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BEFORE THE HEARING EXAMINER OF THE CITY OF MERCER ISLAND

In Re The Appeal of:

BARCELO HOMES, INC.,

Petitioner,

v.

CITY OF MERCER ISLAND,

Respondent.

No. APL21-002

(Ref. No. CE20-0057)

CITY OF MERCER ISLAND’S  
REQUEST FOR  
RECONSIDERATION

I. RELIEF REQUESTED

The City of Mercer Island (“City”) is in receipt of the Hearing Examiner’s Decision and Order dated May 4, 2021, for Barcelo Homes, Inc. APL21-002 (the “Decision”). Pursuant to City of Mercer Island City Code (“MICC”) 3.40.110, the City requests reconsideration to allow for clarification of the Decision, as described herein.

II. LEGAL ANALYSIS

A. Standard for Reconsideration.

MICC 3.40.110 states that a request for reconsideration may be reconsidered by the hearing examiner, if:

1. The decision was based in whole or in part on erroneous facts or information;

1           2. The decision when taken failed to comply with existing laws or regulations  
2 applicable thereto; or

3           3. An error of procedure occurred that prevented consideration of the  
4 interests of persons directly affected by the decision.

5 The City respectfully relies on these provisions allowing for reconsideration and submits that  
6 clarification is warranted in this case.

7           B. Sipiora Observation of Erik Maksimchuk

8           The City respectfully requests a minor correction of the Decision as to which of the  
9 Sipioras (Forrest or Judith) observed Erik Maksimchuk on October 9, 2020. Finding of Fact  
10 5(E). The testimonies of Judith Sipiora and of Stephen McKay was that Judith Sipiora, not  
11 Forrest, observed and confronted Erik Maksimchuk about removal of the stop work order on  
12 October 9, 2020. Testimonies of Judith Sipiora and Stephen McKay, Morning of April 8,  
13 2021. Therefore, Finding of Fact 5(E) should be revised accordingly.

14           C. Standard of Review

15           The City also respectfully notes that the Decision appears to contain some boilerplate  
16 carried over perhaps inadvertently from a land use decision template. *See* Decision, page 13,  
17 referencing the vested rights doctrine. That portion of the Decision also states that the burden  
18 of proof is on the applicant. According to Mercer Island Hearing Examiner Rule 316(a), the  
19 burden of proof in code enforcement hearings is on the City (as opposed to land use review  
20 decisions, in which case the burden is on the applicant). To avoid any confusion, the City  
21 respectfully requests page 13 of the Decision be amended to delete the inapplicable  
22 boilerplate regarding vested rights and to reflect that the City bore the burden of proof in this  
23 proceeding.  
24  
25

26           ///

1           D. Calculation of Civil Penalties

2           Finally, the City requests clarification regarding the timing of the civil penalties. The  
3 Decision provides that no penalties are due until the newly extended compliance penalties  
4 have passed. Conclusion of Law 16 and Decision and Order paragraph E.

5           MICC 6.10.050(D) provides initially for two separate types of civil penalties: general  
6 civil penalties which accrue daily after the compliance period has run and priority violation  
7 penalties that are one-time assessments that do not accrue daily. MICC 6.10.050 (D)(1) and  
8 (D)(2), respectively.  
9

10           D. Civil Penalties.

11           1. Civil Penalties. A civil penalty for violation of the terms and conditions of  
12 a notice of violation, stop work order or voluntary correction agreement shall  
13 be imposed at the rate of \$100 per day for each violation, accruing for every  
14 day after the compliance date listed in the notice of violation. Thirty days after  
15 the compliance date, the penalty will increase to a rate of \$250 per day for  
each violation. Sixty days after the compliance date, the penalty will increase  
to a rate of \$500 per day for each violation, up to a maximum total penalty of  
\$50,000 for each violation.

16           2. Priority Violations. In addition to the penalties described in subsection  
17 (D)(1) of this section, any person that is responsible for a violation of the  
18 provisions of the following regulations will be subject to additional penalties.  
These penalties for priority violations, as described below, will be assessed  
one time and will not accrue daily.  
19

20           The code further provides that for repeat violations, the penalties imposed per (D)(1) and  
21 (D)(2) shall be multiplied. MICC 6.10.050(D)(3). Finally, deliberate violations will also  
22 cause the penalties imposed per (D)(1) and (D)(2) to be multiplied.

23           The City reads (D)(1) and (D)(2) to impose different types of penalties, imposed at  
24 different stages of code enforcement. The City does not read MICC 6.10.050(D) to mean that  
25 compliance dates for (D)(1) penalties must run before (D)(2) penalties are appropriate. The  
26

1 rationale behind the City's interpretation is one of practicality of enforcement. Violations of  
2 stop work orders are classified as (D)(2) priority violations. If the compliance period referred  
3 to in subsection (D)(1) must have run before any priority penalties are imposed, this means  
4 that a responsible person could violate a stop work order (or commit other priority violations)  
5 before the compliance period has run, without incurring any priority penalty at all (or indeed,  
6 any (D)(1) penalty, for that matter).

7 This question is important for the City's future implementation of its code. The City  
8 Code imposes penalties to deter future violations, not to raise revenue, as the Decision aptly  
9 notes. What the City wishes to avoid is a situation in which its code may be skirted by willful  
10 violators so long as those violators time their violations to be prior to the City's compliance  
11 date. Therefore, the City respectfully requests reconsideration of Conclusion of Law 16 and  
12 Decision and Order Paragraph E.  
13

### 14 III. CONCLUSION

15 For the reasons stated above, the City respectfully requests clarification of Finding of  
16 Fact 5(E), page 13 of the Decision, and Conclusion of Law 16 and Decision and Order  
17 Paragraph E.  
18

19 DATED this 13th day of May, 2021.

20 MADRONA LAW GROUP, PLLC

21  
22 By: /s/ Eileen M. Keiffer  
23 Eileen M. Keiffer, WSBA No. 51598

24 *Attorneys for the City of Mercer Island*

1 **DECLARATION OF SERVICE**

2 I, Tori Harris, declare and state:

3 1. I am a citizen of the State of Washington, over the age of eighteen years, not a party  
4 to this action, and competent to be a witness herein.

5 2. On the 13th day of May, 2021, I served a true copy of the foregoing City of Mercer  
6 Island’s Request for Reconsideration on the following counsel of record using the method of  
7 service indicated below:

8 Dianne K. Conway, WSBA No. 28542 9 Gordon Thomas Honeywell LLP 10 1201 Pacific Avenue, Suite 2100 11 Tacoma, WA 98402  Counsel for Petitioner	<input type="checkbox"/> First Class, U.S. Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail: dconway@gth-law.com <input type="checkbox"/> EService pursuant to LGR
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12 I declare under penalty of perjury under the laws of the State of Washington that the  
13 foregoing is true and correct.

14 DATED this 13th day of May, 2021, at Seattle, Washington.

15 **MADRONA LAW GROUP, PLLC**

16 *Tori Harris*

17 \_\_\_\_\_  
18 Tori Harris