

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

In the matter of

Docket No. 2001-1140

**Bureau of Commercial Services,
Petitioner**

Agency No. 21-00-4494-00

v

**Agency: Bureau of Commercial
Services**

**Baker Homes, Inc.
Alvin R. Baker, Q.O.,
Respondent**

Case Type: Sanction

**Issued and entered
this 2nd day of January, 2002
by Robert H. Mourning
Administrative Law Judge**

HEARING REPORT

PROCEDURAL HISTORY

This matter was commenced with the issuance of a Notice of Hearing on a Formal Complaint, dated March 30, 2001, alleging violations by Baker Homes, Inc. (Baker Homes), Alvin R. Baker, Qualifying Officer (Respondent) of the Occupational Code of 1980, as amended 1980 PA 299 (Code), MCL 339.101 *et seq.*; MSA 18.425(101) *et seq.* The Notice of Hearing scheduled the contested case hearing to commence at 9:00 a.m. on September 12, 2001, in the hearing rooms of the Department of Consumer and Industry Services (Department), Bureau of Hearings, Ottawa State Office Building, 2nd Floor, 611 West Ottawa Street, Lansing, Michigan. After granting an adjournment for the Respondent, a hearing was held on October 10, 2001.

At the hearing, Attorney William Sweet appeared on behalf of the Respondent. Attorney Tracey L. Hampton appeared on behalf of the Bureau of Commercial Services (Petitioner).

The following exhibits offered by the Petitioner were admitted into evidence:

- Exhibit 1: Building Inspection Report, November 3, 2000
- Exhibit 2: Building Inspection Report, March 13, 2001
- Exhibit 3: Settlement Statement, November 4, 1998
- Exhibit 4: Residential Construction Contract and Specifications, September 21, 1998
- Exhibit 5: Statement of Complaint, August 21, 2000
- Exhibit 6: Record of Faxes to Respondent
- Exhibit 7: Pictures of the Freitags' Home

The Petitioner offered the testimony of Ricardo Gonzales, building inspector for Washtenaw County, and Otto Freitag, homeowner.

The Respondent testified on his own behalf and offered the testimony of Dave Roeder, representative of a basement sealant company.

The building inspector testified that, on a subsequent inspection, the Respondent had resolved Items 2, 6, 7, and 8 as set forth in his original Building Inspection Report dated November 3, 2000. (Exhibits 1 and 2). The Petitioner did not object to the Administrative Law Judge's decision to dismiss Items 2, 6, 7, and 8 from consideration in the Formal Complaint.

ISSUES AND APPLICABLE LAW

The specific issues are whether the Respondent violated Sections 604(c) and 2411(2)(d) and(m) of the Code and Rule 51(2), (4), and (5) of the Residential Builders' and Maintenance and Alteration Contractors', promulgated under 1979 AC, R 338.1551(2), (4), and (5).

Section 604(c) of the Code provides that:

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.

* * *

Section 2411(2)(d) and (m) provides that:

* * *

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

* * *

d) A willful departure from or disregard of plans or specifications in a material respect and prejudicial to another, without consent of the owner or an authorized representative and without the consent of the person entitled to have the particular construction project or operation completed in accordance with the plans and specifications.

* * *

(m) Poor workmanship or workmanship not meeting the standards of the custom or trade verified by a building code enforcement official.

Rule 51(2), (4), and (5) provide that:

(2) Upon receipt of a valid and written complaint, the department shall assign a complaint number, acknowledge the complaint and forward a copy of the complaint to the licensee. He shall reply to the department within 15 days from receipt of the complaint and shall confirm or deny the justification of the complaint. A complaint acknowledged as justified shall be corrected within a reasonable time. If a complaint or portion thereof is not acknowledged by the licensee as being justified, the department shall notify the complainant of the area of disagreement.

* * *

(4) If a complaint is justified by the local building inspector or by a person authorized by the department to make inspections, the builder or contractor shall correct the complaint within a reasonable time. Failure or refusal by the licensee to correct a structural matter that is materially deficient, dangerous or hazardous to the owners shall be presumed to be dishonest or unfair dealing.

(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.

In addition, the building inspector cited the Respondent with violating the following Sections of the 1996 BOCA Code:

107.3 By whom application is made: Application for a permit shall be made by the *owner* or lessee of the building or structure, or agent of either, or by the *registered design professional* employed in connection with the proposed work. If the application is made by a person other than the *owner* in fee, it shall be accompanied by an affidavit of the *owner* or the qualified applicant or a signed statement of the qualified applicant witnessed by the code official or his designee to the effect that the proposed work is authorized by the *owner* in fee and that the applicant is authorized to make such application.

