

**STATE OF MICHIGAN
DEPARTMENT OF CONSUMER AND INDUSTRY SERVICES
BUREAU OF HEARINGS**

In the Matter of:

Docket No. 2000-92

**Bureau of Commercial Services,
Petitioner
v**

Agency No. 21-98-3733-00

**Agency: Bureau of Commercial
Services**

**Parkside Builders of Michigan, Inc.,
B. Roland Adams, Q.O.
Respondent**

Case Type: Sanction

**Issued and entered
this 30th day of November 2001
by Gregory Holiday
Administrative Law Judge**

HEARING REPORT

PROCEDURAL HISTORY

This proceeding was commenced with the filing of a Notice of Hearing upon a Formal Complaint dated July 21, 1999, charging Respondent with one or more violations of the Occupational Code, 1980 PA 299, as amended (Code), MCL 339.101 *et seq.*; MSA 18.425(101) *et seq.* Pursuant to Section 92 of the Administrative Procedures Act, 1969 PA 306, as amended, MCL 24.201 *et seq.*; MSA 3.560(101) *et seq.*, Respondent was afforded an opportunity to demonstrate compliance prior to the commencement of formal proceedings. Respondent failed to satisfactorily demonstrate compliance and, as a result, the matter was set and noticed for a formal hearing.

The hearing was scheduled to be held on Monday, April 18, 2000 at the Bureau of Hearings of the Department of Consumer and Industry Services, 1200 Sixth Street, Eighth

Floor, Detroit, Michigan. After two postponements, the hearing was rescheduled for, Tuesday, September 26, 2000, commencing at about 9:30 a.m. At that hearing, the parties agreed to continue the matter for at least 70 days. The hearing was scheduled to be continued on January 9, 2001 at 9:30 a.m.. By agreement of the parties, the hearing was again continued and rescheduled for February 27, 2001 at 9:30 a.m. At Petitioner's request, with no objection by Respondent, that hearing was postponed to March 22, 2001 at 9:30 a.m. At Petitioner's request, with no objection by Respondent, that hearing was postponed to April 26, 2001 at 9:30 a.m. At the April 26, 2001 hearing, the parties agreed to dismiss the matter without prejudice and an Order of Dismissal was entered on April 30, 2001. On August 8, 2001, Petitioner filed a Request for Hearing because the parties failed to reach a settlement. A Notice of Remand Hearing was issued which scheduled a hearing for Friday, September 28, 2001 at 9:30 a.m., which hearing was held as scheduled. Gregory Holiday presided as Administrative Law Judge. Hal Ziegler, Authorized Agent, appeared on behalf of the Bureau of Commercial Services' Enforcement Division of the Department of Consumer and Industry Services (Petitioner). Claudette Whitehead, Edward D. Opalewski and Darlene Thompson testified for Petitioner. James M. Stachura, Esq., appeared on behalf of Parkside Builders of Michigan, Inc., B. Roland Adams, Qualifying Officer (Respondent). Terry Adams testified for Respondent.

ISSUES AND APPLICABLE LAW

The general issue presented is whether Respondent violated the Code, with respect to the practice of a residential builder or contractor. The specific issues are whether

Respondent violated Builder Rule 1979 AC, R 338.1551(5) and Sections 604(c) and 2411(2)(e) of the Code, which provide, in pertinent part:

Sec. 604. A person who violates 1 or more of the provisions of an article which regulates an occupation or who commits 1 or more of the following shall be subject to the penalties prescribed in section 602:

(c) Violates a rule of conduct of an occupation.

Sec. 2411...(2) A licensee or applicant who commits 1 or more of the following shall be subject to the penalties set forth in article 6:

(e) A willful violation of the building laws of the state or of a political subdivision of the state.

Rule 338.1551(5) Standards of construction shall be in accordance with the local building code, or in the absence of a code in accordance with the building code of the nearest political subdivision having a building code.

FINDINGS OF FACT

John and Darlene Thompson entered into a contract (Petitioner Exhibit 4) with Respondent in about April 1998 to construct a garage and to perform related cement work for a total price of \$8,500.00. The Thompsons paid a total of \$4,300.00 (See Petitioner Exhibit 5) on the contract and did not pay the balance because the job was never completed.

Respondent performed work on the project but when Mrs. Thompson was dissatisfied with some of the work, she contacted the Building Department of the City of Dearborn Heights for an inspection. There was a meeting held on May 29, 1998 with the Building Inspector, Terry Adams (Respondent's then Vice-President), Mrs. Thompson and others. Immediately after the meeting, Mrs. Thompson and Mr. Adams continued to discuss the matter. Their conversation grew heated and Mrs. Thompson ordered Respondent off the property.

Claudette Whitehead, Building Inspector, conducted an inspection and issued a June 23, 1998 letter (Petitioner Exhibit 2) to Respondent outlining work that needed to be done and confirming another scheduled meeting for the following day. That meeting was held which included the Mayor of the City of Dearborn Heights, the Building Inspector, Respondent's representative and others. Mrs. Thompson felt ambushed, thinking that she was simply attending a meeting with the mayor. That meeting didn't result in a resolution of the dispute. According to Inspector Whitehead, the Thompsons prevented Respondent from performing any additional work at the site by locking Respondent out.

