

IN THE MATTER OF THE CLAIM	*	BEFORE CARLTON A. CURRY,
OF DAVID METHANY AND DAWN	*	AN ADMINISTRATIVE LAW JUDGE
METHANY,	*	OF THE MARYLAND OFFICE
CLAIMANTS	*	OF ADMINISTRATIVE HEARINGS
AGAINST THE MARYLAND HOME	*	
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF VERA FRANCISCO,	*	OAH No.: LABOR-HIC-02-22-16549
T/A R & D MASONRY, INC.,	*	MHIC No.: 22 (75) 735
RESPONDENT	*	

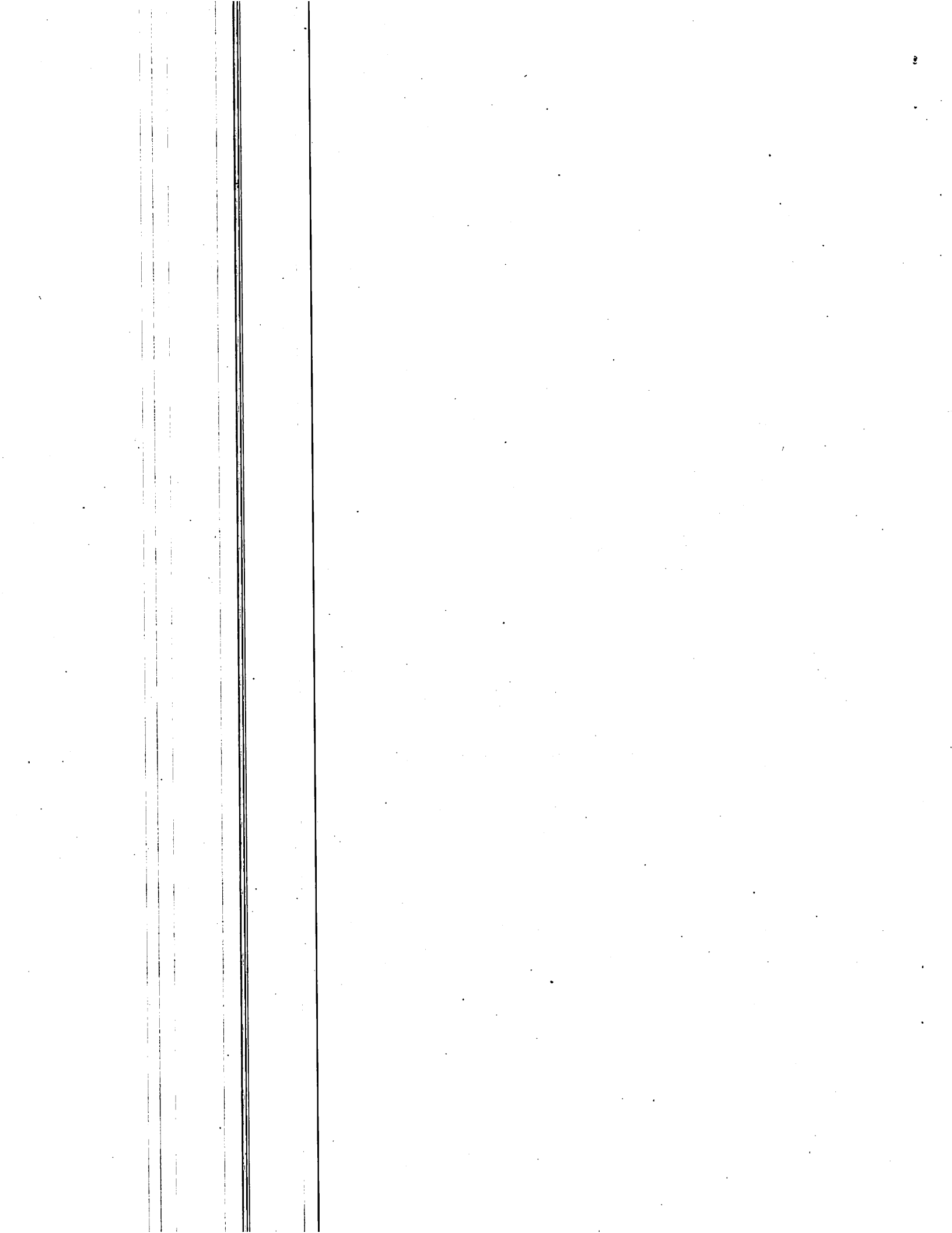
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**PROPOSED DECISION**

STATEMENT OF THE CASE  
ISSUES  
SUMMARY OF THE EVIDENCE  
PROPOSED FINDINGS OF FACT  
DISCUSSION  
PROPOSED CONCLUSIONS OF LAW  
RECOMMENDED ORDER

**STATEMENT OF THE CASE**

On April 6, 2022, David Methany and Dawn Methany (Claimants) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department), for reimbursement of \$11,856.69 for actual losses allegedly suffered as a result of a home improvement contract with Vera Francisco, trading as R & D Masonry, Inc. (Respondent). Md. Code Ann., Bus. Reg.



§§ 8-401 to -411 (2015 & Supp. 2022).<sup>1</sup> On July 1, 2022, the MHIC issued a Hearing Order on the Claim. On July 8, 2022, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On November 22, 2022, I held a hearing by via the Webex online videoconferencing platform. Bus. Reg. §§ 8-407(a), 8-312; Code of Maryland Regulations (COMAR) 28.02.01.20B(1)(b). The Claimants were self-represented, as was the Respondent. Jonathan P. Phillips, Assistant Attorney General, Department, represented the Fund.

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); COMAR 09.01.03; COMAR 28.02.01.

### ISSUES

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

### SUMMARY OF THE EVIDENCE

#### Exhibits

I admitted the following exhibits offered by the Claimants:

Clmts. Ex. 1 Timeline of Events, September 10, 2021 to November 3, 2021

Clmts. Ex. 2 Scaled drawing of backyard, undated, with the following attachments:

