

# CITY OF PORTLAND

Office of City Auditor LaVonne Griffin-Valade

## Hearings Office

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## HEARINGS OFFICER'S ORDER

### APPEAL OF MIKE O'CALLAGHAN

CASE NO. 3110031

[Police Bureau Case No. 11-6638]

PARK: Springwater

DATES OF HEARINGS: February 22, 2011 and February 25, 2011

### APPEARANCES:

Mr. Michael O'Callaghan, Appellant

Ranger Kurt Nelson, for the City

HEARINGS OFFICER: Mr. Gregory J. Frank

### FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Mr. Mike O'Callaghan ("O'Callaghan") appeared at the hearing on February 22, 2011 ("1<sup>st</sup> Hearing") and the hearing on February 25, 2011 ("2<sup>nd</sup> Hearing"). O'Callaghan represented himself at the hearings. City of Portland Park Ranger Kurt Nelson ("Nelson") appeared at the 1<sup>st</sup> Hearing and 2<sup>nd</sup> Hearing and represented the City. Nelson, Portland Park employee Mr. Robert Downs ("Downs") and Portland Police Officer Palmiter ("Officer Palmiter") testified on behalf of the City. The Hearings Officer makes this decision based upon the testimony of Nelson, Downs and Officer Palmiter, the arguments presented by O'Callaghan and Nelson, and the documents admitted into the evidentiary record (Exhibits 1 through and including 11, 13 through and including 18, 19 through and including 25).

### EVIDENTIARY RULINGS:

At the 1<sup>st</sup> Hearing and the 2<sup>nd</sup> Hearing, a number of exhibits were offered, by Nelson and O'Callaghan, into the evidentiary record; a few were not offered into the record by either party. Exhibit 12 was not offered for admission into the evidentiary record. The Hearings Officer finds that the photos displayed on Exhibit 12 are of such poor quality that they would not provide good evidence to justify (or not) the Park Exclusion issued to O'Callaghan on January 26, 2011. Exhibit 12 was not admitted into the record

and not considered by the Hearings Officer in making this decision. Exhibits 18 and 19 were not offered for admission. Exhibits 18 and 19 were referenced in Nelson's testimony and were utilized by O'Callaghan during his cross examination of Nelson. O'Callaghan referenced Exhibit 18, during his final argument, indicating that the tax lot referenced in Exhibit 18 was not referenced in Exhibit 19. The Hearings Officer, at the conclusion of the 2<sup>nd</sup> Hearing, informed the parties that Exhibits 18 and 19 would be reviewed as a part of making the decision in this case. The Hearings Officer admits Exhibits 18 and 19 into the evidentiary record because of the reliance by both parties on those exhibits. Exhibit 18a was not offered into evidence and was not admitted into the evidentiary record. Exhibits 20 and 20a were not offered into evidence. Exhibit 20 is a written summary provided by O'Callaghan asserting various reasons why the Park Exclusion issued to him on January 26, 2011 is not valid. Exhibit 20 is admitted as relevant to the decision to be made in this case. Exhibit 20a is a map which was represented by O'Callaghan to provide a graphical representation of the location that is the subject of the Park Exclusion issued to O'Callaghan on January 26, 2011. Exhibit 20a is admitted into the record. At the 2<sup>nd</sup> Hearing the Hearings Officer announced that Exhibit 24 would not be admitted into the record. Exhibit 24 is a copy of what appears to be a newspaper article (reference to Street Roots, February 18, 2011). The Hearings Officer reverses the rejection of Exhibit 24, announced at the 2<sup>nd</sup> Hearing, and does admit Exhibit 24 into the evidentiary record; reserving the right to address foundation, relevancy, credibility and probative value of the exhibit in this decision. Exhibits not specifically referenced in this paragraph were admitted into the evidentiary record and considered by the Hearings Officer in making this decision.

