



CITY OF

PORTLAND, OREGON

OFFICE OF THE CITY AUDITOR
Hearings Office

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HEARINGS OFFICER'S ORDER

APPEAL OF ARROW SANITARY SERVICE, INC.

CASE NO. 3100358

PROPERTY: 8131-8139 N. Denver

DATE OF HEARING: October 5, 2010

APPEARANCES:

Mr. Mark Peterson, for Arrow Sanitary Service

Mr. Kevin Veaudry Casaus, for the City

HEARINGS OFFICER: Mr. Gregory J. Frank

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

This appeal in this case was filed pursuant to Portland City Code section 17.102.100 and Portland Policy Document ENNN 2.10, Part 4.5 C. Appellant Arrow Sanitary Service, Inc. submitted a request for appeal to the City Code Hearings Office on September 7, 2010 (Exhibit 1a). The Hearings Officer finds he has jurisdiction over this appeal case.

Mr. Mark Peterson appeared at the hearing and represented Appellant. Mr. Kevin Veaudry Casaus appeared at the hearing and represented the City. Ms. Brie Heinz, Mr. Mark Peterson, and Mr. John B. Tolbert appeared at the hearing and testified on behalf of Appellant. Ms. Patty Van Antwerp appeared at the hearing and testified on behalf of the City. The Hearings Officer makes this decision based upon the testimony of Ms. Heinz, Mr. Peterson, Mr. Tolbert, Ms. Van Antwerp, the arguments presented by Mr. Peterson and Mr. Veaudry Casaus, and the documents admitted into the evidentiary record (Exhibits 1 through and including 13, except that Exhibit 9a and Exhibit 11 were not admitted).

Exhibit 3 is an August 27, 2010 letter from Ms. Patty Van Antwerp, City of Portland Bureau of Planning and Sustainability to Appellant (hereafter referred to as the "Determination Letter"). The Determination Letter informed Appellant of a violation of City of Portland Administrative Rules Part 4.5D, Containers in the Right of Way and Rules Part 4.5 A, Commercial Compliance and Enforcement. The Determination Letter assessed a penalty against Appellant in the amount of \$600.00. Appellant, in this

appeal, presents evidence and submits argument that the City erred in its issuance of the Determination Letter. Specifically, Appellant asserts that the City erred in finding Appellant committed a Code/Rule violation because (1) Appellant acted in good faith to correct an outstanding problem involving trash containers on the right of way at 8131-8139 North Denver Avenue (the "Subject Property"), (2) Appellant's placement of the trash containers on August 27, 2010 precluded a health/safety issue being created at the Subject Property and (3) the City represented to a Subject Property tenant representative that Appellant had 30 days to solve the trash containers in the right-of-way problem.

Mr. Tolbert operates a restaurant ("Po'Shines") at the Subject Property. Mr. Tolbert stated that Po'Shines contracted with Appellant to pick up trash containers at the Subject Property. Mr. Tolbert testified that he had communication with Ms. Van Antwerp and he recalled Ms. Van Antwerp talking about potential fines resulting from the trash containers being located in the City right-of-way. Mr. Tolbert recalled that he thought Ms. Van Antwerp told him that if Appellant acted in a timely manner, fines would be avoided by both Po'Shines and Appellant (See also Exhibit 13). Ms. Van Antwerp testified that she did have a conversation with Mr. Tolbert regarding fines not being assessed against Po'Shines. Ms. Van Antwerp denied telling Mr. Tolbert, or telling anyone else involved with this case, that the potential fines being assessed against Appellant would be avoided by timely action to correct the trash containers in the right-of-way violation. The Hearings Officer finds that Mr. Tolbert's testimony, at the hearing, was not definitive about fines being assessed against Appellant. The Hearings Officer finds Ms. Van Antwerp's testimony credible and definitive that fines would be assessed against Appellant; irrespective of whether Appellant made a good faith effort to correct the trash containers in right-of-way violation. The Hearings Officer rejects Appellant's argument that the City represented to Po'Shines a 30-day compliance period as a result of Mr. Tolbert's communication with a City representative.

