BEFORE THE HEARING EXAMINER for the
CITY of MERCER ISLAND

ORDER REVISING A DECISION AFTER RECONSIDERATION

FILE NUMBER:	APL21-003 (Ref. Code Compliance Case CE20-0058)
APPELLANT:	Barcelo Homes, Inc. Premium Homes of Mercer Island, LLC Bogdan Maksimchuk Nadezhda Maksimchuk C/o Dianne K. Conway Gordon Thomas Honeywell LLP 1201 Pacific Avenue, Suite 2100 Tacoma, WA 98402 dconway@gth-law.com
RESPONDENT:	City of Mercer Island Department of Planning & Development C/o Eileen M. Keiffer Madrona Law Group 14205 SE 36th Street, Suite 100, PMB 440 Bellevue, WA 98006 eileen@madronalaw.com
TYPE OF CASE:	Appeal from a Notice of Violation & Civil Penalties

WHEREAS, the City of Mercer Island Hearing Examiner ("Examiner") issued a Decision in the above-entitled matter on May 4, 2021; and

WHEREAS, on May 13, 2021, Respondent City of Mercer Island ("City") Department of Planning & Development ("Department") filed a timely Request for Reconsideration ("Request"). The Examiner received the Request on May 13, 2021; and

WHEREAS, the authority and procedures for reconsideration of Examiner Decisions are spelled out in the Mercer Island City Code ("MICC"):

> A. Any final decision by the hearing examiner may be reconsidered by the hearing examiner, provided a request for reconsideration by a party of record is received within 10 days of the date of the decision by the hearing examiner, if:
>
> 1. The decision was based in whole or in part on erroneous facts or information;

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

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

B. The hearing examiner shall reconsider a final decision based upon the above criteria. The hearing examiner shall issue a decision on the request for reconsideration within 14 days of receiving a request for reconsideration, denying the request or correcting the decision as the examiner determines necessary.

[MICC 3.40.110] Thus, the Examiner has but two options in response to a Request: Deny it or issue a revised Decision, either of which much be completed within 14 days of the date the Examiner receives the Request, which in this case will be May 27, 2021; and

WHEREAS, Appellants Barcelo Homes, Inc., Premium Homes of Mercer Island, LLC, Bogdan Maksimchuk, and Nadezhda Maksimchuk ("Barcelo Homes *et al.*") advised by e-mail on May 13, 2021, that their counsel was on leave until May 24, 2021. Barcelo Homes *et al*. asked that counsel's unavailability be considered in setting any briefing schedule. On May 15, 2021, the Examiner advised the principal parties that he would accept written comments from Barcelo Homes *et al*. through May 25, 2021. Barcelo Homes *et al*. filed a response on May 25, 2021; and

WHEREAS, the following documents received/generated during the reconsideration process are herewith assigned exhibit numbers for identification:

Exhibit 9008:	Hearing Examiner Decision, APL21-002, May 4, 2021
Exhibit 9009:	City of Mercer Island's Request for Reconsideration, filed May 13, 2021
Exhibit 9010:	E-mails, Scheall to Examiner, May 13, 2021, at 11:46 a.m., Examiner to Principal Parties, May 13, 2021, at 12:12 p.m., and Examiner to Principal Parties, May 15, 2021, at 10:00 a.m. (Request for and authorization to submit response)
Exhibit 9011:	Petitioners' Response to City of Mercer Island's Request for Reconsideration, filed May 25, 2021, at 4:38 p.m.; and

WHEREAS, the Request seeks correction of procedural text in the "Legal Framework" section of the Decision and revision of the civil penalty payments provisions in Conclusion of Law 12 and Decision and Order Paragraph E:

A. Legal Framework Section. The Request questions two aspects of this section in the Decision. First, the section includes a "Vested Rights" subsection. The Request believes that the material in that subsection doesn't belong in the Decision and posits that it is "boilerplate" inadvertently incorporated into the Decision from another source. Second, the Request believes that the "Standard

of Review" subsection incorrectly places the burden of proof on the applicant instead of on the respondent. (Exhibit 9009, PDF 2: 7 – 2:17)

This request falls within the scope of MICC 3.40.110(A)(2) and is properly before the Examiner for reconsideration.

