

IN THE MATTER OF THE CLAIM	* BEFORE MARC NACHMAN,
OF DAVID MURRAY,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	* OAH No.: DLR-HIC-02-16-06832
FOR THE ALLEGED ACTS OR	* MHIC No.: 14 (75) 1152
OMISSIONS OF ROBERT E.	*
BUTLER, III,	*
T/A A & R CONSTRUCTION,	*
RESPONDENT	*

* * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
PROPOSED FINDINGS OF FACT
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PROPOSED CONCLUSION OF LAW
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STATEMENT OF THE CASE

On December 9, 2014, David Murray (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$12,107.00 in alleged actual losses suffered as a result of a home improvement contract with Robert Edward Butler, III, trading as A & R Construction (Respondent). A hearing was initially scheduled for July 15, 2015, but was withdrawn by the Claimant because the parties entered into a settlement agreement. The Respondent subsequently failed to honor his obligation under the

settlement agreement. By letter dated January 15, 2016, Susan M. Cherry, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), advised the Office of Administrative Hearings (OAH) that the Respondent had not honored his obligation under the settlement agreement, and asked for the matter to be rescheduled for a hearing on the Claim.

I held a hearing on April 12, 2016 at the County Office Building in Largo, MD. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).¹ The Claimant represented himself. The Respondent represented himself. Hope Sachs, Assistant Attorney General, represented the Fund.²

The contested case provisions of the Administrative Procedure Act, the MHIC procedural regulations, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02.01B, and 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund as a result of any acts or omissions of the Respondent?
2. If so, what is the amount of that loss?

¹ Unless otherwise noted, all citations of the Business Regulation Article hereinafter refer to the 2015 Replacement Volume.

² Prior to the hearing, the Respondent requested a postponement to attend a morning medical appointment, which was denied. Instead, the hearing was scheduled for later in the day to accommodate the Respondent's medical appointment.

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on the Claimant's behalf (except at otherwise noted):

- CL Ex. 1 - [Not admitted]
- CL Ex. 2 - Addition Contract, dated April 25, 2012 (the Contract)
- CL Ex. 3 - Bank of America check to Respondent, dated April 26, 2012
- CL Ex. 4 - Four color pictures, dated September 27, 2014
- CL Ex. 5 - Consent Order to Enforce Compliance with Housing Code, dated October 16, 2013
- CL Ex. 6 - Estimate from Brisk Installations, dated September 17, 2014
- CL Ex. 7 - Estimate of work completed, dated October 9, 2014
- CL Ex. 8 - Color picture, undated
- CL Ex. 9 - Color picture, undated
- CL Ex. 10 - Black and white picture, dated September 26, 2014
- CL Ex. 11 - Several black and white pictures, dated September 26 & 27, 2014.

I admitted no exhibits on the Respondent's behalf.

I admitted the following exhibits on behalf of the Fund:

- GF Ex. 1 - Notice of Hearing, dated March 9, 2016
- GF Ex. 2 - DLLR, ID Registration, Home Improvement Commission, dated January 15, 2016
- GF Ex. 3 - Home Improvement Claim Form, dated December 9, 2014.

Testimony

The Claimant testified on his own behalf and did not present the testimony of any other witnesses.

The Respondent testified on his own behalf and did not present the testimony of any other witnesses.

The Fund did not present any witnesses.

PROPOSED FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC license number 131465.

2. On April 25, 2012, the Claimant and the Respondent entered into the Contract to build an addition on his residence at 2312 Columbia Place, Landover, Maryland. The Contract divided the scope of the work into the following:

- Phase I – Demo[lition]
- Phase II – Grading/Footings
- Phase III – Framing/Roofing/Siding
- Phase IV – Electrical/Plumbing/HVAC
- Phase V – Deck
- Phase IV – Finish and Trim Work.

3. The price of the Contract was \$33,500.00, payable in three installments:

- \$14,144.00 due on April 26, 2012
- \$15,234.00 due on May 11, 2012
- \$4,100 due on completion of the project.

4. The Respondent was obligated to haul debris from the property demolition.

5. The Contract also recognized the need for change orders in the event of “unforeseen events, or to factors unknown to the [Respondent] when the contract was made.”

