

October 28, 2022

Misha Isaak
MIsaak@perkinscoie.com
D. +1.503.727.2086
F. +1.503.346.2086

VIA EMAIL

Ms. Louise Hansen
City Elections Officer
City of Portland Auditor's Office
1221 SW Fourth Avenue, Room 130
Portland, OR 97204

Re: Complaint No. 2022-04-SPM

Dear Ms. Hansen:

Perkins Coie LLP represents Schnitzer Properties Management, LLC with respect to Complaint No. 2022-04-SPM. Enclosed herewith is the Final Order of the Office of Administrative Hearings in the matter of: Rene Gonzalez and Rene for Portland. We respectfully request that the Final Order be included in the record for this complaint.

Further, we respectfully request that this complaint be dismissed both because (1) Schnitzer Properties Management cannot have violated Portland City Charter Section 3-301(a) if receipt of the contribution was permissible, as the Final Order concludes it was, and (2) the reasoning of the Final Order applies with equal force to this complaint.

Thank you for your prompt attention to this matter.

Sincerely,



Misha Isaak

MI:tlt

Enclosure

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
CITY OF PORTLAND, OREGON
SMALL DONOR ELECTIONS PROGRAM**

IN THE MATTER OF:) **FINAL ORDER**
)
RENE GONZALEZ,)
RENE FOR PORTLAND) OAH Case No. 2022-ABC-05629

HISTORY OF THE CASE

On September 20, 2022, the City of Portland Elections Division Small Donor Elections Program (City or Program) issued an Administrative Sanction – Proposed Penalty (Notice) to the Rene for Portland campaign and candidate Rene Gonzalez (individually, Campaign and Candidate respectively, collectively Appellants). On September 27, 2022, Appellants filed a Request for Consideration with Addendum. On September 29, 2022, the City issued a Response to Request for Consideration denying Appellants’ request and reaffirming the proposed administrative sanction. On October 6, 2022, Appellants requested a contested case hearing.

On October 7, 2022, the City referred the hearing request to the Office of Administrative Hearings (OAH). The OAH assigned Senior Administrative Law Judge (ALJ) Joe L. Allen to preside at hearing. On October 11, 2022, the OAH issued a letter from the ALJ to the parties identifying due dates for filing exhibits and witness lists prior to hearing.

On October 18, 2022, the City filed a prehearing brief in the form of a Motion to Uphold the Director’s Penalty Decision (City’s Hearing Brief). Also on that date, Appellants filed a Hearing Brief in Support of Appeal summarizing its case for the upcoming hearing and raising multiple arguments related to actions taken by the Program Director on or about October 10, 2022.¹ Among those arguments, Appellants assert the Program rules prohibiting in-kind are void for vagueness and that the Program’s penalty provisions are too draconian to be enforced.

On October 19, 2022, the City filed City of Portland’s Combined Motion in Limine and

¹ On October 10, 2022, the Director notified Appellants by letter that the Program was withholding matching funds from the campaign until the penalty at issue in this Final Order was paid. In the brief, Appellants argue that the Program’s actions deprived them of due process. Appellants ask the ALJ to order the Program to release matching funds and to reduce any civil penalty found to be appropriate by the reasonable attorney’s fees incurred to address the denial of due process. At hearing, the ALJ determined those arguments to be outside the scope of the current proceeding because the actions of the Program occurred after Appellants filed the request for hearing at issue here. Therefore, the ALJ declined to address either argument.

Partial Motion to Dismiss² (Combined Motion) asking the ALJ to exclude as irrelevant Exhibits R7, a news article regarding an interview with the property owner, and R9, the declaration of Steven Roselli addressing the property owner's motivations for entering the rental agreement with Appellants. The City's motion also asked the ALJ to exclude unduly repetitious testimony from four expert witnesses identified in Appellants' witness list. Finally, the City asked the ALJ to dismiss any issues not raised in Appellants' request for hearing, including the void for vagueness argument and the assertion that the Program's penalty provisions are too draconian to be enforced. The ALJ's rulings on these elements of the motion are addressed in the Evidentiary Rulings section below.

Also on October 19, 2022, the City filed the Parties' Stipulation³ agreeing, *inter alia*, to the following:

1. "Fair market value" is the appropriate standard under ORS 260.005(3) to determine whether there was a contribution, and the size of that contribution, if any, whatever the Hearings Officer⁴ determines that means and what factors go into deciding what the "fair market value" is.
2. Arbitrary and capricious, and substantial evidence, are not relevant standards to this appeal[.]
3. All exhibits on each Exhibit List submitted on October 17, except Appellant's [*sic*] Exhibits R7 and R9, are admissible under the evidentiary rules that apply to this [h]earing and appeal; the parties reserve their right to argue about the relevance and weight of each exhibit.

(Stipulation at 1.)

ALJ Allen convened a telephone hearing on October 20, 2022. Appellant appeared with counsel Darian Stanford and Daniel Newman. Attorneys at Law Chad Jacobs and Emily Matasar represented the City.⁵ Testifying on behalf of Appellant were Rene Gonzalez; Steven Roselli, Senior Vice President of Schnitzer Property Management, LLC; Nathan Sasaki, owner and Executive Director of Apex Real Estate Partners; Patrick Gilligan, Executive Vice President of Lincoln Property Company in Portland; and Brandon Anderson, Managing Partner of Pivot

² This City filed that motion with the OAH at 5:19 p.m., after the close of business.

