

STATE OF MICHIGAN
DEPARTMENT OF LABOR & ECONOMIC GROWTH
BOARD OF RESIDENTIAL BUILDERS AND
MAINTENANCE & ALTERATION CONTRACTORS

DEPARTMENT OF LABOR &
ECONOMIC GROWTH,
BUREAU OF COMMERCIAL SERVICES *ex rel*
TED AND CHERYL VIKAR

Docket No. 2008-208
Complaint No. 300759

Complainant,

v

FIVE POINTES BUILDING AND DESIGN, INC
SUSAN MARIE D'AGOSTINO, QUALIFYING OFFICER
License No. 21-02-141322

Respondent.

FINAL ORDER

WHEREAS, this matter having come before the Michigan State Board of Residential Builders and Maintenance & Alteration Contractors, hereafter the "Board", on November 18, 2008;

WHEREAS, the Board having received a Hearing Report under MCL 339.514 for this case and the Board having considered the Findings of Fact and Conclusions of Law in the Hearing Report of Gregory Holiday, Administrative Law Judge, dated September 8, 2008;

WHEREAS, the hearing report is hereby incorporated by reference;

WHEREAS, the Respondent having been found in violation of the Michigan Occupational Code, PA 299 of 1980, hereafter the "Code," or rules promulgated there under, and the Board having elected to exercise its authority pursuant to MCL 339.514 to impose penalties different from those recommended by the Administrative Law Judge; now, therefore,

IT IS ORDERED, that the following penalties authorized by Section 602 of the Code are imposed:

1. Respondent shall pay a FINE in the amount of \$20,000.00. The fine is payable to the State of Michigan within 60 days from the mailing of this Final Order. Complaint No. 300759 must be clearly indicated on the check or money order, and the payment sent to the Department of Labor & Economic Growth, Administrative Services Division, P.O. Box 30018, Lansing, MI 48909.
2. Respondent shall make RESTITUTION to Theodore Vikar and Cheryl Vikar by satisfying the Judgment entered in the 16th Judicial Circuit Court on July 18, 2007, Case No.

06-4071-CH in the amount of \$54,462.26 plus costs, fees and interest at the statutory rate, by certified check made payable to Theodore Vikar and Cheryl Vikar and mailed to 32804 Jefferson Avenue, Saint Clair Shores, MI 48082, within 60 days from the mailing date of this Final Order.

3. The license of Respondent, and any and all Article 24 licenses held by Respondent or Respondent's Qualifying Officer shall be and hereby are IMMEDIATELY REVOKED. No application for licensure, relicensure, reinstatement or renewal shall be considered or granted by the Department until all Final Orders of the Board have been fully complied with. Respondent's Qualifying Officer may not serve as the Qualifying Officer of any licensed corporate entity while any other Article 24 license held by Respondent or Respondent's Qualifying Officer is in suspended or revoked status.

4. It is also the intent of the Board that the fine and restitution be assessed one time in order to satisfy the Final Orders issued for complaint Numbers 300759 and 300770. Once the fine and restitution ordered in one of the companion Final Orders are satisfied, the fine and restitution ordered in the other Final Order will be considered satisfied.

5. Respondent shall submit in writing to the Michigan Department of Department of Labor & Economic Growth, Bureau of Commercial Services, Administrative Services Division, P.O. Box 30018, Lansing, Michigan 48909, proof of compliance with each and every requirement of this Final Order, in a form acceptable to the Department.

This Final Order shall not be construed as limiting the Department of Labor & Economic Growth, any other agency of the State of Michigan, or any individual as to the use of a lawful method of collection of the payment imposed by this Final Order.

Failure to comply with the provisions of this Final Order is considered a violation of the Code pursuant to Section 604(k) and may result in further disciplinary action.

This Final Order is effective immediately upon its mailing.

Given under my hand at Okemos, Michigan, this 15th day of January, 2009.