The Thompsons filed a Statement of Complaint with the Department of Consumer & Industry Services' Bureau of Commercial Services in July 1998. At the request of the Mayor's Office, another inspection was performed on February 21, 1999 by Edward D. Opalewski, then Director of the Department of Building and Engineering for the City of Dearborn Heights. Mr. Opalewski issued his March 1, 1999 Notice (Petitioner Exhibit 3) as a result of that inspection where he found several Building Code violations. According to Mr. Opalewski, while he found a few items that didn't meet Code, overall the project was

acceptable. Mr. Opalewski set forth a schedule for Respondent to follow in order to correct the violations within 28 days following receipt of the Notice. Unfortunately, Respondent didn't receive a copy of the report until about April 1, 1999. According to Mr. Opalewski, the Thompsons did not provide Respondent with a reasonable opportunity to correct the violations following issuance of the notice.

Mrs. Thompson denies ever refusing Respondent, its workers or subcontractors, access to the property to perform work. She does point out the feeling that "how can someone come out to perform repairs when they don't know what the problem was." As to locking Respondent out, Mrs. Thompson asserts that they installed a lock on their gate to keep children out. There is no indication that after installing the lock on the gate, the Thompsons advised Respondent in any way that, despite the locked gate, Respondent could have access to the property. Mr. Adams recalls some 15 times when he tried to contact the Thompsons (8-10) by telephone. He reports having left several phone messages seeking access to the property and one successful call in which the Thompsons refused to permit access, saying that the city was handling the matter.

The Thompsons obtained a June 16, 1999 estimate to redo the entire project with additional work from Lockwood Construction in Howell for \$34,763.00. Respondent's counsel corresponded with the Thompsons several times in the fall of 1999 (See Respondent Exhibits 1, 2 and 3) in an effort to reach an agreement on having the project completed. No agreement was reached.

CONCLUSIONS OF LAW

The principles that govern judicial proceedings also apply to administrative hearings. 8 Callaghan's Michigan Pleading and Practice (2d ed) § 60.48, page 230. The burden of proof is upon Petitioner to prove, by a preponderance of the evidence, that grounds exist for the imposition of sanctions upon Respondent. 1990 AACRS, R 339.1763.

Violation of Section 604(c) of the Code

By this charge, Petitioner asserts that Respondent violated Builder Rule 338.1551(5), thereby violating Section 604(c) of the Code.

Builder Rule 338.1551(5) requires that the standards of construction be in accordance with the local building code. A violation of, or failure to comply with, the building code does not constitute a violation of Builder Rule 338.1551(5). Building Code violations are addressed under Section 2411(2)(e) of the Code and are required to be willful in order to constitute a violation. As with any administrative rule, Builder Rule 338.1551(5) must be construed in light of the statute it is based upon, in this case, the Code. Construing Builder Rule 338.1551(5) in the manner sought would conflict with Section 2411(2)(e) of the Code. The Michigan legislature determined that as to building code violations, in order to constitute a misconduct under Section 2411(2)(e) of the Code, the violation must be willful. Where there is conflict between a rule and a statute, the statute controls. *Michigan Sportservice, Inc. v Commission of Department of Revenue*, 319 Mich 561; 30 NW2d 281 (1948). Builder Rule 338.1551(5) can be construed to avoid a conflict with Section 2411(2)(e) of the Code. In construing Builder Rule 338.1551(5) in light of Section 2411(2)(e) of the Code, Builder Rule 338.1551(5) governs the standards that are used by a builder or contractor. Where the builder

or contractor knows what the applicable building code requires and, despite that knowledge, elects to use and follow other standards, then a violation of Builder Rule 338.1551(5) is established. For example, where the contractor and the homeowner agree privately that the contractor need not replace rotted roof boards before re-roofing, despite the contractor's knowledge that the applicable building code requires their replacement, the contractor would be in violation of Builder Rule 338.1551(5). That willful violation may also constitute a violation of Section 2411(2)(e) of the Code. If, on the other hand, the contractor simply failed to replace some of the rotted roof boards without any decision to use other standards in place of the applicable building code, there would be no violation of Builder Rule 338.1551(5). There is no violation of Builder Rule 338.1551(5).

Accordingly, Petitioner has not established any violation of Section 604(c) of the Code.

Violation of Section 2411(2)(e) of the Code

By this charge, Petitioner asserts that Respondent wilfully violated building laws, in violation of Section 2411(2)(e) of the Code.

Section 2411(2)(e) of the Code sanctions a builder or contractor who *wilfully* violates building laws. In this case, while the Formal Complaint cites the violation of building laws, there is no allegation that the violation was wilful. It would be inappropriate to draw an inference, based upon the pleadings, that Respondent's violation of building laws was wilful. Even accepting as true the facts set forth in the Formal Complaint as supplemented by the testimony presented at the hearing, there is no basis to find that Respondent wilfully violated

building laws. For these reason, no violation of Section 2411(2)(e) of the Code has been established.

Accordingly, Petitioner has not proven any violation of Section 2411(2)(e) of the Code.

DECISION

It is the decision of this Administrative Law Judge that Petitioner has not established any violations of the Code in this matter.

Gregory Holiday
Administrative Law Judge