

# **Builder – Contractor – Candlestick Maker**

## **Residential Builder Licensing Requirements**

**By Christopher A. Hajek, Esq.**  
**The Hajek Firm, PLLC**

Article 24 of the Michigan Occupational Code requires residential builders and residential maintenance and alteration contractors to be licensed. While licensing sounds simple enough, there is considerable confusion surrounding whether a corporation, limited liability company, partnership or other association acting as a builder, developer or contractor needs to be a licensed under the Code.

Under the Michigan Occupational Code a “Residential Builder” means a person engaged in the construction of a residential structure or a combination residential and commercial structure who, for a fixed sum, price, fee, percentage, valuable consideration, or other compensation, other than wages for personal labor only, undertakes with another or offers to undertake or purports to have the capacity to undertake with another for the erection, construction, replacement, repair, alteration, or an addition to, subtraction from, improvement, wrecking of, or demolition of, a residential structure or combination residential and commercial structure; a person who manufactures, assembles, constructs, deals in, or distributes a residential or combination residential and commercial structure which is prefabricated, preassembled, precut, packaged, or shell housing; or a person who erects a residential structure or combination residential and commercial structure except for the person’s own use and occupancy on the person’s property.<sup>1</sup>

A “Residential structure” means a premises used or intended to be used for a residence purpose and related facilities appurtenant to

the premises, used or intended to be used, as an adjunct of residential occupancy.<sup>2</sup>

A “Residential maintenance and alteration contractor” means a person who, for a fixed sum, price, fee, percentage, valuable consideration, or other compensation, other than wages for personal labor only, undertakes with another for the repair, alteration, or an addition to, subtraction from, improvement of, wrecking of, or demolition of a residential structure or combination residential and commercial structure, or building of a garage, or laying of concrete on residential property, or who engages in the purchase, substantial rehabilitation or improvement, and resale of a residential structure, engaging in that activity on the same structure more than twice in 1 calendar year, except (i) if the work is for the person’s own use and occupancy; (ii) if the rehabilitation or improvement work of residential type property or a structure is contracted for, with, or hired entirely to be done and performed for the owner by a person licensed under Article 24 of the Michigan Occupational Code; or (iii) if work is performed by a person employed by the owner to perform work for which the person is licensed by the state.<sup>3</sup>

While there are limited exceptions to the licensing requirements, in general, if you are in the business of building or contracting and hold yourself or your company out as a builder, developer or contractor, you are probably subject to the Code’s licensing requirements. Under the Code exceptions you are not required to have a builders license: if you are an authorized representative of the

U.S. government, the state, or a county, township, city village or other political subdivision of this state<sup>4</sup>; if you are an owner of property, with reference to a structure on the property for the owner's own use and occupancy<sup>5</sup>; if you are the owner of rental property, with reference to maintenance and alteration of that rental property<sup>6</sup>; if you are an officer of the court acting within the terms of the officer's office<sup>7</sup>; if you are an electrical contractor licensed under Act No. 217 of the Public Acts of 1956, as amended<sup>8</sup>; if you are a plumbing contractor licensed under Act No. 266 of the Public Acts of 1929, as amended<sup>9</sup>; or if you are a mechanical contractor licensed under the Mechanical Contractors Act.<sup>10</sup>

Corporations, partnerships, limited liability companies and other entities are also subject to the Code's licensing requirements. A corporation, partnership or association may apply for a Builders License by designating one of its officers, partners, members or managing agents as a qualifying officer, which qualifying officer is a licensed residential builder.<sup>11</sup> To secure full compliance with the Act, the qualifying officer must be responsible for exercising the supervision or control of the building or construction operations.<sup>12</sup> In addition, for a license to be issued to a corporation, partnership or association, each of its officers, partners, trustees, directors, members and persons exercising control of the entity must be at least 18 years of age and meet the requirements for a license.<sup>13</sup> The license of a corporation, partnership, or other association is suspended when a license or license application of a qualifying officer, partner, trustee, director, officer, member, or a person exercising control of the corporation, partnership, or other association is suspended, revoked, or denied.<sup>14</sup> If the qualifying officer of a licensee ceases to be its qualifying officer, the license of the entity is suspended.<sup>15</sup> A nonresident or foreign corporation may qualify

for a license provided it conforms with the Code.<sup>16</sup>

A person or qualifying officer for a corporation or member of a partnership or other business association who currently holds a residential builder or maintenance and alteration contractor license is not required to repeat the examination for that license when making application for an additional license.<sup>17</sup> However, a residential maintenance and alteration contractor who makes application for a residential builder's license is required to take the residential builder's license exam.<sup>18</sup>

Making sure that you and your qualifying entity (corporation, limited liability company, partnership or other business association) is properly licensed under the Code is a critical issue which cannot be overlooked. Failure to obtain proper licensing may result in the inability to enforce contracts, defend lawsuits, and may result in fines and penalties. Pursuant to the Builders Licensing Act, "[a] person or qualifying officer of a corporation or member of a residential builder or residential maintenance and alteration contractor shall not bring or maintain an action in a court of this state for the collection of compensation for the performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article during the performance of the act or contract."<sup>19</sup>

The Residential Builders Act, Mich Comp. Laws 339.2412 specifically bars an unlicensed builder from maintaining an action for compensation on a residential construction contract.<sup>20</sup> The effect of this provision, as interpreted by Michigan courts, is to preclude non-complying contractors from recovering on contracts even where the contract has been complied with in all respects.<sup>21</sup>

It is not sufficient that an officer, partner, director or member of a corporation, partnership or other association is a licensed builder. Michigan Courts have held that an individual and his corporation are not the same entity for purposes of the licensing act.<sup>22</sup> As a result the courts have barred corporations from maintaining actions to collect monies owed for work performed pursuant to a building contract where the corporation did not possess a valid builder's license, even though its president and sole shareholder was a licensed builder at all relevant times.<sup>23</sup> In other words, an individual who is a licensed residential builder is not considered for licensing purposes to be the same entity as a corporation formed by the individual that has not been issued a license.<sup>24</sup>

Non-licensed entities have been precluded from maintaining actions for collection of a construction contract where the entity lacks a residential builders' license.<sup>25</sup> While the Michigan Courts have provided some relief to residential builders not duly licensed to maintain an action for collection of compensation, such rights are limited.<sup>26</sup> For example, the licensing act does not prohibit an unlicensed contractor from defending a breach of contract suit on its merits.<sup>27</sup> The court was obliged to determine the amount due to the unlicensed plaintiff as a condition to reconveyance of property pursuant to an equitable mortgage.<sup>28</sup> However, these cases represent the minority view and there remains a line of cases which holds that in absence of showing compliance with the Act, contracts with non-licensed builder contractors are void and unenforceable.<sup>29</sup>

Further complicating the licensing issue is the requirement under the Michigan Construction Lien Act, Act 497 of 1980, as amended, which provides that a contractor does not have a right to a construction lien unless the contractor has provided an improvement to the residential

structure pursuant to a written contract.<sup>30</sup> The Construction Lien Act further requires that the written contract contain a statement, in type no smaller than the body of the contract, that (i) the residential builder or residential maintenance and alteration contract is required to be licensed under article 24 of Act 299 of the Public Acts of 1980, as amended, (ii) that the contractor is required to be licensed to provide the contracted improvement and that the contractor is so licensed, and (iii) if a license is required, the contractor's license number.<sup>31</sup> Thus, even if a licensee has complied with the licensing provision of article 24, the failure to comply with the licensing disclosure provision of the Construction Lien Act may result in dismissal and discharge of a claim of lien.

In addition, the Michigan Condominium Act provides that a residential condominium shall not be offered for sale unless in compliance with article 24 or article 25 of the Occupational Code.<sup>32</sup> In order to comply with article 24 of the Occupational Code, a Developer, who is engaged in the construction of residential structures and is a "residential builder" pursuant to the definition set forth in article 24 of the Occupational Code, must hold a residential builders license. Further as previously pointed out, it is insufficient for an officer, partner, director or member of a Developer entity to be a licensed builder. The Developer must be licensed. Under the Condominium Act the penalty for noncompliance is that a person adversely affected by a violation of the Act or any provision of an agreement or a master deed may bring an action for relief in a court of competent jurisdiction and the court may award costs to the prevailing party. Furthermore, a Developer who willfully misrepresents facts concerning a condominium project or makes or circulates false or fraudulent written statements about a Condominium project, which statements may

include the Developer's status as a licensed residential builder when in fact the Developer is not licensed, is guilty of a misdemeanor, punishable by a fine of not more than \$10,000.00, or imprisonment for not more than 1 year, or both.

While the Builders Licensing Act does not deprive unlicensed builders of all rights, the statute, in order to safeguard and protect homeowners, specifically bars an unlicensed builders and residential maintenance and alteration contractors from maintaining an action for compensation on a residential construction contract. Further, the act may preclude enforcement of lien claims and may subject the unlicensed party to penalties and fines for noncompliance under the occupation code and under other Michigan Statutes.