6. The Contract did not specify when the work would commence, but did state that it would be completed “anywhere from 4 to 10 weeks” but could take a longer time “due to weather or the inspections that pertain to the project.”

7. On about April 26, 2012, the Claimant paid the Respondent \$20,541.00 by personal check made payable to the Respondent and \$8,886.00 by a cashier's check made payable to the Respondent's trade name.³

8. The Respondent started work under the Contract.

9. The Respondent did not complete the work.

10. The Claimant paid the Respondent for work that the Respondent failed to complete under the terms of the Contract.

11. On July 15, 2015, the date first scheduled for the hearing in this matter, the parties entered into a settlement agreement, under which the Respondent would pay the Claimant \$6,000.00 within ninety days of that date to resolve his Fund claim. In exchange for that agreement, the Claimant would withdraw his Fund claim.

12. The Respondent failed to satisfy his obligation under the settlement agreement.

13. The Claimant's actual loss is \$6,000.00.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of his claim by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3).⁴ "[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true." *Coleman v. Anne Arundel Cty. Police Dep't.*, 369 Md. 108, 125, n. 16 (2002), quoting Maryland Pattern Jury Instructions 1:7 (3rd. ed. 2000).

³ The Claimant produced one additional check for \$135.00 (Cl. Ex. # 3) made payable to "Burwell Designs." This payment was not part of the Contract obligations.

⁴ As noted above, "COMAR" refers to the Code of Maryland Regulations.

An owner may recover compensation from the Fund “for an actual loss that results from an act or omission by a licensed contractor.” Bus. Reg. § 8-405(a). *See also* COMAR 09.08.03.03B(2) (“actual losses . . . incurred as a result of misconduct by a licensed contractor”). Actual loss “means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant.

The question in this case is whether the Respondent performed unworkmanlike, inadequate or incomplete home improvements. The evidence presented by the Claimant was somewhat confusing at times. He submitted pictures showing progress made on the house addition, but could not quantify how much work was completed, the value of the work that was completed, or how much work remained to be completed. These are three essential factors to determine whether the Fund claim should be awarded. The Claim form asks for an award of \$12,107.00 from the Fund, calculated as follows:

Line 3	Amount of original contract	\$ 33,500.00
Line 4	Amount of any change orders	\$ <u>800.00</u>
Line 5 (Lines 3 and 4)	Subtotal	\$ 34,300.00
Line 6	Amount paid to or on behalf of Respondent	\$ 30,107.00
Line 7	Estimated value of work done by Respondent	\$ <u>18,000.00</u>
Line 8 (Lines 6 - 7)	Subtotal	\$ 12,107.00

Line 10 (Lines 6 + 9 less line 5)	Claim amount calculated from above	\$ 8,807.00
Line 11 (higher of lines 8 or 10)	Claim amount calculated from above	\$ 12,107.00

The pictures submitted into evidence showed that the property was messy, with a lot of debris present. The Claimant also testified and presented evidence that Prince George's County charged him with violations of the Housing Code regarding debris on his property (Cl. Ex 5). The violations, however, involved inoperable vehicles and boats kept on the property and weeds growing on the property. Only part of the violation sanctioned "rubbish, garbage, building materials, wood, bottles, metal, fencing material...", only some of which were visible in the pictures (Cl. Exs. 8 and 9). The Claimant did not identify the exact items left by the Respondent on the property or present any evidence quantifying the expense of removing the offending items.

The Claimant showed photographs of the work performed by the Respondent (Cl. Exs. 8 through 11), but again did not quantify the value of the work that he performed. Even on the claim form, the Claimant was asked to estimate the value of the work done by the Respondent and "PROVIDE PROOF" [emphasis in original] of that value. The Claimant did not present any evidence of the value of the work done, and was not qualified to estimate the value himself, a starting point to determine the Fund award by the calculations, above. The pictures showed, however, that the Respondent failed to complete the work he contracted to perform under the Contract.

