



# Oregon

Kate Brown, Governor

## Department of Environmental Quality

Office of Compliance and Enforcement

700 NE Multnomah St Ste 600

Portland, OR 97232-4100

(503) 229-5696

FAX (503) 229-5100

TTY: 711

July 5, 2017

CERTIFIED MAIL: 7016 2140 0000 2420 4935

Bender Equities, Inc.  
c/o KAR Agent and Service Co., LLC  
520 SW Yamhill Street, Suite 600  
Portland, OR 97204

Re: Notice of Civil Penalty Assessment and Order  
Case No. AQ/AB-WR-2017-077

This letter is to inform you that the Oregon Department of Environmental Quality (DEQ) has issued you a civil penalty of \$5,567 for allowing an unlicensed contractor to perform an asbestos abatement project and for failing to have a thorough asbestos survey performed by an accredited inspector prior to performing a renovation activity. These violations occurred between February 2016 and February 6, 2017 during the renovation of the Oak Vale apartments located at 3930 NW Witham Hill Drive in Corvallis.

DEQ issued this penalty because the removal, handling and disposal of popcorn textured ceiling material containing asbestos could have released asbestos fibers into the air and exposed workers and the public to asbestos. Asbestos fibers are a respiratory hazard proven to cause lung cancer, mesothelioma, and asbestosis. Asbestos is a danger to public health and a hazardous air contaminant for which there is no safe level of exposure. To protect the public from asbestos exposure, the Department requires training and licensing for those who handle asbestos-containing material. These worker certification and licensing requirements are intended to safeguard the public and environment from asbestos exposure resulting from the mishandling of asbestos-containing material. The workers that conducted the improper asbestos abatement project at the Oak Vale apartments were not certified or licensed to do so. In addition, having a thorough asbestos survey performed by an accredited inspector prior to beginning the renovations could have prevented this unlicensed project and the associated risk of exposure.

DEQ appreciates your efforts to prevent the violation from being repeated by stopping work as of February 6, 2017 until the materials affected by the renovation project could be tested, and refraining from further removal of the popcorn texture ceiling material for the remainder of the renovation project. In addition, at DEQ's request, you had an asbestos survey conducted on March 8, 2017 by an accredited inspector before completing renovations. DEQ considered these efforts when determining the amount of civil penalty.

If you wish to appeal this matter, DEQ must receive a request for a hearing within 20 calendar days from your receipt of this letter. The hearing request must be in writing. Send your request to DEQ Office of Compliance and Enforcement:

Via mail – 700 NE Multnomah Street, Suite 600, Portland, Oregon 97232

Via email – [DEQappeals@deq.state.or.us](mailto:DEQappeals@deq.state.or.us)

Via fax – 503-229-5100



Once DEQ receives your request, we will arrange to meet with you to discuss this matter. If DEQ does not receive a timely written hearing request, the penalty will become due. Alternatively, you can pay the penalty by sending a check or money order to the above address.

The attached Notice further details DEQ's reasons for issuing the penalty and provides further instructions for appealing the penalty. Please review and refer to it when discussing this case with DEQ.

DEQ may allow you to resolve part of your penalty through the completion of a Supplemental Environmental Project (SEP). SEPs are environmental improvement projects that you sponsor instead of paying a penalty. Further information is available by calling the number below or at <http://www.oregon.gov/deq/Regulations/Pages/SEP.aspx>.

DEQ's rules are available at <http://www.oregon.gov/deq/Regulations/Pages/Statutes.aspx> or by calling the number below.

If you have any questions, please contact Becka Puskas at 503-229-5058 or toll free in Oregon at 800-452-4011, extension 5058.

Sincerely,



Sarah G. Wheeler, Acting Manager  
Office of Compliance and Enforcement

Enclosures

cc: Kevin Bender, Bender Equities, Inc., 20285 NW Amberwood Drive, Hillsboro, OR 97124  
Dottie Boyd, DEQ Salem Office  
Claudia Davis, DEQ Salem Office  
Shaumae Hall, Accounting, DEQ  
Donald Hendrix, AQ, DEQ



1 requirement of Respondent's mortgage lenders that such testing be conducted with an appraisal. On or  
2 about August 15, 2016, Respondent received the results of the laboratory analysis which states that  
3 both the "Office Ceiling" and the "Unit 90 Ceiling" contained approximately 5% chrysotile asbestos by  
4 weight. The survey conducted on or about August 2016 was not a thorough asbestos survey addressing  
5 the full scope of the Renovation Project.