Mr. Peterson testified that Appellant's trash containers were placed in the right-of-way adjacent to Po'Shines on August 27, 2010. Mr. Peterson stated that Appellant's placement of the trash containers avoided a health risk being created at Po'Shines. The Hearings Officer finds that Mr. Peterson may be correct that a health problem could have been created if Po'Shines continued to generate trash and the restaurant had no place to dispose of its trash. However, the Hearings Officer finds no "public health" exception contained in the Code/Rules applicable to this case. The Hearings Officer denies Appellant's argument that no violation of Code/Rules occurred because Appellant's action avoided a potential health situation occurring at Po'Shines.

Mr. Peterson testified that Appellant acted in good faith to correct the trash containers in the public right-of-way problem for Po'Shines. In light of Mr. Peterson's good faith argument, the Hearings Officer takes note of one of the City Administrative Rules applicable to this case: ENN 2.01 Part 4.5. In particular, the Hearings Officer notes ENN 2.01 Part 4.5 A which states, in relevant part, the following:

"No permittee or independent commercial recycler shall cause any newly placed container for solid waste, compostable or recyclable materials to be stored in the public right of way."

The Hearings Officer also takes particular note of ENN 2.01 Part 4.5 D.5 which states:

"New service. If, in its investigation, BDS determines that a permittee or independent recycler has started service with a customer and is responsible for placing containers in the right of way, BDS may refer the case to BPS for enforcement action against the responsible permittee or independent recycler prior to the completion of the compliance period."

Finally, the Hearings Officer takes note of Portland City Code section 17.102.290. This section of the Portland City Code states, in relevant part:

“No person may store, or cause to be stored, containers of solid waste, recycling or compostables in public right-of-way without a permit from the City Engineer, City Traffic Engineer, or the Bureau of Planning and Sustainability.”

Exhibit 10 is an email string offered into evidence by Appellant. Exhibit 10 includes an email from Gresham Sanitary (the prior trash collection firm servicing Po'Shines) to Po'Shines dated July 23, 2010. Exhibit 10 confirmed a discussion between Gresham Sanitary and a Po'Shines representative regarding “the status of Po Shines with respect to the existing and ongoing violation of the City of Portland’s ordinance regarding CROW (Container on the Right-of-Way).

- a CROW violation currently exists dating back 13 months to 2008.
- Po Shines and any replacement hauler will be in violation of the existing CROW ordinance if and when GSS removes its equipment
- Any hauler who places equipment at Po Shines will be in violation of the existing CROW violation and subject to daily fines up to \$400 per day.”

Ms. Heinz, an employee of Appellant, testified that she was aware, before the trash containers were placed at Po'Shines, that there was an “ongoing violation” related to trash containers being located in the public right-of-way. Ms. Heinz stated that when she first contacted Po'Shines it appeared that the trash containers would be relocated out of the public right-of-way on a neighboring property (“Kenton Club”). Ms. Heinz stated that when the time came for Appellant to deliver the trash containers, the Kenton Club had changed its mind and would not allow the containers to be located on their property. Ms. Heinz stated that the trash containers were delivered to the Po'Shines location and placed on the public right-of-way.

Mr. Peterson testified that Appellant was aware of a containers in the right-of-way violation prior to the placement of Appellant’s trash containers at Po'Shines. Mr. Peterson stated that the prior hauler (Gresham Sanitary) was not proactive in seeking a solution to the containers in the right-of-way violation and that his firm did take an active role in solving the problem. Mr. Peterson stated that when Appellant entered into an agreement to provide service for Po'Shines, there was a tentative agreement between Po'Shines and the Kenton Club to relocate the trash containers off of the right-of-way and onto Kenton Club property. Mr. Peterson stated that the owners of the Kenton Club were on vacation on the date Appellant was scheduled to deliver trash containers to Po'Shines. Mr. Peterson stated that he felt Appellant was in between a rock and a hard place because he had an agreement to provide trash containers to Po'Shines but at the same time he was aware of the trash containers in the right-of-way violation. Mr. Peterson stated that on July 27, 2010, the trash containers were delivered to Po'Shines and located on the public right-of-way. Mr. Peterson stated that a solution was found and the trash containers were relocated to a neighboring property (“Masons”) on August 25, 2010.