#### **OVERVIEW:**

On January 26, 2011, Nelson issued O'Callaghan a Notice of Exclusion or Warning From City of Portland Park (the "Exclusion") (Exhibits 2, 7, 10 and 25). Exhibit 7, the clearest copy of the Exclusion, indicates that O'Callaghan allegedly violated three separate laws; Portland City Code ("PCC") 20.12.100 [Vandalism], PCC 21.12.080 [Erecting Structure] and ORS 164.345 [Criminal Mischief] within Springwater Park. The Exclusion states, in a summary of the incident, that O'Callaghan was "digging tunnel into park property." The Hearings Officer hereafter refers to the location shown in the photos (area excavated into the riverbank with wood surrounding the entrance) in Exhibit 17 as the "Tunnel." The Exclusion indicates that O'Callaghan was being excluded from Springwater Park for 180 days. The Exclusion also contained appeal rights available to O'Callaghan; O'Callaghan filed an appeal that is the subject of the 1<sup>st</sup> Hearing and 2<sup>nd</sup> Hearing and this Order on January 26, 2011.

O'Callaghan noted, during opening comments, that his copy of the Exclusion (Exhibit 25) contained a blurred or otherwise unreadable reference to one of the alleged violations. Nelson requested that the Hearings Officer withdraw the first violation, the one blurred on O'Callaghan's copy of the Exclusion, as a basis for the issuance of the Notice of Exclusion. The Hearings Officer agreed with Nelson. The alleged violation of PCC 20.12.100 [Vandalism] shall not be considered as a justification for the issuance of the Exclusion.

#### **SUMMARY OF O'CALLAGHAN ARGUMENTS:**

O'Callaghan argued that the Exclusion was not valid. The Hearings Officer summarizes O'Callaghan's arguments as follows:

- Double jeopardy – the issuance of the Exclusion and concurrently being arrested and charged criminally constitutes double jeopardy (Exhibit 20).
- Forms - the Exclusion form is not in conformance with PCC 22.03.020 (B) (Exhibit 20).

- Notice – notice should have been given per PCC 22.03.030 (Exhibit 20).
- Jurisdiction – Parks has no jurisdiction over the location of the Tunnel (Exhibit 20).
- Due process – (Exhibit 24a)
  - Criminal charges pending for same offense in “civil court”
  - Preponderance of evidence
  - Failure to issue “citation” as mandated by state law under ORS 133.005 and 133.015.
- Freedom of travel – issuance of the Exclusion violates freedom of travel (Exhibit 24a).

O’Callaghan also filed, at the 2<sup>nd</sup> Hearing, a written “Motion for Injunctive Relief” and a proposed “Order” (Exhibits 24b and 24c).

#### **SUMMARY OF EVIDENCE, TESTIMONY AND ARGUMENTS:**

The Hearings Officer summarizes testimony and evidence admitted into the record in the context of each of O’Callaghan’s arguments.

**Double Jeopardy.** Officer Palmiter testified that O’Callaghan, on January 26, 2011, was arrested and taken into custody. Exhibit 9, a Custody Report completed by Officer Palmiter, indicates that O’Callaghan was charged with violation of PCC 20.12.080, PCC 20.12.100 and ORS 164.345. Although O’Callaghan denied having been arraigned on these charges, Exhibit 22 indicates that O’Callaghan was arraigned on February 10, 2011.

**Forms and Notice.** O’Callaghan argued that the forms utilized by Nelson and Officer Palmiter did not conform to PCC 22.03.020 (B). The Hearings Officer takes notice of PCC 22.03 and PCC 22.10. PCC 22.03 is to be distinguished from PCC 22.10. PCC 22.03 deals with the procedures used by a City of Portland bureau to initiate a proceeding against a person or entity. PCC 22.03 is most analogous to the procedures that the City of Portland must follow in bringing an administrative “lawsuit” against a person or entity who has allegedly violated PCC. PCC 22.10, on the other hand, deals with the right of a person or entity who has been aggrieved by an action by the City of Portland. The right to appeal a City determination is available only when specifically authorized by the PCC. This case is the result of a City of Portland Parks determination (issuance of the Exclusion) and O’Callaghan’s request for an appeal hearing to contest the validity the Exclusion. PCC 22.10 sets forth “appeal” procedures. PCC provides that an “appeal” may be initiated by following procedures set forth in PCC 22.10.030.

