

IN THE MATTER OF THE CLAIM	* BEFORE MICHELLE W. COLE,
OF KATHLEEN SMART,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF PAUL JOHNSON,	*
T/A COMMSERV LLC,	* OAH No.: LABOR-HIC-02-24-02026
RESPONDENT	* MHIC No.: 23 (75) 1009

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On May 10, 2023, Kathleen Smart (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$53,080.00² for actual losses allegedly suffered as a result of a home improvement contract with Paul Johnson, trading as Commserv LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2023).³ On December 29, 2023, the MHIC issued a Hearing Order on the Claim and forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

¹ The MHIC is under the jurisdiction of the Department of Labor.

² At the hearing, the Claimant reported the amount of the actual loss to be \$90,189.20.

³ Unless otherwise noted, all references to the Business Regulation Article are to the 2015 Volume of the Maryland Annotated Code.

On April 26, 2024, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Kris M. King, Assistant Attorney General, Department of Labor (Department), represented the Fund. The Claimant represented herself. The Respondent failed to appear at the hearing.

After waiting fifteen minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. Code of Maryland Regulations (COMAR) 28.02.01.23A. On February 1, 2024, the OAH provided a Notice of Hearing (Notice) to the Respondent by certified mail and first-class mail. Bus. Reg §§ 8-312(d), 8-407(a); COMAR 28.02.01.05C(1). The Notice stated that a hearing was scheduled for April 26, 2024, at 9:30 a.m., at the OAH in Hunt Valley, Maryland. COMAR 09.08.03.03A(2). The Notice further advised the Respondent that failure to attend the hearing might result in "a decision against you."

The United States Postal Service did not return the Notice to the OAH. The Respondent did not notify the OAH of any change of mailing address. COMAR 28.02.01.03E. I determined that the Respondent received proper notice, and I proceeded to hear the matter. COMAR 28.02.01.05.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021 & Supp. 2023); COMAR 09.01.03; COMAR 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund as the result of an unworkmanlike, inadequate or incomplete home improvement by the Respondent?

2. If so, what is the amount of the compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

Unless otherwise noted, I admitted the following exhibits offered by the Claimant:

- Cl. Ex. 1 Estimate, February 16, 2021
- Cl. Ex. 2 Contract, April 17, 2021
- Cl. Ex. 3 Line-item Breakdown, February 26, 2021
- Cl. Ex. 4 Work Order, March 19, 2021
- Cl. Ex. 5 Change Work Order, April 25, 2021
- Cl. Ex. 6 Change Order, May 17, 2021
- Cl. Ex. 7 Invoice, August 14, 2021
- Cl. Ex. 8 Copy of Check, September 10, 2021
- Cl. Ex. 9 Mortgage Loan Payment Summary, undated
- Cl. Ex. 10 Invoice, HoCo Fence, May 3, 2022; Invoice, Caplan Bros., Inc., November 23, 2021
- Cl. Ex. 11 Inspection Reports, May 3, 2021, May 12, 2021, June 10, 2021, July 27, 2021, December 9, 2021, May 3, 2022 and May 16, 2022
- Cl. Ex. 12 Emails between the Claimant and Caliber Home Loans, May 3, 2022, and February 22, 2022; Emails between the Claimant and the Respondent, various dates
- Cl. Ex. 13 Quote, Sugarloaf Painters and Estate Improvements LLC, June 23, 2021; Photographs, October 6, 2021
- Cl. Ex. 14 Not Admitted
- Cl. Ex. 15 Text messages between the Claimant and the Respondent, various dates
- Cl. Ex. 16 Letters to the Respondent from the Claimant, May 17, 2022 and September 27, 2023; Emails from the Claimant to the Respondent, March 9-10, 2022; Agreement to Mediate, March 22, 2022
- Cl. Ex. 17 MHIC Complaint forms, undated

Cl. Ex. 18 Estimate, DH Contractors LLC, May 2, 2023

I admitted the following exhibits offered by the Fund:

Fund Ex. 1 Notice of Hearing, February 1, 2024

Fund Ex. 2 Hearing Order, December 29, 2023

Fund Ex. 3 Licensing Registration, April 16, 2024; Certification of Custodian of Records, April 16, 2024

Fund Ex. 4 Affidavit of David Finneran, April 18, 2024

Fund Ex. 5 Home Improvement Claim Form, May 10, 2023

Fund Ex. 6 Letter to the Respondent from the MHIC, May 24, 2024

The Respondent did not offer any exhibits for admission into evidence.