³ The OAH received the Parties' Stipulation at approximately 8:05 p.m.

⁴ For purposes of this contested case, the terms "Hearing Officer" and "Administrative Law Judge" have the same meaning and are used interchangeably.

⁵ In addition to the parties and counsel, the following members of the media attended the hearing: Shane Dixon Kavanaugh from the Oregonian; Jim Redden with the Portland Tribune; and Sophie Peel of Willamette Week.

Property Management.⁶ Testifying on behalf of the City were Susan Mottet, Program Director, and Hope Beraka, owner and Principal Broker of Think Real Estate / Think Commercial in Portland.⁷ The record closed at the conclusion of the hearing on October 20, 2022.

ISSUES

1. Whether Appellants received prohibited contributions, or prohibited in-kind contributions, of discounted office space for the period May through September 2022 (period in issue) in violation of PCC 2.16.040(D) and (E); Program Administrative Rules 18(G) and 18(J).
2. If so, whether Appellants failed to report any such contributions within the time required by the Program in violation of PCC 2.16.140(C).
3. If one or more alleged violations are proved, what is the appropriate penalty to be assessed for the violation(s). PCC 2.16.140(C); Program Administrative Rules 18(D) and (F).

EVIDENTIARY RULINGS

By stipulation Exhibits A1 through A10, offered by the City, and Exhibits R1 through R6, R8, and R10, offered by Appellants, were admitted into the record without objection.

In its Combined Motion, the City seeks to exclude Exhibits R7 and R9 as irrelevant because they purport to show the property owner/manager's motivation and intent in entering into a short-term rental agreement with Appellants at a significant discount from the advertised lease rate. The City's arguments rely on the Oregon Court of Appeals decision in *Jim Bernard for Clackamas Cnty. Com'r v. Elections Div. of Off. of Sec'y of State*, 229 Or App 419 (2009). According to the City, the Court in *Bernard* held that "the donor's personal decisions are not relevant in determining fair market value for the purposes of in-kind campaign contributions." Combined Motion at 2. That portion of the Combined Motion was denied at hearing. After developing the record, I find the City's arguments are based on a misreading of the Court's statements in *Bernard* (discussed more fully below) and therefore maintain the ruling. Accordingly, Exhibits R7 and R9 were admitted into the record over the City's relevance objection.

⁶ Appellant designated Messrs. Sasaki, Gilligan, and Anderson as expert witnesses on the subject of the Portland real estate market. The City did not object to that designation at hearing. Nonetheless, based on the testimony of each witness, I find the designation overly broad and unsupported by the record. This conclusion is based on each witness's testimony regarding extensive experience in *commercial* real estate in and around Portland, rather than general experience in the real estate industry. The Portland real estate market includes both residential and commercial properties. No witness provided evidence of professional experience with residential real estate sufficient to qualify as an expert in the overall state of the Portland real estate market. Accordingly, the expert designation of each witness is limited to the Portland *commercial* real estate market. This limitation on expert designation does not detract from the relevance or weight of any witness's testimony.

⁷ The City did not designate either of its witnesses as experts in any area.

In addition, the City moved to exclude the testimony of Appellants' designated experts as unduly repetitious. While each witness in issue was designated as an expert in the Portland real estate market, the substance of the expected testimony was not unduly repetitious on its face. *See Appellants' Witness List at 1.* As such, the City's motion to exclude such testimony was denied as premature with the understanding that the City was free to raise the objection as each witness testified if such objection appeared appropriate. Thereafter, the City did not raise an objection to the testimony of any expert as unduly repetitious.

FINDINGS OF FACT

1. The City of Portland Elections Division's Small Donor Elections Program was created to allow candidates raising money from small local donors to compete against candidates receiving large contributions from corporations and wealthy donors. (Test. of Mottet; Ex. A3 at 1; *see also* PCC 2.16 and Program Administrative Rule, Chapter 2.16 generally.)

2. Certified candidates are eligible to receive matching funds from the City at a ratio of 9:1 for qualified donations up to \$250. The program is voluntary. Candidates who elect to participate in the Program must participate in training that covers Program rules and compliance with City Code and Program Administrative Rules. (Test. of Mottet.)

3. Rene Gonzalez is a candidate in the November 2022 election for Portland City Commissioner Seat 3. Mr. Gonzalez applied to join the City's Small Donor Election Program and agreed to abide by its terms. The Program approved Mr. Gonzalez as a Certified Candidate. In fall 2021, Mr. Gonzalez and his campaign manager participated in the required training conducted by the Program director. Thereafter, the Campaign received matching funds from the Program. (Ex. A9 at 1; test. of Gonzalez and Mottet.)

4. As a candidate for City Commissioner, Mr. Gonzalez wanted a downtown presence for the Campaign. The Campaign received several offers from commercial property managers that were cost prohibitive for the Campaign. In or about April 2022, Mr. Gonzalez met with the owner of Schnitzer Property Management, LLC (SPM), Jordan Schnitzer, regarding vacant office space available in one of SPM's commercial properties in downtown Portland located at 1010 SW 11th Avenue (property in issue). (Test. of Gonzalez.)

5. The space SPM offered to the Campaign was a ground-floor retail/office space that had been vacant for more than two years as of April 2022. The space consisted of approximately 3,185 square feet with multiple offices partitioned within the space. Initially, Mr. Gonzalez had concerns about the space due to its excessive size and location in a high-crime area of Portland. Mr. Gonzalez believed the Campaign required only about 500 sq. ft. for the duration of the election cycle, approximately May through November 2022. (Test. of Gonzalez; Ex. A1 at 14-15.)