**Jurisdiction.** Throughout the 1<sup>st</sup> Hearing and 2<sup>nd</sup> Hearing, O’Callaghan attacked the credibility of testimony presented by the City of Portland Parks and Recreation Bureau’s (“Parks”) witnesses. In particular, O’Callaghan challenged testimony by the Parks’ witnesses that the location where he (O’Callaghan) was excluded was within the jurisdiction of the Parks. O’Callaghan’s questions of Parks’ witnesses appeared to suggest that the location where he was located, when issued the Exclusion on January 26, 2011, is owned by the State of Oregon; thereby, beyond the jurisdiction of Parks.

Nelson testified that on January 26, 2011, he was patrolling the Springwater Corridor (east side of the Willamette River in the vicinity of the Ross Island Bridge) and observed what appeared to be a structure located south of the Ross Island Bridge and down the bank from the Springwater Corridor paved trail. Nelson stated that the water in the Willamette River, on January 26, 2011, was very high; covering living trees/vegetation. Nelson stated that he went down the bank and observed O’Callaghan excavating a hole into the riverbank. Nelson testified that he also observed, around the excavation area, wood

products that appeared to be shoring materials. Nelson stated that he observed, as he proceeded down the bank of the river, O'Callaghan shoveling rock and soil from the Tunnel and discarding the rock and soil outside the Tunnel. Nelson testified that he placed a handheld GPS unit on top of the "shoring" (photo on 3<sup>rd</sup> page of Exhibit 17) material and from the data generated by the GPS produced a graphic (map) representation of the location of the Tunnel (Exhibit 11).

Nelson submitted a number of color photographs that were admitted into the evidentiary record (Exhibits 16, 17 and 23). Nelson testified that Exhibit 16 (includes 2 color photos) showed the water level in the Willamette River on January 26, 2010 immediately below the location of the Tunnel. Nelson stated that Exhibit 17 (includes 3 color photographs) showed the water level of the Willamette River in relation to the Tunnel. Nelson noted that the log showing on the left side of the first page photo on Exhibit 17 is the same log shown on the first page photo on Exhibit 16. Nelson stated that the second page photo on Exhibit 17 displays the Tunnel and the third page of Exhibit 17 shows the location of the GPS sitting on top of the shoring material at the Tunnel. Nelson stated that Exhibit 23 is an aerial photo of the general area where the Tunnel was located with tax lots (red lines) superimposed.

Nelson testified that Exhibit 18 represented a Portland Maps printout displaying a map, tax account number and ownership information. Nelson indicated that the map displayed tax boundary lines consistent with the superimposed red lines on Exhibit 23. Exhibit 18 indicates that the "Alt Account #" to be R991110500 and the "state ID" to be 1S1E11BC 7700. Nelson stated that "state ID" #1S1E11BC 7700 is owned by METRO and, through an Intergovernmental Agreement (Exhibit 19) ("IGA") is managed by the City of Portland (Exhibit 19, Exhibit A – Properties To Be Managed By The City of Portland, page 14). The IGA states, among other things, that the City of Portland is "responsible for the ongoing management, maintenance, security, improvements to, and operation" and "act in a timely manner to resolve nuisance complaints and mitigate threats to the resources of the natural area" (Exhibit 9, page 3, paragraphs 4.1 and 4.3). The IGA also states that "METRO grants to the City, and to the City's agents and contractors, the right to enter the Properties for the purpose of performing all activities, including enforcement of the City's code and policies related to City Natural Areas, reasonably necessary for the management, maintenance, and operation of the Properties and for the fulfillment of the City's duties and responsibilities under this Agreement."

O'Callaghan, during cross examination of Nelson, elicited testimony that Nelson was generally unfamiliar with technical operation of a GPS. O'Callaghan, during cross examination of Nelson, elicited Nelson's admission that he did not know the precise elevation, in feet above sea level, of the mean high water mark. O'Callaghan, during cross examination, elicited testimony that Nelson could not find the specific tax lot referenced on Exhibit 18 within the IGA.

