. Lundgren testified that he has not had the house tested for contaminants due to the cost and his belief that the testing threshold is so low that the house would "come back dirty." Lundgren indicated that he believes the low threshold for the test would result in a positive test result for anywhere that was tested. With respect to the notices provided by the Police Bureau, Lundgren testified that his daughter took the police notices off the doors, but that he saw "at least one of them." Lundgren testified that he was aware that his son's girlfriend went to the police station located on 122<sup>nd</sup> Avenue to talk with the police about the notices on the home.

**Findings of Fact and Law:** The Hearings Officer begins by examining the argument by Denkers that this matter should be dismissed in its entirety based on the Police Bureau's failure to follow the procedures set out in OAR 333-040-0050 regarding personal service. The Hearings Officer finds that OAR 333-040-0050 requires notice be served upon the owner of a property within three days of the property being designated as an illegal drug manufacturing site. The Hearings Officer finds that the Police Bureau did not properly serve Lundgren within three days after the property was designated as an illegal drug manufacturing site. The Hearings Officer finds that Lundgren received notice via the U.S. Postal Service from the Police Bureau 14 days after his property had been designated as an illegal drug manufacturing site. The Hearings Officer considers the 3-part test set out in *Mathews v. Eldridge* (424 U.S. 319, 335 (1976)) when determining what, if any, effect the lack of personal service has on this matter. The Hearings Officer finds that an individual's interest in their real property, especially their primary residence, is high, and therefore procedures must be followed to ensure that an individual is not deprived of such property in error. The Hearings Officer finds that the procedures contained within OAR 333-040-0050 allows for three days between the designation and personal service. The Hearings Officer finds that the 3-day period for service set out in OAR 333-040-0050 is reasonable to reduce the risk of any erroneous deprivation, and that other procedural safeguards are unnecessary. The Hearings Officer finds that the Police Bureau has a strong interest in protecting the community from the risks associated with clandestine labs, and that additional delay, beyond the 3-day timeframe, could result in a risk of harm to community members. The Hearings Officer finds that the Police Bureau's delay of 14 days before sending notice of the designation to Lundgren had had no adverse effect on Lundgren's

rights. The Hearings Officer notes that all parties stipulated that Lundgren's appeal was filed in a timely manner, and that an agreement was reached between the Police Bureau and Lundgren about the timing for the appeal hearing. The Hearings Officer notes that all parties stipulated prior to the hearing, that should the property located at 4005 NE 15<sup>th</sup> Avenue be found to be an illegal drug manufacturing site, any liens on the property shall be calculated from the date of the Hearings Officer's order and not from the date of the initial search of the property. The Hearings Officer finds that Lundgren has not been deprived of his property without due process of law as a result of the lack of timely, personal service by the Police Bureau. The Hearings Officer finds that the failure by the Police Bureau is de minimis, and does not warrant dismissal of this matter. The Hearings Officer finds that Denker's argument that the case should be dismissed due to lack of timely, personal service is without merit.

The Hearings Officer found the testimony of Hollins, McCollister and Gates to be credible. The Hearings Officer found the testimony of Lundgren to generally be less credible than that of the other testifying witnesses. The Hearings Officer finds Exhibit 4 and the testimony of McCollister to be accurate and truthful about the location of items within the property prior to seizure by the Police Bureau. The Hearings Officer finds the testimony of Gates regarding the substances identified in the samples seized from the property to be accurate and truthful. The Hearings Officer finds the testimony of Gates that the substances seized from the property were consistent with methamphetamine production to be accurate and truthful. The Hearings Officer finds credible the statement of Gates that the extraction of pseudoephedrine from pharmaceutical tablets has no lawful purpose, and is a necessary step in methamphetamine production.

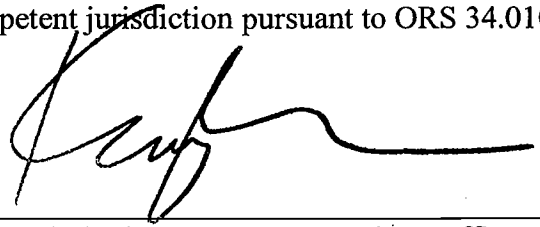
The Hearings Officer finds, based on the substantial evidence in the record, that the property located at 4005 NE 15<sup>th</sup> Avenue contains chemicals, substances, apparatus and chemical residues commonly associated with the manufacturing of methamphetamine, a Schedule I controlled substance. The Hearings Officer finds that the chemicals, substances, apparatus and chemical residues present in the property contaminate the area in which they are contained given the large quantity of precursor substances present, and that the substances have been changed from their original form and/or have been mixed with other chemicals.

The Hearings Officer affirms the Police Bureau's determination that the property located at 4005 NE 15<sup>th</sup> Avenue is an illegal drug manufacturing site as defined in ORS section 453 and OAR section 333-040. The Hearings Officer denies Lundgren's appeal of the Police Bureau determination.

#### ORDER AND DETERMINATION:

1. The property located at 4005 NE 15<sup>th</sup> Avenue shall be designated as an illegal drug manufacturing site, and shall be subject to the provisions of ORS section 453 and OAR section 333-040; Mr. Lundgren's appeal is denied.
2. This order has been mailed to the parties on November 16, 2012.

3. This order may be appealable to a court of competent jurisdiction pursuant to ORS 34.010 et seq.



Dated: November 16, 2012

Kimberly M. Graves, Hearings Officer

KMG:c1

Enclosure

Exhibit #	Description	Submitted by	Disposition
1	8/14/12 Interoffice Memo	Yamachika, Rob	Received
2	ORS printout	Yamachika, Rob	Received
3	Oregon State Archives printout	Yamachika, Rob	Received
4	PPB Special Report	Yamachika, Rob	Received
5	Photos	Yamachika, Rob	Received
6	Oregon State Police: Portland Metro Forensic Laboratory Report	Yamachika, Rob	Received
7	Incident Report	Yamachika, Rob	Received
8	Records for Cary Paul Lundgren	Yamachika, Rob	Rejected
9	Portland LEDS history for Cary Paul Lundgren	Yamachika, Rob	Not Offered
10	Mailing List	Hearings Office	Received
11	Hearing Notice	Hearings Office	Received
12	Address	Denkers, Charles P.	Received
13	Mailing List	Hearings Office	Received
14	Notice of Hearing	Hearings Office	Received
15	Photo	Denkers, Charles P.	Received
16	Property/Evidence Receipt	Denkers, Charles P.	Received
17	Summation of Pseudoephedrine in tablets	Yamachika, Rob	Received
18	Methamphetamine from pseudoephedrine, iodine, and red phosphorus	Yamachika, Rob	Received
19	Photos	Denkers, Charles P.	Received
20	Photos	Denkers, Charles P.	Received
21	1/4/11 letter from Police Bureau to Lundgren	Denkers, Charles P.	Received