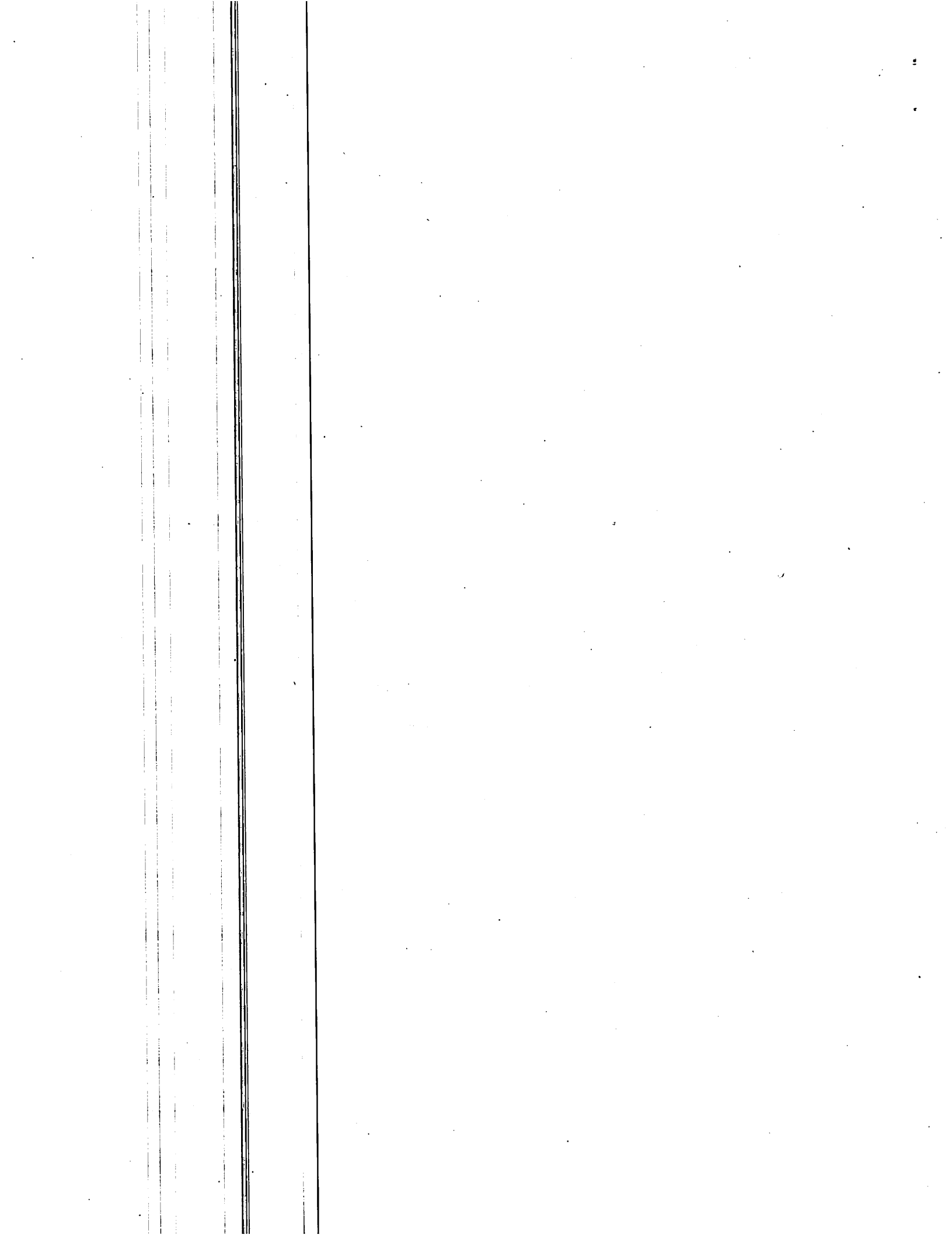
- Invoice #10269, September 2, 2021
- Bank of America, Maryland Checking: Account Activity Transaction Details from the Claimants' account regarding check number 1586, payable to the Respondent in the sum of \$25,868.75, September 9, 2021

Clmts. Ex. 3 Photographs, taken by the Claimants, September/October 2021

- Photo #1 Steps that were removed
- Photo #2 Steps that were removed and steps constructed by the Respondent

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<sup>1</sup> Unless otherwise noted, all references hereinafter to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.



Clmts. Ex. 4 Photographs, taken by the Claimant, September/October 2021, and Frederick County Inspection Results, November 29, 2021

- Photo #1 Form for the steps installed by the Respondent
- Photo #2 Form for the steps installed by the Respondent
- Photo #3 Image showing gap between the house and the steps installed
- Photo #4 Image showing gap between the house and the steps installed
- Photo #5 Image showing gap between the house and the steps installed
- Photo #6 Image showing gap between the house and the steps installed
- Photo #7 Image showing gap between the house and the steps installed
- Photo #8 Steps installed by the Respondent
- Photo #9 Level on the steps
- Photo #10 Steps installed by the Respondent
- Photo #11 Steps installed by the Respondent, with lights on

Clmts. Ex. 5 Photographs, taken by the Claimant, September/October 2021

- Photo #1 Steps and the sliding glass door
- Photo #2 Dog sitting on the top step
- Photo #3 Steps, sliding glass door, and jacuzzi
- Photo #4 Person standing on the steps
- Photo #5 View of steps from house
- Photo #6 People standing on steps

Clmts. Ex. 6 Warranty from the Respondent, undated

Clmts. Ex. 7 Various emails between the Claimants and the Respondent, October 13, 2021, to December 8, 2021

Clmts. Ex. 8 Rooted in Nature Step Removal and Replacement estimate, March 9, 2022

I admitted the following exhibits offered by the Fund:

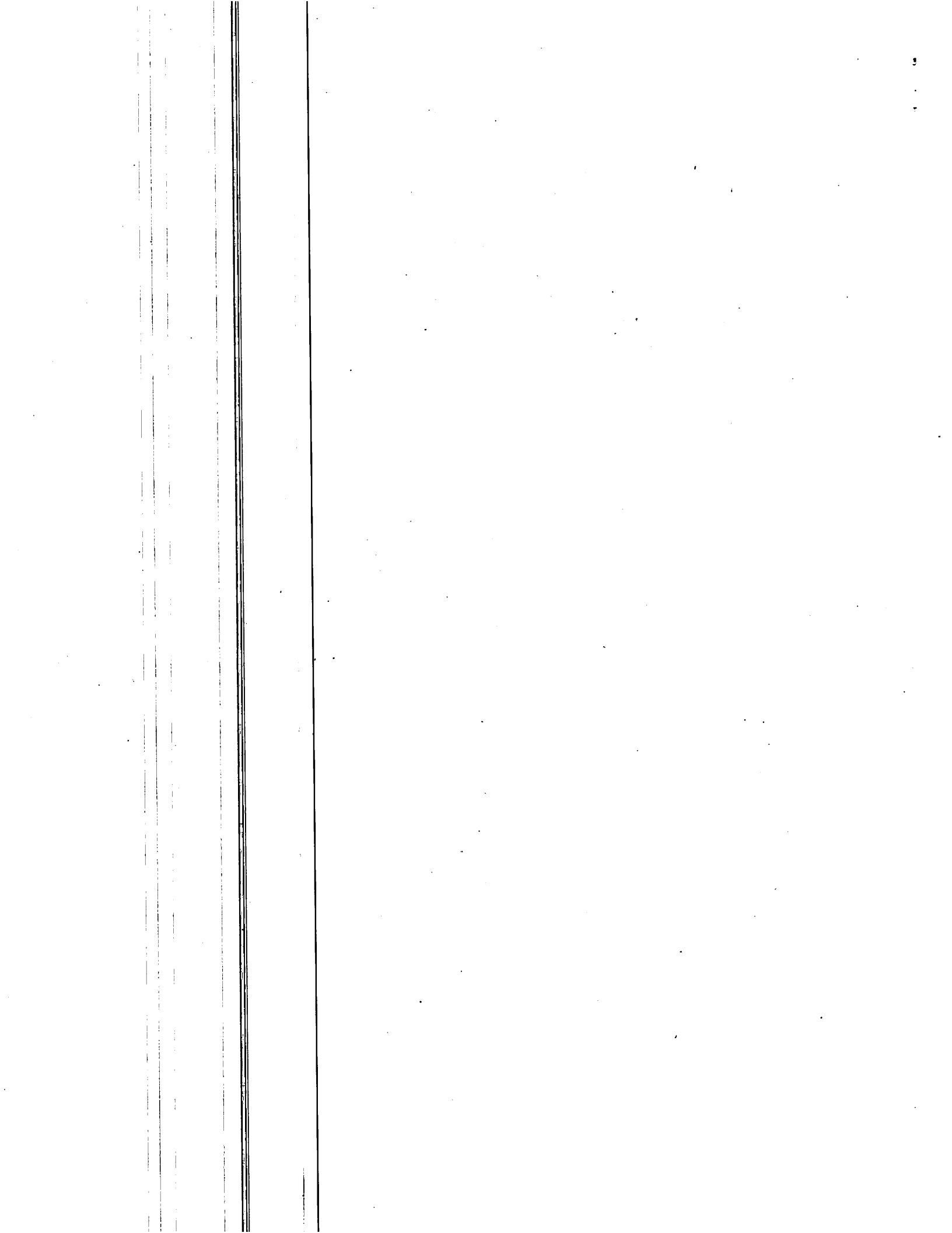
Fund Ex. 1 Notice of Remote Hearing, August 5, 2022