111.3 Compliance with permit: All work shall conform to the approved application and the approved *construction documents* for which the permit has been issued and any approved amendments to the approved application or the approved *construction documents*.

115.1 General: All work shall be conducted, installed and completed in a workmanlike and acceptable manner so as to secure the results intended by this code.

1005.3 Protruding objects: A minimum headroom of 80 inches (2032 mm) shall be provided for any walking surface, including walks, halls, *corridors*, aisles and passageways. Structural elements, fixtures or furnishings shall not project from either side more than 4 inches (102 mm) over any walking surface between the heights of 27 (686 mm) and 80 inches (2032 mm) above the walking surface. A free-standing object mounted on a post(s) or pylon(s) shall not overhang that post(s) or pylon(s) more than 12 inches (305 mm) where the lowest point of the leading edge is more than 27 inches (686 mm) and less than 80 inches (2032 mm) above the walking surface. Door closers and stops shall not reduce headroom to less than 78 inches (1981 mm).

1813.7 Site grading: The ground immediately adjacent to the foundation shall be sloped away from the building at a slope of not less than one unit vertical in 12 units horizontal (1:12) for a minimum distance of 8 feet (2438 mm) measured perpendicular to the face of the wall or an approved alternate method of diverting water away from the foundation shall be used. The procedure utilized to establish the final ground level adjacent to the foundation shall account for all additional settlement of the backfill.

2111.1.8 Weepholes: Weepholes shall be provided in the outside wythe of masonry walls at a maximum spacing of 33 inches (838 mm) on center. Weepholes shall not be less than 3/16 inch (5 mm) in diameter.

FINDINGS OF FACT

1. On or about September 21, 1998, Otto and Helga Freitag (Freitags) executed a residential construction contract with Baker Homes for a contract priced at \$290,000.00. In addition, the Freitags purchased Lot 16, Cedar Hills (8422 Cedar Hills Drive, Dexter, Michigan) for a sum of \$90,000.00 (Exhibits 3 and 4). A driveway with retaining walls on opposite sides of the driveway was completed before the date of purchase of the lot.

2. Baker Homes started construction of the home in September 1998 and finished construction in May 1999. The certificate of occupancy was issued by Washtenaw County on or about May 27, 1999. The Freitags moved into their new house sometime in June 1999.

3. Following the Freitags' attempts to have the Respondent complete or repair certain items involving the new home, Mr. Freitag filed a statement of complaint against the Respondent (Exhibit 5). There is no record that the Respondent responded to the complaint.

4. On October 23, 2000, November 8, 2000, and later on March 6, 2001, the Freitags' home was inspected by the building inspector for Washtenaw County. The 1996 State Code was adopted by resolution by Washtenaw County. The building inspector never saw the residential construction contract and specifications.

5. The building inspector found erosion behind and below a portion of the retaining wall (Item 1). The building inspector testified that he was not an expert on the installation of stone retaining walls. The Respondent is willing to repair a portion of the

retaining wall that has eroded. The Freitags want the retaining walls replaced on both sides of the driveway; the Respondent refused their request.

6. The building inspector found that the basement masonry walls show evidence of past leaks (Item 3). He does not know what specifically is causing the basement to leak. The Respondent was willing to fix the portion of the basement which was leaking. The Respondent sent an expert in waterproofing basements to the Freitags' home to do an inspection and to determine the reason for the leaks. The Freitags refused to allow the person to do an inspection and to determine the reasons for the leaks. The Freitags wanted the entire basement seal coated at the expense of the Respondent. Respondent refused to seal coat the entire basement.

7. The building inspector found that drywall seams were visible at the basement stairwell (Item 4). The Respondent does not disagree that there is a workmanship problem.

8. The Respondent was cited for installation of a down spout near a deck stairway, creating a tripping hazard (Item 5). (Exhibit 7-E).

9. The Respondent was cited for constructing the basement walls out of masonry instead of poured concrete (Item 9). The specifications for the contract calls for poured concrete walls. (Exhibit 4, Specifications III, p. 6). The Freitags did not agree in writing to the change in the construction of the basement walls but did acquiesce in its construction. There is no evidence in the record to support a finding that concrete block basement walls are structurally inferior to poured concrete basement walls. The Respondent did not file this change of contract with Washtenaw County.