6 9. On January 30, 2017, DEQ received complaint #17-458 regarding concerns that asbestos-  
7 containing materials may have been mishandled during the Renovation Project at the Facility.

8 10. On January 31, 2017, DEQ sent a letter and asbestos program information to Respondent,  
9 and requested a copy of the asbestos survey that is required to be performed prior to commencing a  
10 renovation activity pursuant to OAR 340-248-0270(1).

11 11. On February 6, 2017, DEQ received a communication from Respondent stating that  
12 Respondent had stopped work in the closets until additional analysis of the closet ceilings was made.

13 12. On February 7, 2017, Respondent submitted to DEQ the results of a laboratory analysis of  
14 samples collected from the ceiling of the closets in Units 123, 136 and 141 on or about February 6,  
15 2017. The laboratory report states that the ceiling of the closet in Unit 123 contained approximately  
16 5% chrysotile asbestos by weight, the ceiling of the closet in Unit 136 contained approximately 5%  
17 chrysotile asbestos by weight, and no asbestos was detected in the ceiling of the closet in Unit 141.  
18 The survey conducted on or about February 6, 2017 was not a thorough asbestos survey addressing the  
19 full scope of the remaining renovations nor was it performed by an accredited inspector.

20 13. On February 22, 2017, DEQ conducted an inspection of the Facility. During the inspection:

21 a. Respondent reported that renovation activities had been completed at 13 of the  
22 buildings, with four buildings yet to be completed;

23 b. DEQ observed one apartment unit that had already been renovated, with the closet  
24 removed, and one apartment unit that had not yet been renovated; and

25 c. DEQ informed Respondent of the requirement to have a thorough asbestos survey  
26 performed by an accredited inspector prior to commencing the Renovation Project. DEQ  
27 informed Respondent that such a survey must address the full scope of the remaining

1 renovations and must be conducted by an accredited inspector before Respondent resumed  
2 the Renovation Project.

3 14. On March 9, 2017, Respondent submitted to DEQ the lab results from a survey conducted  
4 on or about March 8, 2017. The materials that tested positive for asbestos included ceiling materials  
5 with a popcorn texture that contained approximately 3-5% chrysotile asbestos by weight<sup>1</sup> and beige  
6 vinyl bathroom flooring that contained approximately 5% chrysotile asbestos by weight. The survey  
7 performed on or about March 8, 2017 was accepted by DEQ as a thorough asbestos survey conducted  
8 by an accredited inspector pursuant to OAR 340-248-0270(1).

9 15. As of the date of this Notice, Respondent has not provided documentation to DEQ  
10 demonstrating that it completed a thorough asbestos survey performed by an accredited inspector prior  
11 to commencing the Renovation Project on or about February 2016.

### 12 III. CONCLUSIONS

13 1. Respondent has violated ORS 468A.715 and OAR 340-248-0110(2) by allowing an unlicensed  
14 contractor to perform an asbestos abatement project, as described in Section II, Paragraphs 2-7, above.  
15 Specifically, between February 2016 and February 6, 2017, Respondent allowed its employees to remove,  
16 handle and dispose of popcorn texture ceiling material as part of the Renovation Project. The material is  
17 “asbestos-containing material,” as defined by OAR 340-248-0010(8) because it contained more than  
18 one percent asbestos by weight. The Renovation Project included an “asbestos abatement project,” as  
19 defined by OAR 340-248-0010(6) because it was a renovation that involved the removal, handling and  
20 disposal of asbestos-containing material with the potential to release asbestos fibers into the air. This is  
21 a Class I violation according to OAR 340-012-0054(1)(p). DEQ hereby assesses a \$3,118 civil penalty  
22 for this violation.

23 2. Respondent has violated OAR 340-248-0270(1) by failing to have a thorough asbestos  
24 survey performed by an accredited inspector prior to performing a renovation activity, as described in  
25 Section II, Paragraphs 8-15, above. The Renovation Project was a “renovation” according to OAR  
26 340-248-0010(36) because it involved the alteration of the Facility’s apartment units, including the  
27

---

<sup>1</sup> The lab report for sample No. 2170415 states that the sample was 15% chrysotile asbestos by weight. DEQ believes this may be typographical error and it should say 5% chrysotile asbestos by weight, consistent with the other sample results.

1 removal of a closet, among other changes to the units. This is a Class I violation according to OAR  
2 340-012-0054(1)(l). DEQ hereby assesses a \$2,449 civil penalty for this violation.

3 IV. ORDER TO PAY CIVIL PENALTY

4 Based upon the foregoing FINDINGS OF FACTS AND CONCLUSIONS, Respondent is  
5 hereby ORDERED TO:

6 Pay a total civil penalty of \$5,567. The determination of the civil penalties are attached as  
7 Exhibits 1 and 2 and are incorporated as part of this Notice.

8 If you do not file a request for hearing as set forth in Section V below, your check or money  
9 order must be made payable to "State Treasurer, State of Oregon" and sent to the **DEQ, Business  
10 Office, 700 NE Multnomah Street, Suite 600, Portland, Oregon 97232**. Once you pay the penalty,  
11 the Findings of Fact, Conclusions and Order become final.

12 V. NOTICE OF RIGHT TO REQUEST A CONTESTED CASE HEARING

13 You have a right to a contested case hearing on this Notice, if you request one in writing. DEQ  
14 must receive your request for hearing **within 20 calendar days** from the date you receive this Notice. If  
15 you have any affirmative defenses or wish to dispute any allegations of fact in this Notice or attached  
16 exhibit(s), you must do so in your request for hearing, as factual matters not denied will be considered  
17 admitted, and failure to raise a defense will be a waiver of the defense. (See OAR 340-011-0530 for  
18 further information about requests for hearing.) You must send your request to: **DEQ, Office of  
19 Compliance and Enforcement, 700 NE Multnomah Street, Suite 600, Portland, Oregon 97232**, fax  
20 it to **503-229-5100**, or email it to **DEQappeals@deq.state.or.us**. An administrative law judge  
21 employed by the Office of Administrative Hearings will conduct the hearing, according to ORS  
22 Chapter 183, OAR Chapter 340, Division 011 and OAR 137-003-0501 to 0700. You have a right to be  
23 represented by an attorney at the hearing, however you are not required to be. If you are an individual,  
24 you may represent yourself. If you are a corporation, partnership, limited liability company,  
25 unincorporated association, trust or government body, you must be represented by an attorney or a duly  
26 authorized representative, as set forth in OAR 137-003-0555.

27 Active duty service-members have a right to stay proceedings under the federal Service

1 Members Civil Relief Act. For more information, please call the Oregon State Bar at 1-800-  
2 452-8260 or the Oregon Military Department at 1-800-452-7500. Additional information can be found  
3 online at the United States Armed Forces Legal Assistance (AFLA) Legal Services Locator website  
4 <http://legalassistance.law.af.mil/content/locator.php>.

5 If you fail to file a timely request for hearing, the Notice will become a final order by default  
6 without further action by DEQ, as per OAR 340-011-0535(1). If you do request a hearing but later  
7 withdraw your request, fail to attend the hearing or notify DEQ that you will not be attending the  
8 hearing, DEQ will issue a final order by default pursuant to OAR 340-011-0535(3). DEQ designates  
9 the relevant portions of its files, including information submitted by you, as the record for purposes of  
10 proving a prima facie case.

11  
12  
13  
14 July 5, 2017  
15 Date

14 Sarah Wheeler  
15 Sarah G. Wheeler, Acting Manager  
16 Office of Compliance and Enforcement

EXHIBIT 1

FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY  
PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-012-0045

VIOLATION No. 1: Allowing an unlicensed contractor to perform an asbestos abatement project, in violation of ORS 468A.715 and OAR 340-248-0110(2).

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0054(1)(p).

MAGNITUDE: The magnitude of the violation is minor pursuant to OAR 340-012-0135(1)(h)(C) because based on the information available to DEQ, the violation involved less than 80 square feet of asbestos-containing material.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is:  $BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$

"BP" is the base penalty, which is \$2,000 for a Class I, minor magnitude violation in the matrix listed in OAR 340-012-0140(3)(b)(A)(iii) and applicable pursuant to OAR 340-012-0140(3)(a)(B).

"P" is whether Respondent has any prior significant actions, as defined in OAR 340-012-0030(19), in the same media as the violation at issue that occurred at a facility owned or operated by the same Respondent, and receives a value of 0 according to OAR 340-012-0145(2)(a)(A), because there are no prior significant actions.

"H" is Respondent's history of correcting prior significant actions, and receives a value of 0 according to OAR 340-012-0145(3)(c) because there is no prior history.

"O" is whether the violation was repeated or ongoing, and receives a value of 0 according to OAR 340-012-0145(4)(a) because there is insufficient information on which to base a finding under paragraphs (4)(b) through (4)(d). Respondent allowed its employees to remove popcorn textured ceiling material containing asbestos from closet ceilings as part of the Renovation Project between on or about February 2016 and the date of DEQ's inspection on February 22, 2017; however, DEQ does not have sufficient information to determine the number of apartment units where Respondent allowed an its employees to remove the popcorn textured material from the closet ceilings.

"M" is the mental state of the Respondent, and receives a value of 4 according to OAR 340-012-0145(5)(c) because Respondent's conduct was negligent. Negligent means the Respondent failed to take reasonable care to avoid a foreseeable risk of conduct constituting or resulting in a violation. Prior to commencing the Renovation Project, Respondent knew that popcorn textured ceilings, including some of the closet ceilings in the Facility's apartment units, may contain asbestos. Specifically, Respondent stated in an email to DEQ on April 7, 2017, "As original owner and manager of our 1972 built property, we have had testing done from time

to time at Oak Vale for financing and know of the risk popcorn ceilings have containing asbestos.” On or about August 15, 2016, Respondent received the results of a laboratory analysis demonstrating that both the “Office Ceiling” and the “Unit 90 Ceiling” contained approximately 5% chrysotile asbestos by weight. In addition, during DEQ’s inspection of the Facility on February 22, 2017, Mr. Bender stated that he knew that popcorn texture could have asbestos. By allowing its employees to remove the popcorn textured ceiling of some of the Facility’s closets, which Respondent knew may contain asbestos, Respondent failed to take reasonable care to avoid a foreseeable risk of allowing an unlicensed contractor to perform an asbestos abatement project.

"C" is Respondent's efforts to correct or mitigate the violation, and receives a value of -1 according to OAR 340-012-0145(6)(e) because Respondent made reasonable efforts to ensure the violation would not be repeated. On February 6, 2017 DEQ received a communication from Respondent stating that Respondent had stopped work in the closets until additional analysis of the closet ceilings was made. Following additional analysis of the closet ceilings in February and March 2017, Respondent refrained from removing ceiling material for the remainder of the Renovation Project and thus made reasonable efforts to ensure that the violation would not be repeated.

"EB" is the approximate dollar value of the benefit gained and the costs avoided or delayed as a result of the Respondent’s noncompliance. It is designed to “level the playing field” by taking away any economic advantage the entity gained and to deter potential violators from deciding it is cheaper to violate and pay the penalty than to pay the costs of compliance. In this case, “EB” receives a value of \$518. This is the amount Respondent gained by avoiding spending \$800 to have a licensed contractor abate popcorn ceiling texture from closets at two to three square feet per closet and a small quantity (less than 80 square feet). This “EB” was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency’s BEN computer model.