6. As of April 2022, and continuing to the time of hearing, SPM listed the property in issue for lease at the rate of \$26 per sq. ft. annually – approximately \$6,900 per month – for a full-service lease. The listing also indicated the lease included two parking spaces in the 1,000 sq. ft. surface level parking lot. That listing also indicated tenant improvements were available.

(Ex. A1 at 14-15; test. of Roselli and Gonzalez.) During that period, no prospective tenant was willing to tour or lease the property in issue. (Test. of Roselli.)

7. The neighborhood surrounding the property in issue has experienced an increase in the homeless population in recent years, as well as an increase in vandalism and other property crimes such as burglary. (Ex. R9 at 1; test. of Gonzalez.) The increase in crime and homelessness in downtown Portland has made once popular ground-floor commercial properties undesirable. (Ex. R9 at 1; test. of Roselli and Sasaki.)

8. At the direction of Mr. Schnitzer, SPM offered the space to the Campaign in exchange for a nominal rental rate – for the limited space to be used by the Campaign – and the Campaign’s agreement to cover a proportional share of the building utilities, janitorial, and common area maintenance based on the entire 3,185 sq. ft., rather than the actual space to be used by the Campaign. (Test. of Roselli and Gonzalez; Exs. R7 and R9.)

9. SPM and the Campaign agreed to a month-to-month rental agreement under which the Campaign would pay \$250 per month rent and \$540 per month as the proportional share of the building utilities, janitorial, and common area maintenance. The agreement allowed the Campaign to use the property in issue between May and November 2022 unless SPM found a long-term tenant, in which case the Campaign agreed to vacate on 30-days written notice. The agreement also provided the Campaign with the two parking spaces identified in the property listing. (Test. of Gonzalez; Exs. R9 and R5 at 1-3.)

10. Under the terms of the rental agreement, the Campaign also agreed to accept the property in “as is” condition. According to the rental agreement, SPM was not obligated to remodel, renovate, or otherwise modify the property to accommodate the Campaign. In addition, the Campaign was required to repair damage to the property that might occur during its occupation, including any broken glass resulting from vandalism or crime. (Ex. R5; test. of Gonzalez.)

11. During the period in issue, vandals broke ground-floor windows of the Campaign’s office and, on one occasion, the Campaign’s office was burglarized, resulting in the loss of all computer and audio-video equipment in the office. (Test. of Gonzalez.)

12. SPM has previously structured short-term leases, at significant discounts, for tenants operating “pop-up” business intended to be open for a short period, such as stores catering to a particular holiday season. During difficult market conditions, SPM benefits from such agreements by increasing foot traffic in and around the building making it more desirable to prospective tenants. (Test. of Roselli; Ex. R9.)

13. SPM has also entered into a short-term lease with the Beaverton Police Department. Under that lease, the Beaverton Police Department pays no rent, but covers all utilities and building costs. (Test. of Roselli.)

14. Due to the proliferation of public unrest along with the increase in homelessness, vandalism, and other property and person-to-person crimes, the commercial real estate market in

Portland is extremely weak, with many properties carrying vacancy rates of 30 percent or more. Coupled with the COVID-19 pandemic restrictions and many employers transitioning to work-from-home arrangements, demand for commercial real estate in downtown Portland has decreased significantly. Banks have foreclosed on many commercial buildings in the city. (Test. of Sasaki and Gilligan.)

15. In commercial real estate, a full-service lease refers to one that includes all building services, utilities, and common area maintenance (CAM) costs in the agreed upon price per square foot. By contrast, a triple-net (NNN) lease is one in which those costs are apportioned and billed to each tenant separate from the agreed upon rental rate per square foot. (Test. of Roselli.)

16. Nathan Sasaki is a commercial real estate broker and owner of Apex Real Estate Partners in Portland. Mr. Sasaki has worked in commercial real estate in Portland for approximately 24 years. Mr. Sasaki currently owns and manages commercial real estate across the city including a full block at Second Ave and Ash, a building at 1106 W Burnside, as well as multiple properties in the Pearl District and Old Town. (Test. of Sasaki.)

17. In Mr. Sasaki's experience, landlords in downtown Portland are currently making short-term lease deals that simply cover operating costs in order to break even. Ms. Sasaki is aware of some short-term "pop-up" businesses obtaining zero-cost leases in order to get consumer traffic into a vacant building. Those businesses include art expos, beer gardens, and seasonal stores. (Test. of Sasaki.)

18. As part of his practice, Ms. Sasaki calculates fair market value of real estate assets almost daily. He is aware of several acceptable methods for calculating fair market value of a property. In his opinion, it is inappropriate to utilize the advertised lease price to calculate fair market value because that number often represents the starting point for negotiations, rather than an end. (Test. of Sasaki.)

19. Mr. Sasaki reviewed the Campaign's agreement for the property in issue and found it to be one he would accept for a vacant property in order to get a tenant into the property and generate consumer traffic. (Test. of Sasaki.)

20. Under normal market conditions, the lease rate and utility expenses identified in the Campaign's rental agreement does not represent fair market value for ground-floor retail space in downtown Portland. (Test. of Sasaki.)

21. Under current market conditions – with ground-floor commercial space sitting vacant for more than two years – a short-term lease that allows the property owner to recover operating costs, increases property exposure, and decreases vagrancy, loitering, and crime may represent fair market value even if it generates no profit. (Test. of Sasaki.)

