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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. APL21-003

(Ref. No. CE20-0058)

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 APL21-003 (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 explained 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  
applicable thereto; or

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

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

6 B. Standard of Review

7 The City respectfully notes that the Decision appears to contain some boilerplate  
8 carried over perhaps inadvertently from a land use decision template. *See* Decision, pages  
9 15-16, referencing the vested rights doctrine. That portion of the Decision also states that the  
10 burden of proof is on the applicant. Decision, page 16. According to Mercer Island Hearing  
11 Examiner Rule 316(a), the burden of proof in code enforcement hearings is on the City (as  
12 opposed to land use review decisions, in which case the burden is on the applicant). To avoid  
13 any confusion, the City respectfully requests pages 15-16 of the Decision be revised to delete  
14 the inapplicable boilerplate and to reflect that the City bore the burden of proof in this  
15 proceeding.  
16

17 C. Calculation of Civil Penalties

18 The City also requests clarification regarding the timing of the civil penalties. The  
19 Decision provides that no penalties are due until the newly extended compliance penalties  
20 have passed. Conclusion of Law 12 and Decision and Order paragraph E.

21 MICC 6.10.050(D) provides initially for two separate types of civil penalties: general  
22 civil penalties which accrue daily after the compliance period has run and priority violation  
23 penalties that are one-time assessments that do not accrue daily. MICC 6.10.050 (D)(1) and  
24 (D)(2), respectively.  
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1 D. Civil Penalties.

2 1. Civil Penalties. A civil penalty for violation of the terms and conditions of  
3 a notice of violation, stop work order or voluntary correction agreement shall  
4 be imposed at the rate of \$100 per day for each violation, accruing for every  
5 day after the compliance date listed in the notice of violation. Thirty days after  
6 the compliance date, the penalty will increase to a rate of \$250 per day for  
7 each violation. Sixty days after the compliance date, the penalty will increase  
8 to a rate of \$500 per day for each violation, up to a maximum total penalty of  
9 \$50,000 for each violation.

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

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

14 The City reads (D)(1) and (D)(2) to impose different types of penalties, imposed at  
15 different stages of code enforcement. The City does not read MICC 6.10.050(D) to mean that  
16 compliance dates for (D)(1) penalties must run before (D)(2) penalties are appropriate. The  
17 rationale behind the City's interpretation is one of practicality of enforcement. Violations of  
18 stop work orders are classified as (D)(2) priority violations. If the compliance period referred  
19 to in subsection (D)(1) must have run before any priority penalties are imposed, this means  
20 that a responsible person could violate a stop work order (or commit other priority violations)  
21 before the compliance period has run, without incurring any priority penalty (or indeed, any  
22 (D)(1) penalty, for that matter).

24 This question is important for the City's future implementation of its code. The City  
25 Code imposes penalties to deter future violations, not to raise revenue, as the Decision aptly  
26

1 notes. What the City wishes to avoid is a situation in which its code may be skirted by willful  
2 violators so long as those violators time their violations to be prior to the City's compliance  
3 date. Therefore, the City respectfully requests reconsideration of Conclusion of Law 12 and  
4 Decision and Order Paragraph E.

5  
6 III. CONCLUSION

7 For the reasons stated above, the City respectfully requests clarification of pages 15-  
8 16 of the Decision, Conclusion of Law 12 and Decision and Order Paragraph E.

9 DATED this 13th day of May, 2021.

10 MADRONA LAW GROUP, PLLC

11  
12 By: /s/ Eileen M. Keiffer  
Eileen M. Keiffer, WSBA No. 51598

13 *Attorneys for the City of Mercer Island*  
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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:

|  |   |
|--|---|
| <p>8 Dianne K. Conway, WSBA No. 28542<br/>9 Gordon Thomas Honeywell LLP<br/>10 1201 Pacific Avenue, Suite 2100<br/>11 Tacoma, WA 98402<br/>12 Counsel for Petitioner</p> | <p><input type="checkbox"/> First Class, U.S. Mail, Postage Prepaid<br/><input type="checkbox"/> Legal Messenger<br/><input type="checkbox"/> Overnight Delivery<br/><input type="checkbox"/> Facsimile<br/><input checked="" type="checkbox"/> E-Mail: dconway@gth-law.com<br/><input type="checkbox"/> EService pursuant to LGR</p> |
|--|---|

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