The Hearings Officer finds that Appellant could reasonably feel it was in a rock and a hard place on July 27, 2010 (date trash containers delivered to Po'Shines). The Hearings Officer appreciates that Appellant had entered into an agreement to serve Po'Shines with the understanding that the containers would be located at the Kenton Club. The Hearings Officer also appreciates that Appellant was aware of the containers in the right-of-way violation at the time it made an agreement to serve Po'Shines. The Hearings Officer finds ENN 2.01 Part 4.5 is clear that Appellant was legally precluded from placing one or more containers (new service) in the public right-of-way during the ongoing Po'Shines containers in

the right-of-way violation. The Hearings Officer also finds ENN 2.01 Part 4.5 clear that any "grace period" or "compliance period" is not applicable to a hauler who places containers in the public right-of-way when a violation is being processed as an enforcement action by BDS/BPS.

The Hearings Officer finds Appellant's good faith argument is not persuasive. The Hearings Officer finds Appellant was aware of the current containers in the right-of-way violation at Po'Shines at the time it entered into an agreement to provide trash service to Po'Shines. The Hearings Officer finds that ENN 2.01 Part 4.5 A and D preclude a hauler from starting new trash hauling service during the time that a property owner/tenant is in violation of Portland City Code 17.102.890 and Administrative Rule ENN 2.01 Part 4.5.

Appellant raised no issues regarding the amount of penalty/fine assessed. The Hearings Officer finds the amount of penalty/fine assessed to be in accordance with applicable Code/Rules. The Hearings Officer finds that the Determination Letter (Exhibit 3) is valid and was issued in conformance with the relevant City Code/Rules.

ORDER AND DETERMINATION:

1. The Determination Letter (August 27, 2010 letter from the Portland Bureau of Planning and Sustainability to Arrow Sanitary Inc.) is valid; Appellant's appeal is denied.
2. This order has been mailed to the parties on October 7, 2010.
3. This order may be appealed to a court of competent jurisdiction pursuant to ORS 34.010 et seq.

Dated: October 7, 2010

GJF:rs

Enclosure



Gregory J. Frank, Hearings Officer

| Exhibit # | Description | Submitted by | Disposition |
|------------------|--|-------------------------|--------------------|
| 1 | Appeal form page 1 | Veaudry Casaus, Kevin | Received |
| 1a | 9/3/10 letter, Mark Peterson to Patty Van Antwerp | Veaudry Casaus, Kevin | Received |
| 2 | Appeal form page 2 | Veaudry Casaus, Kevin | Received |
| 3 | 8/27/10 letter, Van Antwerp to Arrow Sanitary Inc. | Veaudry Casaus, Kevin | Received |
| 4 | Mailing List | Hearings Office | Received |
| 5 | Hearing Notice | Hearings Office | Received |
| 6 | Letter with attachments | Veaudry Casaus, Kevin | Received |
| 6a | "Timeline of CROW Events" document (2 pages) | Veaudry Casaus, Kevin | Received |
| 6b | Letter to Arrow Sanitary dated 8/10/10 with photo attached | Veaudry Casaus, Kevin | Received |
| 6c | Photo dated 8/2/10 | Veaudry Casaus, Kevin | Received |
| 6d | Letter to Po'Shines Restaurant from Patty Van Antwerp dated 8/12/10 | Veaudry Casaus, Kevin | Received |
| 6e | Copy of email from John Tolbert to Patty Van Antwerp dated 8/12/10 | Veaudry Casaus, Kevin | Received |
| 7 | Letter from Karen Echo Humber dated 7/12/09 | Arrow Sanitary Service, | Received |
| 8 | Letter from Mark Peterson dated 8/17/10 with attachments | Arrow Sanitary Service, | Received |
| 8a | Letter to Arrow Sanitary Service from Planning and Sustainability dated 8/10/10 (2 pages) | Arrow Sanitary Service, | Received |
| 9 | Letter from Mark Peterson dated 9/3/10 with attachments | Arrow Sanitary Service, | Received |
| 9a | Letter from Patty Van Antwerp dated 8/27/10 with copy of Instructions for Appeals to the Code Hearings Officer | Arrow Sanitary Service, | Not Offered |
| 10 | Copy of email from John Tolbert to Mark Peterson dated 10/4/10 | Arrow Sanitary Service, | Received |
| 11 | Letter to Van Antwerp from Cafe De La Soul/Pastor John Tolbert dated 10/4/10 | Arrow Sanitary Service, | Not Offered |
| 12 | Google map | Arrow Sanitary Service, | Received |
| 13 | Duplicate original signed copy of Exh. 11 | Arrow Sanitary Service, | Received |