

Hearing Examiner Galt

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BEFORE THE HEARING EXAMINER OF THE CITY OF MERCER ISLAND

In Re The Appeal of:

BARCELO HOMES, INC.,

Petitioner,

vs.

CITY OF MERCER ISLAND,

Respondent.

NO. APL21-002

(Ref. CE20-0057)

PETITIONER’S HEARING BRIEF

HEARING DATE: APRIL 8, 2021

Petitioners submit this hearing brief in advance of the hearing scheduled for April 8, 2021.

I. BACKGROUND

The evidence will show:

A. The Petitioners

Petitioners Nadezhda (“Nadia”) and Bogdan Maksimchuk are a married couple who reside on Mercer Island. After immigrating to the United States from the Ukraine in 1998, 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. Including its time as Benjamin

1 Custom Homes, Barcelo has now built over 150 homes—including eight homes on Mercer
2 Island¹—and two commercial buildings. Barcelo had never received a stop-work order from
3 any municipality during any of this construction until the construction of what eventually
4 became the Maksimchuks’ personal home on 9104 SE 50th Sreet (discussed further
5 below).
6

7 Petitioner Nadia Maksimchuk founded Petitioner Premium Homes of Mercer Island
8 LLC (“Premium Homes”) in 2014 with the goal of starting a business focused on remodeling
9 and then reselling homes on Mercer Island. But those plans were pushed aside for the next
10 five years, as Nadia focused on other construction projects and raising her and Bogdan’s
11 five children. Neither Bogdan nor Barcelo has ever had any interest in Premium Homes.

12 Nadia handled most permitting and bookkeeping responsibilities for Barcelo
13 through 2019. After finishing construction of their personal home in 2019, Nadia refocused
14 her energy on Premium Homes and gave up responsibility for handling permitting and
15 bookkeeping for Barcelo (that work is now done by a Barcelo employee).² To that end,
16 Premium Homes purchased three properties:
17

- 18 • 7216 93rd Ave. SE, a 1349 sf home build in 1946. 1349 sf home. The property was
19 initially purchased by Barcelo Homes Inc. on July 14, 2019; Barcelo transferred the
20 home to Premium Homes on November 6, 2019.
- 21 • 7847 SE 40th St., which Premium Homes purchased on July 31, 2020.
- 22 • 2906 74th Ave. SE, a 2920 sf home built in 1948. Premium Homes purchased this
23 property on August 26, 2020.
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26 ¹ Four homes were built when the company was known as Benjamin Custom Homes.

² Contrary to the City’s apparent contention, Nadia is not Barcelo’s registered agent.

1 Barcelo and Bogdan have no connection to the Property. Nadia is the owner of Premium
2 Homes, which is a fully compliant LLC under the laws of the State of Washington.

3 **B. Stop Work Order**

4 This appeal involves a Notice of Violation issued regarding the first property acquired
5 by Premium Homes, 7216 93rd Ave. SE. (“the Property”).

6
7 Premium Homes plans to pursue a short subdivision of the Property rather than
8 remodel the current home, which is in poor condition. Premium Homes admits it used the
9 Property to stockpile soil and debris from other jobs until it learned about the Stop Work
10 Order. This use was based on its misunderstanding that a permit was required only for
11 grading and not the stockpiling of such material. And at no time did Premium Homes do
12 any grading on the Property.

13 Since Premium Homes was not doing work at the Property, Nadia was rarely onsite.
14 On October 12, 2020, she received a call from her son, Eric,³ who told her he had brought
15 a truck load of soil/debris to the Property and been approached by a neighbor(s) who told
16 him that the Property was subject to a stop work order. He did not see a sign posted, and
17 he called Nadia from the site to report on the conversation.

18
19 Nadia immediately called City of Mercer Island Building Official Don Cole, and they
20 spoke on October 13, 2020. Mr. Cole confirmed that there was a Stop Work Order, and it
21 applies the dumping and stockpiling of soil and debris on all parts of the Property. No
22 dumping has occurred on the Property since that time.

23 Premium Homes and Nadia strongly dispute that they ever removed the posted Stop
24 Work Order and question why anyone would think doing so would be to their benefit.

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³ Eric owns his own company that sometimes does work for Premium Homes.

