

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

In the Matter of:	Docket No. 2000-1106
Bureau of Commercial Services, Petitioner	Agency No. 21-98-4148-00
v	Agency: Bureau of Commercial Services
Coast To Coast Development Corporation Terry S. Goldin, Q.O., Respondent	Case Type: Sanction

**Issued and entered
this 17th day of January, 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 February 8, 2000, 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 Wednesday, June 28, 2000 at 9:00 a.m. at the Bureau of Hearings of the Department of Consumer and Industry Services, 1200 Sixth Street, Eighth Floor, Detroit, Michigan, and the same proceeded as scheduled. The hearing was concluded on Thursday, August 31, 2000. Gregory Holiday presided as Administrative Law Judge. Kimbal R. Smith, III, Esq., appeared on behalf of the Bureau of Commercial Services' Enforcement Division of the Department of Consumer and Industry Services (Petitioner). Craig Michael McCloud, James W. Bushway, Jr. and Judy Fields testified for Petitioner. Caleb Simon, Esq., appeared on behalf of Coast To Coast Development Corporation, Terry S. Goldin, Qualifying Officer (Respondent). David Levy and Terry S. Goldin 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. The specific issues are whether Respondent violated Builder Rules 1979 AC, R 338.1551(4) and 1979 AC, R 338.1551(5) and Sections 604(c) and 2411(2)(m) 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:

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

Rule 51...(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.

Rule 51...(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.

Petitioner offered the following exhibits for consideration at the hearing:

<u>Exhibit</u>	<u>Description</u>
1	10/23/96 Building Agreement between Coast To Coast Development and Craig & Jean McCloud for Lot #66 - Whitney Model totaling \$181,291.00
2	10/19/99 Building Inspection Report of Judy Fields (misdated 7/14/99)
3	Copy of 11/10/99 Building Inspection Report of James W. Bushway
4	Copy of undated Estimate from J.A.C. Construction totaling \$18,840.78
5	Copy of 7/27/99 Repair/Correction Notice to Respondent with Certificate of

Mailing

- 6 Copy of 1/7/00 Repair/Correction Notice to Respondent with Certificate of Mailing

Respondent offered the following exhibits for consideration at the hearing:

<u>Exhibit</u>	<u>Description</u>
1	Copy of 4/20/98 Belle Pointe Estates Walk-Through Form
2	Photo showing rear corner of home with missing downspout
3	Photo showing doorwall and rear of home
4	Copy of 1/31/97 90-day Certificate of Occupancy and Use from the Charter Township of Van Buren
5	Phot showing front and side view of the McCloud home
6	Copy of 8/9/00 Certification of License History of Coast to Coast Development Corp. by Sandra M. Pohl
7	Curriculum Vitae of David Levy
8	8/25/00 Letter to Coast to Coast Development from David Levy, LKV Group, Inc.

FINDINGS OF FACT:

Craig Michael McCloud is a maintenance supervisor at an apartment complex. His position includes performing apartment turnovers, doing carpentry work, and installing garbage disposals, electrical outlets, fixtures, and more. In 1996, Respondent was constructing homes in Belleville, Michigan.

On about October 23, 1996, Craig and Jean McCloud signed a Building Agreement

(Petitioner Exhibit 1) with Respondent which called for Respondent to complete a split-level home at 7136 Belle Pointe Drive in Belleville (already under construction by Respondent) for them. The transaction closed on February 3, 1997, and the McClouds moved in about February 14, 1997. After move-in, they noticed a number of complaint items to bring to Respondent's attention including: (1) lower level heat was not adjusted, (2) drywall nail pops, (3) stairs to lower level brass caps showing wood, and (4) outlet missing in closet and other places. Mr. McCloud complained at their 45-day walk-through where homeowners typically identify needed repairs. According to Mr. McCloud, Respondent made an effort to correct some, but not all, items on the McClouds' list.

On December 17, 1997, Terry S. Goldin became the qualifying officer for Respondent (See Respondent Exhibit 6). Prior to that date, Mr. Goldin was a construction manager of Respondent and has held a residential builder's license since 1996.

An April 20, 1998 walk-through was done and a form was generated showing the McClouds' indication of whether the walk-through items were completed. That form did not identify any walk-through items as not complete.

Mr. McCloud filed a Statement of Complaint with CIS on about August 17, 1998. Judy Fields has been a Plumbing and Building Inspector for Van Buren Township for about 5 years. Before that, she performed plumbing, rough work and finish work as a builder for about 15 years. From the Statement of Complaint, Inspector Fields performed a complaint

inspection and generated her October 19, 1999 Building Inspection Report¹ identifying the following workmanship and/or building code violations:

Item 1. Basement bathroom - Small portion of drywall paper coming down around showerhead

Item 2. Basement - cold air register, screws are loose/missing - Inspector Fields felt that because the screws were going into drywall, they needed anchor bolts to secure them.