BY: 
Mark T. Glynn, Chairperson

Date mailed: 1-15-09

Proof of Compliance should be filed with:

Department of Labor & Economic Growth, Bureau of Commercial Services
Administrative Services Division
P.O. Box 30018
Lansing, MI 48909

Five Pointes Building and Design
Susan Marie D'Agostino, Qualifying Officer
Final Order in Complaint No. 300759
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**STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES**

In the matter of	Docket No.	2008-208
Bureau of Commercial Services, Petitioner	Agency No.	300759
v	Agency:	Bureau of Commercial Services
Five Pointes Building and Design, Inc.	Case Type:	Sanction
Susan Marie D'Agostino, Q.O., Respondent		
and		
Bureau of Commercial Services, Petitioner	Docket No.	2008-209
v	Agency No.	300770
Susan Marie D'Agostino, Respondent	Agency:	Bureau of Commercial Services
_____ /	Case Type:	Sanction

Issued and entered
this 8th day of September, 2008
by Gregory Holiday
Administrative Law Judge

HEARING REPORT

PROCEDURAL HISTORY

This proceeding was commenced with the filing of Notices of Hearing upon Formal Complaints issued by the Enforcement Division of the Department of Labor & Economic Growth's Bureau of Commercial Services (Petitioner) dated November 2, 2007, charging Susan Marie D'Agostino (D'Agostino) and Five Pointes Building and Design, Inc, Susan Marie D'Agostino, Qualifying Officer (Five Pointes, or collectively Respondents) with one or more violations of the Occupational Code, 1980 PA 299, as amended (Code), MCL

339.101 *et seq.* Pursuant to Section 92 of the Administrative Procedures Act, 1969 PA 306, as amended, MCL 24.201 *et seq.*, Respondents were afforded an opportunity to demonstrate compliance prior to the commencement of formal proceedings. Respondents failed to satisfactorily demonstrate compliance and, as a result, the matters were set and noticed for formal hearings.

The hearings were set for April 17, 2008 at 9:00 a.m., at the State Office of Administrative Hearings & Rules of the Department of Labor & Economic Growth, Cadillac Place, 2nd Floor Annex, Room 2-700, 3026 West Grand Boulevard, Detroit, Michigan. At Petitioner's request, the hearings were postponed to Monday, June 16, 2008 at 9:00 a.m., and the same proceeded at about 9:35 a.m. Gregory Holiday presided as Administrative Law Judge. Tiffany Daugherty, Esq., appeared on behalf of the Petitioner. Neither Respondents, nor anyone on behalf of either Respondent, appeared for the hearing. Ted and Cheryl Vikar and Inspector Dennis Cairns were present as potential witnesses. No witnesses testified during the hearing.

ISSUES AND APPLICABLE LAW

The general issue presented is whether Respondents violated the Code, with respect to the practice of a residential builder. The specific issues are whether Respondents violated Builder Rule 1979 AC, R 338.1551(5) and Sections 604(c) and 2411(2)(l) and (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:

(l) Becoming insolvent, filing a bankruptcy action, becoming subject to a receivership, assigning for the benefit of creditors, failing to satisfy judgments or liens, or failing to pay an obligation as it becomes due in the ordinary course of business.

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

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.

EXHIBITS

Petitioner offered the following exhibits for consideration at the hearing:

<u>Exhibit</u>	<u>Description</u>
1	September 30, 2005 Building Inspection Report of Dennis Cairns for 32804 Jefferson, St. Clair Shores
2	Five Pointes Building & Design Proposal for Ted and Cheryl Vikar totaling \$265,265.00
3	July 18, 2007 16 th Circuit Court Default Judgment against Five Pointes Building & Design for \$54,462.26
4	April 20, 2005 Claim of Lien of Modde Construction Co. for \$10,590.00
5	August 26, 2003 Claim of Lien of Schuster Construction Services for \$8,323.00

FINDINGS OF FACT

1. Five Pointes was, at all relevant times, licensed as a residential builder under the Code.

2. D'Agostino was, at all relevant times, licensed as a residential builder under the Code.

3. A Statement of Complaint (Exhibit 1 attached to the Formal Complaint) was filed by Ted and Cheryl Vikar with the Department against Respondents on September 13, 2005.

