

BEFORE THE HEARING EXAMINER OF THE CITY OF MERCER ISLAND

In Re The Appeal of:

BARCELO HOMES, INC., et al.,

Petitioners,

vs.

CITY OF MERCER ISLAND,

Respondent.

NO. APL21-002

(Ref. CE20-0057)

PETITIONERS' CLOSING STATEMENT

HEARING DATE: APRIL 8, 2021

Subsequent to the hearing held in this matter on April 8, 2021, Petitioners submit this Closing Statement for consideration by the Hearing Examiner.

I. SITE HISTORY

The testimony and other evidence at the hearing showed:

Petitioners Nadezhda (“Nadia”) and Bogdan Maksimchuk are a married couple who immigrated to the United States from the Ukraine in 1998.¹ After initially working on paper route to support themselves and their firstborn (of five) children, the Maksimchuks began working in the local construction industry. After specializing in siding for ten years, Bogdan started Benjamin Custom Homes in 2009, which focused on the construction of high-end modern homes. In 2013 Bogdan changed the name of Benjamin Custom Homes to Petitioner Barcelo Homes, Inc. (“Barcelo”). It is undisputed that at all times Barcelo has

¹ Ukraine was a part of the Soviet Union until it gained independence in 1991 following the breakup of the Soviet Union. Accordingly, the Maksimchuks largely grew up under the Soviet police state and occupation.

1 been owned solely by Bogdan.

2 Nadia was an employee of Barcelo through 2019. She handled most permitting and
3 some bookkeeping responsibilities for Barcelo during this period. It is undisputed that at
4 no time did Nadia have any involvement with Barcelo's actual construction activities.

5 Including its time as Benjamin Custom Homes, Barcelo has now built over 150
6 homes—including at least six on Mercer Island—and two commercial buildings. The
7 testimony at the hearing confirmed that Barcelo had never received a stop-work order from
8 any municipality during any of this construction until the construction of a home on 9104
9 SE 50th Street in 2018.

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11 Petitioner Nadia Maksimchuk founded Petitioner Premium Homes of Mercer Island
12 LLC (“Premium Homes”) in 2014 with the goal of starting a business separate from her
13 husband that focused on remodeling and then reselling homes on Mercer Island. But those
14 plans were delayed for the next five years, as Nadia focused on other business and raising
15 her and Bogdan’s five children. It is undisputed that neither Bogdan nor Barcelo has ever
16 had any involvement or interest in Premium Homes.

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18 In 2019, Nadia and Bogdan agreed that Nadia would cease her employment
19 Barcelo and focus on the remodeling and reselling homes through Premium Homes.²
20 Accordingly, her employment with Barcelo ceased in late 2019, though, as she testified,
21 she sometimes provides advice or testimony in matters she was involved in while was an
22 employee.

23 As part of Bogdan and Nadia’s agreement to separate her employment from Barcelo
24 and support Nadia’s new venture with Premium Homes, Barcelo deeded 7216 93rd Ave.
25 SE (“the Property”), a 1349 sf home built in 1946, to Premium Homes on November 6,
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² As testified to by Bogdan, Barcelo was making a change in its focus.

1 2019. The Property had been purchased by Barcelo four months earlier on July 14, 2019.

2 Nadia testified that Premium Homes initially intended to remodel the home on the
3 Property for sale but ultimately determined that the poor condition of the home made this
4 unfeasible. Accordingly, Premium Homes held the property with intention of subdividing it
5 once the home was removed.³
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7 Both Nadia and Bogdan testified that neither Bogdan nor anyone from Barcelo has
8 been on the Property since the transfer to Premium Homes in November 2019.

9 II. Stop Work Order

10 This appeal involves a Notice of Violation issued regarding a series of events between
11 October 7-14, 2020.

12 Premium Homes has never disputed that it used the Property to stockpile soil and
13 debris from other jobs. As testified to by Nadia, she understood—incorrectly— that a permit
14 was required only for grading and not the stockpiling of such material, and at no time did
15 Premium Homes do any grading on the Property.
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17 As Nadia testified, since Premium Homes was not doing work at the Property, Nadia
18 was rarely onsite. The testimony and other evidence shows that on October 9, 2020, she
19 asked her oldest son, Erik, to help her out and take a load of soil⁴ to the Property from
20 another project she was working on. She subsequently received a call from Erik while he
21 was at the Property, who told her he had been approached by a neighbor(s) who told him
22 that the Property was subject to a stop work order. While the testimony regarding the
23 posted stop work order is inconsistent,⁵ it is undisputed that no further delivery of soil or
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³ Subdivision was not possible without removal of the existing home.

