

STATE OF MICHIGAN  
DEPARTMENT OF ENERGY, LABOR & ECONOMIC GROWTH<sup>1</sup>  
BOARD OF RESIDENTIAL BUILDERS AND  
MAINTENANCE & ALTERATION CONTRACTORS

DEPARTMENT OF ENERGY, LABOR &  
ECONOMIC GROWTH,  
BUREAU OF COMMERCIAL SERVICES *ex rel*  
JEFF AND BETH JASKOLSKI

Docket No. 2008-943  
Complaint No. 304868

Complainant,

v

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

Respondent.

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FINAL ORDER

WHEREAS, this matter having come before the Michigan State Board of Residential Builders and Maintenance & Alteration Contractors, hereafter the "Board", on March 10, 2009;

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 David Cohen, Administrative Law Judge, dated January 14, 2009;

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 \$5,000.00. The fine is payable to the State of Michigan within 60 days from the mailing of this Final Order. Complaint No. 304868 must be clearly indicated on the check or money order, and the payment sent to the Department of Energy, Labor & Economic Growth, Bureau of Commercial Services, Final Order Monitoring, P.O. Box 30018, Lansing, MI 48909.

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<sup>1</sup> Effective December 28, 2008, by Executive Order 2008-20, the Department of Labor & Economic Growth (DLEG) was reorganized and renamed as the Department of Energy, Labor & Economic Growth (DELEG).

2. Respondent's failure to comply with each and every condition of this Final Order shall result in CONTINUED REVOCATION of any and all Article 24 licenses held by Respondent or Respondent's Qualifying Officer. 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.

3. 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 304868 and 304869. 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.

4. Respondent shall submit in writing to the Michigan Department of Energy, Labor & Economic Growth, Bureau of Commercial Services, Final Order Monitoring, 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 Energy, 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 12<sup>th</sup> day of May, 2009.

BY:   
Mark T. Glynn, Chairperson

Date mailed: May 12 2009

Proof of Compliance should be filed with:

Department of Energy, Labor & Economic Growth, Bureau of Commercial Services  
Final Order Monitoring  
P.O. Box 30018  
Lansing, MI 48909

**STATE OF MICHIGAN  
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES**

In the matter of	Docket No.	2008-943
Bureau of Commercial Services, Petitioner	Agency No.	304868
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.	2008-944
v	Agency No.	304869
Susan Marie D'Agostino, Respondent	Agency:	Bureau of Commercial Services
_____ /	Case Type:	Sanction

Issued and entered  
this 14<sup>th</sup> day of January, 2009  
by David Cohen  
Administrative Law Judge

**HEARING REPORT**

**PROCEDURAL HISTORY**

These matters commenced with the issuing of Formal Complaints (Complaints) dated January 17, 2008 by the Department of Labor and Economic Growth<sup>1</sup>, Bureau of Commercial Services (Petitioner) against Five Pointes Building and Design, Inc., Susan Marie D'Agostino, Qualifying Officer, and Susan Marie D'Agostino individually

(Respondents), alleging one or more violations of the Occupational Code (Code), 1980 PA 299, as amended, MCL 339.101, et seq. and the administrative rules promulgated thereunder.

Notices of Hearing (Notices) were issued scheduling contested case hearings at 9:00 a.m. on September 23, 2008. At the request of Petitioner, the scheduled hearings were adjourned until 9:00 a.m. on November 19, 2008 at the State Office of Administrative Hearings & Rules, Cadillac Place, 2<sup>nd</sup> Floor Annex, Suite 2-700, Detroit, Michigan. The notices were all properly sent to Respondents' last known address of record and three other addresses on file for the company and/or qualifying officer. Neither Respondents nor an attorney on behalf of Respondents appeared at the hearing. Administrative Law Judge David M. Cohen presided. Mike Frezza, Assistant Attorney General, appeared on behalf of Petitioner.

At the onset of the initial proceeding, both hearings were consolidated solely for hearing purposes.

The hearings proceeded in Respondents' absence pursuant to Section 72 of the Administrative Procedures Act of 1969 (APA), 1969 PA 306, as amended, MCL 24.201 *et seq.*, and a default was granted on behalf of Petitioner pursuant to Section 78 of the APA.