Downs testified that he was a Parks employee and that on or about January 27, 2011, he was assigned to repair damage along the Springwater Corridor. Downs stated that he is trained, by Parks Bureau Supervisors, to be aware of what "is and is not Park's property." Downs stated that the location of the Tunnel is above the red line shown on Exhibit 23. Downs, during cross examination by O'Callaghan, stated that he was unable to provide a legal definition of "mean high water mark." Downs, during cross examination by O'Callaghan, stated that living trees and vegetation were covered by the Willamette River flowing water and that coverage of the trees and vegetation was unusual.

O'Callaghan offered no testimony or evidence regarding the boundaries of the tax lot referred to above as 1S1E11BC 7700 excepting the submission of Exhibit 20a. O'Callaghan stated, with respect to Exhibit 20a, that in the vicinity of the Tunnel the "mean high water elevation" is 17.2 feet.

**Due Process.** O'Callaghan did not testify on his own behalf. O'Callaghan, through cross examination of Officer Palmiter, elicited testimony that Officer Palmiter did not issue a "citation" to O'Callaghan on January 26, 2011. Officer Palmiter testified that he arrested O'Callaghan during his contact with him in the vicinity of the Tunnel and transported O'Callaghan to jail where O'Callaghan was processed. Officer Palmiter testified that O'Callaghan was arrested and initially charged with violation of Oregon Revised Statute (ORS) 164.354 (Criminal Mischief II), PCC 20.12.080 (Structure in Park) and PCC 20.12.100 (Vandalism of Park Property).

**Freedom of Travel.** O'Callaghan did not testify on his own behalf. O'Callaghan, through cross examination of Nelson and Officer Palmiter, elicited testimony that O'Callaghan was issued the Exclusion (Exhibits 2, 7, 10 and 25) and was arrested and taken into custody on January 26, 2011. Nelson stated that the Exclusion would preclude O'Callaghan's traveling in and through Springwater Park during the term of the exclusion.

**Length of Exclusion.** O'Callaghan did not testify on his own behalf. Nelson testified that it was "his belief" that O'Callaghan had received two or more Park Exclusions within the period of two years before January 26, 2011. O'Callaghan received the Exclusion that is subject to this appeal on January 26, 2011. O'Callaghan filed his appeal on January 26, 2011 (Exhibit 3) and the Portland Police Bureau issued a "stay" of effectiveness of O'Callaghan's the Exclusion on January 27, 2011 at 8:04 a.m. The Exclusion indicates that the term/length of exclusion is one hundred eighty (180) days (Exhibit 10).

#### **HEARINGS OFFICER'S FINDINGS BASED UPON THE EVIDENCE IN THE RECORD AND APPLICABLE LAW(S):**

**Jurisdiction.** PCC 20.12.265 F provides that a person who receives a park exclusion is entitled to appeal the validity of the Notice in accordance with provisions of Title 22. If an appeal is filed contesting the validity of a park exclusion, the Hearings Officer is to conduct a "de novo" review and determine, based upon a preponderance of the evidence, if it is more likely than not that the excluded person in fact committed the alleged violation.

While O'Callaghan did raise, through cross examination questions of Nelson, Palmiter and Downs, issues related to the depth of knowledge of each of those persons related to the location of the mean high water mark of the Willamette River in the vicinity of the Tunnel, the Hearings Officer finds that O'Callaghan submitted no evidence to demonstrate the proper or actual location of the mean high water mark. O'Callaghan argued that the City failed to carry its burden (preponderance of evidence) that the City had the right to exclude him from the vicinity of the Tunnel; therefore, the City did not have jurisdiction over the location of the Tunnel to allow it to issue a valid park exclusion to O'Callaghan.