4. St. Clair Shores Building Inspector Dennis Cairns submitted an evaluation of the Vikar Statement of Complaint (Exhibit 2 attached to the Formal Complaint and Petitioner Exhibit 1).

5. D'Agostino, on behalf of Five Points, entered into a contract to perform services regulated by the Code with Ted and Cheryl Vikar on about August 5, 2003 (See Petitioner Exhibit 2).

6. Respondents have failed to perform the requirements of the contract in a workmanlike manner.

7. Respondents, in performing the contract, failed to comply with § R801.3, R703.1, R701.2, R323.1.3, R2709.1, R2607.1 and R301.1 of the 2000 Michigan Residential Code, which was adopted pursuant to the Stille-DeRossett-Hale single state Construction Code Act, effective July 31, 2001.

8. Respondents failed to satisfy a lien filed on September 21, 2005 by Modde Construction Co., Inc., in the County of Macomb, Michigan (See Petitioner Exhibit 4).

9. Respondents failed to satisfy a lien filed on February 17, 2004 by Schuster Construction Services in the County of Macomb, Michigan (See Petitioner Exhibit 5).

10. On July 18, 2007, Five Pointes had a judgment entered against it in the 16th Judicial Circuit Court of Michigan in the amount of \$54,462.26 (See Petitioner Exhibit 3).

11. Five Pointes failed to satisfy the judgment.

12. Respondents violated a rule of conduct in practicing an occupation.

13. D'Agostino was a party to the acts and omissions set forth above and was in a position to ensure compliance with the Code or otherwise prevent the violations that are the subject of the Formal Complaint but failed to do so.

14. Although properly served with notice of these proceedings, Respondents did not appear for the hearing.

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 each Respondent. 1990 AACS, R 339.1763.

The findings of fact are adequate to establish that Five Pointes violated Section 2411(2)(l) of the Code and that both Respondents violated Sections 2411(2)(m) of the Code. No violation of Section 604(c) of the Code or Builder Rule 338.1551(5) was established for the following reasons:

Builder Rule 338.1551(5) requires that the standards of construction be in accordance with the local building code. The Formal Complaint in this matter, as it relates to Builder Rule 338.1551(5), simply alleges violations of the 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 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 might also constitute a violation of Section 2411(2)(e) of the Code. If, on the other hand, the

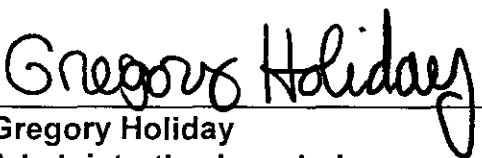
contractor simply failed to replace some of the rotted roof boards without any decision to use other standards in place of the applicable building code, there would be no violation of Builder Rule 338.1551(5). There is no violation of Builder Rule 338.1551(5).

DECISION AND RECOMMENDED SANCTIONS

It is the decision of this Administrative Law Judge that Respondent Five Pointes violated Section 2411(2)(l) of the Code and that both Respondents violated Section 2411(2)(m) of the Code, as described in this Hearing Report. Petitioner recommended that sanctions include revocation of all Article 24 licenses of both Respondents and the payment of civil fines in the maximum amount.

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

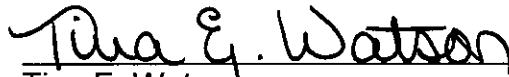
1. Payment of a civil fine in the amount of \$10,000.00 for each Respondent.
2. Payment of restitution to Ted and Cheryl Vikar in the form of a satisfaction of their July 18, 2007 16th Circuit Court Judgment
3. Revocation of all Article 24 licenses held by either Respondent.



Gregory Holiday
Administrative Law Judge

PROOF OF SERVICE

I hereby state, to the best of my knowledge, information and belief, that a copy of the foregoing document was served upon all parties and/or attorneys of record in this matter by Inter-Departmental mail to those parties employed by the State of Michigan and by UPS/Next Day Air, facsimile, and/or by mailing same to them via first class mail and/or certified mail, return receipt requested, at their respective addresses as disclosed by the file on the 8th day of September, 2008.



Tina E. Watson

State Office of Administrative Hearings and Rules

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