Item 3. Basement bedroom - poor heat (register in ceiling) - Inspector Fields concluded that the likely problem was an imbalance in the heating system correctable by adjusting the ventilation ducts.

Item 4. Door to garage and house - drywall around frame cracked

Item 5. Main floor - Step from main floor, baluster loose

Item 6. Kitchen - Cabinet not secure, heat register under counter, dishwasher drain support to back wall not done

Item 7. Kitchen - Floor cove coming apart at seam, counter tops not caulked, drywall seam to skylight frame coming apart - Inspector Fields concedes that if the house were kept especially warm, one could expect cracking and separation of seams.

Item 8. Outside - gas meter not secure to building (unsafe) Inspector Fields didn't know why the gas meter wasn't secured.

Item 9. Outside faucet screw loose, down spout back side 5' off ground

Inspector Fields was equivocal on whether many of the inspection items were Respondent's fault. She considered all of the items as BOCA Building Code violations and items 7 and 8 workmanship defects.

¹ The document's signature date of 7/14/99 is incorrect.

Another complaint inspection was performed on about November 10, 1999 by Van Buren Township Building Inspector James W. Bushway, Jr. Inspector Bushway has been a Building Official for Van Buren Township since 1994. Before that, he spent 14 years as Building Inspector for City of Southfield. In his November 10, 1999 inspection, Inspector Bushway identified the following workmanship and/or building code violations:

Item 1. Fasten gas meter to house - Inspector Bushway believes that the gas meter was alright in January 1997.

Item 2. Downspout short - 6 feet - (see Respondent Exhibit 2 photograph) Inspector Bushway admits that they could have missed the absence of the downspout, a BOCA Building Code, Section 1403 violation, when the inspection was performed on about January 31, 1997.

Item 3. Back of house siding short - Inspector Bushway noted that the siding was short about 6" going to the corner. He does not believe that the siding could have slid over to expose 6" because he believes that the siding can slide not more than 1 ½". In his opinion, a piece of siding was missing in violation of Section 1403 of the BOCA Building Code.

Item 4. Forms on front door cap need to be removed - Mr. McCloud identified the form as a 5' piece of 2 x 4 lumber used for framing the front door cap. Inspector Bushway considered it a workmanship violation.

Item 5. Replace front door entrance and door trim - Inspector Bushway considered this a violation of Section 804 of the BOCA Building Code.

Item 6. Repaint entire house paint faded - On this item, Inspector Bushway found no workmanship or building code violation.

Item 7. Kitchen cabinets need to be completely work over - Inspector Bushway found that the kitchen cabinetry work violated Section 805 of the BOCA Building Code. Following that inspection, Respondent returned and performed repairs on the kitchen cabinets but failed to paint the molding or punch in the finishing nails.

Item 8. Sink leads damage sink base cabinet needs replacement - Inspector Bushway identified this item as a BOCA Building Code, Section 804 violation.

Mr. McCloud acknowledges that Respondent returned to the home several times to make repairs. While Mr. McCloud's testimony discussed problems with regulating ducts, missing caulk in a bedroom window, absence of touch-up paint, a possible cracked header above a door, and carpeting, neither of the two inspections covered any of those items. Mr. McCloud, using the yellow pages, obtained an estimate (Petitioner Exhibit 4) from J.A.C. Construction to correct items that he felt were defective. Mr. McCloud does not have confidence in Respondent and would not want Respondent to return to make corrections or to select a contractor to make any corrections.

David Levy grew up in the construction industry and has a non-degreed engineering background with industry certifications in critical path methods, construction estimating and construction cost accounting. He apprenticed on various trades with his father before attending the University of Michigan - Dearborn School of Engineering. He has experience in cost estimating for commercial and residential remodeling as well as new construction (See his Curriculum Vitae - Respondent Exhibit 7). Mr. Levy is an expert in estimating and the cause of damage in construction matters.

Using the J.A.C. quote (Petitioner Exhibit 4), Mr. Levy performed a room-by-room inspection of the McCloud's "Raised Ranch" home. What he found were basically minor items, most of which would have been attended to at the 11-month service visit for a newly-constructed home. All told, he estimated the total repair cost to be from \$1,800.00 to \$2,400.00, excluding any painting. Mr. Levy's report is an August 25, 2000 letter (Respondent

Exhibit 8).

