

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

In the matter of

Docket No. 2000-1929

Bureau of Commercial Services,
Petitioner

Agency No. 21-99-6911-00

v

Agency: Bureau of Commercial
Services

Krauss Builders, Inc.
William D. Krauss, Q.O.,
Respondent

Case Type: Sanction

_____ /

**Issued and entered
this 13th day of April, 2001
by Gregory Holiday
Administrative Law Judge**

HEARING REPORT

PROCEDURAL HISTORY:

This proceeding was commenced with the issuance of a Notice of Hearing upon a Formal Complaint dated August 18, 2000, charging Respondent with 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 hearing as described above. A hearing was scheduled to be held on

December 12, 2000, at 9:30 a.m., at the Bureau of Hearings of the Department of Consumer and Industry Services, 1200 Sixth Street, 8th Floor, Detroit, Michigan. That hearing was postponed to Tuesday, February 20, 2001 at 9:30 a.m., and the hearing proceeded as scheduled. Gregory Holiday presided as Administrative Law Judge. Tracey Hampton, Esq., appeared on behalf of the Bureau of Commercial Services' Enforcement Division, of the Department of Consumer and Industry Services (Petitioner). Richard Sligay, Kenneth C. Stewart and Russell Whitman testified for Petitioner. William D. Krauss appeared on behalf of Krauss Builders, Inc., William D. Krauss, Qualifying Officer (Respondent). Rajaram Khatri and Anthony Krauss testified as witnesses for Respondent.

ISSUES AND APPLICABLE LAW:

The general issue presented, is whether or not Respondent violated the Code with respect to the practice of a residential builder. The specific issues are whether or not Respondent violated Administrative Rules 1979 AC, R 338.1551(4) and 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 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.

EXHIBITS:

Petitioner offered the following exhibits for consideration at the hearing:

| <u>Exhibit</u> | <u>Description</u> |
|----------------|--|
| 1 | Copy of 7/4/98 Specifications for Lot #59 and Plan # 2-3334 |
| 2 | Copy of 3-page 3/29/98 Offer To Purchase Real Estate at 8385 Cadillac |
| 3 | Copy of 7/3/98 Offer To Purchase 8385 Cadillac for \$332,700.00 |
| 4 | Copy of 4/12/2000 Statement of Complaint of M/M Kenneth Stewart |
| 5A | Copy of 4/13/2000 Statement from Jay Sea Construction, Inc. for \$2,950.00 |
| 5B | Copy of 9/7/99 Proposal from Aqua Mist for \$4,750.00 |
| 5C | Copy of 5/11/00 Proposal from Floral City Tree Service for \$1,350.00 |

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6A Copies of Photograph of drain area and of topsoil at 1 foot from house taken 6/11/00

Exhibit Description

6B Copies of Photographs of topsoil measured 10 feet from base of foundation taken 6/11/00

6C Copies of Photograph of catch basin and of interior foundation crack repair taken 6/23/00

6D Copies of Photographs of Basement Wall Cracks taken 6/23/00

7 Building Inspection Report of Richard Sligay signed 8/8/00

8 Copy of Building Inspection Report of Richard Sligay signed 11/2/99

9 Copy of 2/5/99 Letter to Township of Grosse Ile from Charles E. Raines Company re: Final Grade Plan for 8385 Cadillac Circle

10 Copy of 12/9/99 Letter to Township of Grosse Ile from Charles E. Raines Company re: Final Grade Plan Review for 8501 [sic] Cadillac Circle

Respondent elected not to offer any additional exhibits for consideration at the hearing.