Fund Ex. 2 Hearing Order from the MHIC, July 1, 2022

Fund Ex. 3 Letter from the Department to the Respondent, April 15, 2022; Home Improvement Claim Form, April 6, 2022

Fund Ex. 4 MHIC License History of the Respondent as of November 4, 2022

The Respondent did not offer any exhibits.



Testimony

The Claimants presented the testimony of Mr. Mahaney and did not present other witnesses. The Respondent testified and presented the testimony of Diogo Francisco. The Fund did not offer any 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 MHIC license number 5924069.

2. In 2021, the Claimants contracted with Anthony & Sylvan Pools (Anthony & Sylvan) to have swimming pool installed in the backyard of their home. The Respondent was subcontracted by Anthony & Sylvan to install 500 square feet of masonry work for the pool deck.

3. On September 2, 2021, the Claimant agreed to have the Respondent perform additional work in conjunction with the pool installation (Contract) as outlined in an August 18, 2021 invoice, which included:

- Install an additional 1,506.25 square feet of concrete, \$16,568.75;
- Remove old steps and install steps and pavers, \$3,200.00;
- Install paver borders around the pool deck, \$4,325.00; and,
- Install nine under-cap stainless steel lights at steps, with transformer, \$1,775.00.

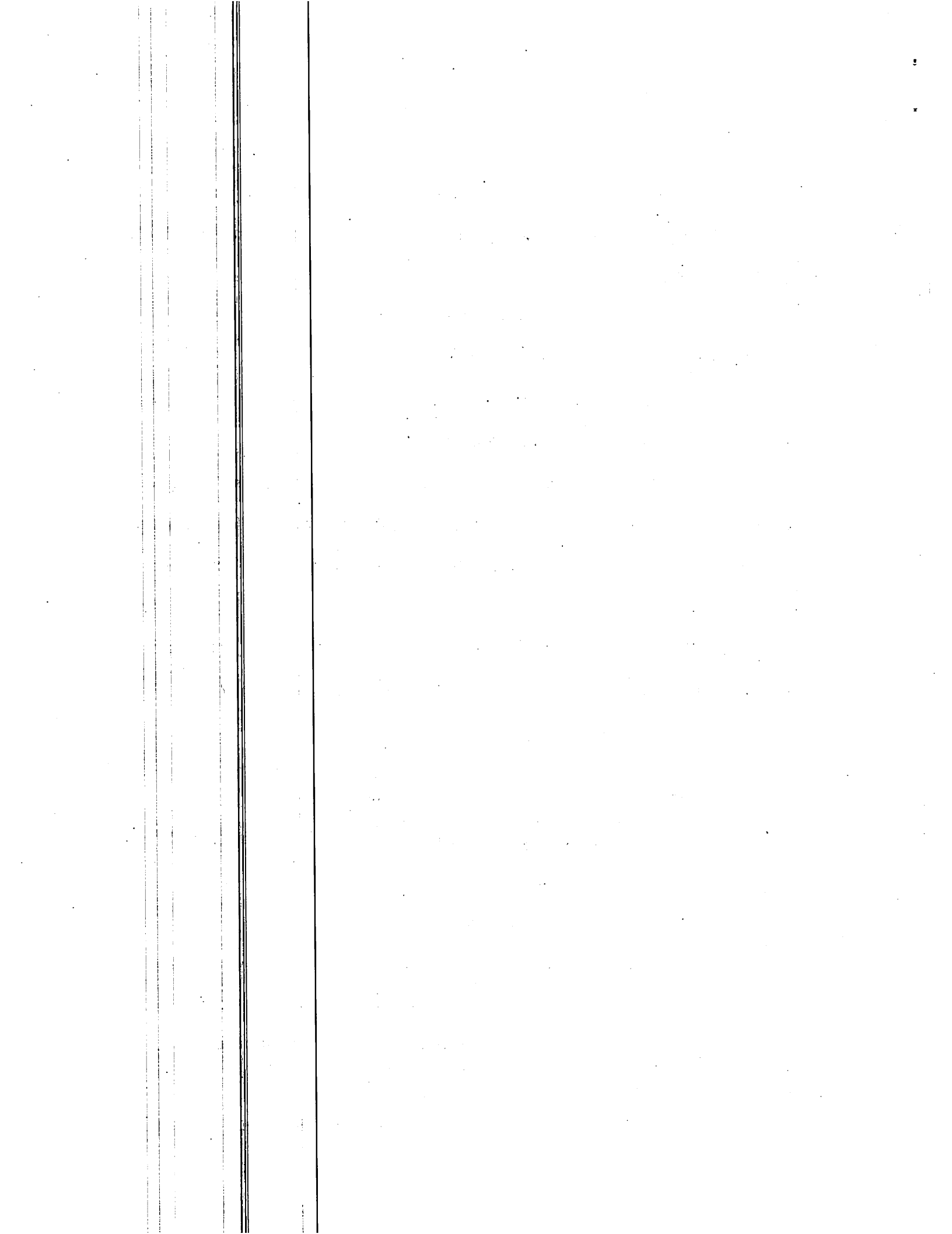
4. The total Contract price was \$25,868.75.

5. The Contract was silent as to the design of the steps.

6. The work began on September 10, 2021, and concluded on October 14, 2021.

7. On October 13, 2021, the Claimants contacted the Respondent regarding the placement of the steps not being centered on the width of the sliding glass door and the incomplete light installation.

8. The Respondent did not install the steps flush against the house.





9. On October 26, 2021, the Respondent visited the home and met with the Claimants regarding the steps. The Respondent agreed to level the steps, install two additional lights, and add polymeric sand. Anthony & Sylvan agreed to pay for these repairs and the additional lights.