10. The building inspector found that the grading within 8 feet of the house was either flat or negative (Item 10). This is one of the possible causes of water in the basement. Landscaping, top soil, and finish grade are not the obligation of the Respondent under the terms of the contract.

11. The Respondent was cited for burying brick veneer below grade (Item 11). Since the building inspector does not conduct destructive inspections, he does not know if the brick veneer was covered with waterproofing and damping materials. The building inspector admits that it is not a violation to bury brick veneer that has been covered with waterproofing and damping materials. The Respondent testified these materials were applied over the brick veneer.

12. The Respondent admits that he did not provide weepholes at the brick veneer (Item 12).

13. The Respondent was cited for improper grading of the rear yard and drain field (Items 13 and 14). These items are not related to the leaks in the basement. The Respondent did not have a contractual obligation for the finish grade on the rear yard and drain field.

CONCLUSIONS OF LAW

The principles that govern judicial proceedings apply to administrative hearings. 8 Callaghan's Michigan Pleading and Practice, (2d ed) § 60.48, p. 230. The burden of proof is on the Petitioner to prove, by a preponderance of the evidence, the matters alleged in the Formal Complaint. 1990 AACS, R 339.1763.

Items Dismissed from Building Inspection Report

In addition to the items dismissed from the building inspection report dated October 23, 2000, at the beginning of these proceedings, the Administrative Law Judge dismissed Items 3, 10, 11, 13, and 14. These items are dismissed because there was either insufficient evidence of a violation or the Respondent was not required to perform the work under the terms of the contract.

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

The Petitioner alleges that the Respondent failed to complete the contract in accordance with the plan and specifications in the contract. It is undisputed by the Respondent that he built the basement walls with concrete blocks instead of poured concrete as required by the contract (Item 9). The Freitags acquiesced in the construction of the basement walls with concrete blocks. There is no evidence in the record to support a finding that concrete block basement walls are structurally inferior to poured concrete basement walls.

Accordingly, the Petitioner has not proven, by a preponderance of the evidence, that the Respondent has violated Section 2411(2)(d) of the Code.

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

The Petitioner has alleged that the Respondent has not performed the requirements of the contract in a workmanlike manner. The building inspector cited the Respondent with workmanship violations in Items 1 and 4. The Respondent has admitted that a portion of the retaining wall needs to be repaired or replaced. The Freitags insisted that the Respondent replace both retaining walls on opposite sides of the driveway. There is insufficient evidence to support a finding that both retaining walls need to be removed and

replaced to correct Item 1. In addition, there is sufficient evidence in the record to find a violation in Item 4 (problems with drywall seams at the basement stairwell).

Accordingly, the Petitioner has proven, by a preponderance of the evidence, that the Respondent has violated Section 2411(2)(m) of the Code.

Violation of Section 604(c) of the Code and Rule 51(2), (4), and (5)

First, there is sufficient evidence in the record that establishes the Respondent failed to respond to the complaint in a timely manner. Second, there is sufficient evidence that the Respondent failed to correct Items 4, 5, 9, and 12 within a reasonable time. Third, the evidence demonstrates that the Respondent, in performance of the contract, failed to comply with the local building code for Washtenaw County regarding Items 5, 9, and 12 in the Building Inspection Report.

Accordingly, the Petitioner has proven, by a preponderance of the evidence, that the Respondent has violated Section 604(c) of the Code and Rule 51(2), (4), and (5) regarding Items 4, 5, 9, and 12.

Restitution

The Petitioner has not offered evidence that reasonably shows the amount of restitution that would be appropriate in this case. An estimate offered by the Petitioner for removal and replacement of both retaining walls on opposite sides of the driveway was not admitted into evidence because it did not reflect the cost to repair or replace the portion of the retaining wall identified by the building inspector as in need of repair.

RECOMMENDATIONS

The Administrative Law Judge recommends the following sanctions:

1. The Respondent be assessed a civil fine in the amount of \$2,000.00.
2. In the event that the civil fine has not been paid within 60 days following the issuance of a final order by the Board, the Respondent's Article 24 licenses should be suspended. No Article 24 license shall be renewed nor shall any new Article 24 license be issued until the civil fine is paid in full.

Robert H. Mourning
Administrative Law Judge