§ 72(1) of the APA provides, in pertinent part:

If a party fails to appear in a contested case after proper service of notice, the agency, if no adjournment is granted, may proceed with the hearing and make its decision in the absence of the party.

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<sup>1</sup> Now the Department of Energy, Labor & Economic Growth (DELEG)

§ 78(2) of the APA provides, in pertinent part:

Except as otherwise provided by law, disposition may be made of a contested case by stipulation, agreed settlement, consent order, waiver, default or other method agreed upon by the parties.

As a result of the default, the factual allegations contained in Petitioner's Formal Complaints, and not altered by the statements of counsel, were deemed proven. It should be noted that Attorney Frezza provided additional information of note regarding the underlying facts in this matter at the hearing, and this information is referenced below.

### **EXHIBITS**

The following exhibits were attached to both of the formal complaints and are taken as part of the formal record pursuant to the default.

<b><u>Exhibit</u></b>	<b><u>Description</u></b>
1	October 4, 2006 Statement of Complaint against Respondent Five Pointes
2	October 11, 2006 St. Clair Shores Building Inspection Report
3	March 2005 Construction Proposal from Respondent Five Pointes.
4	October 29, 2007 Correspondence indicating lapse of Michael D'Agostino's Residential Builder Salesperson License, #2105-093834.
5	Claim of Lien filed by Ulrich Lumber & Builder's Supply, Inc.

### **ISSUES AND APPLICABLE LAW**

The specific issue in this case is whether Respondent violated Sections 604(c), 2411(2)(a) and 2411(2)(l) of the Occupational Code, 1980 PA 299; as amended; MCL 339.604(c), MCL 339.2411(2)(a), MCL 339.2411(2)(l), and Rules 36 and 51(5) of the Residential Builders and Maintenance and Alteration Contractors Board Rules; promulgated thereunder as 1979 AC, R 338.1536 and 1979 AC, R 338.1551(5), which provides in pertinent part:

Section 604. A person who violates 1 or more of the following 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.

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Section. 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.

(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.

R 338.1536.

Rule 36 Acceptance or performance of a contract procured by a salesperson not licensed under a builder or contractor, or acceptance or performance of a contract, other than the sale of real property, procured by anyone not licensed under the act, is prohibited.

R 338.1551.

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.

#### FINDINGS OF FACT

Based on the record, the following findings of fact are established:

1. Respondent, Five Pointes Building and Design, Inc., Susan Marie D'Agostino Qualifying Officer, has, at times relevant to this Complaint,

been licensed as a residential builder under Occupational Code, 1980 PA 299 as amended , Article 24; MCL 339.2401-2412.

2. Respondent, Susan Marie D'Agostino, has, at times relevant to this Complaint, been licensed as a residential builder under Occupational Code, 1980 PA 299 as amended, Article 24; MCL 339.2401-2412.
3. A Statement of Complaint was filed with the Enforcement Division On October 4, 2005 by Jeff & Beth Jaskolski against Respondent Five Pointes Building & Design, Inc. (Formal Complaint Exhibit 1)
4. An authority charged with the enforcement of the laws governing construction of residential and commercial buildings in the political subdivision in which the building is located, has submitted an evaluation of the Complaint submitted. (Formal Complaint Exhibit 2)
5. On or about March 30, 2005, Michael D'Agostino, on behalf of Respondent Five Pointes, entered into or modified an existing contract to perform services , regulated by the Code, with Jeffrey and Beth Jaskolski, (Formal Complaint Exhibit 3)
6. At the time Michael D'Agostino entered into the contract on behalf of Respondent Five Pointes, Michael D'Agostino was not licensed, contrary to MCL 339.601(1), although required to be licensed pursuant to the Code.
7. Respondents accepted a contract procured by a salesperson not licensed, contrary to 1979 AC R 338.1536.
8. Respondent, in performance of the contract, failed to comply with R 312.1 and R 109.1.6 of the 2003 Michigan Residential Code, adopted pursuant to the Stille-DeRossett-Hale single state construction code act, contrary to 1979 AC, R 338.1551(5).
9. Respondents have, without legal excuse, failed to perform the terms of the contract, contrary to MCL 339.2411(2)(a).
10. Respondents failed to satisfy a lien filed on October 10, 2006, by Ulrich Lumber & Builders Supply Inc., in the County of Macomb, Michigan, on real property commonly known as 27330 Lane, St Clair Shores, contrary to MCL 339.2411(2)(l). (Formal Complaint Exhibit 5)
11. Respondents have violated a rule of conduct in practicing an occupation, contrary to MCL 339.604(c).