22. Patrick Gilligan⁸ is a partner and Executive Vice President of Lincoln Property

⁸ Mr. Gilligan donated the maximum allowable under the program (\$250) to the Campaign. (Test. of Gilligan.)

Company, a full service property developer and management company overseeing eight million square feet of commercial real estate. Mr. Gilligan has more than 16 years of experience in commercial real estate. He is responsible for overseeing the company's business operations for Oregon, Washington, Idaho, and Utah. (Test. of Gilligan.)

23. In Oregon, Mr. Gilligan oversees approximately two million square feet of commercial real estate space located in downtown Portland including the Wells Fargo Center, Pacwest Center, and the Freemont Office Building. (Test. of Gilligan.)

24. In recent years, Mr. Gilligan has observed the exodus of large employers from the downtown area due to increased crime and public unrest. Mr. Gilligan has also observed many smaller retail businesses close following the departure of large businesses. (Test. of Gilligan.)

25. Lincoln Property Co. has also experienced recent difficulties retaining existing tenants in long-term leases due to ongoing negative conditions downtown Portland. (Test. of Gilligan.)

26. Lincoln Property Co. is currently seeking short-term tenants operating pop-up businesses in Portland to occupy vacant ground-floor commercial space in order to increase traffic and marketability of other vacant spaces within a given building. Mr. Gilligan believes it is beneficial to grant significant concessions – including agreements that cover operating costs but generate no profit – for short-term tenants because it can offset the property owner's cost during difficult market conditions until a long-term tenant can be found. (Test. of Gilligan.)

27. Mr. Gilligan has experience determining fair market value for commercial property and assets. In his opinion, it is inappropriate to use the listed lease rate to determine fair market value because it does not account for current comparables, market vacancy rates, and interest from commercial tenants. (Test. of Gilligan.)

28. Mr. Gilligan believes the rent and operating costs paid by the Campaign represent the current fair market value for the period of the agreement because it covers the owner's costs and generates some rent in a building located in a high crime area with significant vacancies. Mr. Gilligan believes this agreement was good for the property owner because the Campaign accepted the property without any tenant improvements. In his experience, long-term tenants are seeking significant concessions, included substantial tenant improvements. (Test. of Gilligan.)

29. Brandon Anderson is a partner at Pivot Property Management and owns commercial real estate in downtown Portland including buildings located at Fifth Ave. and Alder, Fourth Ave. and Alder, Second Ave. and W. Ash, and SW Broadway and Oak. Mr. Anderson has more than 20 years of experience in commercial real estate in downtown Portland. (Test. of Anderson.)

30. In Mr. Anderson's experience, it is unusual to sign a lease at the listed rate without granting substantial concessions – in the form of tenant improvements, common area costs, utilities, etc. – to the tenant. (Test. of Anderson.)

31. Under the current market conditions in downtown Portland, Mr. Anderson is granting 20 to 30 percent discounts off lease rates for existing tenants just to keep the space occupied. (Test. of Anderson.)

32. In Mr. Anderson's experience, the listed lease rate is not appropriate for determining fair market value because it is considered as the starting point for negotiations, rather than a firm price. (Test. of Anderson.)

33. Hope Beraka is the owner and principal broker of Think Real Estate and Think Commercial in Portland. Approximately 70 to 80 percent of Ms. Beraka's real estate business is residential, with the remaining 20 to 30 percent focused on commercial properties. (Test. of Beraka.)

34. Ms. Beraka owns one commercial building in East Portland and one in Southeast Portland. None of the commercial properties she owns or manages is located in downtown Portland. (Test. of Beraka.)

35. In preparation for the hearing, Ms. Beraka researched commercial properties in downtown Portland at the City's request. Ms. Beraka searched for leases comparable to that signed by the Campaign. She found some newly signed leases ranging from \$20 to \$30 per square foot and included both full service and NNN leases. The shortest executed lease Ms. Beraka located was two years with the longest being 10 years. (Test. of Beraka.)

36. On August 7, 2022, the Portland City Auditor's Office received a complaint of a potential campaign finance violation by the Campaign. The Program treated the complaint as a tip.⁹ That tip alleged the Campaign was violating Program contribution limits by not paying appropriate rent on its headquarters in downtown Portland. (Ex. A9 at 1-2.)

37. Based on the tip, Program Director Susan Mottet initiated an investigation. Ms. Mottet reviewed the Campaign's expenditures and contributions reported to the Program to identify rental expenditures and obtained information regarding the rental agreement from the Campaign. Ms. Mottet then retrieved the active listing for the space occupied by the Campaign from the internet and noted that the advertised price for the entire space, including the two parking spaces, was \$26.00 per sq. ft. (Ex. A9 at 2-3; test. of Mottet.)

38. Ms. Mottet conducted an internet search for what she considered comparable properties in the downtown area in order to calculate the fair market value of the Campaign's headquarters. The six properties Ms. Mottet identified as comparable ranged in price from \$23 to \$30 per sq. ft. One property listed for \$24 per sq. ft. included three parking spaces. Another, listed at \$26 per sq. ft. included two parking spaces. A third listing advertising \$27 per sq. ft. included a single parking space. The remaining three listings selected by Ms. Mottet did not mention available parking spaces. (Ex. A9 at 9.)