The Claimant submitted a "Proposal" from Brisk Installations (MHIC Lic. #90233) (Cl. Ex. 7), on which was written a title "Estimate of Work Completed." The Claimant wanted me to

consider this document as evidence concerning the Respondent's deficiencies. Its author⁵ writes that the "footing and concrete were poured wrong," and "there is a 2 [inch] gap between the slab and the cinder block." The author wrote about defects in the door slider. The author, however, states that the frame work was finished and the roof and shingles were done as well. He then indicated that the following work was not done: siding, gutters and downspouts, insulation in walls and ceiling, drywall, carpet, and base and trim molding. He quoted a price to complete or remediate the work which is illegible, although it consists of five digits, and starts with the number "1" (i.e., the proposal was for at least \$10,000.00).

The difficulty using this "Proposal" to determine the amount of work done is that the work is not itemized, and is lumped into one figure. Accordingly, it is not useful to estimate the amount of work done by the Respondent.

Similarly, a second contract from Brisk Installations (Cl. Ex. 6) purports to be an estimate for installing siding, screening in the porch, installing the patio doors, insulation, drywall hanging, base molding, and installing gutters and downspouts. That estimate is for \$13,000.00, and like the other document from Brisk, fails to itemize any of the work.

Regardless of the lack of itemization, however, no one from Brisk presented any evidence at the hearing. Although hearsay evidence is admissible in administrative hearings, and in some instances may entirely support the decision in a case, it must be reliable. There are no indicia of reliability in either of these documents. Moreover, if the writer of those documents were present at a hearing, he (or she) would be subject to qualification as an expert and be further subject to cross-examination by the Respondent. Accordingly, I cannot consider either document as proof of the Claimant's loss.

⁵ Although the writer's name was signed at the bottom of the form, his name is not clearly legible.

further subject to cross-examination by the Respondent. Accordingly, I cannot consider either document as proof of the Claimant's loss.

The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). Although the Claimant has failed to adequately prove an actual loss, he should still be entitled to reimbursement from the Fund for his loss because, if he were not so compensated, the Respondent would benefit from renegeing on his settlement agreement with the Claimant. The Claimant was present at the first hearing in July 2015 to present his case; this hearing was almost a year later, and the evidence in his presentation was almost a year stale.⁶

MHIC's regulations provide three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). The first three formulas calculate the Fund award when: 1) "the contractor abandoned the contract without doing any work;" 2) "the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract;" and 3) "the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract."

If the Commission determines that the original contract price is too unrealistically low or high to provide a proper basis for measuring actual loss, the Commission may adjust its measurement accordingly. In addition, where necessary, the Commission may apply a "unique measurement" in determining a claimant's actual loss. COMAR 09.08.03.03B(3)(c). None of the above formulas is appropriate in this case and, thus, I shall apply the following unique formula. Although the Claimant has not shown sufficient evidence to use any of those three

⁶ Additionally, the Claimant was represented at the first hearing by his attorney, Paul Balassa. If the Claimant was able to have an attorney at the present hearing, his presentation might have been more cogent. The Respondent should not benefit from causing a one year delay in the proceedings.

formulas, the equities of his claim require that he should still receive an award from the Fund for his loss. The evidence establishes that the Claimant has incurred a loss because he paid for work that was not completed and the Respondent walked off the project before completing it. The evidence further establishes that the Respondent acknowledged the Claimant's loss when, on July 15, 2015, he entered into a settlement agreement agreeing to pay the Claimant \$6,000.00 within 90 days of that date to "resolve his claim against the Guaranty Fund." The present hearing was convened at the request of Susan M. Cherry, Assistant Attorney General, who wrote to the OAH that Claimant "has advised the Commission that the [Respondent] has not complied with the settlement terms previously agreed to by the parties on July 15, 2015."⁷

Accordingly, the Claimant is entitled to reimbursement of \$6,000.00, the amount that the Respondent previously agreed to pay the Claimant to resolve his claim. Bus. Reg. § 8-405(a).

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$6,000.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015).

RECOMMENDED ORDER

I **RECOMMEND** that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$6,000.00; and

ORDER that the Respondent is ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed


⁷ Although the OAH does not have jurisdiction to enforce the parties' settlement agreement, the benefits of that agreement to the Claimant (and the putative benefits to the Respondent by not having the Fund pay a claim against him) should not be nullified by the Respondent's failure to fulfill the terms of the settlement agreement.

under this Order, plus annual interest of at least ten percent (10%) as set by the Maryland Home Improvement Commission;⁸ and

ORDER that the records and publications of the Maryland Home Improvement Commission reflect this decision.