The Hearings Officer finds that Nelson testified, in his opinion, that the location of the Tunnel was above the mean high water mark of the Willamette River and within the jurisdiction of the City. The Hearings Officer finds that Nelson supported his opinion by noting the location of the Tunnel relative to the location of living trees/vegetation covered by Willamette River water flow. The Hearings Officer finds that Nelson supported his opinion by placing a GPS device on the top of the "shoring" of the Tunnel and using the data to generate a map showing the location of the Tunnel to be above mean high water of the Willamette River. The Hearings Officer finds that Nelson submitted a copy of a Portland Maps printout showing the tax lot referred to above as 1S1E11BC 7700 and indicating that the Tunnel was located on said tax lot. The Hearings Officer finds that Nelson submitted a copy of the IGA which specifically includes the tax lot referred to as 1S1E11BC 7700. The Hearings Officer finds the

testimony and supporting documentary evidence of Nelson is credible and provides the Hearings Officer with the only evidence of the location of the Tunnel. The Hearings Officer finds, based upon the testimony of Nelson and Downs, that the Tunnel is on the tax lot referred to above as 1S1E11BC 7700 and that such location transfers to the City (from the landowner METRO) the management responsibilities for tax lot referred to above as 1S1E11BC 7700 (Exhibit 19, page 14). The Hearings Officer finds that the Tunnel is within the jurisdiction of the City of Portland including the enforcement of PCC 20.265.

**Actions by O'Callaghan.** O'Callaghan did not testify at the hearing. Therefore, O'Callaghan offered no description of his activities, or lack therefore, related to the Tunnel; including the excavation and shoring of the Tunnel. Nelson testified that on January 26, 2011, as he was descending the riverbank from the Springwater paved trail, he observed rocks and debris being tossed out of the Tunnel and immediately thereafter Nelson observed O'Callaghan with a shovel in his hands. Officer Palmiter stated that on January 26, 2011, he observed O'Callaghan digging in the vicinity of the Tunnel. The Hearings Officer finds the testimony of Nelson and Officer Palmiter to be credible and accurately reflect actions of O'Callaghan in the vicinity of the Tunnel on January 26, 2011. The Hearings Officer finds that O'Callaghan did, to some extent, dig and/or excavate soil in the bank of the Willamette River on real property subject to the control and jurisdiction of the City of Portland. The Hearings Officer finds that O'Callaghan participated in the creation of the Tunnel on January 26, 2011; including the excavation and shoring activities.

**Alleged Violations of PCC 20.265.** The Hearings Officer finds that PCC 20.265 A grants authority to "any Park Officer" to exclude a person who violates an "applicable law." PCC 20.265 B states, for the purposes of issuing a Notice of Exclusion from a City of Portland Park, that "'applicable provision of law' includes any applicable provision of this Code, or any City ordinance, or of any rule or regulation promulgated by the Commissioner or the council under this Title, any applicable criminal or traffic law of the State of Oregon..." PCC 20.265 D specifically lists ORS Chapter 164 as an "applicable law" that does not require a prior warning to the person receiving the a park exclusion.

A person violates ORS 164.345 (Criminal mischief in the third degree) if the person, with intent to cause substantial inconvenience to the owner, and having no right to do so nor reasonable grounds to believe that the person has such right, the person tampers or interferes with property of another. Oregon courts have held that if conduct of a person affects the property or its use, such alters or changes the property of another, then the person tampered with the property. *State v. Schoen*, 348 Or 207 (2010) The Hearings Officer, having found above that the real property location of the Tunnel is within the jurisdiction of the City, further finds that O'Callaghan altered such real property by digging and/or excavating and/or installing wooden shoring materials in the riverbank. The Hearings Officer finds that O'Callaghan was aware that the location of the Tunnel was public property and that he had no reasonable grounds to believe he had the right to alter such property. The Hearings Officer finds that O'Callaghan did violate ORS 164.345 on January 26, 2011.