Barcelo Homes *et al.* have no objection to the requested clarification and agree that the language should clearly indicate that Respondent Department has the burden of proof. (Exhibit 9011)

The Request is correct. In preparing the form for Notice of Violation appeals the Examiner inadvertently incorporated "boilerplate" language from a land use application form and failed to adjust it to properly reflect requirements associated with a Notice of Violation appeal. The Examiner is embarrassed by that error and apologizes for it. The Vested Rights section is inapplicable. The burden of proving the violation rests with the respondent. That section needs to be substantially revised.

B. Conclusion of Law 12 and Decision and Order Paragraph E. The Request disputes the Examiner's calculation of when civil penalties are due and payable. The Request does not dispute the Examiner's conclusion that basic civil penalties imposed under MICC 6.10.050(D)(1) are not due until the deadline for corrective action compliance has passed without completion of the required correction(s). However, the Request vigorously disputes the Examiner's conclusion that the MICC 6.10.050(D)(2) priority violation and its associated multipliers in MICC 6.10.050(D)(3) and (D)(4) are subject to the same payment timing. The Request argues that MICC 6.10.050(D)(2) through (D)(4) penalties are due and payable immediately, regardless of corrective action compliance. (Exhibit 9010, PDF 2:18 – 4:5)

> The City reads (D)(1) and (D)(2) to impose different types of penalties, imposed at different stages of code enforcement. The City does not read MICC 6.10.050(D) to mean that compliance dates for (D)(1) penalties must run before (D)(2) penalties are appropriate. The rationale behind the City's interpretation is one of practicality of enforcement. Violations of stop work orders are classified as (D)(2) priority violations. If the compliance period referred to in subsection (D)(1) must have run before any priority penalties are imposed, this means that a responsible person could violate a stop work order (or commit other priority violations) before the compliance period has run, without incurring any priority penalty at all (or indeed, any (D)(1) penalty, for that matter).
>
> This question is important for the City's future implementation of its code. The City Code imposes penalties to deter future violations, not to raise revenue, as the Decision aptly notes. What the City wishes to avoid is a situation in which its

> code may be skirted by willful violators so long as those violators time their violations to be prior to the City's compliance date. Therefore, the City respectfully requests reconsideration of Conclusion of Law 12 and Decision and Order Paragraph E.

(Exhibit 9009, 3:14 – 4:5)

This request falls within the scope of MICC 3.40.110(A)(2) and is properly before the Examiner for reconsideration.

Barcelo Homes *et al.* object to this part of the Department's Request. Barcelo Homes *et al*. asserts that "giving alleged violators of MICC 6.10.050(D)(1) an opportunity to correct their violations before incurring additional penalties under MICC 6.10.050(D)(2) is a completely appropriate measure from a public policy standpoint." (Exhibit 9012, PDF 2:1 – 2:5)

Chapter 6.10 MICC contains a number of provisions regarding the payment of civil penalties, all contained in MICC 6.10.050: [1]

> **6.10.050 Enforcement provisions.**
>
> Violations may be enforced by issuing one or more civil infractions or one or more notices of violation or any combination thereof. The city shall have discretionary authority to enforce a violation by issuing a civil infraction or a notice of violation pursuant to this chapter or prosecuting it as a criminal matter.
>
> Each day during which a code violation is committed, occurs or continues shall be considered a separate offense for purposes of civil infractions or notices of violation.
>
> A. *Misdemeanors.* …
>
> B. *Code Violations.* Whenever the director has reason to determine that a code violation occurred or is occurring, or that the code violations cited in an infraction have not been corrected, or that the terms of a voluntary correction agreement have not been met, the director is authorized to issue a notice of violation to any person responsible for the code violation.
>
> Subsequent violations shall be treated as new violations for purposes of this section.

[1] For the sake of completeness, all subsections in MICC 6.10.050 are listed; for the sake of expediency and efficiency, content unrelated to the issue at hand has been replaced by ellipses (…).

1. *Notice of Violation.* A notice of violation shall be completed in a form approved by the director and the city attorney, and shall be served consistent with MICC 6.10.040 and shall, at minimum, include the following:

…

d. An order requiring corrective action to be taken, description of corrective action that is necessary to achieve compliance, and a date by which the correction must be completed;

e. A statement that if the violation is not corrected and the notice is not appealed, the determination is final and monetary penalties shall be due;

f. The amount of penalty that will be assessed; and

g. …

2. *Supplementation, Revocation or Modification.* …

3. *Failure to Correct.* Failure to correct the code violation in the manner prescribed in the notice of violation subjects the person responsible to any of the following compliance remedies:

a. Civil penalties and costs;

…

4. *Time Limits.*

a. Persons receiving a notice of violation shall rectify the code violations identified within the time period specified by the director in the notice of violation issued pursuant to this chapter.

b. Unless an appeal is filed with the city for a hearing before the hearing examiner in accordance with the provisions of this chapter, the notice of violation shall become the final administrative order of the director, and the civil penalties assessed and accrued shall be immediately due and subject to collection.