FINDINGS OF FACT:

Kenneth and Jan Stewart executed an Offer to Purchase (Petitioner Exhibit 2), and then a Purchase Agreement (Petitioner Exhibit 3), to have a home built for them on Grosse Ile, by Krauss Builders, Inc., in about 1998 to 1999. The home was to be constructed in accordance with certain plans and with the Specifications for Lot 59 dated July 3, 1998 (Petitioner Exhibit 1). The total project cost, including the property, was about \$430,000 and was substantially completed by February 1999. Prior to construction, Grosse Ile Township

identified the brickledge elevation (relative to sea level), that the home should be constructed at. The lower elevation selected by Grosse Ile Township made it somewhat difficult for the builder to achieve the required pitch (downward slope) away from the home. Throughout the construction, the Stewarts primarily dealt with Anthony Krauss (Mr. Krauss). The Stewarts paid Respondent all sums due under the Purchase Agreement. A certificate of occupancy was issued that was conditioned upon Respondent completing the grading to meet the building code. While the building code required a positive pitch of at least six inches per 10 feet, the actual positive pitch at the southeast corner was about 4.8 inches per 10 feet.

Respondent had his grading person use a bulldozer to re-grade the area surrounding the Stewart home to establish the proper pitch. Following completion of the re-grading, Mr. Krauss located Grosse Ile Building Inspector Richard Sligay, and showed him the corrected grade. While Inspector Sligay has many years of experience in checking and approving grading, by that time the Grosse Ile Township Building Department had ceased having its building inspectors perform grading inspections, in favor of contracting for that service with a private civil engineering firm. Mr. Krauss also tried, unsuccessfully, to reach the representative of Grosse Ile's contracted civil engineering firm for approval. As is customary, Respondent had an "as-built" drawing created by a surveyor, which showed the home and property as-built in comparison to the contracted plans and specifications.

Around April 1999, during some heavy downpours, the Stewarts noticed puddling against the east and south walls and saw water cascading through a basement window. They also saw the same or similar puddling and cascading on other occasions.

Respondent sent workers to make repairs to the foundation cracks (See Petitioner Exhibits 6C and 6D). Respondent was unaware that the crack repairs were not completely successful until a mediation occurred on March 2, 2000.

Some time after the grading was corrected but before any approval was obtained, the Stewarts caused to have some 200 to 300 yards of dirt (one tractor with two large-capacity trailers carries about 40 yards of dirt), placed on the property for use in landscaping and to create a berm. Because Respondent is generally the only builder on Gross Ile, he saw the "gravel-trains" delivering dirt to the Stewart home and immediately located and brought Inspector Sligay to the Stewart home to witness the delivery of dirt. Respondent had some concern that the dirt brought to the site could change the fine-grading that had been done by Respondent. Because it was raining, Respondent was in a position to witness the rain draining away from the home.

In fact, some time later, Mr. Krauss received authorization to have a second as-built drawing done at the property. Respondent retained the same surveyor (now deceased) to complete that drawing. According to that 2nd as-built drawing, the prior positive 4.8" per 10 feet pitch at the southeast corner of the home had changed to about negative 4" per 10 feet toward the home. This change in pitch would cause excessive hydrostatic pressure upon the foundation walls which could, in turn, promote cracks, window leaks and a whole host of other negative consequences.

In August 1999, the civil engineer under contract with Grosse Ile came out to conduct a follow-up on-site inspection. It was upon that inspection that the Stewarts learned that there were code violations concerning the grading.

In September 1999, the Stewarts met with William D. Krauss, Respondent's Qualifying Officer, at their home. The Stewarts explained what they saw as the problem. The conversation deteriorated and William D. Krauss abruptly left the home. The Stewarts then hired an independent building inspector, Melvin Jacobs to conduct an inspection relative to their complaints. Inspector Jacobs identified four vertical cracks in the basement showing water leakage around the repair area. The Stewarts also hired a landscape architect who told them that the rough grade was inadequate to drain water away from home. The Stewarts contacted Respondent again, and refused an offer by Respondent to put in a drain pipe system underground to take water away from the home. The Stewarts felt that the pitch problem was a result of Respondent's work and that Respondent should correct it properly.

On October 14, 1999, Inspector Sligay conducted a complaint inspection of the foundation leakage and grading. From that inspection, Inspector Sligay generated his Building Inspection Report (Petitioner Exhibit 8), which concluded that the basement and window leaks and the grading did not comply with the applicable building code. Because he knew about the 200-300 yards of dirt used for landscaping at the site, Inspector Sligay noted that "landscaping along South side of residence has added to the drainage problem." When the Stewarts complained to Mr. Sligay's superiors about the landscaping notation on the

report, Mr. Sligay's superiors directed that information be deleted in a revised Building Inspection Report (Petitioner Exhibit 7 - signed August 8, 2000).

In late 1999 or early 2000, the Stewarts decided to work together with the township's contracted civil engineer, certain recommended contractors, and the Grosse Ile Township Building Department (but without Respondent), on a remedy/plan to properly correct the pitch/drainage and grading problem in order to receive a final Certificate of Occupancy. The Stewarts wrote two letters to Respondent in an effort to have the matter resolved. A mediation occurred on March 2, 2000 which was unsuccessful. As a result, the Stewarts filed their Statement of Complaint (Petitioner Exhibit 4) with the Department on about April 17, 2000.

The Stewarts contracted with Jay Sea Construction (Petitioner Exhibit 5A), Aqua Mist & Fireside Shoppe (Petitioner Exhibit 5B), and Floral City Tree Service (Petitioner Exhibit 5C), to have the pitch and drainage corrected at a total cost of \$9,050.00.

Russell Whitman, a licensed civil engineer, has worked for the Charles Raines Company some 31 years. The company has been the appointed consulting civil engineer for Grosse Ile Township since before the construction of the Stewart home. On this project, after reviewing the plans for grading, he and his assistant, Kelly-Marie Fedele, went to the Stewart home in February 1999 to check whether the grade complied with the plans. They found that the grade away from the home was insufficient and, that at the southeast corner, the pitch was visibly sloped toward the house. Following the inspection, Ms. Fedele issued a February 5, 1999 letter (Petitioner Exhibit 9) to Grosse Ile Township summarizing their findings. They

returned to the site in about December 1999, and found that there was still insufficient slope away from the house. While the slopes were different from those found on their first visit, they were still insufficient. Mr. Whitman does not know whether the landscaping could have caused the problem and could not agree that the landscaping had no effect on the slope. Mr. Whitman generated the December 9, 1999 follow-up letter to Grosse Ile Township (Petitioner Exhibit 10).

Rajaram Khatri has been both a licensed professional engineer and a licensed Surveyor for some 30 years. In reviewing the construction plans, and the first and second as-built drawings, Mr. Khatri concludes that Respondent set the grade substantially in accordance with the requirements of Grosse Ile Township. He concludes, as does Mr. Wittman, that it would have helped if the township had set a higher brickledge elevation for the home.

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 Respondent violated the Code. 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) requires a builder or contractor to correct a justified item of complaint within a reasonable time. The items of complaint referred to in Builder Rule

338.1551(4) are the complaint items set forth in a homeowner's Statement of Complaint to the Department (in this case, Petitioner Exhibit 4). Following the completion of the Statement of Complaint, a building inspector conducts an evaluation of the Statement of Complaint and either justifies or fails to justify each item of complaint. The builder or contractor, under Rule 338.1551(4), is then required to correct any complaint items justified by the building inspector. In this case, while Inspector Sligay found some justification for the foundation/window leak and grading complaints following his October 14, 1999 inspection, Respondent was not provided with any opportunity to make corrections. The Stewarts undertook to have any required repairs done on their own and without Respondent's involvement. Absent a reasonable opportunity to make corrections, there can be 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 Dept 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)(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 willful. Accepting as true the facts set forth in the Formal Complaint, there is no basis to find that Respondent willfully violated building laws. Moreover, none of the evidence presented at the hearing would support a finding that any building code violation was willful. 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 AND RECOMMENDED SANCTIONS:

It is the decision of this Administrative Law Judge that Petitioner has proven no violation of the Code by Respondent as alleged in the Formal Complaint. Petitioner's recommended sanctions, therefore, are irrelevant.

IT IS THEREFORE ORDERED that the Formal Complaint in this matter shall be, and the same is hereby, DISMISSED WITH PREJUDICE.

Gregory Holiday
Administrative Law Judge