10. On November 23, 2021, the Claimants emailed the Respondent detailing their ongoing concerns with the step and lighting installation.

11. On December 8, 2021, the Claimants and the Respondent communicated via email regarding a mutually agreeable date and time for the Respondent to perform the repairs and install additional lights on the stairs.

12. The Respondent ceased communication with the Claimants after December 8, 2021. The Respondent did not return to the home to perform any additional work.

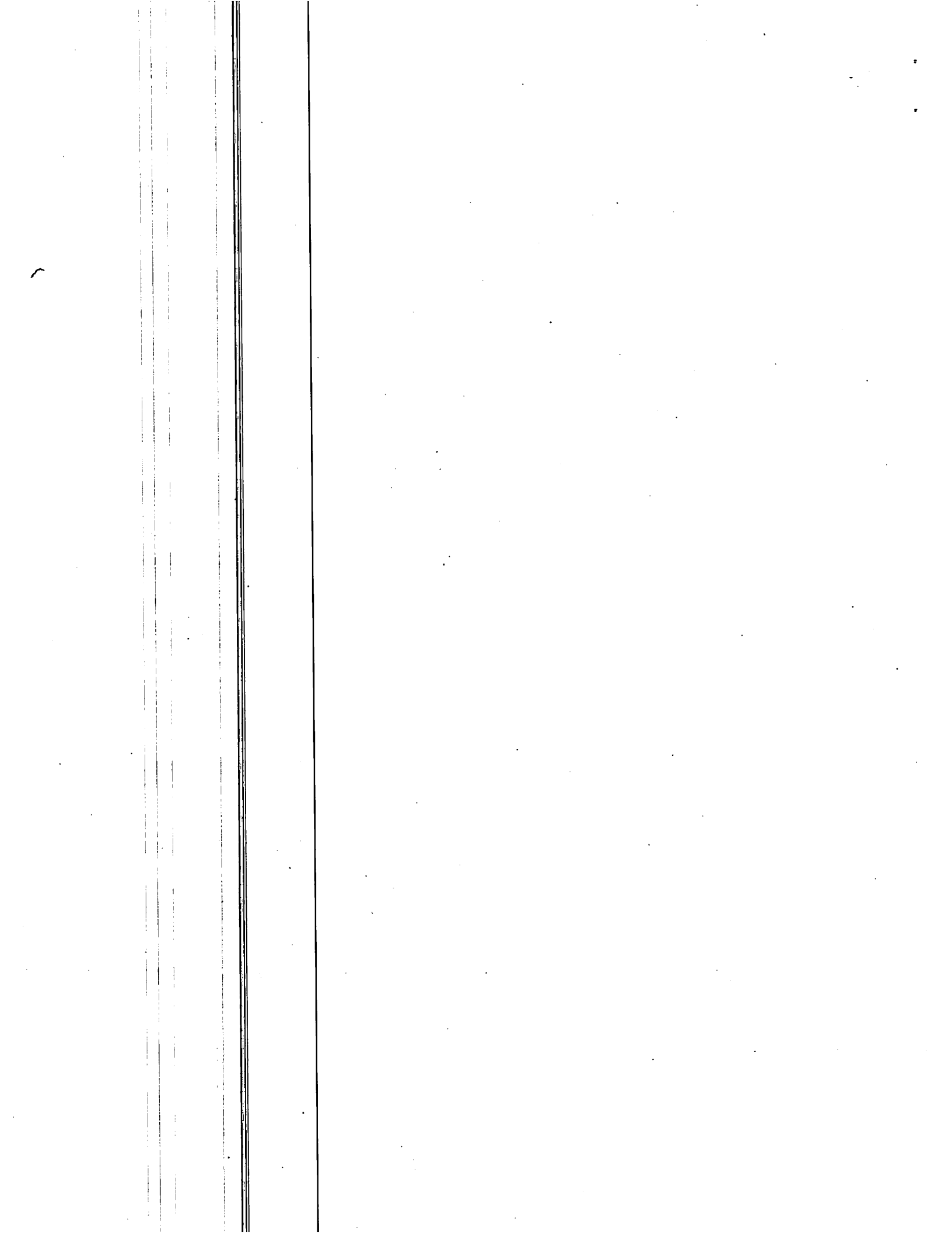
13. On March 9, 2022, the Claimants obtained an estimate from Rooted in Nature to remove and replace the steps installed by the Respondent, and to perform additional work.

## DISCUSSION

### Legal Framework

The Claimants have 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); *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.

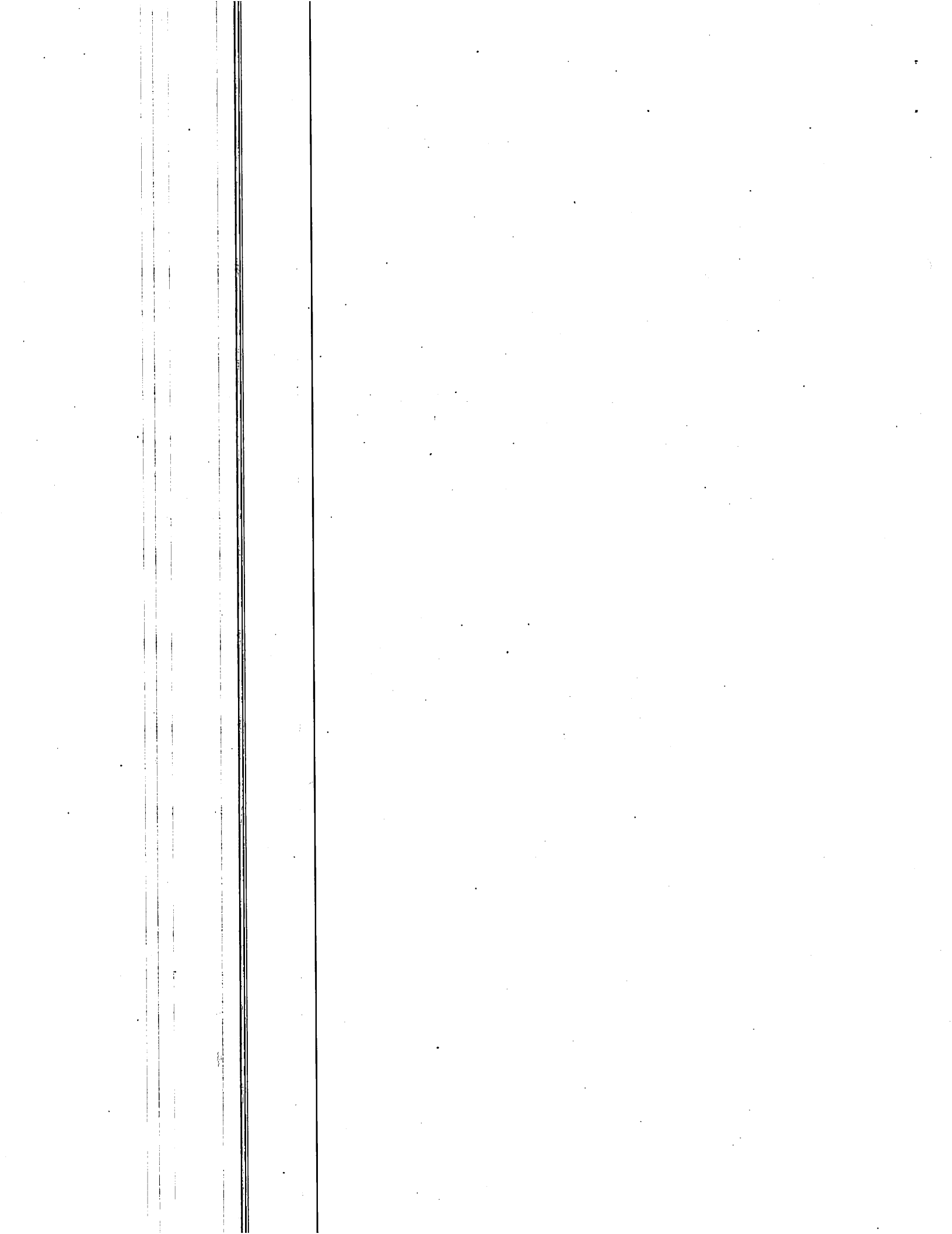
By statute, certain claimants are excluded from recovering from the Fund altogether. In this case, there are no such statutory impediments to the Claimants’ recovery. The Claim was timely filed, there is no pending court claim for the same loss, and the Claimants did not recover the alleged losses from any other source. Bus. Reg §§ 8-405(g), 8-408(b)(1) (Supp. 2022). The Claimants reside in the home that is the subject of the Claim and do not own more than three dwellings. *Id.* § 8-405(f)(2) (Supp. 2022). The parties did not enter into a valid agreement to submit their disputes to arbitration. *Id.* §§ 8-405(c), 8-408(b)(3) (2015 & Supp. 2022). The Claimants are not relatives, employees, officers, or partners of the Respondent, and are not related to any employee, officer, or partner of the Respondent. *Id.* § 8-405(f)(1) (Supp. 2022).