⁴ As Dave Henderson also testified, the delivery in question only involved soil, not any construction debris.

⁵ The neighbors testified that Erik removed the stop work order on October 9, 2020, though this is not shown on the video recording. Erik testified he did not see a sign posted that day but admitted to seeing and removing a stop work order on another visit to show Nadia during a Facetime chat; he further testified he put it back up following instructions from Nadia, and he did not deliver the load. While the recollections of Erik

1 debris occurred following October 9, 2020.

2 Following the call from Erik, Nadia called City of Mercer Island Building Official Don
3 Cole, and they spoke on October 13, 2020.⁶ Mr. Cole confirmed that there was a Stop Work
4 Order, and it applied the dumping and stockpiling of soil and debris on all parts of the
5 Property.
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7 Nadia strongly disputed that Premium Homes ever removed the posted Stop Work
8 Order and questioned why anyone would think doing so would be to its benefit. Additionally,
9 all testimony at the hearing confirmed that no materials were delivered to the Property
10 following the alleged October 9, 2020 removal of the stop work order.

11 The Stop Work Order required Premium Homes to remove the soil and debris
12 previously brought to the Property. As both Nadia and Mr. Cole testified, during their
13 October 13, 2020 conversation, Mr. Cole advised Nadia that this could be done without a
14 permit.
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16 On or about November 2, 2020, the City issued a Notice of Violation and Penalty to
17 Barcelo Homes regarding the same violations alleged in this matter. After Barcelo filed an
18 appeal in which it noted it had no relationship to the Property, the City withdrew the Notice
19 of Violation and Penalty. Notably, both Nadia and Erik testified that Nadia asked Erik to
20 return to the Property in early November following receipt of the Notice of Violation and
21 Penalty to see if there was a posted stop work order in place, demonstrating that she had
22 no knowledge or understanding that it had been removed.
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24 _____
25 and Nadia are not completely consistent, both support that there was no delivery to the Property after October
26 9, 2020. The inconsistency also demonstrates that there is no collusion between Nadia and Erik regarding
this issue—their recollections are simply a bit different, which is not surprising given the passage of time.

⁶ Mr. Cole's testimony on the timing did not make much sense given his email entry. It is clear that he entered
the information regarding the call with Nadia on Tuesday, October 13, 2020.

1 It is undisputed that between October 12, 2010 to January 27, 2021, none of the
2 Petitioners or anyone on their behalf went to the Property. On January 27, 2021, Premium
3 Homes brought a small load of gravel to the Property in preparation for the anticipated
4 removal work required by the Stop Work Order to prevent dirt runoff onto the road; Premium
5 Homes used a trailer it had rented from Barcelo for this purpose. This gravel delivery
6 generated an additional complaint by a neighbor. Mr. Henderson testified that when he
7 went to investigate, he saw that there was considerable dirt/mud runoff just from the trailer
8 that had delivered the gravel, which demonstrates that Premium Homes' concern was
9 legitimate. Mr. Henderson also begrudgingly testified that the gravel was indeed "flattened
10 out" after his initial visit and before the debris piles were removed.
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12 Mr. Cole contacted Nadia by email regarding "unlawful continuance of work in
13 violation of posted stop work orders at the three subject properties."⁷ Mr. Cole met with
14 Nadia at the Property on February 1, 2021, to discuss the planned work and acknowledged
15 it did not require a permit. He confirmed this in a February 3, 2021 email to Nadia:
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17 At our site meeting on Monday afternoon, you stated your intention to remove all
18 the dumped materials this week and requested permission to place an additional 2
19 cubic yards of gravel at the entrance to the subject property in order to mitigate mud
20 tracking onto the street. This request is permitted.⁸

21 The debris and soil were removed from the Property shortly after Mr. Cole's site visit.
22 Premium Homes is presently working on complying with the remaining requirements of the
23 Stop Work Order.
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25 The City issued the Notice of Violation and Civil Penalties on February 5, 2021. The
26 document does not rely on any acts and omissions that occurred after October 14, 2020.

⁷ City's Exhibit 12.

⁸ Petitioners' Exhibit 1001.