39. Ms. Mottet believed the parking spaces included with the Campaign's

⁹ The Program Director made this determination because the complaint did not meet Program requirements for valid complaints. (Ex. A9 at 1.)

headquarters should be assigned a fair market value separate from the office space. To determine that value, Ms. Mottet researched a commercial parking lot adjacent to the property and found single unassigned parking spaces advertised for \$230 per month. Ms. Mottet also determined that the advertised price was not subject to negotiation. As such, she calculated the fair market value of the parking spaces alone to be \$460 per month. (Ex. A9 at 3-4; test. of Mottet.)

40. Ms. Mottet also attempted to determine if commercial property managers were advertising or granting free months of rent as lease incentives to attract new tenants. Ms. Mottet found that advertised discounts did not offer more than one month of free rent for signed a signed lease. She then contacted a commercial real estate broker and asked what discounts were available on commercial real estate leases in the downtown Portland area.

41. None of the commercial properties researched by Ms. Mottet was subject to an executed lease. During her research, Ms. Mottet did not find any advertisements for short-term leases of commercial properties in downtown Portland. (Test. of Mottet.)

42. Ms. Mottet has no professional experience in commercial or residential real estate. (Test. of Mottet.)

43. Based on her research, Ms. Mottet estimated the fair market value of the property in issue to be the advertised price of approximately \$6,900 per month.¹⁰ Accordingly, Ms. Mottet determined the Campaign received prohibited contributions or in-kind contributions over the allowable limit of \$6,650 each month from May through September 2022. Ms. Mottet then determined the Campaign failed to report each of those contributions in accordance with Program requirements. (Exs. A1 at 3-4 and A9 at 4-5; test. of Mottet.)

CONCLUSIONS OF LAW

1. The City failed to prove that Appellants received prohibited contributions or in-kind contributions in the form of discounted office space because the City did not show the fair market value of the office space in issue was something other than what Appellants paid.

2. Because the City did not establish Appellants received prohibited or in-kind contributions in the form of discounted office space during the period in issue, Appellants were not required to report the purported discount.

3. Because the City did not prove any violation alleged in the Notice, no civil penalty is appropriate.

OPINION

This case involves application of relatively new code provisions (Portland City Code Chapter 2.16 – effective December 10, 2021 – and its corresponding administrative rules –

¹⁰ Inexplicably, despite determining a separate fair market value for each, the Director did not include the estimated value for the two parking spaces in this calculation.

effective February 15, 2022) regarding the public financing of elections through the Program, which matches eligible contributions at a ratio up to 9:1. Those provisions regulate contribution limits for participating candidates to ensure the Program is administered fairly. Although relying on state definitions for some terms, the City's code provisions and administrative rules are separate from state statutes and administrative rules governing elections generally, which are enforced by the Oregon Secretary of State.

In this matter, the City alleges Appellants received prohibited contributions from SPM – in the form of either over the limit contributions or discounted office space constituting in-kind contributions –during the period in issue because Appellants did not pay fair market value for the office space. The City also asserts that Appellants failed to report each of those contributions as required under the Portland City Code and Program Administrative Rules. For those violations, the City proposes to assess a civil penalty against Appellant of \$77,140, consisting of \$33,250 to be repaid to SPM, \$33,205 to be paid to the Program for accepting the prohibited contributions, and an additional \$10,640 for failing to report contributions in a timely manner.

As the proponent of those positions, the City bears the burden of proving its allegations by a preponderance of the evidence. ORS 183.450(2) and (5); PCC 22.03.080(B)¹¹; *Reguero v. Teachers Standards and Practices Commission*, 312 Or 402, 418 (1991) (burden is on Commission in disciplinary action); *Dixon v. Board of Nursing*, 291 Or App 207, 213 (2018) (in administrative actions, the standard of proof that generally applies in agency proceedings, including license-related proceedings, is the preponderance standard.) Proof by a preponderance of the evidence means that the fact finder is convinced that the facts asserted are more likely true than false. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

The burden of proof encompasses two burdens, the burden of production and the burden of persuasion. *Marvin Wood Products v. Callow*, 171 Or App 175 (2000) (Conceptually, the burden of proof encompasses two distinct burdens: the burden of producing evidence of a particular fact (*i.e.*, the burden of production), and the burden of convincing the trier of fact that the alleged fact is true (*i.e.*, the burden of persuasion)). Accordingly, any party advocating a particular position bears the burdens of production and persuasion as to that position. A party may not rely on an absence of evidence in the record to meet its burden. *May Trucking Co. v. Dept. of Transportation*, 203 Or. App. 564, 572-573, 126 P.3d 695, 700-701 (2006) (rejecting petitioner's contention of an absence of evidence in the record and finding, "It was petitioner's obligation to make sure that there is evidence in the record supporting its position.")

The parties agree that the appropriate starting point for this case is the determination of fair market value of the office space in issue. At hearing, Appellants conceded that any amount over the fair market value constituted an in-kind contribution to the campaign. Similarly, the City conceded that only the dollar value determined to exceed the fair market value of the property qualified as a prohibited direct or in-kind contribution. As discussed below, the City

¹¹ Unless otherwise provided in PCC 22.16, contested case hearings for alleged Program violations are conducted in accordance with PCC 22.10. PCC 2.16.170(G)(6). PCC 22.10.050(A) states, "Hearings shall be conducted in accordance with the procedures set forth in Sections 22.03.050 to 22.03.115 of this Title."

failed to establish, by a preponderance of the evidence, the fair market value of the office space. As such, the City failed to prove Appellants did not pay fair market value for the space during the period in issue.¹²

The Program was created under Portland City Code (PCC) Chapter 2.16. See PCC 2.16.005. PCC 2.16.010 provides definitions applicable to the Program and provides, in pertinent part:

As used in this Chapter, unless the context requires otherwise:

A. “Allowable Contribution” is a contribution of no more than \$250 that will be further defined by the Portland Elections Commission and the definition will be published in administrative rules.