#### Position of the Parties

The Claimants argued that the Respondent’s installation of the steps was unworkmanlike or inadequate. Specifically, the steps were not centered on the width of the sliding glass door, there were gaps where the steps should meet the house, and the placement of the under-step lighting is inadequate and poses a hazard.

The Respondent contended that the design and placement of the steps were discussed with the Claimants, and that all of issues concerning the steps could have been addressed with the Respondent performing one day’s work.

The Fund agrees with the Claimants that the Respondent performed unworkmanlike or inadequate home improvements. However, the Fund asserts that a reward in this matter should not be based on the estimate the Claimants provided from Rooted in Nature, as the work in the estimate is beyond the scope of work contracted and performed by the Respondent.

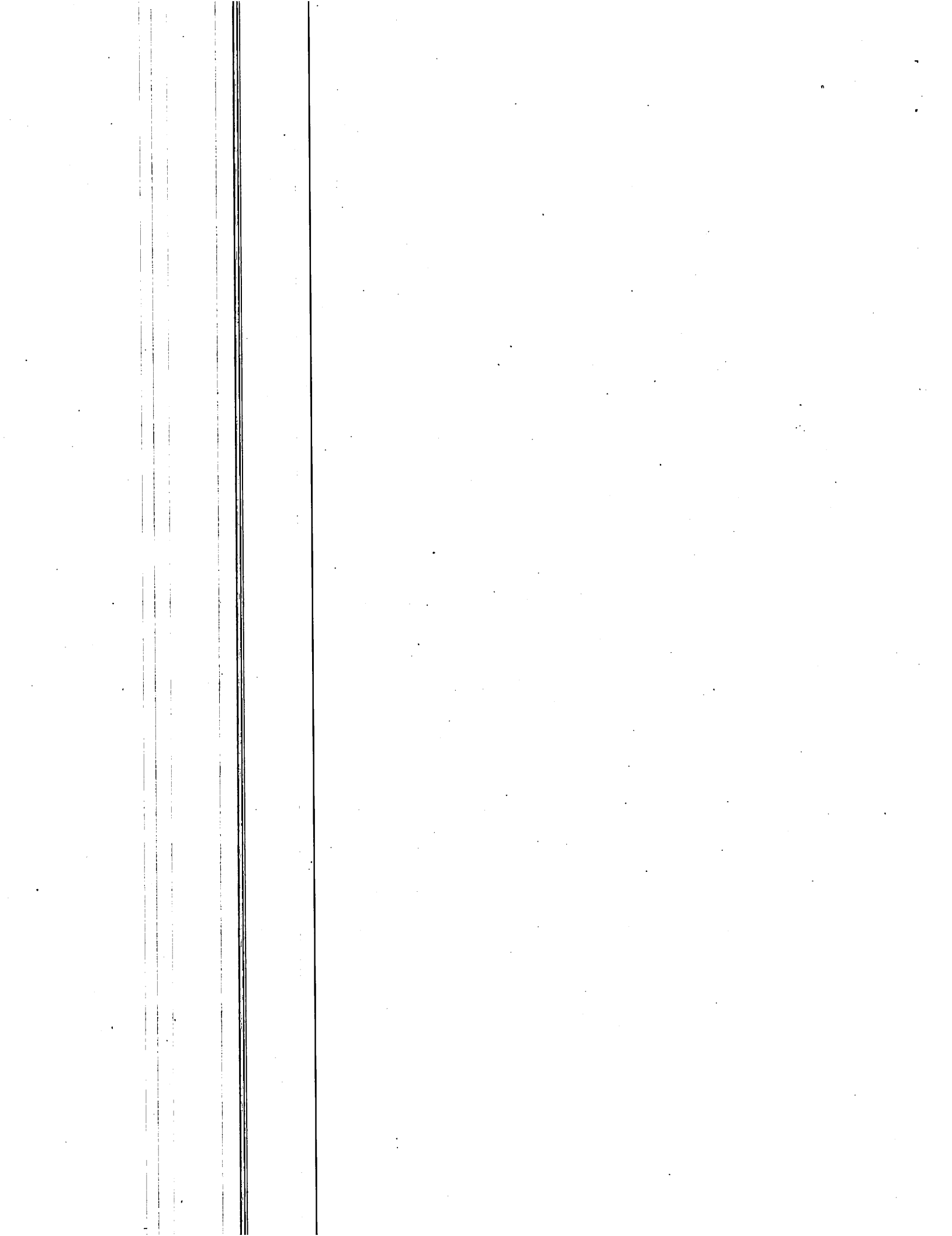


For the reasons stated below, the Claimants met their burden to demonstrate the Respondent performed unworkmanlike or inadequate home improvements and that they are, therefore, eligible for compensation from the Fund. Further, I recommend an award in the amount of the Claimants' actual loss, as explained below.