Terry S. Goldin was first licensed as a builder in about 1996. He became Qualifying Officer of Respondent on December 17, 1997. At that point, the McCloud home had already been constructed. Mr. Goldin had contact with the McClouds before becoming Respondent's qualifying officer, since he was Respondent's construction manager. After October 1999, he was showed a Building Inspection Report list but was not told to correct the items. He recalls that Respondent sent drywall, painter and flooring workers to the McCloud home but the workers were refused entry. Mr. Goldin's last conversation with Ms. McCloud was when he told her that he was sending trades over. On that same day, he got a call from a tradesperson saying that Mrs. McCloud slammed the door on them and that she was taking matters into her own hands. Mr. Goldin acknowledges that Respondent received the July 27, 2000 and January 7, 2000 Repair/Correction Notices (Petitioner Exhibits 5 and 6) from the Department, but insists that the McClouds wouldn't permit Respondent an opportunity to make corrections.

Amos Knoll is an officer of Respondent. Shortly after receiving a Repair/Correction notice, and in an effort to resolve their dispute, Mr. Knoll contacted the McClouds and set up a meeting at the McCloud home. At the McCloud's request, Mr. Goldin was not included in the meeting. Mr. Knoll had been directed by Mr. Goldin to do whatever was necessary to get the matter resolved. At the meeting, they went through the home and reviewed the complaints item by item. Mr. Knoll viewed many of the items as not the builder's responsibility including (1) the heat register near the doorwall was hanging loose because someone opened it up to put a telephone wire in; (2) the drywall repairs were done many times but the repaired drywall

could not cure due to the high heat setting in the home; (3) the shower wallpaper/drywall paper in the shower would not hold because the McClouds attempted to use wallpaper in the shower (Respondent did not place wallpaper in the shower); and (4) securing the gas meter is a matter for the utility company - builders aren't permitted to reposition/secure gas meters. In addition, the kitchen cabinets weren't nailed in all the way because the kitchen tile would have to be installed first and Respondent hadn't yet reached an agreement with the McClouds on installing the kitchen tile.

CONCLUSIONS OF LAW:

The principles that govern judicial proceedings also apply to administrative hearings. 8 Callaghan's Michigan Pleading & 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 AACS, R 339.1763.

Violation of Section 604(c) of the Code

By this charge, Petitioner asserts that Respondent violated Builder Rules 338.1551(4) and 338.1551(5), thereby violating Section 604(c) of the Code.

Builder Rule 338.1551(4) sanctions a builder or contractor who fails to correct a justified item of complaint within a reasonable time. Inspectors Fields and Bushway identified a number of justified items of complaint. Respondent was cooperative in correcting complaint items and the failure to correct all of the complaint items is not attributable to Respondent. When the McClouds refused entry by Respondent's tradespeople, and indicated that they didn't want Respondent to return to their home, that prevented Respondent from making any

required repairs. For these reasons, there was no violation of Builder Rule 338.1551(4).

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 proven any violation of Section 604(c) of the Code.

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

By this charge, Petitioner asserts that Respondent practiced poor workmanship or workmanship not meeting the standards of the custom or trade verified by a building code

enforcement official on the McCloud construction project in violation of Section 2411(2)(m) of the Code.

The fact that Respondent was prevented from making required repairs does not affect this charge. In Michigan, a builder or contractor is required to do the job right the first time. *Arndt v Dept Licensing & Regulation*, 147 Mich App 97; 383 NW2d 136 (1985). Once Respondent tendered the home to the McClouds as complete², he effectively represented to all that the home's construction was free from defects amounting to poor workmanship. From Inspector Fields' October 19, 1999 Report, Items 7 is an example of poor workmanship. From Inspector Bushway's November 10, 1999 Report, Item 4 is an example of poor workmanship.

Accordingly, Petitioner has proven that Respondent has violated Section 2411(2)(m) of the Code. This violation is not attributable to Terry S. Goldin as qualifying officer since the construction resulting in poor workmanship occurred prior to the date he became qualifying officer.

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DECISION AND RECOMMENDED SANCTIONS

It is the decision of this Administrative Law Judge that Respondent violated Section 2411(2)(m) of the Code as described in this Hearing Report. Petitioner recommended that sanctions include a \$10,000.00 civil fine and an appropriate amount of restitution to the

² With the exception of certain items reserved on the 90-day Certificate of Occupancy that would be completed within 90 days.

McClouds.

It is recommended that the Board include the following as sanctions in this matter:

1. Payment of a civil fine in the amount of \$2,000.00
2. Payment of restitution to Craig and Jean McCloud in the amount of \$2,400.00.
3. In the event the civil fine and restitution have not been paid within 60 days following the issuance of a final order, then all Article 24 licenses should be suspended and no new or renewal licenses should be issued until the civil fine and restitution have been paid.

GREGORY HOLIDAY
Administrative Law Judge