5. *Appeals.* … Failure to appeal the notice within 14 days shall render the notice a final determination that the conditions described therein existed and constitutes a code violation, that assessed and accrued civil penalties are due, and that the named party is liable as a person responsible.

C. *Civil Infractions.* …

D. *Civil Penalties.*

1. *Civil Penalties.* A civil penalty for violation of the terms and conditions of a notice of violation, stop work order or voluntary correction agreement shall be imposed at the rate of $100 per day for each violation, accruing for every day after the compliance date listed in the notice of violation. Thirty days after 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.

2. *Priority Violations.* In addition to the penalties described in subsection (D)(1) of this section, any person that is responsible for a violation of the 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.

…

3. *Repeat Violations.* … Repeat violations will incur double the civil penalties set forth in subsections (D)(1) and (2) of this section. If violations are repeated a third or subsequent time within a 36-month period, the penalties will be five times those set forth above. The city also has authority to suspend or revoke a business license when a responsible party is repeatedly doing work in violation of city regulations (Chapter 5.01 MICC).

4. *Deliberate Violation.* If a violation was deliberate, the result of blatant disregard for direction from the city or knowingly false information submitted by the property owner, agent or their contractor, civil penalties will be incurred at double those set forth above in subsections (D)(1) through (3) of this section.

5. *Voluntary Compliance.* …

E. *Suspension, Revocation or Limitation of a Permit.* …

F. *Hold on Future Permits.* …

G. *Notice on Title.* …

[Bold and italic in original; underling added]

The penalty payment timing provisions of MICC 6.10.050 are not a paragon of preciseness or consistency. A Notice of Violation is required to state that if the Notice is not appealed or the violation is not corrected, penalties are due. [MICC 6.10.050(B)(1)(e)] Nothing in that section says that some of the civil penalties are payable regardless of whether the violation is corrected. Subsection 6.10.050(B)(3) MICC also states that failure to correct the violations subjects the person to civil penalties. That code provision also does not say that some penalties are due whether or not the violation is corrected. Subsection 6.10.050(D)(1) also states that the basic $100 per day civil penalty begins to accrue the day after the compliance date.

Contrary language is found in MICC 6.10.050(B)(4)(b) and (B)(5) which state that penalties are due immediately if the Notice is not appealed.

The "Priority," "Repeat," and "Deliberate" violation add-on/multiplier paragraphs say nothing about when those penalties are due and payable. [MICC 6.10.050(D)(2), (D)(3), and (D)(4)] Each does, however, reference back to (D)(1) which states that the basic civil penalty is assessed after the compliance date has passed. The two contrary provisions in MICC 6.10.050(B)(4)(b) and (B)(5) fly in the face of the remainder of the code section. They purport to require immediate payment of the civil penalty if an appeal is not filed, a position completely contrary to the very carefully crafted language in MICC 6.10.050(D)(1). One would have to infer a different payment schedule than expressed in the code to reach the position that the Request encourages.

The Examiner understands the rationale of the Department's position as argued in the Request. The Examiner is also not unaware of the concept of according deference to the staff's interpretation of the code it deals with daily. [2] But a staff interpretation cannot effectively amend an adopted ordinance. [3] Appellate courts have also said that a staff interpretation of an unclear code must be based on a pattern and practice followed over some period of time. [4] There is no such evidence

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[2] "'[I]t is well settled that due deference must be given to the specialized knowledge and expertise of an administrative agency.'" [*Port of Seattle v. Pollution Control Hr'gs Bd.*, 151 Wn.2d 568, 595, 90 P.3d 659 (2004) (alteration in original) (quoting *Dep't of Ecology v. Pub. Utility Dist. No. 1 of Jefferson County*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993), *aff'd*, 511 U.S. 700, 114 S. Ct. 1900, 128 L. Ed. 2d 716 (1994))]

[3] An agency interpretation or agency policy cannot work to effectively "amend" an ordinance or apply it in a manner that clearly exceeds its intended scope. [*Mall, Inc. v. City of Seattle*, 108 Wn.2d 369, 378, 739 P.2d 668 (1987)]