*Christopher A. Hajek, Esq, The Hajek Firm, PLLC, is a member of the Real Property Law Section of the State Bar of Michigan. Mr. Hajek's practice focuses on real estate law including land acquisition and development and condominium formation.*

***Contact Information:***

**Christopher A. Hajek, Esq.**

**The Hajek Firm, PLLC**

**Telephone (248) 613-9563**

**Email [CAH@theHajekFirm.com](mailto:CAH@theHajekFirm.com)**

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- <sup>1</sup> MCLA 339.2401(a) Michigan Occupational Code, Act 299 of 1980, as amended.
- <sup>2</sup> MCLA 339.2401(c) Michigan Occupational Code, Act 299 of 1980, as amended.
- <sup>3</sup> MCLA 339.2401(b) Michigan Occupational Code, Act 299 of 1980, as amended.
- <sup>4</sup> MCLA 339.2403 (a) Michigan Occupational Code, Act 299 of 1980, as amended.
- <sup>5</sup> MCLA 339.2403 (b) Michigan Occupational Code, Act 299 of 1980, as amended.
- <sup>6</sup> MCLA 339.2403 (c) Michigan Occupational Code, Act 299 of 1980, as amended.
- <sup>7</sup> MCLA 339.2403 (d) Michigan Occupational Code, Act 299 of 1980, as amended.
- <sup>8</sup> MCLA 339.2403 (g) Michigan Occupational Code, Act 299 of 1980, as amended.
- <sup>9</sup> MCLA 339.2403 (h) Michigan Occupational Code, Act 299 of 1980, as amended.
- <sup>10</sup> MCLA 339.2403 (i) Michigan Occupational Code, Act 299 of 1980, as amended.
- <sup>11</sup> MCLA 339.2405(1) Michigan Occupational Code, Act 299 of 1980, as amended.
- <sup>12</sup> MCLA 339.2405(1) Michigan Occupational Code, Act 299 of 1980, as amended.
- <sup>13</sup> MCLA 339.2405(1) Michigan Occupational Code, Act 299 of 1980, as amended.
- <sup>14</sup> MCLA 339.2405(2) Michigan Occupational Code, Act 299 of 1980, as amended.
- <sup>15</sup> MCLA 339.2405(4) Michigan Occupational Code, Act 299 of 1980, as amended.
- <sup>16</sup> MCLA 339.2406 Michigan Occupational Code, Act 299 of 1980, as amended.
- <sup>17</sup> MCLA 339.2410 Michigan Occupational Code, Act 299 of 1980, as amended.
- <sup>18</sup> MCLA 339.2410 Michigan Occupational Code, Act 299 of 1980, as amended.
- <sup>19</sup> MCLA 339.2412 Michigan Occupational Code, Act 299 of 1980, as amended.
- <sup>20</sup> Annex Construction, Inc. v. Fenech, 191 Mich App 219, 477 NW2d 103 (1991).
- <sup>21</sup> Bernard F. Hoste, Inc. v. Kortz, 117 Mich App 448, 324 NW2d 46 (1982).
- <sup>22</sup> Bernard F. Hoste, Inc. v. Kortz, 117 Mich App 448, 324 NW2d 46 (1982).
- <sup>23</sup> Annex Construction, Inc. v. Fenech, 191 Mich App 219, 477 NW2d 103 (1991).
- <sup>24</sup> Bernard F. Hoste, Inc. v. Kortz, 117 Mich App 448, 324 NW2d 46 (1982).
- <sup>25</sup> Charles Featherly Construction Co. v. Property Development Group, Inc. 400 Mich 198, 253 NW2d 643 (1977); Superior American Homes v. Fry, 130 Mich App 379, 343 NW2d 561 (1983); Bernard F. Hoste, Inc. v. Kortz, 117 Mich App 448, 324 NW2d 46 (1982).
- <sup>26</sup> Barbour v. Handlos Real Estate & Building Corp, 152 Mich App 174, 393 NW2d 581 (1986); app den 428 Mich 865 (1987); See Parker v. McQuade Plumbing & Heating, Inc., 124 Mich App 469, 335 NW2d 7 (1983) and Kirkendall v. Heckinger, 403 Mich 371, 269 NE2d 184 (1978);
- <sup>27</sup> Parker v. McQuade Plumbing & Heating, Inc., 124 Mich App 469, 335 NW2d 7 (1983)
- <sup>28</sup> Kirkendall v. Heckinger, 403 Mich 371, 269 NE2d 184 (1978)
- <sup>29</sup> Brummel v. Whelpley, 46 Mich App 93, 207 NW2d 399 (1973); Maciak v. Olejniczak, 79 F. Supp 817 (DC Mich, 1948).
- <sup>30</sup> MCLA 570.1114 Michigan Construction Lien Act, Act 497 of 1980, as amended.
- <sup>31</sup> MCLA 570.1114 Michigan Construction Lien Act, Act 497 of 1980, as amended.
- <sup>32</sup> MCLA 559.111 Michigan Condominium Act, Act 59 of 1978, as amended.