* * * * *

I. “Contribution” has the meaning set forth in ORS 260.005 and 260.007.

* * * * *

R. “In-Kind Contribution” will be defined by the Portland Elections Commission and the definition will be published in administrative rules.

S. “Matchable Contribution” is a contribution made by a Matchable Donor and will be further defined by the Portland Elections Commission and published in administrative rules.

(Emphasis in original.)

ORS 260.005(3) defines “contribution,” as follows:

(3) Except as provided in ORS 260.007, “contribute” or “contribution” includes:

(a) The payment, loan, gift, forgiving of indebtedness, or furnishing without equivalent compensation or consideration, of money, services other than personal services for which no compensation is asked or given, supplies, equipment or any other thing of value:

(A) For the purpose of influencing an election for public office or an election on a measure, or of reducing the debt of a candidate for nomination or election to public office or the debt of a political committee; or

¹² As discussed more fully herein, this determination is based on a lack of reliable and probative evidence establishing the fair market value of the property, rather than on the strength or weight of contrary evidence from Appellants establishing fair market value to be the agreed upon rate. The ALJ reaches this conclusion based on the required allocation of the burden in contested case proceedings set forth above.

(B) To or on behalf of a candidate, political committee or measure; and

(b) The excess value of a contribution made for compensation or consideration of less than equivalent value.¹³

Program Administrative Rule Chapter 2.16 provides additional clarification to the terms in PCC 2.16 and reads, in relevant part:

(2) **Purpose.** The program’s purpose is to reduce or eliminate corruption or the appearance of corruption in elections and governing by elected officials. These administrative rules provide further detail to implement of the program and will be broadly interpreted to effectuate the program’s purpose.

(3) **Definitions.**

A. “**Allowable contribution**” means a contribution of no more than \$250 in support of a participating or certified candidate that is:

1. Made by an individual or a small donor organization; and
2. Made during the election cycle in which the candidate is seeking office;
3. Not eligible to be matched with city matching funds; and
4. Includes the fair market value of proceeds from selling campaign merchandise.

B. “**Contributions**” do not include services an individual provides without compensation while volunteering their time to the candidate or campaign committee.

* * * * *

D. “**Egregious**” means conspicuously, glaringly, or flagrantly bad, which includes conduct that would conceal an instance of committing fraud against the program or conduct that would conceal an instance of violating a requirement or prohibition of the program.

* * * * *

F. “**In-kind contribution**” means a good or service that has monetary value, other than money, that is provided directly by a contributor to a participating or certified candidate. In-kind Contributions that increase language inclusivity or accessibility for people with disabilities may be provided directly or indirectly to

¹³ ORS 260.007 provides exclusions from the definitions of “contribution” and “expenditure,” none of which is relevant to this proceeding.

a participating or certified Candidate.

* * * * *

H. “**Matchable amount**” means the amount, in aggregate, of a matchable contribution, that is matched per donor per election period.

I. “**Matchable contribution**” means contributions of up to \$250 in aggregate per donor per election period.

* * * * *

M. “**Violation**” means each time a campaign or political committee receives a notice of penalty for one or multiple instances of failing to comply with the program or these rules.

(Emphasis in original.)

Finally, neither PCC 2.16 nor Program Administrative Rule Chapter 2.16 define the term “fair market value.” At hearing, Director Mottet indicated that the Program uses the state definition of “contribution,” which in turn refers to fair market value as defined in state rules. The Oregon Secretary of State Elections Division 2022 Campaign Finance Manual (CFM), adopted pursuant to OAR 165-012-0005, defines Fair Market Value as, “the dollar amount a consumer would expect to pay for good or services.”¹⁴ CFM at 88.

As discussed above, in its Combined Motion, the City moved to exclude certain evidence of the property owner or manager’s opinions regarding fair market value of the property in issue based on the Oregon Court of Appeals opinion in *Bernard*. Combined Motion at 2. In the Combined Motion and at hearing, the City argued that the Court in that case held, “the donor’s personal decisions are not relevant in determining fair market value for the purposes of in-kind campaign contributions.” *Id.* To the extent the City reads *Bernard* to hold a property owner or manager’s opinion as to the actual fair market value of an asset irrelevant, I disagree.

In *Bernard*, the Court was tasked with determining whether a billboard on private property had any fair market value to determine the value of an in-kind contribution. In that case, a supporter of Mr. Bernard offered to print a campaign poster and display it on a large two-sided sign structure located on his property. The donor used one side of the sign structure to advertise his personal business. The other side of the sign displayed an American flag. The donor printed the poster and had it mounted on one side of the billboard opposite the existing business advertisement. The campaign paid nothing for use of the sign structure. The campaign reported the costs of the sign printing as a campaign contribution but did not report the value of the billboard as an in-kind contribution. Based on a complaint and subsequent investigation, the

¹⁴ Similarly, Black’s Law Dictionary defines “fair market value” as, “[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm’s-length transaction; the point at which supply and demand intersect.” Black’s Law Dictionary 1549 (Seventh Edition 1999).

Oregon Secretary of State Elections Division determined the campaign violated reporting requirements by failing to report use of the billboard as an in-kind contribution and assessed a civil penalty of \$11,500. 229 Or App 421-22. (2009).

On appeal, the campaign asserted several assignments of error including, as relevant to the City's argument, that the Secretary of State erred in treating use of the billboard as an in-kind contribution because the owner of that structure never put it to commercial use. In rejecting the campaign's argument, the Court reiterated, "fair market value is an objective concept representing the price that a hypothetical willing buyer would pay a hypothetical willing seller." *Id.* at 425, citing *PGF Care Center, Inc. v. Wolfe*, 208 Or App 145, 153 (2006) and *Tofte and Tofte*, 134 Or App 449, 457 (1995).

Contrary to the position espoused by the City, the Court in *Bernard* did not declare the donor's (or property owner's) personal experience and opinions are not relevant in determining fair market value for the purposes of in-kind campaign contributions. Rather, the Court stated, "[the property owner's] personal decision not to lease the billboard is not relevant" to determining whether the billboard had *any* fair market value. *Bernard*, 229 Or App 419, 245 (2009). The cited passage follows the Court's express rejection of the property owner's suggestion that, because he chose not to lease the billboard to others, it had *no* fair market value.

The City misreads *Bernard* to stand for the proposition that a property owner's experience, opinions, or financial considerations are not relevant to determining the actual fair market value of the property in issue. *Bernard* is silent on whether a property owner's personal or professional experience and opinions are relevant to determining the fair market value of an asset. As such, the case before me is distinguishable from *Bernard* in that the question here is not whether an asset has any fair market value. In this matter, there is no dispute that the property in issue has some fair market value. The question to be resolved is what the appropriate value of that asset is for purposes of determining whether an in-kind contribution occurred because of a disparity between the amount paid by the Campaign and the fair market value of the property.¹⁵

According to the overwhelming weight of expert testimony, the current state of the commercial real estate market – particularly ground-floor retail and office space – in downtown Portland is weak due to repeated civil unrest, increased homelessness, vagrancy, as well as both personal and property crimes. Those elements, coupled with the COVID 19 pandemic and corresponding transitions to work-from-home operations and combined with current economic stressors conspire to drive large and small businesses out of downtown. That exodus of employers results in increased vacancies for commercial properties in downtown Portland.

¹⁵ The City also argued at hearing that, under *Bernard*, its only burden was to show that a market exists for the property in issue and that there is a price at which a hypothetical willing buyer would pay to a hypothetical willing seller. *See* 229 Or App 419, 425 (2009). Again, this case is distinguishable because there is no dispute over whether a market exists and thus no need to engage in hypothetical market analyses. Rather, this case centers on an asset actively marketed for long-term lease opportunities and occupied by a short-term tenant. Where an actual willing buyer and seller exist, it is inapposite to apply the hypothetical standards.

According to the record, this is especially true for ground-floor retail and office space due to higher incidents of crime and vandalism involving such ground-floor units. Specifically, the property in issue – listed at a competitive lease rate for downtown properties and offering a full service lease with two parking spaces included – remained vacant from April 2020 until the Campaign agreed to the short-term agreement in issue here.

The preponderant weight of the evidence established that, to combat high vacancy rates during these difficult market conditions, property owners and managers are seeking out short-term agreements with pop-up businesses designed to operate for a limited period, such as a holiday season or special event. In doing so, those entities are offering significant discounts – including structuring deals that merely cover operating costs of the space and offset some or all of the operating costs of the building – in order to get a tenant in the building that will increase foot traffic and reduce vacant retail space, particularly in ground-floor units that have become less desirable due to the proliferation of vandalism and crime in the area. Based on this record, the evidence established that commercial property owners benefit from this arrangement because the entire property is more marketable with less observable vacancy. Moreover, because tenants are responsible for repairing damage to the property, owners can avoid repair expenses they would otherwise pay on a vacant space.

The gravamen of the City's argument is that Appellants provided no objective evidence supporting a determination that the amounts paid by the Campaign, for the property in issue, represents fair market value. That argument appears to misapply the burden in this matter. As discussed in detail above, as the proponent of the position that the fair market value is different from the amount paid by the Campaign, the City bears the burden of presenting evidence on that fact. That evidence must be sufficient to persuade the trier of fact of the correctness of the City's position. It is undisputed that the property in issue has some fair market value. The only dispute is the dollar amount assigned as that value. The proposed penalty is based on the City's calculation of the fair market value to be \$6,900 per month. It is the City's burden, therefore, to establish that fair market value by a preponderance the evidence.

To determine fair market value of the property in issue, the Program Director performed an internet search looking for both the listing of property in issue and listed lease rates for other commercial properties, along with advertised discounts. In addition, the Program Director determined that two parking spaces – advertised as included at the advertised lease rate for the property in issue – should be assigned a separate fair market value. To assign fair market value to the property, the Director reviewed internet advertisements for commercial leases available in building she determined to be comparable. Because those advertised lease rates were similar to the \$26 per sq. ft. advertised for the property in issue, the Director assigned the advertised lease rate – approximately \$6,900 per month – as the fair market value. Thereafter, the Director researched commercial parking lots in the area and determined the two parking spaces advertised with the lease had a separate fair market value of \$460 per month. She then subtracted the monthly rent paid by the Campaign from the \$6,900 per month fair market value she assigned the property and determined the Campaign received \$6,650 in prohibited or in-kind contributions over the allowable limit for each month between February and September 2022. According to the overwhelming weight of the evidence, the Director's methodology and calculations were oversimplified and inappropriate to determine fair market value of commercial real estate in

downtown Portland under the current socioeconomic conditions affecting the market.