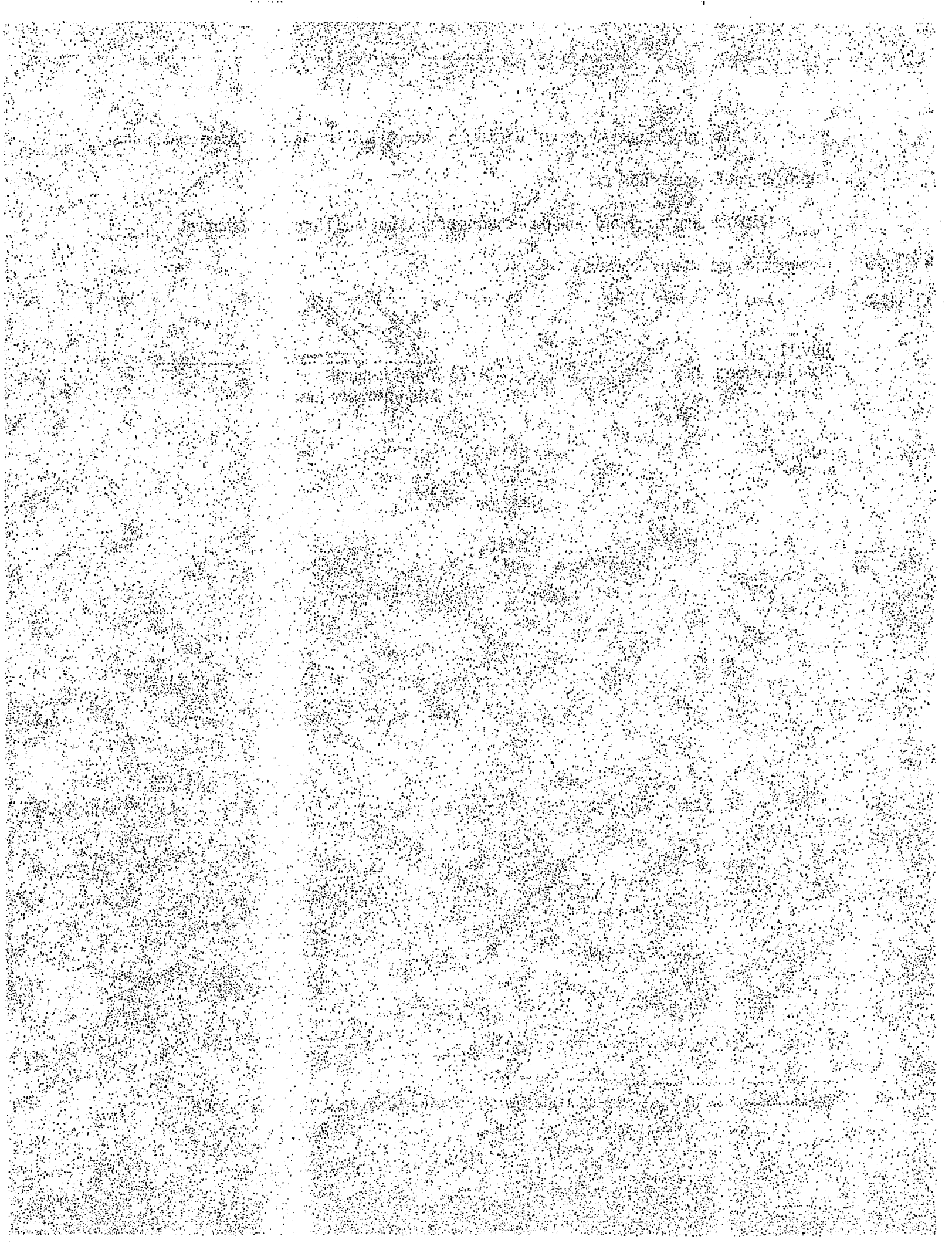
Signature on File

July 11, 2016
Date Decision Issued

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Marc Nachman
Administrative Law Judge

MN/sm
#161909

⁸ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.



PROPOSED ORDER

WHEREFORE, this 19th day of August, 2016, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.

J. Jean White

***I. Jean White
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION