

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

In the matter of

Docket No. 2000-555

**Bureau of Commercial Services,
Petitioner**

Agency No. 21-99-4235-00

v

Agency: Bureau of Commercial Services

Jones Builders, Inc.

**Jack Robert Jones, Q.O.,
Respondent**

Case Type: Sanction

_____ /

**Issued and entered
this 12th day of June, 2001
by Lauren G. Van Steel
Administrative Law Judge**

HEARING REPORT

PROCEDURAL HISTORY

On December 16, 1999, Petitioner Bureau of Commercial Services (BCS), within the Department of Consumer and Industry Services, filed a Formal Complaint against Respondent Jones Builders, Inc., Jack Robert Jones, Qualifying Officer, a licensed residential builder. The Formal Complaint alleges that Respondent violated certain provisions of the Michigan Occupational Code (Code), 1980 PA 299, as amended, MCL 339.101 *et seq.*; MSA 18.425(101) *et seq.*, as well as certain administrative rules of the Residential Builders and Maintenance and Alteration Contractors Board Rules, being 1979 AC, R 338.1511, *et seq.*

On February 18, 2000, upon a request for hearing from Petitioner under MCL 339.511; MSA 18.425(511), a Notice of Hearing was issued, which set hearing for May 3,

2000. Upon Petitioner's request, by Order dated May 5, 2000, the hearing date was adjourned and rescheduled for August 16, 2000. An Order for Dismissal of Request for Hearing was issued on August 18, 2000.

On September 26, 2000, another request for hearing was received from Petitioner by the Bureau of Hearings. A Notice of Remand Hearing was issued on October 17, 2000, setting hearing for November 27, 2000. Upon Respondent's request, an Order Granting Adjournment was issued on November 20, 2000, rescheduling hearing for January 19, 2001. Upon Petitioner's request, the hearing was again adjourned by Order Granting Adjournment, dated January 2, 2001, rescheduling hearing for February 9, 2001. At Petitioner's request, an Order Granting Telephone Testimony was issued on January 17, 2001, allowing Petitioner's complaining witness, Judith Ann Matthews, to testify by means of telephone. On February 8, 2001, at Petitioner's request, an Order Granting Change of Venue was issued. On February 12, 2001, at Respondent's request without objection from Petitioner, an Order Granting Adjournment was issued, rescheduling hearing for April 25, 2001. An Order Granting Adjournment was then issued on February 27, 2001, rescheduling hearing for March 21, 2001.

Respondent subsequently requested adjournment of the March 21, 2001, hearing date; Petitioner objected to the request. On March 5, 2001, an Order Denying Request for Adjournment was issued.

The hearing proceeded as scheduled on March 21, 2001. Kimbal R. Smith, Attorney at Law, represented Petitioner. Ms. Matthews testified for Petitioner at the hearing

by means of telephone. Robert Yaske, Building and Zoning Administrator for Gerrish Township, also testified for Petitioner. The following exhibits were offered by Petitioner and admitted into the record:

Petitioner's Exhibit 1	Payment Schedule and Residential Building Contract, dated 9/23/98
Petitioner's Exhibit 2	Statement of Complaint, received 8/11/99
Petitioner's Exhibit 3	Building Inspection Report by Robert Yaske, Inspector for Township of Gerrish, dated 8/9/99
Petitioner's Exhibit 4	Proposal, Henry M. Martens Co., dated 2/8/00
Petitioner's Exhibit 5	Statement, R.P. Glass, dated 5/3/99
Petitioner's Exhibit 6	Estimate, M & S Construction, dated 1/25/00
Petitioner's Exhibit 7	Contract, Henderson Aluminum & Construction Co., dated 7/23/99

Petitioner's counsel requested that Respondent be fined \$1,500.00 for the violations alleged, and that Respondent be ordered to pay restitution to Ms. Matthews of \$3,800.00, based on the estimates in Petitioner's Exhibits 4 to 7.

Jack R. Jones appeared and testified as the Qualifying Officer (Q.O.) on behalf of Respondent. Respondent was not represented by counsel at the hearing. In addition, Walter Niedowicz, a subcontractor to Respondent, and Deborah (Kay) Reeser, a former employee of Respondent, testified by means of telephone (without objection by Petitioner) on behalf of Respondent. Respondent offered the following exhibits, of which only Respondent's Exhibits C, D and E were admitted into the record as evidence:

Respondent's Exhibit A	Response to Complaint (admitted as a pleading only)
Respondent's Exhibit B	Withdrawn; not admitted into record
Respondent's Exhibit C	Letter from Mary Ann Sharpe, Township of Gerrish, to Jones Builders, Inc., dated 5/21/99
Respondent's Exhibit D	Letter from Jack R. Jones to Bob Yaske, Gerrish Township, dated 5/21/99
Respondent's Exhibit E	Gerrish Township Application for Temporary Certificate of Occupancy, dated 11/22/99

ISSUES AND APPLICABLE LAW

The questions at issue in this matter are whether Respondent violated Sections 604(c) and 2411(2)(a), (e) and (m) of the Code and/or Rules 51(2), (4) and (5) of the Residential Builders and Maintenance and Alteration Contractors Board Rules, being 1979 AC, R 338.1551(2), (4) and (5), which provide in pertinent part as follows:

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:

(a) Abandonment without legal excuse of a contract, construction project, or operation engaged in or undertaken by the licensee.

* * *

(e) A willful violation of the building laws of the state or of

a political subdivision of the state.

* * *

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

Rule 51(2) Upon receipt of a valid and written complaint, the department shall * * * 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 * * *.

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 * * *.

Rule 51(5) Standards of construction shall be in accordance with the local building code * * *.

FINDINGS OF FACT

The following facts are found as established, by a preponderance of the evidence, based on the record following hearing:

1. Respondent has been a licensed residential builder in Michigan since 1994. Located in St. Helen, Michigan, Respondent has built approximately 50 homes in the Higgins Lake and Houghton Lake areas.
2. On September 23, 1998, Respondent contracted with Judith Ann Matthews, then of Arlington, Texas, to build a home in Roscommon, Michigan, for \$98,895.00 [Petitioner's Exhibit 1].
3. On August 11, 1999, Ms. Matthews filed a Statement of Complaint with

Petitioner. (The original Statement of Complaint is contained in the record; a copy of a portion of the Statement was also admitted as Petitioner's Exhibit 2.)

4. A building inspection of the home in question was conducted by Robert Yaske for the Township of Gerrish on August 9, 1999. (The Building Inspection Report is contained in the record, attached to the Formal Complaint; a copy of the Report was also admitted as Petitioner's Exhibit 3.) The Building Inspection Report found workmanship and code violations for nine general construction items.
5. The rough or poor finish on the exterior concrete referenced in the Building Inspection Report was caused by rain during the pouring of the concrete.
6. Ms. Matthews did not accept Respondent's offer to remove the concrete and re-pour it or receive a credit of \$400.00, based on the contract price for the concrete. Rather, Ms. Matthews wanted Respondent to pay for another contractor to complete the work at a higher cost [Respondent's Exhibit A; Petitioner's Exhibit 1, p 7].
7. Excessive cracking in the concrete front walk was caused by Respondent's failure to put in proper control joints.
8. In pouring the concrete for the rear patio of the home, Respondent failed to use any form of flashing to prevent the concrete from running up to the vinyl siding.

9. The construction contract specifies that a driveway is not included [Petitioner's Exhibit 1, p 7]. There was no subsequent agreement between Respondent and Ms. Matthews regarding installation of a driveway. Respondent left the driveway as dirt, 4" down from the garage floor, to allow a driveway to be poured or laid with gravel. The dirt driveway may be traversed by a vehicle with some difficulty, but it is not otherwise in keeping with customs or standards of the trade.
10. Certain debris was left on the property by workers unrelated to Respondent's construction project. Respondent, however, was responsible for some debris left at the site after the construction project.
11. The lot grading done by Respondent was very rough and not in keeping with customs or standards of the trade or practice.
12. The construction contract specifies that a 6' x 36"-40" covered front porch was not included [Petitioner's Exhibit 1, p 7].
13. Prior to or at the time of construction, however, a dispute arose between Ms. Matthews and Respondent about whether a front porch was meant to be included in the construction contract, based on Ms. Matthews' understanding of Respondent's representations when she signed the contract. A preponderance of the evidence shows that Respondent in fact agreed with Ms. Matthews to modify the contract so that a front porch would be included with the home.

14. The home was left without proper means of front ingress or egress for several months. At the time of the building inspection on August 9, 1999, there was no proper means of ingress or egress.
15. Respondent attempted to install a pre-cast concrete step unit at one point, which Ms. Matthews would not allow. A cement slab was left by Respondent, without a front porch of corresponding length.
16. Petitioner's Exhibit 6, for a total of \$3,791.30, includes an estimate that Ms. Matthews obtained to "expand front porch to match the existing cement slab *
* * ."
17. The construction contract did not specify painted exterior doors or trim [Petitioner's Exhibit 1, p 7], but that was not in keeping with the customs or standards of the practice or trade.
18. Interior painting, especially on the ceilings in the bedroom, bathroom and living room of the home, was not in keeping with standards of the practice or trade.
19. Miscellaneous defects or tears in the kitchen vinyl floor were not caused by Respondent, but rather created when Ms. Matthews had a large refrigerator installed, prior to obtaining proper occupancy.
20. While a handrail may have been loosened at the top of the stairs initially for painting purposes, it was not tightened during subsequent work periods.

The failure to tighten the handrail was not in keeping with standards of the trade

or practice.

21. Respondent's use of a small wood siding piece on the front of the vinyl-sided home is not consistent with the balance of the home's exterior, and is not in keeping with the standards of the trade or practice.
22. Excessive scratches and/or wear on the kitchen sink were not caused by Respondent. The sink was new when it was installed by Respondent.
23. Respondent did not allow occupancy of the home without a certificate of occupancy. Ms. Matthews took occupancy of the home when the construction work exceeded the planned time period, prior to its completion by Respondent. Respondent took proper steps to prevent unlawful occupancy [see Respondent's Exhibits C and D].
24. Respondent attempted to make corrections on more than one occasion, but a breakdown in cooperation and communication between Ms. Matthews and Respondent prevented Respondent from making corrections within a reasonable time.

CONCLUSIONS OF LAW

Petitioner has the burden of proof in this matter to show, by a preponderance of the evidence, that Respondent has violated the Code and/or administrative rules as alleged in the Formal Complaint [1990 MR 7, R 339.1763].

Based on the above findings of fact, it is concluded that Petitioner has shown

by a preponderance of the evidence that Respondent failed to perform the requirements of the contract in a workmanlike manner, contrary to Section 2411(2)(m) of the Code, as relates to the exterior concrete work (lack of control joints and flashing); lot grading; the unusable driveway; interior painting; the loose handrail; and the front wood siding piece. In addition, Respondent failed to perform the terms of the contract, contrary to Section 2411(2)(a) of the Code, by not providing a fully vinyl-sided home, and installing sub-standard exterior concrete.

Further, the record evidence shows that Respondent failed to comply with Section 1017.1 of the 1996 State Code, contrary to Rule 51(5), being 1979 AC, R 338.1551(5), by failing to provide a front porch or steps at the time of the building inspection.

Accordingly, a violation of Section 604(c) of the Code, meaning violation of a rule of conduct in practicing an occupation, has been shown.

The record does not support a finding, however, that Respondent violated Section 118.1 of the State Code, as set forth in the Building Inspection Report, by allowing occupancy of the dwelling without a certificate of occupancy. There was no violation of Section 2411(2)(e) of the Code on that basis.

Finally, the record does not support a finding that Respondent failed to correct those items as justified by the building inspection within a reasonable time or failed to respond to Ms. Matthews' complaint in a timely manner. Respondent did make attempts to correct several of the items, but was unsuccessful in significant part because of a breakdown in communication and cooperation with Ms. Matthews. No violation of Rules 51(2) and (4), being 1979 AC, R 338.1551(2) and (4), has been shown.

DECISION AND RECOMMENDATIONS

Based on the above findings of fact and conclusions of law, the undersigned finds that Respondent has violated Sections 604(c) and 2411(2)(a) and (m) of the Code, as well as Rule 51(5), being 1979 AC, R 338.1551(5).

Section 513 of the Code provides that a hearing report may recommend the penalties to be assessed as prescribed in article 6 [MCL 339.513; MSA 18.425(513)]. Based upon the above findings of fact and conclusions of law, the undersigned makes the following recommendations to the Residential Builders and Maintenance and Alteration Contractors Board:

1. That Respondent pay a **civil fine in the amount of \$1,500.00** for the above-cited violations.
2. That Respondent pay **restitution** to Ms. Matthews in the amount of **\$3,791.30** for the above-cited violations. This restitution amount is based on Petitioner's Exhibit 6; the other estimates/invoices in Petitioner's Exhibits 4, 5 and 7 cover either duplicative items, or items not included in the Building Inspection Report.

Lauren G. Van Steel
Administrative Law Judge