PENALTY CALCULATION:  $Penalty = BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$   
 $= \$2,000 + [(0.1 \times \$2,000) \times (0 + 0 + 0 + 4 + -1)] + \$518$   
 $= \$2,000 + (\$200 \times 3) + \$518$   
 $= \$2,000 + \$600 + \$518$   
 $= \$3,118$

EXHIBIT 2

FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY  
PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-012-0045

- VIOLATION No. 2: Failing to have a thorough asbestos survey performed by an accredited inspector prior to performing a renovation activity, in violation of OAR 340-248-0270(1).
- CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0054(1)(I).
- MAGNITUDE: The magnitude of the violation is minor pursuant to OAR 340-012-0135(1)(h)(C) because based on the information available to DEQ, the violation involved less than 80 square feet of asbestos-containing material.
- CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is:  $BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$
- "BP" is the base penalty, which is \$2,000 for a Class I, minor magnitude violation in the matrix listed in OAR 340-012-0140(3)(b)(A)(iii) and applicable pursuant to OAR 340-012-0140(3)(a)(B).
- "P" is whether Respondent has any prior significant actions, as defined in OAR 340-012-0030(19), in the same media as the violation at issue that occurred at a facility owned or operated by the same Respondent, and receives a value of 0 according to OAR 340-012-0145(2)(a)(A), because there are no prior significant actions.
- "H" is Respondent's history of correcting prior significant actions, and receives a value of 0 according to OAR 340-012-0145(3)(c) because there is no prior history.
- "O" is whether the violation was repeated or ongoing, and receives a value of 0 according to OAR 340-012-0145(4)(a) because there was only one occurrence of the violation. Respondent failed to have a thorough asbestos survey performed by an accredited inspector prior to commencing the Renovation Project at the Facility on or about February 2016. At DEQ's request, Respondent completed an asbestos survey by an accredited inspector on or about March 8, 2017 and submitted the results to DEQ on March 9, 2017. Respondent completed the March 8, 2017 survey prior to re-commencing work to remove suspect asbestos-containing materials as part of the Renovation Project.
- "M" is the mental state of the Respondent, and receives a value of 4 according to OAR 340-012-0145(5)(c) because Respondent's conduct was negligent. Negligent means the Respondent failed to take reasonable care to avoid a foreseeable risk of conduct constituting or resulting in a violation. Prior to commencing the Renovation Project, Respondent knew that popcorn textured ceilings, including some of the closet ceilings in the Facility's apartment units, may contain asbestos. Specifically, Respondent stated in an email to DEQ on April 7, 2017, "As

original owner and manager of our 1972 built property, we have had testing done from time to time at Oak Vale for financing and know of the risk popcorn ceilings have containing asbestos.” On or about August 15, 2016, Respondent received the results of a laboratory analysis demonstrating that both the “Office Ceiling” and the “Unit 90 Ceiling” contained approximately 5% chrysotile asbestos by weight. In addition, during DEQ’s inspection of the Facility on February 22, 2017, Mr. Bender stated that he knew that popcorn texture could have asbestos. By commencing the Renovation Project on or about February 2016 without first having a thorough asbestos survey performed by an accredited inspector, Respondent failed to take reasonable care to avoid a foreseeable risk of conduct constituting or resulting in a violation.

"C" is Respondent's efforts to correct or mitigate the violation, and receives a value of -2 according to OAR 340-012-0145(6)(d) because Respondent eventually made some efforts to correct the violation. At DEQ’s request, on or about March 8, 2017, Respondent had a thorough asbestos survey conducted by an accredited inspector prior to completing the Renovation Project.

"EB" is the approximate dollar value of the benefit gained and the costs avoided or delayed as a result of the Respondent’s noncompliance. It is designed to “level the playing field” by taking away any economic advantage the entity gained and to deter potential violators from deciding it is cheaper to violate and pay the penalty than to pay the costs of compliance. In this case, “EB” receives a value of \$49. This is the amount Respondent gained by delaying spending \$1,620 to have a thorough asbestos survey performed by an accredited inspector. The survey should have been performed on or before the commencement of the Renovation Project in February 2016; it was actually performed on March 8, 2017. This “EB” was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency’s BEN computer model.

PENALTY CALCULATION:  $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$   
= \$2,000 + [(0.1 x \$2,000) x (0 + 0 + 0 + 4 + -2)] + \$49  
= \$2,000 + (\$200 x 2) + \$49  
= \$2,000 + \$400 + \$49  
= \$2,449