### Analysis

The Contract called for the Respondent to, among other things, install steps and lighting as part of a larger pool installation where the Respondent was a subcontractor. On October 13, 2021, the Claimants emailed the Respondents indicating they were pleased with much of the work performed but expressed concerns regarding the installed steps and lighting. (Clmts. Ex. 7). The Claimant testified he was dissatisfied that the steps were centered on the width of the entrance of the sliding glass door, not on the width of the two doors. The Respondent testified credibly that the design and placement of the steps were discussed with the Claimant to maximize space between the steps and the jacuzzi. No discussion of the design is mentioned in the Contract. I find that the design and placement of the steps do not constitute an unworkmanlike or inadequate home improvement.

The Respondent performed unworkmanlike, inadequate, or incomplete home improvements in the construction of the steps. The steps installed by the Respondent were not flush with the home, and had noticeable gaps, raising concerns from the Claimants regarding moisture entering the gaps between the house and steps. In Claimants' Exhibit 4, photographs three through seven clearly establish that the steps were not abutting the house, and the Respondent did not contest these facts. In response to an email from the Claimants on November 14, 2021, the Respondent agreed to add more polymeric sand to the joints between the house and stairs. (Clmts. Ex. 7).



On November 23, 2021, the Claimants emailed the Respondent and identified several issues that needed to be addressed including: centering of existing lights; gaps needing to be filled with polymeric sand; installation of two additional lights; remediation of gaps to protect from water and/or snow; and addressing the sloping top step. (Clmts. Ex. 7). The Claimant testified and provided photographic evidence (Clmts. Ex. 4, Photo #9) that the top step was not level. I find that the sloping step constitutes unworkmanlike and inadequate home improvement.

The Claimants did not unreasonably reject good faith efforts by the Respondent to resolve the claim. *See* Bus. Reg. § 8-405(d). The Respondent agreed to remedy the issues raised by the Claimants but failed to do so. The record demonstrates that the Claimants were in communication with the Respondent regarding scheduling a date to remedy and repair the work per email communications on November 23, 2021. (Clmts. Ex. 12). The Respondent testified she stopped communicating with the Claimants after December 8, 2021, after receiving word from Anthony & Sylvan not to proceed any further “because they were going to handle the situation.” This cessation in communication frustrated any efforts to resolve the Claim. The Respondent had a contract with the Claimants and a duty to communicate even if a third party, Anthony & Sylvan, was assisting with resolving the complaints.<sup>2</sup>

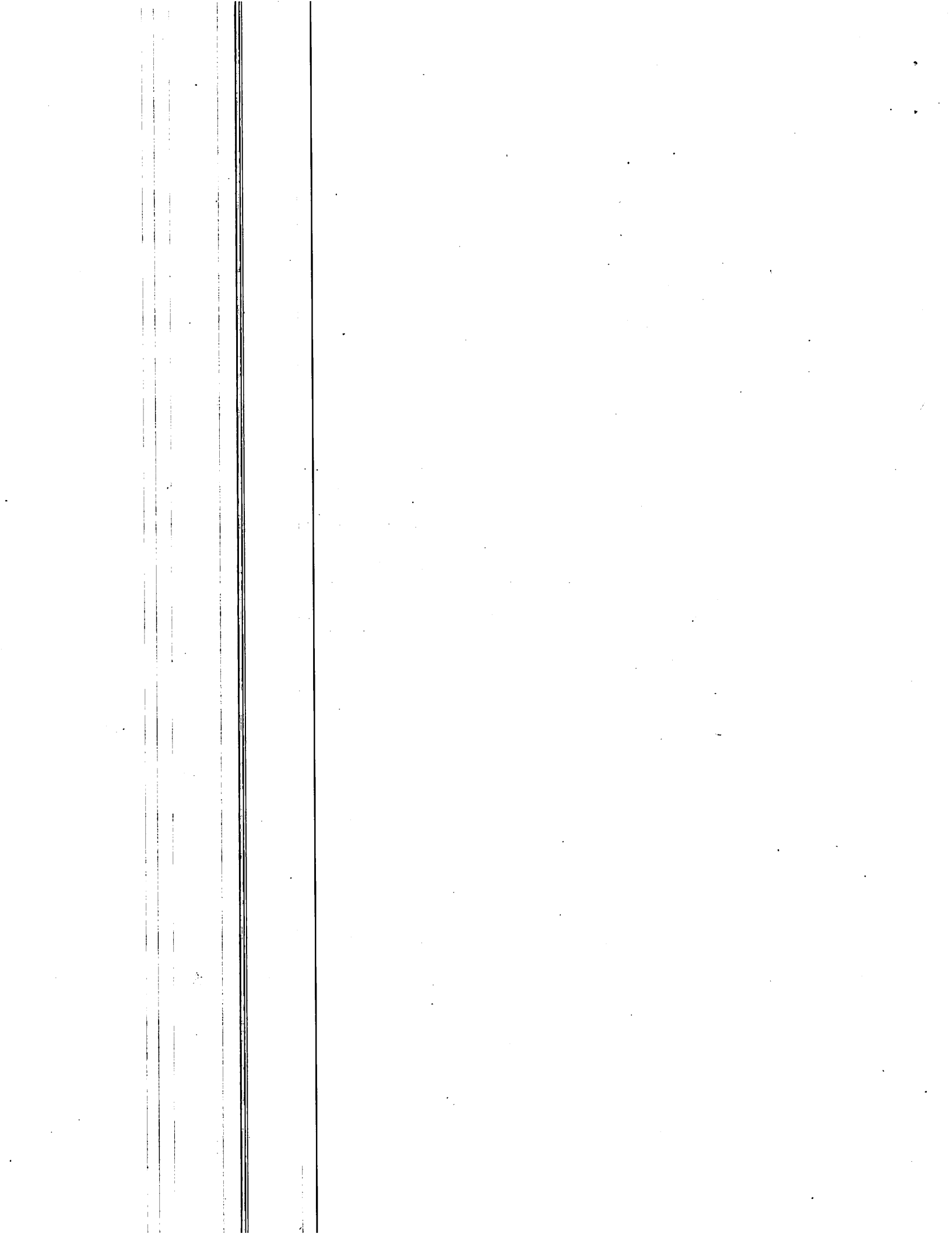
For the reasons stated above, the Respondent performed unworkmanlike or inadequate home improvements, and I find that the Claimants are eligible for compensation from the Fund.

#### Actual Loss and Recovery

Having found eligibility for compensation I must determine the amount of the Claimants’ actual loss and the amount, if any, that the Claimants are 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. 2022); COMAR 09.08.03.03B(1).

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<sup>2</sup> Anthony & Sylvan did not resolve the issues brought up by the Claimants.





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

The Respondent performed some work under the Contract, and the Claimants intend to retain other contractors to complete or remedy that work. Accordingly, the following formula appropriately measures the Claimants' actual loss:

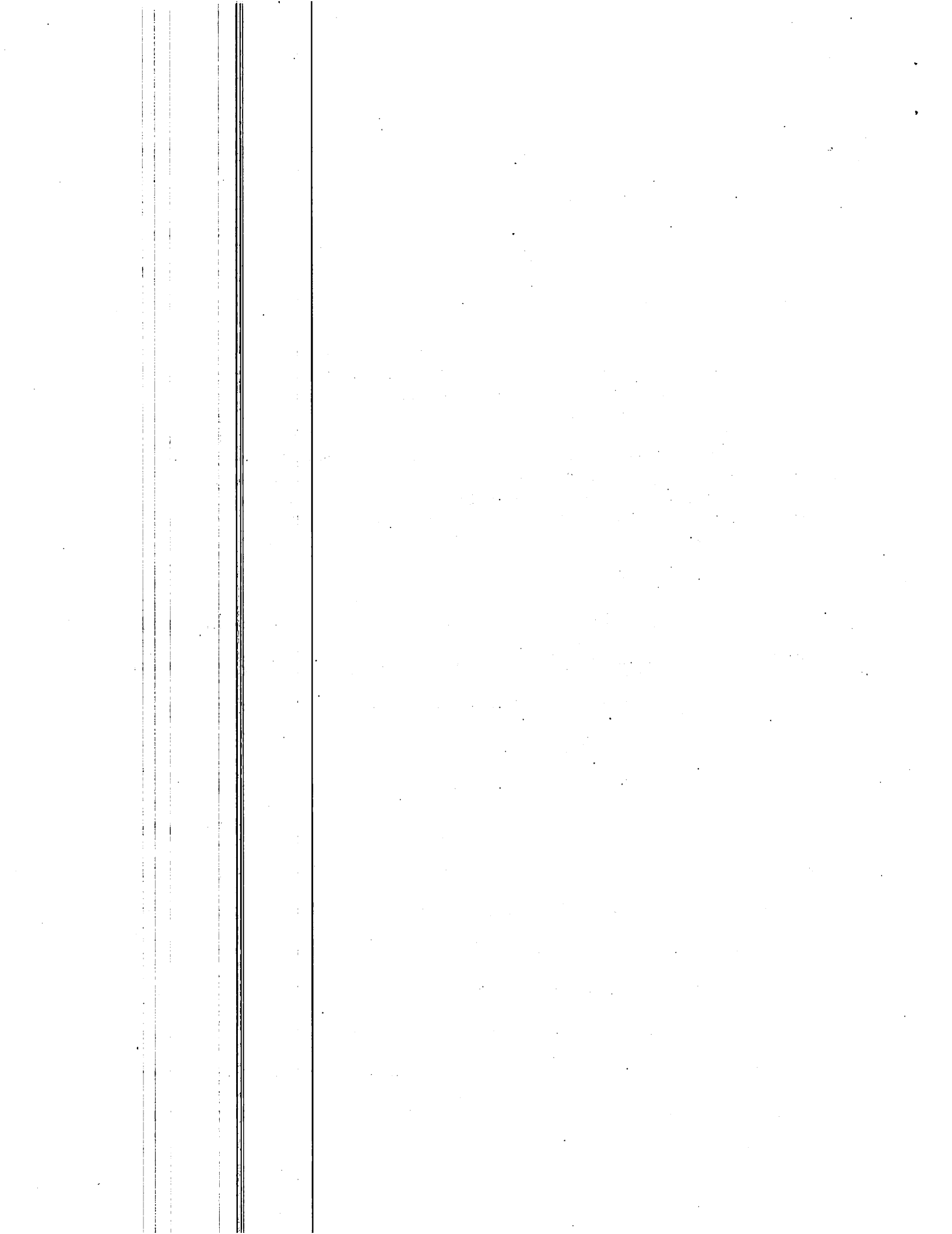
If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable 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)(c).

The Claimants provided an estimate from Rooted in Nature, a contractor licensed by the MHIC, in the amount of \$11,856.69 to remove and replace the steps installed by the Respondent. (Clmts. Ex. 8). The same amount is listed on the Claim as the amount to restore, repair, or replace the work of the Respondent. (Fund Ex. 3).

The Fund argued that the Claimants met their burden of demonstrating that the Respondent performed an unworkmanlike or inadequate home improvement. The Fund further argued that the estimate for Rooted in Nature is a fundamentally different project than the work performed by the Respondent and should not be considered. The Fund further argued that the Claimants' actual loss should be limited to \$1,500.00 based on the testimony of Mr. Francisco as to the cost to repair the issues identified in the November 23, 2021, email.

I agree with the Fund. The scope of work in the Rooted in Nature is far beyond what the Respondent was contracted to do. At the hearing, the Claimants concurred with this assessment. I will not consider the estimate from Rooted in Nature. Mr. Francisco testified that repairs and



installation of additional lights could be completed in one day, at a labor cost of \$1,500. I do find the testimony of Mr. Francisco credible; his demeanor was calm, professional, and he spoke knowledgeably. The credible evidence presented through the testimony of Mr. Francisco established by a preponderance that the amount to repair the work would be \$1,500.00. Using the formula in COMAR 09.08.03.03B(3)(c), the following calculations apply:

\$25,868.75 paid to the Respondent; plus  
1,500.00 amount required to repair the Respondent's work; equals  
\$27,368.75 minus the contract price;  
-25,868.75 equals  
\$1,500.00 actual loss.