At hearing, all expert witnesses agreed that using advertised lease rates to calculate fair market value of a property alone was inappropriate – particularly with regard to the short-term agreement between SPM and the Campaign – because those rates represent the starting point for negotiations for long-term leases measured in years, rather than months. Moreover, according to the preponderant weight of the evidence, the Director’s methodology failed to account for net benefits realized by the property owner by avoiding tenant improvements, increasing foot traffic to the property, and offsetting operating costs and repair expenses for a ground-floor retail space that lay vacant for more than two years. In addition, because the agreement between the Campaign and SPM allows the property manager to continue to market the property and remove the Campaign on proper notice, the property in issue is not encumbered for any term beyond the required period for a notice to vacate. Thus, the property manager can continue to seek a long-term tenant while the Campaign occupies the space.

According to the evidence presented on this record, the Director did not find any executed short-term leases for the period in issue in downtown Portland. The comparison between a short-term month-to-month agreement and a lease for a term of years cannot be said to be an apples-to-apples comparison. Moreover, the Director did not consider other elements paid by the Campaign – including utilities and janitorial on the entire space, and repair of all damage from vandalism – or the benefit to the property manager in avoiding tenant improvements because the Campaign accepted the property in “as-is” condition, rather than asking to have the space partitioned to accommodate its minimal space needs. The Director convoluted the fair market value calculation by separating out parking spaces, included with the lease, and assigning separate value to each space, despite finding multiple listings that includes parking spaces at no additional charge. As that information does not appear to have been included in the Director’s final estimation of fair market value, it is unclear why the City addressed that value in the Notice or at hearing.¹⁶ The City failed to show that those parking spaces were marketable separately from the property.

The record before me establishes the fair market value of the property in issue was more than zero, but substantially less than the listed lease rate. Most telling is the fact that the property owner and manager have in the past, and continue to, list the property at that rate for more than two years as of the time of hearing with no interest. The record also supports the conclusion that Appellants paid substantially more than the \$250 per month rental rate on the space utilized – between 300 and 500 sq. ft. – in the form of utilities, janitorial, and repair costs for the entirety of

¹⁶ To the extent the Director estimated fair market value of the parking spaces simply as confirmation that the fair market value of the office space with the parking spaces was more than that paid by the Campaign, the Director again failed to conduct an accurate comparison. The record does not show the parking spaces were severable in any way from the property in issue. The City failed to demonstrate the appropriateness of comparing such spaces to individually leasable spaces in a commercial parking lot for the purposes of estimating fair market value. Moreover, the Director’s decision to determine a separate value for each space is confusing in light of her own market research showing multiple properties that included similar parking spaces in the advertised lease rate. Ultimately, it is unnecessary to resolve this anomaly in the Director’s calculation because such clarity would not alter the outcome of this Final Order.

the space – approximately 3,185 sq. ft. – rather than some prorated amount based on the actual square footage occupied. These factors, along with the purported benefit to the owner in avoiding tenant improvements, not having to subdivide the leased space, recovery of costs for CAMs and vandalism, and increasing foot traffic to the building to increase marketability, impact the determination of the then-current fair market value of the space in issue. Coupled with a time of unprecedented challenges in the commercial real estate market, created in part by the current conditions in downtown Portland, the evidence supports a finding that the fair market value is substantially less than the advertised list price of \$26 per sq. ft.

The City failed to carry its burden to demonstrate, by a preponderance of the evidence, that the discounted office space constituted contributions (in-kind or otherwise) because its fair market value exceeded the amount paid. As such, it is unnecessary to address the City’s allegation that Appellants failed to report the purported contributions timely.

Additionally, because the City did not prove that Appellants received and/or failed to report contributions as required by the Portland City Code and Program Administrative Rules, it failed to show any civil penalty is appropriate.

ORDER

The City’s Administrative Sanction – Proposed Penalty issued to the Rene for Portland campaign / Rene Gonzalez on September 20, 2022 is hereby REVOKED.

Joe L. Allen

Senior Administrative Law Judge
Office of Administrative Hearings

APPEAL RIGHTS

Review of this order by either party, including the City of Portland Small Donor Elections Program, shall be by writ of review to the Circuit Court of Multnomah County, Oregon, as provided in ORS 34.010 to 34.100. Under ORS 34.030, a party has 60 days from the date of this decision to petition for review.

CERTIFICATE OF MAILING

On October 27, 2022, I mailed the foregoing Final Order issued on this date in OAH Case No. 2022-ABC-05629.

By: Electronic Mail

Rene Gonzalez
PO Box 82356
Portland OR 97282
Email: rene@artifexpartners.com

Darian Stanford
Tonkon Torp LLP
888 SW 5th Ave Ste 1600
Portland OR 97204
Email: darian.stanford@tonkon.com

Chad Jacobs
Beery Elsner Hammond LLP
1804 NE 45th Ave
Portland OR 97213
Email: chad@gov-law.com

By: Electronic Mail

Susan Mottet, Agency Representative
City of Portland Elections Division
1221 SW 4th Avenue, Room 220
Portland OR 97204

Lucy Garcia for Anesia N Valihov
Hearing Coordinator