12. Respondent Susan D'Agostino was a party to the above-referenced acts and omissions and was in a position to ensure compliance with the Occupational Code but failed to do so.

### CONCLUSIONS OF LAW

The principles that govern judicial proceedings also apply to administrative hearings. 8 Callaghan's Michigan Pleading and Practice (2d ed.) Section 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 Respondents. 1990 AACS, R 339.1763. Under § 72 of the APA, there is no requirement to provide a full evidentiary hearing when all alleged facts are taken as true. Smith v Lansing School Dist, 428 Mich. 248 (1987).

In requesting the above-referenced default, Attorney Frezza indicated that he was previously involved in civil litigation on behalf of the Homeowner Construction Lien Recovery Fund; litigation which resulted due to the same underlying incidents in this matter. As such, Mr. Frezza was aware of several additional mitigating facts, and stated them for the ALJ and Board to consider.

Attorney Frezza drew attention to Exhibit 2 of the formal complaint, which is the amended building inspection report, and its findings. Mr. Frezza stated that in the previous civil litigation there was conflicting testimony offered that supported the proposition that access to the Second Floor Balcony at 27330 Lane, St. Clair Shores had been securely blocked. As such, Respondent could have offered a viable argument regarding the lack of a guard rail on the second floor balcony.

Additionally, a broader issue regarding the underlying construction revolves around a dispute between Respondents and the homeowners concerning payment for the modified contract. Mr. Frezza indicated that these issues resulted in a compromise settlement of the Homeowner Construction Lien Recovery Fund claim.

Attorney Frezza also wished to convey to the ALJ and the Board that the underlying contract in this matter was procured by Michael D'Agostino. Mr. D'Agostino appears to have supervised the construction project. Of note, Mr. D'Agostino's builder's license appears to have been previously removed by the board, and his salesperson's license had lapsed. Mr. Frezza's recollection was that Mr. D'Agostino had outstanding fines from his license, and that these remain unsatisfied. Per Mr. Frezza's representation to the ALJ, it appears that Respondent Susan D'Agostino sat for the Builder's exam after her spouse, Michael D'Agostino lost his license.

The ALJ is not unsympathetic to the reality that Respondents appear to have had possible arguments to at least a portion of the allegations in the formal complaint, but it does not alter the reality of their failure to appear for the hearing, and the default judgment which appropriately resulted.

Based upon the facts described herein, Petitioner has proven, by a preponderance of the evidence, that Respondents violated MCL 339.604(c), MCL 339.2411(2)(a), MCL 339.2411(2)(l), as well as 1979 AC, R 338.1536 and 1979 AC, R 338.1551(5).

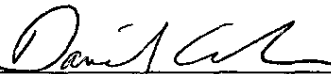
Petitioner recommended a fine in the amount of \$1,500.00, jointly and severally against both Respondent Five Pointes and Susan Marie D'Agostino. Petitioner would recommend that Respondents be allowed six months to pay the fine, with their

licenses suspended during that period. If the fine is unpaid after six months, Petitioner recommended that Respondents' licenses be permanently revoked. Given the totality of the representations made, the ALJ concurs with these recommendations.

**RECOMMENDATIONS**


The Administrative Law Judge makes the following recommendations to the Board:

1. Respondent pay a civil fine in the amount of \$1,500.00, or in an amount deemed reasonable by the Board.
2. Respondents' licenses be suspended until the civil fine is paid in full.
3. If the civil fine is unpaid after a six month period, Respondent's licenses should be revoked.

  
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David Cohen  
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 14<sup>th</sup> day of January, 2009.



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