1 The Stop Work Order required Premium Homes to remove the soil and debris
2 previously brought to the Property. During their October 13, 2020 conversation, Building
3 Official Don Cole advised Nadia that this could be done without a permit.
4

5 Between October 12, 2010 to January 27, 2021, none of the Petitioners or anyone
6 on their behalf went to the Property. On January 27, 2021, Premium Homes brought a small
7 load of gravel to the Property in preparation for the anticipated removal work required by
8 the Stop Work Order to level the driveway and prevent dirt runoff onto the road. Mr. Cole
9 contacted Nadia by email regarding “unlawful continuance of work in violation of posted
10 stop work orders at the three subject properties.”⁴ Mr. Cole met with Nadia at the Property
11 on February 1, 2021, to discuss the planned work and acknowledged it did not require a
12 permit. He confirmed this in a February 3, 2021 email to Nadia:

13 At our site meeting on Monday afternoon, you stated your intention to remove all
14 the dumped materials this week and requested permission to place an additional 2
15 cubic yards of gravel at the entrance to the subject property in order to mitigate mud
tracking onto the street. This request is permitted.⁵

16 The debris and soil were removed from the Property shortly after Mr. Cole’s site visit.
17 Premium Home is presently working on complying with the remaining requirements of the
18 Stop Work Order.

19 At no time did any Petitioner remove a posted stop-work order, which remains in
20 place.

21 The City issued the Notice of Violation and Civil Penalties on February 5, 2021. The
22 document does not rely on any acts and omissions that occurred after October 14, 2020.
23

24 II. CALCULATION OF PENALTY

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26 ⁴ City’s Ex. 12.

⁵ Petitioners’ Exhibit 1001.

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

3 First, the City seeks to impose penalties against Nadia and Bogdan individually as
4 well as Barcelo. This is highly improper. As set forth above, the Property is owned solely by
5 Premium Homes. While Barcelo briefly owned it before Premium Homes, none of the
6 violations occurred during its period of ownership. Bogdan has no relationship to the
7 Property or Premium Homes. And pursuing Nadia individually for a violation made by
8 Premium Homes is directly contrary to Washington law:

10 Disregarding the corporate form or “Piercing the corporate veil,” is an
11 equitable remedy imposed only in exceptional circumstances. A plaintiff
12 seeking to impose direct shareholder liability must demonstrate that: (1) the
13 corporate form has been intentionally used to violate or to evade a duty; and
14 (2) disregard of the corporate form is necessary to prevent an unjustified
15 loss to the creditor. Piercing the corporate veil requires a showing of fraud or
16 abuse. Piercing the corporate veil also requires an “overt intention to
17 disregard the corporate entity by using it for an improper purpose.”⁶

18 Second, the City misuses prior violations to radically increase the amount of the
19 penalty on the basis that they are “repeated” violations:

- 20 • CE20-0057: This Notice of Violation was issued solely to Barcelo *for the*
21 *same violations that are in this current Notice of Violation*. The City withdrew
22 the Notice of Violation after Barcelo pointed out it did not own or otherwise
23 have a relationship with the Property. In any event, using the CE 20-0057 as
24 a basis for increasing the penalty is double counting.

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26 ⁶ § 2:7. Piercing the corporate veil, 33 Wash. Prac., Wash. Construction Law Manual § 2:7 (2020-2021 ed.)
(internal citations omitted).

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- CE18-0140: Barcelo purchased the property in question, 7223 93rd Ave. SE on April 30, 2014 and sold it November 14, 2015.⁷ The Stop Work Order in question was issued three years later, on November 21, 2018, and has nothing to do with Barcelo. Premium Homes has never had any relationship with the property.
 - CE19-0007 and CE19-0023: These alleged violations involved Barcelo on property it owned at the time. Premium Homes had no involvement with the property. CE19-0023 was also strongly disputed by Barcelo, but the City told Barcelo—incorrectly, Barcelo believes—that it had no right to appeal.
 - 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 agreed to have Barcelo apply for a permit for the owners (in the owners' names) after a Stop Work Order was issued while the owners were out of town. But Barcelo has never done any work on the property, including the work that apparently led to a later Notice of Violation.

18 III. CONCLUSION

19 The Notice of Violation and Penalty is based on incorrect facts and law. No penalty
20 should have been issued under the circumstances. To the extent the Hearing Examiner
21 believes a penalty is warranted, it should only be against Premium Homes and not include
22 any acceleration due to prior violations.
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⁷ Petitioners' Exhibit 1002.