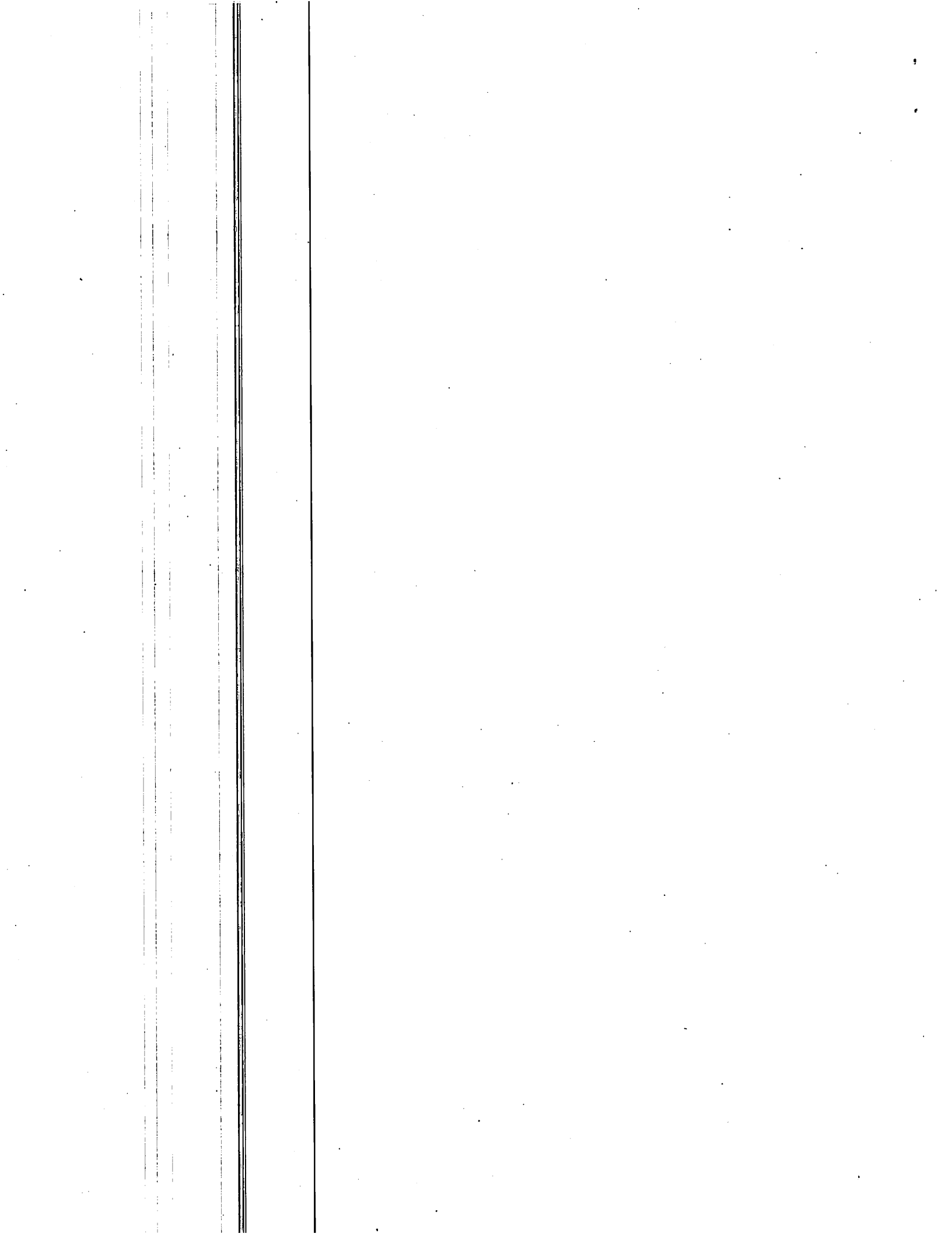
Effective July 1, 2022, a claimant's recovery is capped at \$30,000.00 for acts or omissions of one contractor, and a claimant may not recover more than the amount paid to the contractor against whom the claim is filed.<sup>3</sup> Bus. Reg. § 8-405(e)(1), (5) (Supp. 2022); COMAR 09.08.03.03B(4). In this case, the Claimants' actual loss is less than the amount paid to the Respondent and less than \$30,000.00. Therefore, the Claimants are entitled to recover their actual loss of \$1,500.00.

### **PROPOSED CONCLUSIONS OF LAW**

I conclude that the Claimants have sustained an actual and compensable loss of \$1,500.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2022); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover \$1,500.00 from the Fund. Md. Code Ann., Bus. Reg. § 8-405(e)(5) (Supp. 2022); COMAR 09.08.03.03B(4).

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<sup>3</sup> 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**

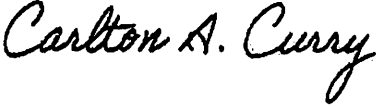
I **RECOMMEND** that the Maryland Home Improvement Commission:

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimants \$1,500.00; 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;<sup>4</sup> and

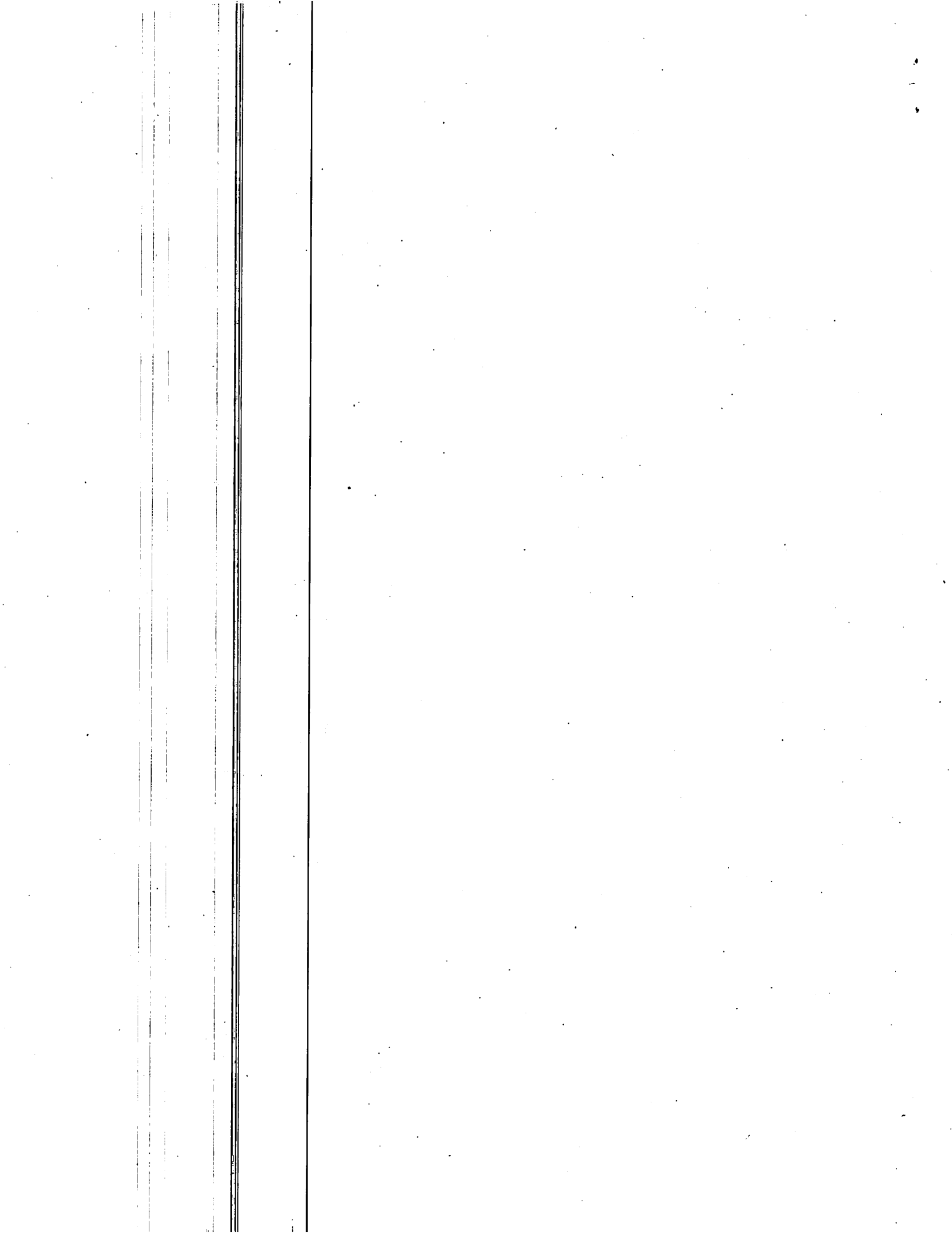
**ORDER** that the records and publications of the Maryland Home Improvement Commission reflect this decision.

February 21, 2023  
Date Decision Issued

  
\_\_\_\_\_  
Carlton A. Curry  
Administrative Law Judge

CAC/at  
#203850

<sup>4</sup> See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.



**PROPOSED ORDER**

***WHEREFORE, this 24<sup>th</sup> day of March, 2023, 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***