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III. CALCULATION OF PENALTY

As plainly shown in the testimony and documentary evidence, Premium Homes has never disputed that it brought soil and construction debris to the Property before it learned of the stop work order on or about October 9, 2020. Premium Homes has also never disputed that, following the discussion between Nadia and Mr. Cole on October 13, 2020, the delivery of this soil and debris was a violation of the Mercer Island Code. What Premium Homes (and other Petitioners) dispute is the legitimacy of the penalty imposed by the Notice of Violation

There are multiple issues with the calculation of the penalty imposed by the Notice of Violation.

First, the City seeks to impose penalties against Nadia and Bogdan individually as well as Barcelo. This is highly improper. First, this is 2021, and a wife is no longer the chattel of her husband.⁹

Second, the Property is owned solely by Premium Homes, a Washington LLC. While Barcelo briefly owned it before Premium Homes, none of the violations occurred during its period of ownership, and the testimony shows that Bogdan and Barcelo have no relationship to the Property or Premium Homes. Moreover, pursuing Nadia individually for a violation made by Premium Homes is directly contrary to Washington law:

Disregarding the corporate form or “Piercing the corporate veil,” is an equitable remedy imposed only in exceptional circumstances. A plaintiff seeking to impose direct shareholder liability must demonstrate that: (1) the corporate form has been intentionally used to violate or to evade a duty; and (2) disregard of the corporate form is necessary to prevent an unjustified loss to the creditor. Piercing the corporate veil requires a showing of fraud or abuse. Piercing the corporate veil also requires an “overt intention to

⁹ RCW 26.16.190

1 disregard the corporate entity by using it for an improper purpose.”¹⁰

2 The City has made no showing whatsoever supporting piercing of the LLC
3 veil.

4 Third, the City misuses prior violations by Barcelo and others to radically increase
5 the amount of the penalty on the basis that they are “repeated” violations:

- 6 • CE20-0057: This Notice of Violation was issued solely to Barcelo *for the*
7 *same violations that are in this current Notice of Violation*. The City withdrew
8 the Notice of Violation after Barcelo pointed out it did not own or otherwise
9 have a relationship with the Property. In any event, using the CE 20-0057 as
10 a basis for increasing the penalty is double counting. Notably, Mr. Henderson
11 provided no justification for using this violation in support of the penalty.
- 12 • CE18-0140: Barcelo purchased the property in question, 7223 93rd Ave. SE
13 on April 30, 2014 and sold it November 14, 2015.¹¹ The Stop Work Order in
14 question was issued three years later, on November 21, 2018. While
15 subsequent litigation was filed by the owners in 2018 regarding a number of
16 imagined defects, it is undisputed that Premium Homes has never had any
17 relationship with the property.
- 18 • CE19-0007 and CE19-0023: These alleged violations involved Barcelo on
19 property it owned at the time. Premium Homes had no involvement with the
20 property. CE19-0023 was also strongly disputed by Barcelo, but the City told
21 Barcelo—incorrectly, Barcelo believes—that it had no right to appeal.
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25 ¹⁰ § 2:7. Piercing the corporate veil, 33 Wash. Prac., Wash. Construction Law Manual § 2:7 (2020-2021 ed.)
26 (internal citations omitted). See also RCW 26.16.190.

¹¹ Petitioners’ Exhibit 1002.

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- CE20-0017: Barcelo, Premium Homes, Bogdan, and Nadia have no interest in the property in question. The owners are family members of Bogdan and Nadia, and they asked Nadia to apply for a permit after receiving a stop-work order in February 2020 while they were in California and unable to travel due to Covid and pregnancy. As testified by Nadia, while she applied for the permit under the correct owners name, she defaulted to putting Barcelo down as the contractor, since that was what she always did But it is undisputed that Barcelo has never done any work on the property, including the work that apparently led to a later Notice of Violation. In any event, there is no dispute that Premium Homes has no involvement with this property. Indeed, Mr. Henderson testified that he is dealing directly with the property owners regarding correction of the violation and that Nadia never responded to his emails regarding the same.

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IV. CONCLUSION

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The Notice of Violation and Penalty is based on incorrect facts and law. No penalty should have been issued under the circumstances. To the extent the Hearing Examiner believes a penalty is warranted, it should only be against Premium Homes and not include any acceleration due to prior violations. In short, as found by Mr. Henderson himself, it should be no more than \$100.

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DATED this 19th day of April 2021.

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GORDON THOMAS HONEYWELL LLP

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