A person violates PCC 20.12.080 (Structures in Parks) if the person excavates for, erects, installs or places, or does any act as part of or commencement of excavation, erection, installation or placement of any permanent or temporary structure or facility in or on any Park. The Hearings Officer finds that Nelson and Officer Palmiter testified that they each observed O'Callaghan using a shovel and digging/discarding dirt from the vicinity of the Tunnel. The Hearings Officer finds this evidence is credible; no evidence to the contrary is in the record. The Hearings Officer finds that O'Callaghan's actions (using a shovel to dig/discard dirt) constitute excavation as contemplated in PCC 22.12.080. The

Hearings Officer finds that the placement of shoring materials constitutes the installation of a temporary structure. The Hearings Officer finds that O'Callaghan did violate PCC 20.12.080 on January 26, 2011.

**Double Jeopardy.** The Hearings Officer takes note that O'Callaghan offered no evidence at the hearing related to the federal concept of double jeopardy (or, in Oregon former jeopardy). The only evidence related to O'Callaghan's double jeopardy argument is that he was issued a Notice of Exclusion for violation of ORS 164.345 and PCC 20.12.080 and has also been arraigned for violation of ORS 164.345 (Exhibit 22).

O'Callaghan did not expand on his double jeopardy argument contained in Exhibit 20. The Hearings Officer finds O'Callaghan's argument lacks specificity. O'Callaghan's cursory argument leaves the Hearings Officer to speculate as to his specific claims related to double jeopardy which the Hearings Officer finds is inappropriate.

As a general proposition Oregon Courts have reviewed City of Portland exclusion ordinances and found that the exclusion is a civil remedy rather than a criminal penalty and the double jeopardy or former jeopardy arguments were not persuasive. *State v. Lhasawa*, 334 Or 543 (2002), *State v. James*, 159 Or App 502 (1999) The Hearings Officer rejects O'Callaghan's double jeopardy argument.

**Forms and Notice.** O'Callaghan argued that the forms utilized by Nelson and Officer Palmiter did not conform to PCC 22.03.020 (B). The Hearings Officer finds that this case is an appeal by O'Callaghan. The Hearings Officer finds that PCC 22.10 provides the legal authority for the Hearings Officer to conduct appeal hearings. The Hearings Officer finds that PCC 22.10.030 sets forth the procedural steps for the initiation of an appeal case. The Hearings Officer finds actions by both O'Callaghan and the City adequately conform to the requirements of PCC 22.10.030; the appeal was initiated by O'Callaghan and processed by the City resulting in a hearing.

PCC 22.10.050 sets forth hearing procedure. PCC 22.10.050 A states that hearings "shall be conducted in accordance with the procedures set forth in Sections 22.03.050 to 22.03.115 of this Title." O'Callaghan argues that the City failed to follow the provisions in PCC 22.03.020 (B). PCC 22.03.020 (B) sets forth how the City may initiate a code hearing proceeding. The Hearings Officer finds that PCC 22.03.020 (B) is not applicable to an appeal case. The Hearings Officer rejects O'Callaghan's Forms and Notice argument.

**Due Process.** O'Callaghan's due process arguments (Exhibit 24a) are that criminal charges are (1) pending for same offense in civil court, (2) preponderance of evidence, and (3) the failure to issue a 'citation' as mandated by ORS 133.005 and 133.015.

The Hearings Officer, once again, notes that O'Callaghan's arguments are cursory at best and totally inadequate at the worst. The Hearings Officer is forced to make assumptions or draw inferences as to what exactly O'Callaghan's legal argument(s) is/are; this is inappropriate for the Hearings Officer. The Hearings Officer believes that O'Callaghan's due process "criminal charges are pending" argument is a restatement of his double jeopardy argument. The double jeopardy argument is dealt with above.

The Hearings Officer does not understand O'Callaghan's "preponderance" argument in the context of due process. PCC 20.12.265 F states, in relevant part, that the Hearings Officer "shall uphold the exclusion if, upon the Code Hearings Officer's de novo review, the preponderance of evidence admissible under the provisions of Title 22 of this Code convinces the Code Hearings Officer that, more

likely than not, the person in fact committed the violation, and if the exclusion is otherwise in accordance with law.” The Hearings Officer is obligated to apply the legal concept of preponderance of the evidence in this case and has made every effort to do so.

During O’Callaghan’s cross examination of Officer Palmiter he asked whether a “citation” had been issued to him when he was taken to jail. Officer Palmiter responded that no “citation” had been issued during the arrest and transport stage of his contact with O’Callaghan on January 26, 2011. O’Callaghan cited ORS 133.005 and ORS 133.015 as support that Officer Palmiter erred in failing to give him a citation. The Hearings Officer finds that the issuance of a criminal based citation is not a prerequisite to the issuance of a park exclusion under PCC 20.12.265. The Hearings Officer takes note that ORS 133.005 defines “arrest” as placing a person under actual or constructive restraint or to take a person into custody for the purpose of charging that person with an offense. ORS 133.015 lists the contents of the accusatory instruments of “information” and “complaint.” There is no factual dispute that O’Callaghan was taken into custody and charged with a crime (Exhibit 22). The Hearings Officer finds that O’Callaghan has the right to raise any criminal defenses that he feels appropriate in any criminal case that he is involved. However, whether or not ORS 133.005 and ORS 133.015 apply, and their affect upon O’Callaghan, are properly raised in O’Callaghan’s criminal case.

The Hearings Officer rejects O’Callaghan’s due process arguments.

**Freedom of Travel.** O’Callaghan argued that the Exclusion “abridges my freedom of travel right” (Exhibit 24a). O’Callaghan restated his freedom of travel argument during his oral closing argument. The Hearings Officer finds that O’Callaghan did not expand on his freedom of travel argument beyond his brief references made in his oral closing argument or Exhibit 24a. The Hearings Officer finds O’Callaghan’s argument lacks specificity. The Hearings Officer is left to speculate as to the legal basis/bases of O’Callaghan’s freedom of travel argument; for example, is O’Callaghan’s argument based upon federal or state constitutional grounds? The Hearings Officer rejects O’Callaghan’s freedom of travel argument because O’Callaghan failed to specify the factual and legal basis/bases for such argument.

**Length of Exclusion.** O’Callaghan received the Exclusion on January 26, 2011. The park exclusion form (Exhibit 10) indicates the length/term of O’Callaghan’s exclusion is 180 days. PCC 20.12.265 C states that a park exclusion term shall be thirty (30) days unless the excluded person had received, within two years, an additional park exclusion or more park exclusions. PCC 20.12.265 C stats that if a person receives a second park exclusion within the two year period then the term of the exclusion is ninety (90) days and if the person receives any additional Park Exclusions within the two year period the term is one hundred eighty (180) days. Nelson testified that it was his belief that O’Callaghan had received more than two park exclusions within the period of two years before January 26, 2011. O’Callaghan did not testify at the hearing and did not submit any written evidence related to the number of park exclusions he received (if any) within the two year period prior to January 26, 2011. The Hearings Officer finds that the only credible evidence in the record related to the number of park exclusions received by O’Callaghan with the two year period prior to January 26, 2011, was Nelson’s testimony. The Hearings Officer finds that it is more likely than not that O’Callaghan did receive two or more park exclusions within the two year period prior to January 26, 2011.

O’Callaghan received the Notice of Exclusion From City of Portland Park that is subject to this appeal on January 26, 2011. O’Callaghan filed the appeal in this case on January 26, 2011 (Exhibit 3). PCC 20.12.265 H provides the effectiveness of the exclusion shall be stayed upon the filing of an appeal.



PCC 20.12.265 H states that if the Hearings Officer upholds the validity of a park exclusion then "the remaining period of the exclusion" shall begin on the effective date of the Hearings Officer's Order. The "stay" became effective at 0804 (8:04 a.m.) on January 27, 2011 (Exhibit 4). The Hearings Officer finds the original term of 180 days must be reduced by one day to reflect the effective date of the "stay" occurring one day after the Notice of Exclusion From City of Portland Park was issued (January 26, 2011).

**Summary of Findings.** The Hearings Officer finds that the only credible evidence in the record was offered by the testimony of Nelson, Downs and Officer Palmiter and the admitted exhibits. The Hearings Officer finds that it is more likely than not that the Tunnel is located on real property described as 1S1E11BC 7700 on Exhibit 18 and Exhibit 19 and is within the control (jurisdiction) of the City of Portland. The Hearings Officer finds that the preponderance of the evidence is that it is more likely than not that O'Callaghan did use a shovel and excavate in or around the Tunnel. The Hearings Officer finds that it is more likely than not that on January 26, 2011, O'Callaghan did violate ORS 164.245 and PCC 20.12.080. The Hearings Officer rejects O'Callaghan's double jeopardy, due process and freedom of travel arguments primarily for the reason that O'Callaghan failed to present his arguments with the necessary legal specificity and failed to support his arguments with the necessary factual/evidentiary background.

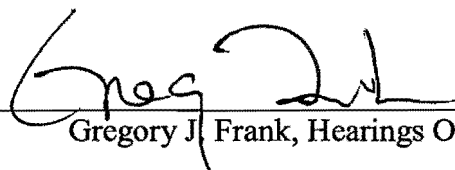
The Hearings Officer finds the Exclusion issued to O'Callaghan on January 26, 2011 for violation of ORS 164.345 and PCC 20.12.080 in the Springwater Park is valid. The Hearings Officer finds that the remaining period/term of the Exclusion is 179 days and shall begin on the effective date of this Order.

#### **ORDER AND DETERMINATION:**

1. The Exclusion from Springwater Park issued to Mr. Michael O'Callaghan on January 26, 2011 is valid; O'Callaghan's appeal is denied.
2. The remaining term of the Exclusion from Springwater Park shall commence on March 25, 2011 and end at 4:00 p.m. on September 21, 2011.
3. This order has been mailed to the parties on March 14, 2011 and will become final and effective on March 25, 2011.
4. This order may be appealed to a court of competent jurisdiction pursuant to ORS 34.010 et seq.

Dated: March 14, 2011

GJF:rs



Gregory J. Frank, Hearings Officer

Enclosure

<b>Exhibit #</b>	<b>Description</b>	<b>Submitted by</b>	<b>Disposition</b>
1	Appeal form page 1a	Complaint Signer's Office,	Received
2	Notice of Exclusion or Warning From City of Portland Park	Complaint Signer's Office,	Received
3	Appeal form page 2	Complaint Signer's Office,	Received
4	Special Report	Complaint Signer's Office,	Received
5	Appeal form page 2	Complaint Signer's Office,	Received
6	Appeal form page 1a	Complaint Signer's Office,	Received
7	Notice of Exclusion or Warning From City of Portland Park	Complaint Signer's Office,	Received
8	Investigation Report	Complaint Signer's Office,	Received
9	Custody Report	Complaint Signer's Office,	Received
10	Notice of Exclusion or Warning From City of Portland Park	Complaint Signer's Office,	Received
11	Map	Complaint Signer's Office,	Received
12	Photos	Complaint Signer's Office,	Not Offered
13	Property/Evidence Receipt	Complaint Signer's Office,	Received
14	Mailing List	Hearings Office	Received
15	Hearing Notice	Hearings Office	Received
16	Photos	Nelson, Ranger K.	Received
17	Photos	Nelson, Ranger K.	Received
18	PortlandMaps printout	Nelson, Ranger K.	Received
18a	E-mails	Nelson, Ranger K.	Not Offered
19	Intergovernmental Agreement	Nelson, Ranger K.	Received
20	Statement	O'Callaghan, Mike	Received
20a	General Electric Co. Springwater Corridor Metro 17Apr98	O'Callaghan, Mike	Received
21	Springwater on the Willamette Trail Cost Estimate for Damages	Nelson, Ranger K.	Received
22	E-mails	Nelson, Ranger K.	Received
23	Photo	Nelson, Ranger K.	Received
24	Street Roots article	O'Callaghan, Mike	Received
24a	Argument	O'Callaghan, Mike	Received
24b	Motion for Injunctive Relief	O'Callaghan, Mike	Received
24c	Proposed Order	O'Callaghan, Mike	Received
25	Copy of O'Callaghan's Notice of Exclusion or Warning From City of Portland Park	O'Callaghan, Mike	Received