Testimony

The Claimant testified and did not present other witnesses.

The Respondent failed to appear at the hearing and did not present witness testimony.

The Fund did not present witness testimony.

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 the MHIC.
2. On February 26, 2021, the Claimant and the Respondent entered into a contract to renovate the Claimant's home (Contract).
3. Under the Contract, the Respondent agreed to perform the following work at the home:

Fence

- Demo and haul away existing fence
- Remove rails, panels, posts, and concrete base
- Install metal fence

- Lay out post locations
- Dig post holes up to 3 ft. deep

Windows

- Remove existing dry rotted wood trim from existing windows and door trim casing

Deck Floor

- Replace damaged floor boards
- Layout and install 6-inch-wide decking on existing deck support framing
- Fabricate decking and secure with corrosion resistant

Re-pipe House

- Re-pipe house water supply lines and main sewage drains to pass Baltimore County inspection
- Repair or replace all faucets and drains throughout the home
- Remove existing piping between fixtures
- Replace, secure, and test new piping fixture cutoff valves
- Remove old piping where needed to pass inspection
- Includes tear-out and put back drywall and framing in all areas affected by the re-pipe tape
- Spackle, sand, and prime all affected areas

Electrical Re-Wire Kitchen/Laundry

- Disconnect and remove wiring
- Route, secure, and connect new NM-B wiring runs

Piano Room/Office

- Demo existing ceiling and remove from site
- Reinstall drywall in ceiling
- Tape, spackle, sand, and prime
- Add eight recessed lights

Half Bathroom/First Floor

- Remove and replace existing vanity
- Remove and replace existing mirror

Drywall Repair and Skimcoat

- Repair cut out holes
- Match and secure sheetrock patch tape and mud joint, lightly sand and float joint to visually blend with surrounding surface

- Final sand for primer/finish ready
- Cut out damaged drywall in basement and skim coat walls in entire house
- No work to any wall with wallpaper

Shed

- Remove existing shed
- Detach from adjacent surfaces
- Break into haulable pieces
- Remove from home and dispose

Septic Tank

- Remove sections of fence as necessary
- Cut out and set aside existing sod where necessary
- Excavate earth to create pit for placement of septic tank
- Disconnect existing septic tank connections
- Furnish and install 150-gal concrete septic tank
- Tie into existing system
- Seal and abandon in place existing concrete septic tank
- Install manhole cover and shaft to new septic tank
- Reinstall sod as necessary
- Haul all debris

Haul Debris

- Haul all debris caused by work

(Cl. Ex. 3).

4. The original agreed-upon Contract price was \$58,086.00. The total amount of the original Contract price was paid to the Respondent through a home equity loan. For the home equity loan, payments were issued based on work completion and were authorized by the Claimant before each draw.

5. Subsequently, the parties agreed to change orders for additional work, including the installation of carpet, removal and installation of a hot water heater, replacement of cabinets, counter tops, and a bulkhead in the kitchen, installation of hardwood floors, adding a closet and vanity in the second floor bathroom, replacing ceramic tile, replacing the laundry room cabinets,

power washing the deck, radon testing, painting the garage interior, repairing a dual glazed window, and extending the fence. The total cost for the additional work was \$77,540.20.

<u>Date of Change Order</u>	<u>Work</u>	<u>Cost</u>
3/19/21	Installation of carpet and hot water heater	\$4,240.00
4/25/21	Kitchen renovation, installation of hardwood floors, adding a closet and vanity to the second floor bathroom, replacing ceramic tile and laundry room cabinets, and fence extension	\$67,642.20
5/17/21	Power wash deck, radon testing, painting of the interior garage, and window repair	\$5,658.00

(Cl. Exs. 4, 5, 6).

6. For the costs associated with the change work orders, the Claimant made payments and some payments were covered by the home equity loan.⁴

7. While working at the Claimant's property, the Respondent caused a leak which damaged the piano room, hall bathroom, and basement. The cost for the Respondent to repair the damages was \$12,649.00. Some of the cost for damages was paid through an insurance claim.

8. As of May 3, 2022, the following work was inspected and marked as completed for purposes of the home equity loan:

- Power wash, stain, and seal existing deck
- Radon pipe
- Paint entire interior of garage

⁴ The record shows the following payments to the Respondent:

3/29/21	Credit Card	\$2,120.00
4/27/21	Credit Card	\$5,000.00
5/20/21	Check	\$10,738.72
9/10/21	Claimant personal check	<u>\$26,000.00</u>
		\$43,858.72

(Cl. Exs. 4, 5).

- Fencing demo and haul away of existing fence. Remove rails and panels, remove posts and concrete base.
- Repair dual glazed window.
- Window trim and door casting removal. Remove existing dry rotted wood trim from existing windows and door trim casting.
- Additional haul debris.
- Deck floor. Replace damaged floor boards. Replace with 16 ft. floor.
- Re-pipe house. Re-pipe water supply and main sewage drains. Repair and replace all faucets and drains, shut off valves.
- Electrical. Rewire kitchen and laundry, including connectors, fittings, junction boxes and fasteners.
- Piano room/Office. Demo existing ceiling and remove from site. Reinstall drywall in ceiling, tape, spackle, sand and prime. Add eight recessed lights.
- Half bathroom – 1st floor. Remove and replace vanity and mirror.
- Drywall. Repair and skim coat on all walls. Cut out damaged drywall in basement. No work to any wall with wallpaper.
- Demolish shed. Remove existing shed.
- Septic tank. Disconnect existing septic tank connections. Install 1500 gallon concrete septic tank. Reinstall sod as necessary. Haul all debris.
- Haul debris. Haul all debris caused by our work.

(Cl. Ex. 10). Even though the fence was marked as completed, the Respondent did not replace the fence. At that time, \$60,510.00 had been disbursed from the home equity loan.

9. On January 10, 2022, the Claimant sent an email to the Respondent providing an updated punch list of remaining work for the Claimant's home as follows:

Great Room/Fireplace Room

- Install tile around the fireplace and complete install of the mantel

Owner's Bath

- Repair trim surrounding the skylight
- Install mirror (that is currently in place) – **Mark installed the mirror, so this has been completed**

Powder Room & Hall Bath

- Install mirrors to be provided by homeowner – **Mark installed the mirror, so this has been completed.**

Exterior

- Strip, repair and repaint deck – some spots need painted still (stair risers. . . .)

- **Install fence – per the county, we were supposed to get a temporary fence to surround the pool. This has not yet been installed. I would also like to know the DATE that is already reserved for the installation of the permanent fence. While we have been understanding about supply chain issues, this was initially scheduled back in March 2021, so the installation date for our job should be coming up soon. We would also like to know who is coming to complete this portion of the job (vendor information). Please provide proof that this has been scheduled.**

Garage

- Paint/repair cracked ceiling spots
- Paint/repair walls
- Paint floor
- Address breakers that keep tripping – one that serves the microwave and fridge, one that serves the front driveway light and power outlet between kitchen/living room – This was addressed THIS MORNING, we'll let you know if the issues have been resolved.

Basement

- Remove walls in two studio/office areas
- Remove "stage" in former theater room
- Remove all drywall from walls and ceiling – strip down to studs
- Replacing the grey water line on the utility tub in the basement
- Plumbing the drain water from the water softener to the septic

(Cl. Ex. 12 (emphasis in original)).

10. On February 5, 2022, the Respondent sent a text message to the Claimant: "The fire place completion fence and removal of equipment in the garage and we can [be] done with each other." (Cl. Ex. 15).

11. On February 22, 2022, the Respondent sent an email to the project analyst for the home equity loan stating "he is walking away from the project . . . would send someone else out to the property to put up a temporary fence . . . [and] will not be requesting the remaining funds on the project." (Cl. Ex. 12).

12. On May 3, 2022, the Claimant paid \$11,880.00 to HoCo Fence to replace the fence on the exterior of the Claimant's home.

13. On May 2, 2023, the Claimant received an estimate from DH Contractors in the amount of \$41,200.00 to perform the following work at the Claimant's home:

Point up the entire house, ceilings walls and trim as needed in the 4 bedrooms and closets and the 2 bathrooms upstairs, upstairs hallway, the front foyer, living room, dining room, living room, half bathroom, office room, kitchen, laundry [and] garage.

Paint the entire house as needed, to include the 4 bedrooms upstairs, 2 bathrooms, hallway, closets; trim, baseboard, doors, front foyer, living room, dining room, family room, office room, half bathroom, kitchen, laundry, [and] the garage.

We will use eggshell on the rooms, hallways, foyer, living room, dining room, family room, laundry [and] garage, semigloss to the bathrooms, kitchen, and all the trim and doors. Customer will choose the colors.

Total 12,300 materials and labor

Change the carpet

Change the carpet and pad in the 4 rooms upstairs, hallway, and the stairs going upstairs. Screw down the subfloor in the second floor before install[ing] the new carpet.

Total 10,400 materials and labor

Basement put back

Install back all the lights, switches, and outlets as needed. Install all the drywall as needed, mud it, install new baseboards, doors, as needed, prime the walls and ceiling, paint the ceilings, walls, trim and doors, install new vinyl plank flooring as needed and shoemolding, redo the stairs.

Total 18,500 materials and labor

(Cl. Ex. 18).

DISCUSSION

The Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); State Gov't § 10-217 (2021); COMAR 09.08.03.03A(3).

To prove a claim by a preponderance of the evidence means to show that it is "more likely so

than not so” when all the evidence is considered. *Coleman v. Anne Arundel Cnty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002).

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) (Supp. 2023); *see also* COMAR 09.08.03.03B(2) (“The Fund may only compensate claimants for actual losses . . . incurred as a result of misconduct by a licensed contractor.”). “[A]ctual 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 for an incomplete home improvement of the fence.

Actual Loss – Prima Facie Impediments

By statute, certain claimants are excluded from recovering from the Fund altogether. In this case, there are no such statutory impediments to the Claimant’s recovery. The claim was timely filed, there is no pending court claim for the same loss, and the Claimant did not recover the alleged losses from any other source. Bus. Reg §§ 8-405(g), 8-408(b)(1) (2015 & Supp. 2023). The Claimant resides in the home that is the subject of the claim or does not own more than three dwellings. *Id.* § 8-405(f)(2) (Supp. 2023). The parties did not raise any claim regarding the binding arbitration clause. *Id.* §§ 8-405(c), 8-408(b)(3) (2015 & Supp. 2023). The Claimant is not a relative, employee, officer, or partner of the Respondent, and is not related to any employee, officer, or partner of the Respondent. *Id.* § 8-405(f)(1) (Supp. 2023). The Claimant did not unreasonably reject good faith efforts by the Respondent to resolve the claim. *Id.* § 8-405(d) (Supp. 2023).

Actual Loss – Unworkmanlike or Inadequate Home Improvement by the Respondent

The Claimant claimed that she has sustained an actual loss as the result of an unworkmanlike, inadequate, and incomplete home improvement by the Respondent. She presented evidence showing that she entered into the Contract with the Respondent to complete renovations on the exterior of the home and several rooms within the home. The Claimant testified and reviewed photographs taken during and after the Respondent's home improvement work and estimates from other contractors. She stated that the Respondent stopped working and responding to her communications and she had to hire other contractors to complete the Respondent's work. At that time, the Respondent held a valid MHIC license.

The Claimant did not complain about the actual work performed by the Respondent nor present expert testimony to establish any deficiencies in the work completed by the Respondent. She complained that the project took much longer than promised and was largely incomplete. The Claimant's claim is based on the Respondent's failure to complete work under the Contract. The Claimant testified and presented exhibits showing that the Respondent performed work under the Contract before the work being performed slowed and the Respondent stopped responding to her communications. Specifically, she noted problems with subpar materials, plumbing, paint, and the fence. She stated the drywall was not sanded or finished, the painting work was poor, and the new fence was never installed. She also claimed that the carpet needed to be replaced. However, she did not present any expert testimony to demonstrate any problems with the workmanship in these areas and the photographs failed to show inadequate or unworkmanlike home improvement work. As such, I do not find an actual loss as the result of an inadequate or unworkmanlike home improvement by the Respondent.

Actual Loss – Incomplete Home Improvement by the Respondent

The evidence supports the Claimant's claim of an incomplete home improvement. She provided emails and texts which showed that the Claimant submitted a list of incomplete work in January, and the Respondent acknowledged work that remained incomplete when he stopped working in February 2022, including the replacement of the fence surrounding the pool. The parties agreed at the time the Respondent stopped working that the fence had not been replaced. The Claimant has established an actual loss for incomplete home improvement work on the fence.

To the extent that the Claimant represents that painting of the entire home was not completed, the record fails to support such a conclusion by a preponderance of the evidence. Indeed, the evidence on this point was limited and does not support the Claimant's claim. The Claimant presented an estimate from DH Contractors for "pointing up" and painting the entire house "as needed." (Cl. Ex. 18). She testified that the Respondent hired a subcontractor to paint her home, which was poorly done and resulted in a lawsuit for unpaid work. The evidence does not support a claim for incomplete painting work under the Contract.

The Contract called for repairing drywall, spackle, sanding, and priming or skimcoating the walls and ceiling. The May 17, 2021 Change Order and the Claimant's January 2022 email of final punch list items listed only painting the garage interior. The Claimant did not present any other change orders for painting work under the Contract. On this record, I conclude that the Claimant has failed to establish an actual loss for incomplete painting work.

The Respondent failed to appear for the hearing and did not present any witnesses or evidence to rebut the Claimant's case. I conclude that the Claimant is eligible for compensation from the Fund based on an incomplete home improvement of the fence.

Compensation from the Fund

Having found eligibility for compensation I must determine the amount of the Claimant's actual loss and the amount, if any, that the Claimant is entitled to recover. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. Bus. Reg. § 8-405(e)(3) (Supp. 2023); COMAR 09.08.03.03B(1).

MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work:

- (a) If the contractor abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract.
- (b) If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.
- (c) If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the claimant has paid or will be required to pay another contractor to repair poor work done by the original contractor under the original contract and complete the original contract, less the original contract price. 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.

COMAR 09.08.03.03B(3)(a)-(c). However, none of these formulas appropriately measure the Claimant's actual loss.

The Respondent did not abandon the contract without doing any work, so the formula under (3)(a) is inapplicable. COMAR 09.08.03.03B(3)(a). The Claimant paid other contractors to perform work on the home improvement, so the formula under (3)(b) is inapplicable. COMAR 09.08.03.03B(3)(b). While it appears that (3)(c) is applicable to the present

circumstance since the Claimant hired other contractors to complete work under the Contract, I do not find this formula to measure the Claimant's actual loss.

It is unclear what total amount was paid by the Claimant and the loan company to the Respondent when the Respondent stopped working at the Claimant's home. The Claimant reported making full payment, but did not submit evidence showing all payments made. Weighing against the Claimant's claim is the Respondent's statement in his email to the loan company that, at the time he stopped working on the project, he would not seek "the remaining funds on the project." (Cl. Ex. 12). What is clear is that the loan company paid the Respondent for completing the fence work, which was not completed by the Respondent, and the Claimant paid another contractor to finish this work. The cost to complete the fence was \$11,880.00.

Effective July 1, 2022, a claimant's recovery is capped at \$30,000.00 for acts or omissions of one contractor, and a claimant may not recover more than the amount paid to the contractor against whom the claim is filed.⁵ Bus. Reg. § 8-405(e)(1), (5) (Supp. 2023); COMAR 09.08.03.03B(4). In this case, the Claimant's actual loss is less than the amount paid to the Respondent and less than \$30,000.00. Therefore, the Claimant is entitled to recover her actual loss of \$11,880.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$11,880.00 as a result of the Respondent's incomplete home improvement work. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2023); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover that amount from the Fund. COMAR 09.08.03.03B(3)(c).

⁵ On or after July 1, 2022, the increased cap is applicable to any claim regardless of when the home improvement contract was executed, the claim was filed, or the hearing was held. See *Landsman v. MHIC*, 154 Md. App. 241, 255 (2002) (explaining that the right to compensation from the Fund is a "creature of statute," these rights are subject to change at the "whim of the legislature," and "[a]mendments to such rights are not bound by the usual presumption against retrospective application").

RECOMMENDED ORDER


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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$11,880.00; 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 under this Order, plus annual interest of ten percent (10%) as set by the Maryland Home Improvement Commission;⁶ and

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

July 24, 2024
Date Decision Issued



Michelle W. Cole
Administrative Law Judge

MWC/dlm
#213061

⁶ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 10th day of December, 2024, 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.

Robert Altieri

Robert Altieri

Panel B

**MARYLAND HOME IMPROVEMENT
COMMISSION**