[4] "Often when an agency or executive body is charged with an ordinance's administration and enforcement, it will interpret ambiguous language within that ordinance. But the agency must show it adopted its interpretation as a 'matter of agency policy.' *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992). While the construction does not have to be memorialized as a formal rule, it cannot merely 'bootstrap a legal argument into the place of agency interpretation' but must prove an established practice of enforcement. *Id.*" [*Sleasman v. City of Lacey*, 159 Wn.2d 639, 151 P.3d 990 (2007)]

present in this case. Finally, appellate courts have also held that a Hearing Examiner's interpretation of code provisions is to be accorded deference. [5]

Therefore, the Examiner concludes that the current structure of MICC 6.10.050 does not support the notion that the "Priority," "Repeat," and "Deliberate" violation add-on/multipliers are payable regardless of whether the person charged in the Notice complies with the Notice's requirements. If the City's legislative officials want those penalties to be due and payable immediately, without regard to compliance with a Notice's corrective actions, then the code needs to clearly so state. It does not do so now. This element of the Request must be denied; and

WHEREAS, the Examiner concludes for the reasons set forth above that the Decision as issued on May 4, 2021, should be revised; and

WHEREAS, any of the above recitals deemed to be Findings of Fact and/or Conclusions of Law are hereby adopted as such.

NOW, THEREFORE, the Examiner **GRANTS IN PART** the request for reconsideration and **REVISES** the Decision as follows:

A. The "Legal Framework" section of the Decision is **REVISED** in its entirety to read:

> The Examiner is legally required to decide this case within the framework created by the following principles:
>
> Authority
> The Examiner is charged with hearing timely appeals of Notices of Violation. [MICC 6.10.090(B)] The Examiner holds an open record hearing after which he issues a written decision. The Examiner's Decision is a final decision for the City subject to the right of reconsideration and appeal to a court of competent jurisdiction. [MICC 6.10.090(D); MICC 3.40.110]
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> Review Criteria
> 1. Following review of the evidence submitted, if the examiner finds that no violation has occurred, the hearing examiner shall uphold the appeal and reverse the notice of violation or stop order. If the hearing examiner finds that a violation

[5] "And we must give substantial deference to both the legal and factual determinations of a hearing examiner as the local authority with expertise in land use regulations. *City of Medina v. T-Mobile USA, Inc.*, 123 Wn. App. 19, 24, 95 P.3d 377 (2004)." [*Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wn. App. 408, 225 P.3d 448 (2010)]

has occurred, the hearing examiner shall issue an order to the person responsible for the violation which includes the following information:

a. The decision regarding the alleged violation including findings of fact and conclusions based thereon in support of the decision;
b. The required corrective action;
c. The date by which the correction must be completed; and
d. The civil penalties assessed based on the provisions of this chapter and the fee resolution;

2. If an owner of property where a violation has occurred has affirmatively demonstrated that the violation was caused by another person or entity not the agent of the property owner and without the property owner's knowledge or consent, such property owner shall be responsible only for abatement of the violation.

[MICC 6.10.090(C)]

Standard of Review

The standard of review is preponderance of the evidence. The respondent has the burden to prove the violation. [MICC 6.10.090(B)(1); MICC 3.40.080(B); Hearing Examiner Rule of Procedure 316(a)]

Scope of Consideration

The Examiner has considered: all of the evidence and testimony; applicable adopted laws, ordinances, plans, and policies; and the pleadings, positions, and arguments of the parties of record.

B. The Request to Reconsider Conclusion of Law 12 and Decision and Order Paragraph E is **DENIED**.

C. Except as expressly stated above, the Decision as issued on May 4, 2021, is unchanged.

ORDER issued May 26, 2021.

\s\ John E. Galt

John E. Galt
Hearing Examiner

NOTICE OF RIGHT OF APPEAL

The initial Decision, as revised by this Order Revising a Decision after Reconsideration, is the final and conclusive action for the City. "Any judicial appeal of the hearing examiner's decision shall be filed in King County superior court pursuant to Chapter 36.70C RCW, the Land Use Petition Act ('LUPA'). The land use petition must be filed within 21 days of the issuance of the hearing examiner's decision." [MICC 3.40.100, ¶ 2]

The following statement is provided pursuant to RCW 36.70B.130: "Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation."