STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF REAL ESTATE,	)	
Petitioner,	)	
vs.	)	Case Nos. 04-1148PL 04-1680PL
ELSA G. CARTAYA,	)	
Respondent.	)	

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing on July 29, 2004, in Miami, Florida, and again by video teleconference on August 20, 2004, at sites in Tallahassee and Miami, Florida

APPEARANCES

For Petitioner: Alfonso Santana, Esquire
Department of Business and Professional Regulation
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Orlando, Florida 32801-1757

For Respondent: Jerome H. Shevin, Esquire
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STATEMENT OF THE ISSUE

In this disciplinary proceeding, the issues are, first, whether Respondent, a certified real estate appraiser, committed various disciplinable offenses in connection with three residential appraisals; and second, if Respondent is guilty of any charges, whether she should be punished therefor.

PRELIMINARY STATEMENT

On August 26, 2002, the Department of Business and Professional Regulation, as Petitioner, issued a six-count Administrative Complaint against Respondent Elsa Cartaya, who then timely requested an administrative hearing. On January 16, 2003, the agency issued a separate, four-count Administrative Complaint against Ms. Cartaya, who again timely requested a hearing. The earlier complaint alleged that Ms. Cartaya had engaged in wrongdoing in connection with two residential appraisals; the latter charged additional wrongdoing in connection with yet a third appraisal. These two matters were referred to the Division of Administrative Hearings on April 2, 2004.

On May 13, 2004, the agency's motion to consolidate the cases was granted. The consolidated cases proceeded together to final hearing on July 29, 2004, and again on August 20, 2004.

The agency called the following witnesses: Tibizay Morales; David B.C. Yeomans, Jr.; Marisel Ross; Mark A. Cannon;

and Rocky Hubert. Petitioner's Exhibits numbered 1, 2, 4, 5, 9, and 18-20 were received into evidence. Ms. Cartaya testified on her own behalf and called no other witnesses. Respondent's Exhibits 1-6 were admitted into evidence.

The final hearing transcript, comprising four volumes, was filed on October 4, 2004. Petitioner timely filed a Proposed Recommended Order before the original established deadline, which was October 25, 2004. At the request of Ms. Cartaya's counsel, that deadline was extended to October 29, 2004. Even still, Respondent's Proposed Recommended Order was filed late, on November 1, 2004. The parties' post-hearing submissions were considered.

Petitioner's Motion to Bar Respondent From Filing a Proposed Recommended Order, After October 29, 2004, which was filed on November 1, 2004, is denied.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2003 Florida Statutes.

FINDINGS OF FACT

1. The Florida Real Estate Appraisal Board ("Board") is the state agency charged with regulating real estate appraisers who are, or want to become, licensed to render appraisal services in the State of Florida. The Department of Business and Professional Regulation ("Department") is the state agency

responsible for investigating and prosecuting complaints against such appraisers.

2. At all times relevant to this proceeding, Elsa Cartaya ("Cartaya") was a Florida-certified residential real estate appraiser. Her conduct as an appraiser in connection with the matters presently at issue falls squarely within the Board's regulatory jurisdiction.

Case No. 04-1680

3. In the Administrative Complaint that initiated DOAH Case No. 04-1680, the Department charged Cartaya with numerous statutory violations relating to her appraisal of a residence located at 930 East Ninth Place, Hialeah, Florida (the "Hialeah Property").

4. Specifically, the Department made the following allegations against Cartaya:[1]

> 5. Respondent developed and communicated an appraisal report (Report) for the property commonly known as 930 E. 9 Place, Hialeah, Florida 33010. A copy of the report is attached hereto and incorporated herein as Administrative Complaint Exhibit 1.
> 6. On the Report, Respondent represents that:
> a. she signed it on July 27, 2000,
> b. the Report is effective as of July 27, 2000.
> 7. On or about October 26, 2001, Respondent provided a "Report History" to Petitioner's investigator. A copy of the report history is attached hereto and incorporated herein as Administrative Complaint Exhibit 2.

8. On the Report History, Respondent admits that she completed the report on August 7, 2000.
9. On Report, Respondent represents that there were no prior sales of subject property within one year of the appraisal.
10. Respondent knew that a purchase and sale transaction on subject property closed on July 28, 2000.
11. Respondent knew that the July 28, 2000, transaction had a contract sales price of $82,000. A copy of the closing statement is attached hereto as Administrative Complaint Exhibit 3.
12. Respondent knowingly refused to disclose the July 28, 2000, sale on Report.
13. On [the] Report, Respondent represented that the current owner of subject property was Hornedo Lopez.
14. Hornedo Lopez did not become the title-owner until on or about July 28, 2000, but before August 7, 2000.
15. On [the] Report, Respondent represents that quality of construction of subject property is "CBS/AVG."
16. The public records reflect that subject property is of mixed construction, CBS and poured concrete.
17. On [the] Report, Respondent represents: "The income approach was not derived due to lack of accurately verifiable data for the mostly owner occupied area."
18. The multiple listing brochures indicate as follows:
a. for comparable one: "Main House 3/2 one apartment 1/1 (Rents $425) and 2 efficiencies each at $325. Live rent free with great income or bring your big family." A copy of the brochure for comparable one is attached hereto and incorporated herein as Administrative Complaint Exhibit 4.
b. for comparable three: "Great Rental . . . two 2/1 two 1/1 and one studio. Total rental income is $2,225/month if all rented." A copy of the brochure for comparable three is attached and

> incorporated as Administrative Complaint Exhibit 5.
> 19. On or about October 23, 2001, Petitioner's investigator inspected Respondent's work file for Report.
> 20. The investigation revealed that Respondent failed to maintain a true copy of Report in the work file.
> 21. On [the] Report, Respondent failed to analyze the difference between comparable one's listing price, $145,000, and the sale price, $180.000.
> 22. On [the] Report History, Respondent admits to having received a request for appraisal of subject property indicting a contract price of $195,000.
> 23. On [the] Report History, Respondent admits that the multiple listing brochure for subject property listed the property for $119,900, as a FANNIE MAE foreclosure.
> 24. On [the] Report History, Respondent also admits that she had a multiple listing brochure in the file, listing subject property for $92,000.
> 25. On [the] Report History, Respondent admits that she did not report the listings in Report.
> 26. On [the] Report History, Respondent admits knowledge that comparable three was "rebuilt as a 2/1 with two 1/1 & 1 studio receiving income although zoned residential."
> 27. On [the] Report, Respondent failed or refused to explain or adjust for comparable three's zoning violations.

5. On the foregoing allegations, the Department charged Cartaya under four counts, as follows:

COUNT I

> Based upon the foregoing, Respondent is guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest conduct, culpable negligence, or breach of trust in any

business transaction in violation of Section 475.624(2), Florida Statutes.[2]

COUNT II

Based upon the foregoing, Respondent is guilty of having failed to use reasonable diligence in developing an appraisal report in violation of Section 475.624(15), Florida Statutes.

COUNT III

Based upon the foregoing, Respondent has violated a standard for the development or communication of a real estate appraisal or other provision of the Uniform Standards of Professional Appraisal Practice in violation of Section 475.624(14), Florida Statutes.

COUNT IV

Based upon the foregoing, Respondent is guilty of having accepted an appraisal assignment if the employment itself is contingent upon the appraiser reporting a predetermined result, analysis, or opinion, or if the fee to be paid for the performance of the appraisal assignment is contingent upon the opinion, conclusion, or valuation reached upon the consequent resulting from the appraisal assignment in violation of Section 475.624(17), Florida Statutes.[3]

6. In her Answer and Affirmative Defenses, Cartaya admitted the allegations set forth in paragraphs 5-9, 11, 13-15, 17-19, and 23-25 of the Amended Complaint. Based on Cartaya's admissions, the undersigned finds these undisputed allegations to be true. Additional findings are necessary, however, to make sense of these particular admissions and to determine whether Cartaya committed the offenses of which she stands accused.

7. In April 2000, Southeast Financial Corporation ("Southeast") asked Cartaya to prepare an appraisal of the Hialeah Property for Southeast's use in underwriting a mortgage loan, the proceeds of which would be applied by the prospective mortgagor(s) towards the $205,000 purchase price that he/she/they had agreed to pay Hornedo Lopez ("Hornedo") for the residence in question.[4]

8. In preparing the appraisal, Cartaya discovered that the putative seller, Hornedo, was actually not the record owner of the Hialeah Property. Rather, title was held in the name of the Federal National Mortgage Association ("Fannie Mae"). The Hialeah Property was "in foreclosure."

9. Cartaya informed her contact at Southeast, Marianella Lopez ("Marianella"), about this problem. Marianella explained that Hornedo was in the process of closing a sale with Fannie Mae and would resell the Hialeah Property to a new buyer soon after acquiring the deed thereto. Cartaya told Marianella that, to complete the appraisal, she (Cartaya) would need to be provided a copy of the closing statement documenting the transfer of title from Fannie Mae to Hornedo.

10. No further work was done on the appraisal for several months. Then, on July 25, 2000, Marianella ordered another appraisal of the Hialeah Property, this time for Southeast's use in evaluating a mortgage loan to Jose Granados ("Granados"), who

was under contract to purchase the subject residence from Hornedo for $195,000.

11. Once again, Cartaya quickly discovered that Fannie Mae, not Hornedo, was the record owner of the Hialeah Property. Once again, Cartaya immediately informed Marianella about the situation. Marianella responded on July 26, 2000, telling Cartaya that the Fannie Mae-Hornedo transaction was scheduled to close on July 28, 2000.

12. On July 27, 2000, Marianella faxed to Cartaya a copy of the Settlement Statement that had been prepared for the Fannie Mae sale to Hornedo. The Settlement Statement, which confirmed that the intended closing date was indeed July 28, 2000, showed that Hornedo was under contract to pay $82,000 for the Hialeah Property——the property which he would then sell to Granados for $195,000, if all the pending transactions closed as planned.

13. Upon receipt of this Settlement Statement, Cartaya proceeded to complete the appraisal. In the resulting Appraisal Report, which was finished on August 7, 2000,[5] Cartaya estimated that the market value of the Hialeah Property, as of July 27, 2000, was $195,000.

14. The Department failed to prove by clear and convincing evidence that the house at the Hialeah Property was, in fact, constructed from CBS and poured concrete, as alleged.[6]

15. At the time Cartaya gave the Department a copy of her workfile for this appraisal assignment, the workfile did not contain a copy of the competed Appraisal Report.[7] (The workfile did, however, include a working draft of the Appraisal Report.)

16. The allegation, set forth in paragraph 21 of the Administrative Complaint, that Cartaya "failed to analyze the difference between comparable one's listing price, $145,000, and the sale price, $180,000," was not proved by clear and convincing evidence. First, there is no nonhearsay evidence in the record that "comparable one" was, in fact, listed at $145,000 and subsequently sold for $180,000. Instead, the Department offered a printout of data from the Multiple Listing Service ("MLS"), which printout was included in Cartaya's workfile. The MLS document shows a listing price of $145,550 for "comparable one" and a sales price of $180,000 for the property——but it is clearly hearsay as proof of these matters,[8] and no predicate was laid for the introduction of such hearsay pursuant to a recognized exception to the hearsay rule (including Section 475.28(2)). Further, the MLS data do not supplement or explain other nonhearsay evidence.[9] At best, the MLS document, which is dated July 25, 2000, establishes that Cartaya was on notice that "comparable one" might have sold for more than the asking price, but Cartaya has not been charged with overlooking MLS data.

17. Second, in any event, in her Report History, Cartaya stated that she had analyzed the putative asking price/sales price differential with respect to "comparable one" and concluded that there was no need to make adjustments for this because available data relating to other sales persuaded her that such differentials were typical in the relevant market. Cartaya's declaration in this regard was not persuasively rebutted.

18. Since the evidence fails persuasively to establish that Cartaya's conclusion concerning the immateriality of the putative asking price/sales price differential as a factor bearing on the value of "comparable one" was wrong; and, further, because the record lacks clear and convincing evidence that an appraiser must, in her appraisal report, not only disclose such information, even when deemed irrelevant to the appraisal, but also expound upon the grounds for rejecting the data as irrelevant, Cartaya cannot be faulted for declining to explicate her analysis of the supposed price differential in the Appraisal Report.

19. The evidence is insufficient to prove, clearly and convincingly, that Cartaya "failed or refused to explain or adjust for "comparable three"'s zoning violations." This allegation depends upon the validity of its embedded assumption that there were, in fact, "zoning violations."[10] There is,

however, no convincing evidence of such violations in the instant record. Specifically, no copy of any zoning code was offered as evidence, nor was any convincing nonhearsay proof regarding the factual condition of "comparable three" offered. Cartaya cannot be found guilty of failing or refusing to explain or adjust for an underlying condition (here, alleged "zoning violations") absent convincing proof of the underlying condition's existence-in-fact.

Case No. 04-1148

20. In the Administrative Complaint that initiated DOAH Case No. 04-1148, the Department charged Cartaya with numerous statutory violations relating to her appraisals of residences located at 1729 Northwest 18th Street, Miami, Florida ("1729 NW 18th St") and 18032 Northwest 48th Place, Miami, Florida ("18032 NW 48th Place"). These appraisals will be examined in turn.

21. With regard to 1729 NW 18th St, the Department alleged as follows:

> 4. On or about April 29, 1999, Respondent developed and communicated a Uniform Residential Appraisal Report for the property commonly known as 1729 NW 18th Street, Miami, Florida. A copy of the report is attached hereto and incorporated herein as Administrative Complaint Exhibit 1.
> 5. On or about March 18, 2001, David B. C. Yeomans, Jr., A.S.A., and Mark A. Cannon, A.S.A., performed a field review of the report. A copy of the review is attached

hereto and incorporated herein as Administrative Complaint Exhibit 2.

6. The review revealed that unlike it states in the Report, the subject property's zoning was not "Legal," but "legal noncomforming (Grandfathered use)."

7. The review further revealed that Respondent failed to report that if the improvements sustain extensive damage or demolishment or require renovation which exceeds 50% of the depreciated value, it is likely that a variance would be necessary to build a new dwelling.

8. The review further revealed that Respondent failed to report that subject property has two underground gas meters.

9. The review further revealed that unlike Respondent states in Report, subject property's street has gutters and storm sewers along it.

10. The review further revealed that subject property is a part of a "sub-market" within its own neighborhood due to its construction date of 1925.

11. Respondent applied three comparables built in 1951, 1953, and 1948, respectively, all of which reflect a different market, without adjustment.

12. Respondent applied comparables which have much larger lots than the subject, which is of a non-conforming, grandfathered use.

13. Respondent failed to adjust for quality of construction even though subject is frame and all three comparables are of concrete block stucco construction.

14. Respondent failed to note on the Report that comparables 1 and 2 had river frontage.

15. Respondent failed to adjust comparables 1 and 2 for river frontage.

16. The review revealed that at the time of the Report there were at least five sales more closely comparable to Subject than those which Respondent applied.

22. On the foregoing allegations, the Department brought the following three counts against Cartaya:

COUNT I

> Based upon the foregoing, Respondent is guilty of having failed to use reasonable diligence in developing an appraisal report in violation of Section 475.624(15), Florida Statutes.

COUNT II

> Based upon the foregoing, Respondent has violated a standard for the development or communication of a real estate appraisal or other provision of the Uniform Standards of Professional Appraisal Practice in violation of Section 475.624(14), Florida Statutes.

COUNT III

> Based upon the foregoing, Respondent is guilty of culpable negligence in a business transaction in violation of Section 475.624(2), Florida Statutes.

23. Cartaya admitted the allegations set forth in paragraph 4 of the Administrative Complaint. Those undisputed allegations, accordingly, are accepted as true.

24. The rest of the allegations about this property were based upon a Residential Appraisal Field Review Report (the "Yeomans Report") that David B.C. Yeomans, Jr. prepared in March 2001 for his client Fannie Mae. The Yeomans Report is in evidence as Petitioner's Exhibit 2, and Mr. Yeomans testified at hearing.

25. Mr. Yeomans disagreed with Cartaya's opinion of value regarding 1729 NW 18th St, concluding that the property's market value as of April 29, 1999, had been at the low end of the $95,000-to-$115,000 range, and not $135,000 as Cartaya had opined. The fact-findings that follow are organized according to the numbered paragraphs of the Administrative Complaint.

26. Paragraphs 6 and 7. The form that Cartaya used for her Appraisal Report regarding 1729 NW 18th St contains the following line:

> Zoning compliance ☐ Legal ☐ Legal nonconforming (Grandfathered use) ☐ Illegal ☐ No zoning

Cartaya checked the "legal" box. Mr. Yeomans maintains that she should have checked the box for "legal nonconforming" use because, he argues, the property's frontage and lot size are smaller than the minimums for these values as prescribed in the City of Miami's zoning code.

27. The Department failed, however, to prove that Cartaya checked the wrong zoning compliance box. There is no convincing nonhearsay evidence regarding either the frontage or the lot size of 1729 NW 18th St.[11] Thus, there are no facts against which to apply the allegedly applicable zoning code provisions. Moreover, and more important, the Department failed to introduce into evidence any provisions of Miami's zoning code. Instead, the Department elicited testimony from Mr. Yeomans regarding his

understanding of the contents of the zoning code. While Mr. Yeomans' testimony about the contents of the zoning code is technically not hearsay (because the out-of-court statements, namely the purported code provisions, consisted of non-assertive declarations[12] that were not offered for the "truth" of the code's provisions[13]), such testimony is nevertheless not clear and convincing evidence of the zoning code's terms.[14]

28. And finally, in any event, Cartaya's alleged "mistake" (which allegation was not proved) was immaterial because, as Mr. Yeomans conceded at hearing, in testimony the undersigned credits as true, the alleged "fact" (again, not proved) that 1729 NW 18th St constituted a grandfathered use would have no effect on the property's market value.

29. Paragraphs 8 and 9. The Yeomans Report asserts that "[b]ased on a physical inspection as of March 17, 2001[,] it appears that the site has two underground gas meters and there were gutters and storm sewers along the subject's street." It is undisputed that Cartaya's Appraisal Report made no mention of underground gas meters or storm water disposal systems. While the Department alleged that Cartaya's silence regarding these matters constituted disciplinable "failures," it offered no convincing proof that Cartaya defaulted on her obligations in any way respecting these items. There was no convincing evidence that these matters were material, affected the

property's value, or should have been noted pursuant to some cognizable standard of care.

30. Paragraphs 10 and 11. The contention here is that Cartaya chose as comparables several homes that, though relatively old (average age: 48 years), were not as old as the residence at 1729 NW 18th St (74 years). Mr. Yeomans asserted that older homes should have been used as comparables, and several such homes are identified in the Yeomans Report.

31. The undersigned is persuaded that Mr. Yeomans' opinion of value with respect to 1729 NW 18th St is probably more accurate than Cartaya's. If this were a case where the value of 1729 NW 18th St were at issue, e.g. a taking under eminent domain, then Mr. Yeomans' opinion might well be credited as against Cartaya's opinion in making the ultimate factual determination. The issue in this case is not the value of 1729 NW 18th St, however, but whether Cartaya committed disciplinable offenses in appraising the property. The fact that two appraisers have different opinions regarding the market value of a property does not mean that one of them engaged in misconduct in forming his or her opinion. Based on the evidence presented, the undersigned is not convinced that Cartaya engaged in wrongdoing in connection with her appraisal of 1729 NW 18th St, even if her analysis appears to be somewhat less sophisticated than Mr. Yeomans'.

32. Paragraphs 12 through 16. The allegations in these paragraphs constitute variations on the theme just addressed, namely that, for one reason or another, Cartaya chose inappropriate comparables. For the same reasons given in the preceding discussion, the undersigned is not convinced, based on the evidence presented, that Cartaya engaged in wrongdoing in connection with her appraisal of 1729 NW 18th St, even if he is inclined to agree that Mr. Yeomans' opinion of value is the better founded of the two.

33. With regard to 18032 NW 48th Place, the Department alleged as follows:

> 18. On or about August 9, 1999, Respondent prepared and communicated a Uniform Residential Appraisal Report for the Property commonly known as 18032 NW 48th Place, Miami, Florida, 33055. (Report) A copy of the Report is attached hereto and incorporated herein as Administrative Complaint Exhibit 3.
> 19. On the Report, Respondent incorrectly stated that the property is in a FEMA Zone X flood area. In fact, the property is in an AE Zone.
> 20. In Report, Respondent states: "Above sales were approximately adjusted per market derived value influencing dissimilarities as noted."
> 21. Respondent failed to state in Report, that comparables 1 and 3 have in-law quarters.
> 22. In [the] Report, Respondent represented comparable 1 had one bath, where in fact it has at least two.
> 23. In [the] Report, Respondent failed to state that comparable 1 has two in-law quarters.

> 24. In [the] Report, Respondent stated that comparable 3 is a two-bath house with an additional bath in the in-law quarters.

34. On the foregoing allegations, the Department brought the following three counts against Cartaya:

COUNT IV

> Based upon the foregoing, Respondent has violated a standard for the development or communication of a real estate appraisal or other provision of the Uniform Standards of Professional Appraisal Practice in violation of Section 475.624(14), Florida Statutes.

COUNT V

> Based upon the foregoing, Respondent is guilty of having failed to use reasonable diligence in developing an appraisal report in violation of Section 475.624(15), Florida Statutes.

COUNT VI

> Based upon the foregoing, Respondent is guilty of culpable negligence in a business transaction in violation of Section 475.624(2), Florida Statutes.

35. Cartaya admitted the allegations set forth in paragraphs 18 and 20 of the Administrative Complaint. Those undisputed allegations, accordingly, are accepted as true.

36. The rest of the allegations about this property were based upon a Residential Appraisal Field Review Report (the "Marmin Report") that Frank L. Marmin prepared in May 2001 for his client Fannie Mae. The Marmin Report is in evidence as

Petitioner's Exhibit 5. Mr. Marmin did not testify at hearing, although his supervisor, Mark A. Cannon, did.

37. Mr. Marmin disagreed with Cartaya's opinion of value regarding 18032 NW 48th Place, concluding that the property's market value as of August 9, 1999, had been $100,000, and not $128,000 as Cartaya had opined. The fact-findings that follow are organized according to the numbered paragraphs of the Administrative Complaint.

38. Paragraph 19. Cartaya admitted that she erred in noting that the property is located in FEMA Flood Zone "X," when in fact (she agrees) the property is in FEMA Flood Zone "AE." She did, however, include a flood zone map with her appraisal that showed the correct flood zone designation. Cartaya's mistake was obviously unintentional——and no more blameworthy than a typographical error. Further, even the Department's expert witness conceded that this minor error had no effect on the appraiser's opinion of value.

39. Paragraphs 20 through 24. The Department asserts that two of Cartaya's comparables were not comparable for one reason or another. The Department failed clearly and convincingly to prove that its allegations of fact concerning the two comparables in question are true. Thus, the Department failed to establish its allegations to the requisite degree of certainty.

Ultimate Factual Determinations

Having examined the entire record; weighed, interpreted, and judged the credibility of the evidence; drawn (or refused to draw) permissible factual inferences; resolved conflicting accounts of what occurred; and applied the applicable law to the facts, it is determined that:

40. Applying the law governing violations arising under Section 475.624(2), Florida Statutes, to the historical facts established in the record by clear and convincing evidence, it is found as a matter of ultimate fact that Cartaya did not commit culpable negligence in connection with the appraisals at issue.

41. Applying the law governing violations arising under Section 475.624(15), Florida Statutes, to the historical facts established in the record by clear and convincing evidence, it is found as a matter of ultimate fact that Cartaya did not fail to exercise reasonable diligence in developing the appraisals at issue.

42. Applying the law governing violations arising under Section 475.624(14), Florida Statutes, to the historical facts established in the record by clear and convincing evidence, it is found as a matter of ultimate fact that, in connection with the Appraisal Report relating to the Hialeah Property, Cartaya did commit one unintentional violation of Standards Rule 2-

2(b)(vi) of Uniform Standards of Professional Appraisal Practice and two unintentional violations of Standards Rule 2-2(b)(ix).

CONCLUSIONS OF LAW

43. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

44. Section 475.624, Florida Statutes, under which Cartaya has been charged, sets forth the acts for which the Board may impose discipline. This statute provides, in pertinent part:

> The board may deny an application for registration, licensure, or certification; may investigate the actions of any appraiser registered, licensed, or certified under this part; may reprimand or impose an administrative fine not to exceed $5,000 for each count or separate offense against any such appraiser; and may revoke or suspend, for a period not to exceed 10 years, the registration, license, or certification of any such appraiser, or place any such appraiser on probation, if it finds that the registered trainee, licensee, or certificateholder:
>
> * * *
>
> (2) Has been guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest conduct, culpable negligence, or breach of trust in any business transaction in this state or any other state, nation, or territory; has violated a duty imposed upon her or him by law or by the terms of a contract, whether written, oral, express, or implied, in an appraisal assignment; has aided, assisted, or conspired with any other person engaged in any such misconduct and in

> furtherance thereof; or has formed an intent, design, or scheme to engage in such misconduct and committed an overt act in furtherance of such intent, design, or scheme. It is immaterial to the guilt of the registered trainee, licensee, or certificateholder that the victim or intended victim of the misconduct has sustained no damage or loss; that the damage or loss has been settled and paid after discovery of the misconduct; or that such victim or intended victim was a customer or a person in confidential relation with the registered trainee, licensee, or certificateholder, or was an identified member of the general public.
>
> * * *
>
> (14) Has violated any standard for the development or communication of a real estate appraisal or other provision of the Uniform Standards of Professional Appraisal Practice.
>
> (15) Has failed or refused to exercise reasonable diligence in developing an appraisal or preparing an appraisal report.

45. As a disciplinary statute, Section 475.624 "must be construed strictly, in favor of the one against whom the penalty would be imposed." Munch v. Department of Professional Regulation, Div. of Real Estate, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992).

46. A proceeding, such as this one, to suspend, revoke, or impose other discipline upon a professional license is penal in nature. State ex rel. Vining v. Florida Real Estate Commission, 281 So. 2d 487, 491 (Fla. 1973). Accordingly, to impose

discipline, the Department must prove the charges against Cartaya by clear and convincing evidence. Department of Banking and Finance, Div. of Securities and Investor Protection v. Osborne Stern & Co., 670 So. 2d 932, 933-34 (Fla. 1996)(citing Ferris v. Turlington, 510 So. 2d 292, 294-95 (Fla. 1987)); Nair v. Department of Business & Professional Regulation, 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

47. Regarding the standard of proof, in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the Court of Appeal, Fourth District, canvassed the cases to develop a "workable definition of clear and convincing evidence" and found that of necessity such a definition would need to contain "both qualitative and quantitative standards." The court held that

> clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Id. The Florida Supreme Court later adopted the fourth district's description of the clear and convincing evidence standard of proof. Inquiry Concerning a Judge No. 93-62, 645 So. 2d 398, 404 (Fla. 1994). The First District Court of Appeal

also has followed the Slomowitz test, adding the interpretive comment that "[a]lthough this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp., Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 1279 (1992)(citation omitted).

48. The legislature has directed the regulatory boards falling under the Department's jurisdiction to promulgate rules specifying the penalties that can be imposed for statutory offenses. Section 455.2273, Florida Statutes, provides:

> (1) Each board, or the department when there is no board, shall adopt, by rule, and periodically review the disciplinary guidelines applicable to each ground for disciplinary action which may be imposed by the board, or the department when there is no board, pursuant to this chapter, the respective practice acts, and any rule of the board or department.
>
> (2) The disciplinary guidelines shall specify a meaningful range of designated penalties based upon the severity and repetition of specific offenses, it being the legislative intent that minor violations be distinguished from those which endanger the public health, safety, or welfare; that such guidelines provide reasonable and meaningful notice to the public of likely penalties which may be imposed for proscribed conduct; and that such penalties be consistently applied by the board.
>
> (3) A specific finding of mitigating or aggravating circumstances shall allow the board to impose a penalty other than that provided for in such guidelines. If

> applicable, the board, or the department when there is no board, shall adopt by rule disciplinary guidelines to designate possible mitigating and aggravating circumstances and the variation and range of penalties permitted for such circumstances.
>
> (4) The department must review such disciplinary guidelines for compliance with the legislative intent as set forth herein to determine whether the guidelines establish a meaningful range of penalties and may also challenge such rules pursuant to s. 120.56.
>
> (5) The administrative law judge, in recommending penalties in any recommended order, must follow the penalty guidelines established by the board or department and must state in writing the mitigating or aggravating circumstances upon which the recommended penalty is based.

49. In compliance with this statutory mandate, the Board has adopted Florida Administrative Code Rule 61J1-8.002, which sets forth the disciplinary guidelines applicable to the violations described in Section 475.624, Florida Statutes. The prescribed penalties, which the undersigned must follow if punishment is recommended, reveal the Board's judgment as to the relative severity of the various statutory offenses, providing an interpretive gloss that is useful in applying the disciplinary statutes at hand.

Culpable Negligence

50. The penalty ranges for the offenses described in Section 475.624(2) are set forth in Rule 61J1-8.002(3)(e), where

the several enumerated offenses are grouped into three categories of decreasing severity or grades of guilt. For ease of reference, the offenses within these penalty categories can fairly be denominated "first-degree offenses" (the most serious), "second-degree offenses," and "third-degree offenses" (the least serious). In relevant part, Rule 61J1-8.002(3)(e) provides as follows:

> [First-Degree Offenses:] In the case of fraud, misrepresentation and dishonest dealing, the usual action of the Board shall be to impose a penalty of revocation.
>
> [Second-Degree Offenses:] In the case of concealment, false promises and false pretenses, the usual action of the Board shall be to impose a penalty of a 3 to 5 year suspension and an administrative fine of $1000.
>
> [Third-Degree Offenses:] In the case of culpable negligence and breach of trust, the usual action of the Board shall be to impose a penalty from a $1000 fine to a 1 year suspension.

51. As the First District Court of Appeal has made clear, intent is an element of each of these offenses. See Munch, 592 So. 2d at 1143-44. Therefore, the Department must prove scienter, or guilty knowledge, in order to prove a violation of Section 475.624(2); it is not enough to show, e.g., that the licensee was merely negligent. For that reason, a finding of guilt entails a strong degree of moral culpability, warranting

the relatively severe penalties that Section 475.624(2) offenses carry.

52. In the present case, the Department has elected to travel under the theory that Cartaya exhibited "culpable negligence" in connection with the appraisals at issue, a third-degree offense. "Culpable negligence" is a term of art in criminal law, where it has the following meaning:

> "Culpable negligence consists of: more than a failure to use ordinary care toward others. In order for negligence to be culpable, it must be gross and flagrant. Culpable negligence is a course of conduct showing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or such an entire want of care as to raise a presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or such an indifference to the rights of others as is equivalent to an intentional violation of such rights. The negligent act or omission must have been committed with an utter disregard for the safety of others. Culpable negligence is consciously doing an act or following a course of conduct that the defendant must have known, or reasonably should have known, was likely to cause death or great bodily injury."

Carrin v. State, 875 So. 2d 719, 721 (Fla. 1st DCA 2004)(quoting Logan v. State, 592 So. 2d 295, 298 (Fla. 5th DCA 1991)).

53. In the instant context, financial damage or loss, not bodily injury, is the harm against which the disciplinary statute affords protection. Nevertheless, the above definition

of "culpable negligence" works well here. The requisite state of mind is a conscious indifference to consequences, which can be inferred from direct proof of reckless or wanton behavior.

54. The fact-finder is not convinced, and thus could not find above, that Cartaya prepared the appraisals at issue with conscious indifference to the consequences. Hence Cartaya has been found not guilty of culpable negligence as a matter of ultimate fact.

Reasonable Diligence

55. The penalty range for failing or refusing to exercise reasonable diligence is as follows:

> The usual action of the Board shall be to impose a penalty from a 5 year suspension to revocation and an administrative fine of $1000.

Fla. Admin. Code R. 61J1-8.002(3)(r). Comparing this penalty range to the penalties prescribed for the Section 475.624(2) offenses shows that the Board views the offense of failure to use reasonable diligence as being somewhat more serious than the second-degree offenses of promissory fraud and concealment (since revocation is a potential punishment for lack of diligence) and somewhat less serious than ordinary fraud and dishonest dealing, those first-degree offenses for which the lesser penalty of suspension is not usually allowed.

56. Because the Board plainly considers the Section 475.624(15) offense to be more serious than culpable negligence (a third-degree offense, an element of which is the mens rea of conscious indifference to consequences), it is obvious that merely negligent conduct (which need not be undertaken with guilty knowledge or intent) cannot support a finding of guilt on the charge of failure to use reasonable diligence. Standing implicitly behind the penalties prescribed in Rule 61J1-8.002(3)(r), therefore, is the Board's construction of Section 475.624(15) as requiring an intentional act. The requisite state of mind for this offense, it is concluded, is willful inattention, a deliberate failure or refusal or exercise reasonable diligence in the preparation of an appraisal.

57. The undersigned is not convinced that Cartaya was willfully inattentive to her work in preparing the appraisals in question. To the contrary, she seems to have intended to devote such care and attention to these appraisals as was reasonable under the circumstances. Thus, Cartaya was found not guilty, as a matter of ultimate fact, on the charge of failing or refusing to exercise reasonable diligence.

Uniform Standards of Professional Appraisal Practice

58. Florida-certified appraisers are obligated to comply with the Uniform Standards of Professional Appraisal Practice ("USPAP"), a code of conduct for appraisers developed and

published by a private entity known as the Appraisal Standards Board of the Appraisal Foundation. Section 475.628, Florida statutes, provides:

> Each appraiser registered, licensed, or certified under this part shall comply with the Uniform Standards of Professional Appraisal Practice. Statements on appraisal standards which may be issued for the purpose of clarification, interpretation, explanation, or elaboration through the Appraisal Foundation shall also be binding on any appraiser registered, licensed, or certified under this part.

Section 475.624(14) makes it a disciplinable offense to violate "any standard" prescribed in USPAP.

59. The penalty range for a violation of USPAP is identical to that prescribed for the Section 475.625(15) offense of failing to use reasonable diligence. Rule 61J1-8.002(3)(q) provides that as punishment for a violation of USPAP, "[t]he usual action of the Board shall be to impose a penalty from a 5 year suspension to revocation and an administrative fine of $1000."

60. Implicit in this penalty range is the Board's view that violating a USPAP standard is roughly as serious, in the main, as committing promissory fraud or ordinary fraud, see Rule 61J1-8.002(3)(e), both of which are characterized by an intent to deceive. To underscore the significance of this point, take note that the Board has chosen to punish culpable negligence

with less severe penalties than are authorized for violating a USPAP standard. Compare Rule 61J1-8.002(3)(e) with 61J1-8.002(3)(q). It would be patently anomalous (and grossly unfair) to penalize innocently incorrect——or even merely negligent——conduct that happens to violate a USPAP standard more harshly than culpably negligent conduct that does not violate USPAP, despite being undertaken recklessly, with a conscious indifference to the consequences. Thus, while Section 475.624(14) might be read on its face as describing a strict liability offense, the Board implicitly has construed the statute to require an element of intent, at least in the usual circumstances.

61. This interpretation cannot hold in all circumstances, however, because, as will be seen, USPAP clearly proscribes merely negligent conduct in some instances. Thus, it is concluded that, where a violation of USPAP can be shown without proof of the licensee's wrongful intent, the absence of guilty knowledge is a mitigating factor that permits a downward departure from the prescribed range of penalties.

62. Before turning to the specific charges under USPAP, a couple of preliminary observations are in order. First, the Department did not mention, in its Administrative Complaints, the specific USPAP provisions that it believed Cartaya had violated, saving the details for its Proposed Recommended Order.

Arguably the Department's factual allegations were adequate to place Cartaya on notice of the charges against her, and, to be sure, Cartaya could have pinned down the Department as to the particulars via discovery, but it is nevertheless somewhat disconcerting that the Department's Proposed Recommended Order has unleashed a barrage of accusations regarding multiple alleged violations of various USPAP provisions, the effect of which is to change the complexion of the case. Because Cartaya has not argued that this infringed her due process rights, however, the matter will not be further pursued here.

63. Second, the Department did not offer the relevant USPAP provisions into evidence or ask that official recognition of them be taken. The provisions of USPAP are facts that the Department needed to prove, and its failure to do so is arguably fatal to its prosecution of Count III of Case No. 04-1680 and Counts II and IV of Case No. 04-1148. On the other hand, the Department has quoted USPAP provisions in its Proposed Recommended Order, as has Cartaya herself. Put another way, neither party has made an issue out of the Department's failure properly to place USPAP into the evidentiary record; instead each has proceeded as if the "formality" of this proof can be dispensed with.

64. The problem with the parties' casual approach is that, without independent access to the text, the undersigned cannot

read the USPAP provisions in context, or even be sure that what the parties have quoted is accurate. As it happens, the undersigned has found the current version of USPAP, which is published on the internet,[15] and hence could study the uniform standards were it appropriate to do so. Because the parties have taken the liberty of relying upon and quoting USPAP despite the fact that USPAP is outside the record in this case, the undersigned has elected to review and rely upon the electronic version of USPAP. Whether doing so constitutes legal error is an issue that the parties can argue in another forum if need be.

65. The Department alleges that Cartaya violated the following USPAP standards, including the comments thereto, which latter are set forth in the endnotes:

> Standards Rule 1-1
>
> (This Standards Rule contains binding requirements from which departure is not permitted.)
>
> In developing a real property appraisal, an appraiser must:
>
> (a) be aware of, understand, and correctly employ those recognized methods and techniques that are necessary to produce a credible appraisal;[16]
>
> (b) not commit a substantial error of omission or commission that significantly affects an appraisal; and[17]
>
> (c) not render appraisal services in a careless or negligent manner, such as by making a series of errors that, although individually might not significantly affect

the results of an appraisal, in the aggregate affects the credibility of those results.[18]

Standards Rule 1-4

(This Standards Rule contains specific requirements from which departure is permitted. See the DEPARTURE RULE.)

In developing a real property appraisal, an appraiser must collect, verify, and analyze all information applicable to the appraisal problem, given the scope of work identified in accordance with Standards Rule 1-2(f).

(a) When a sales comparison approach is applicable, an appraiser must analyze such comparable sales data as are available to indicate a value conclusion.

Standards Rule 1-5

(This Standards Rule contains binding requirements from which departure is not permitted.)

In developing a real property appraisal, when the value opinion to be developed is market value, an appraiser must, if such information is available to the appraiser in the normal course of business:

(a) analyze all agreements of sale, options, or listings of the subject property current as of the effective date of the appraisal; and

(b) analyze all sales of the subject property that occurred within the three (3) years prior to the effective date of the appraisal.

Standards Rule 2-2

(This Standards Rule contains binding requirements from which departure is not permitted.)

Each written real property appraisal report must be prepared under one of the following

> three options and prominently state which option is used: Self-Contained Appraisal Report, Summary Appraisal Report, or Restricted Use Appraisal Report.[19]
>
> * * *
>
> (b) The content of a Summary Appraisal Report must be consistent with the intended use of the appraisal and, at a minimum:[20]
>
> * * *
>
> (vi) state the effective date of the appraisal and the date of the report;[21]
>
> * * *
>
> (ix) summarize the information analyzed, the appraisal procedures followed, and the reasoning that supports the analyses, opinions, and conclusions;[22]

66. The Department contends that Cartaya violated Standards Rule 2-2(b)(vi) in connection with the appraisal of the Hialeah Property by stating, in her Appraisal Report, both an incorrect effective date as well an erroneous report date. The Department's position is only partially persuasive. What Cartaya got wrong was the date of the report, for she mistakenly represented that the Appraisal Report had been signed on July 27, 2000, when in fact the correct date was August 7, 2000. The Department has failed convincingly to prove, however, that the effective date of Cartaya's appraisal of the Hialeah Property was not July 27, 2000, as stated in the Appraisal Report. Thus, the Department has established an unintentional violation of Standards Rule 2-2(b)(vi).

67. The Department asserts that Cartaya violated Standards Rules 1-5(b) and 2-2(b)(ix) by failing to disclose, in her Appraisal Report on the Hialeah Property, the sale to Hornedo that was scheduled to close on July 28, 2000, which was a "prior sale" of the subject property, according to the Department. This argument fails because the sale to Hornedo occurred one day after the effective date of Cartaya's appraisal of the Hialeah Property. However, Cartaya's mistake in dating the report as of the effective date of the appraisal obscured the fact that her opinion of value was effectively retroactive to a point in time that pre-dated a material transaction relating to the value of the subject property. Although the undersigned is convinced that Cartaya did not intend to deceive her client (which knew all about the Fannie Mae-Hornedo transaction in any event), the fact that the Appraisal Report failed clearly to reveal the retroactive nature of Cartaya's opinion of value meant that the rationale for the opinions and conclusions was insufficiently expressed. Thus, the Department has established an unintentional violation of Standards Rule 2-2(b)(ix).

68. The Department argues that Cartaya violated Standards Rules 1-5(a) and 2-2(b)(ix) by failing to disclose, in her Appraisal Report on the Hialeah Property, that the listing price for the subject property had changed several times in the months preceding her appraisal. This argument is not as compelling as

the Department believes, because Standards Rule 1-5(a) requires the appraiser to analyze listings and agreements of sale "current as of the effective date of the appraisal," which date in this case was July 27, 2000. Listings that were not current as of July 27, 2000, could be ignored without running afoul of Standards Rule 1-5(a). That said, Cartaya should have included in her Appraisal Report some reference to the Fannie Mae-Hornedo transaction, which was the subject of an agreement of sale current as of the effective date of the appraisal. Cartaya's failure to include a summary of her analysis of the pending sale constituted a violation of Standards Rule 2-2(b)(ix). The undersigned is not convinced, however, that this failure was willful.

69. The Department argues that Cartaya violated Standards Rules 1-5(a) and 2-2(b)(ix) by failing to disclose, in her Appraisal Report on the Hialeah Property, the supposed asking price/sales price differential with respect to "comparable one." The Department failed to prove that there was in fact such a differential, so this charge necessarily fails. Moreover, Standards Rule 1-5(a) requires that listing and sales prices for the subject property be analyzed; it says nothing about comparable properties, and thus could not have been violated in the way the Department contends in regard to this "comparable one."

70. The Department asserts that Cartaya committed multiple violations in connection with the comparables used in the appraisals of 1729 NW 18th St and 18032 NW 48th Place. The undersigned, however, has found as a matter of fact that the Department failed clearly and convincingly to prove that Cartaya chose inappropriate comparables for these properties. Thus, the instant accusations must fail.

Mitigating Circumstances

71. Florida Administrative Code Rule 61J1-8.002(4) provides as follows:

> (4)(a) When either the petitioner or respondent is able to demonstrate aggravating or mitigating circumstances to the Board by clear and convincing evidence, the Board shall be entitled to deviate from the above guidelines in imposing discipline upon a licensee. Whenever the petitioner or respondent intends to introduce such evidence to the Board in a Section 120.57(2), F.S., hearing, advance notice of no less than seven (7) days shall be given to the other party or else the evidence can be properly excluded by the Board.
> (b) Aggravating or mitigating circumstances may include, but are not limited to, the following:
> 1. The degree of harm to the consumer or public.
> 2. The number of counts in the administrative complaint.
> 3. The disciplinary history of the licensee.
> 4. The status of the licensee at the time the offense was committed.
> 5. The degree of financial hardship incurred by a licensee as a result of the

imposition of a fine or suspension of the license.
6. Violation of the provision of Part II of Chapter 475, F.S., wherein a letter of guidance as provided in Section 455.225(3), F.S., previously has been issued to the licensee.

72. As mitigating factors, the undersigned finds that the no harm to any consumer or the public resulted from Cartaya's violations of USPAP. Further, none of the violations was intentional; at worst, Cartaya was negligent, but it is at least equally as likely that she thought she was complying with USPAP even as she failed to do so. Finally, Cartaya has a clean disciplinary record. She is not a repeat offender.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board enter a final order finding that:

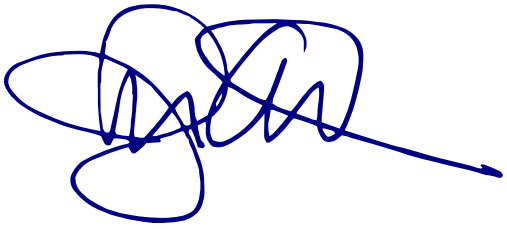
(1) As to Case No. 04-1148, Cartaya is not guilty on Counts I through VI, inclusive;

(2) As to Case No. 04-1680, Cartaya is not guilty on Counts I, II, and IV; she is, however, guilty, under Count III, of one unintentional violation of Standards Rule 2-2(b)(vi) and two unintentional violations of Standards Rule 2-2(b)(ix).

(3) As punishment for the violations established, Cartaya's certificate should be suspended for 30 calendar days, and she should be placed on probation for a period of one year,

a condition of such probation being the successful completion of a continuing education course in USPAP. In addition, Cartaya should be ordered to pay an administrative fine of $500.

DONE AND ENTERED this 10th day of November, 2004, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of November, 2004.

ENDNOTES

[1]/ To be clear, the undersigned is not finding here that the Department's allegations are true. Rather, he is simply repeating, for the reader's benefit, what the Department has alleged.

[2]/ In its Proposed Recommended Order, the Department has pursued only the allegation of culpable negligence, effectively abandoning the charges of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest conduct, and breach of trust. As to these latter offenses, then, Cartaya is found not guilty without further comment.

[3]/ In its Proposed Recommended Order, the Department conceded that it had failed to prove this charge——an assessment with

which the undersigned agrees. Thus, Cartaya is not guilty of violating Section 475.624(17).

[4]/ The findings in paragraphs 7 through 13 of this Recommended Order are based largely on the so-called "Report History" that Cartaya prepared for the Department on October 24, 2001. This Report History was attached to the Administrative Complaint as Exhibit 1 and was received in evidence at hearing as Petitioner's Exhibit 19. The statements that Cartaya made in the Report History, having been offered against her at hearing, are admissible as substantive evidence under the "admissions" exception to the hearsay rule. See § 90.802(18)(a), Fla. Stat.

[5]/ The Appraisal Report states, apparently erroneously, that Cartaya signed the report on July 27, 2000.

[6]/ In paragraph 16 of the Amended Complaint, the Department alleged that the "public records reflect that the subject property is of mixed construction." The undersigned does not know to what "public records" the Department was referring but emphasizes that there is insufficient nonhearsay evidence in the record to convince him that the Hialeah Property is of "mixed construction."

[7]/ In its Proposed Recommended Order, the Department contends, on the authority of Section 475.28(2), Florida Statutes, that Cartaya's entire workfile is competent evidence, standing alone, of the truth of any matter to which reference was made in any document contained therein. Section 475.28(2) provides:

> Photostatic copies of any papers or documents may be introduced in lieu of the originals in any proceeding or prosecution under this chapter. The books of account and records of any person shall be admissible upon a showing that they were made in the regular course of business, without introducing the person who made the entries, the weight of such evidence to be decided by the court or commission.

The Department misperceives the operation of Section 475.28(2). First, the admissibility of Cartaya's workfile was not really an issue, because the file was admissible for nonhearsay purposes (such as to show whether she had properly maintained a workfile in accordance with governing law) having nothing to do with the

truth of the matters asserted therein. Ruling that a document is "admissible" is not the equivalent of deeming it competent proof of the truth of its contents. Second, while Section 475.28(2) arguably relaxes the "business records exception" to the hearsay rule, it nevertheless requires that the offering party lay a predicate, namely that each record have been made in the regular course of business. In this case, Cartaya's workfile contains materials that she did not make, but rather received in the regular course of business. Regarding these documents that Cartaya did not make, there is no persuasive evidence (i.e. testimony by a witness having personal knowledge) showing that any of them were made in the regular course of business. Absent the proper predicate, these materials are simply uncorroborated hearsay, which cannot support of finding of fact. See § 120.57(1)(c), Fla. Stat. Finally, even if all the papers in Cartaya's workfile were admissible as substantive evidence, determining the weight of that evidence is exclusively the province of the undersigned as fact-finder. To the extent that the findings of fact herein ignore——or are in conflict with——any assertion made in any document contained in Cartaya's workfile, it is because the undersigned, in sifting through and weighing the evidence, determined that the matters ignored or rejected were insufficiently probative to clearly convince the undersigned of their truth.

[8]/ See § 90.801(1)(c), Fla. Stat. (defining "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.").

[9]/ See § 120.57(1)(c), Fla. Stat. ("Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.")

[10]/ Logically, if there were no zoning violations, then there was nothing for Cartaya to fail or refuse to explain or make adjustments for.

[11]/ The Yeomans Report repeats measurements for frontage and lot size without identifying the source thereof. There is no persuasive evidence that Mr. Yeomans had personal knowledge of these measurements; rather, the likelihood is that he obtained the figures from some reference extrinsic to himself. Thus, the figures in the Yeomans Report are considered hearsay for which no exception to the hearsay rule was established.

[12]/ A statement must be an "assertion" to be hearsay. See § 90.801(1)(a), Fla. Stat. (defining "statement" as an "assertion"). An "assertion" is a "positive declaration" that communicates a thought, idea, or fact. See, e.g., Lark v. State, 617 So. 2d 782, 789 (Fla. 1st DCA)(query was not assertion), rev. denied, 626 So. 2d 208 (Fla. 1993). Legal codes are prescriptive rather than assertive and hence are to be obeyed rather than believed.

[13]/ The legitimacy and authority of a legal code arise not from its fidelity to fact or reality (i.e. its "truth") but from the source of the law and the lawgiver's power to enforce it.

[14]/ Taken together, the terms of a zoning code as it exists at any given point in time comprise an objective fact that ordinarily should be proved by offering a true and correct (i.e. properly authenticated) copy of the pertinent text. (Expert opinion testimony is neither necessary nor even appropriate proof of the provisions of a legal code, because the terms of a written text are not matters of opinion or beyond the ken of any literate human being to comprehend.) Although it is permissible for a witness with personal knowledge of the code's terms to testify about them over a hearsay objection, as acknowledged above, such testimony is inherently unconvincing, for several reasons. First, no one is likely to recall every detail accurately, and details matter in dealing with a legal code. Second, the fact-finder has no idea whether the witness examined every potentially relevant provision of the code in question, and completeness counts in dealing with a legal code. Third, without the text of the code, it is impossible for the fact-finder to evaluate whether the witness is repeating verbatim what he has read in the code (as fact), or rather is offering an interpretation based on the memory of what he has seen (which would amount to an inadmissible legal opinion regarding the code's meaning). At bottom, as proof of a legal code, fact witness testimony is simply too unreliable to constitute clear and convincing evidence.

[15]/ See <http://www.appraisalfoundation.org/html/USPAP2004/forward.htm>.

[16]/ Comment: This Rule recognizes that the principle of change continues to affect the manner in which appraisers perform appraisal services. Changes and developments in the real estate field have a substantial impact on the appraisal profession. Important changes in the cost and manner of constructing and

marketing commercial, industrial, and residential real estate as well as changes in the legal framework in which real property rights and interests are created, conveyed, and mortgaged have resulted in corresponding changes in appraisal theory and practice. Social change has also had an effect on appraisal theory and practice. To keep abreast of these changes and developments, the appraisal profession is constantly reviewing and revising appraisal methods and techniques and devising new methods and techniques to meet new circumstances. For this reason, it is not sufficient for appraisers to simply maintain the skills and the knowledge they possess when they become appraisers. Each appraiser must continuously improve his or her skills to remain proficient in real property appraisal.

[17]/ Comment: In performing appraisal services, an appraiser must be certain that the gathering of factual information is conducted in a manner that is sufficiently diligent, given the scope of work as identified according to Standards Rule 1-2(f), to ensure that the data that would have a material or significant effect on the resulting opinions or conclusions are identified and, where necessary, analyzed. Further, an appraiser must use sufficient care in analyzing such data to avoid errors that would significantly affect his or her opinions and conclusions.

[18]/ Comment: Perfection is impossible to attain, and competence does not require perfection. However, an appraiser must not render appraisal services in a careless or negligent manner. This Standards Rule requires an appraiser to use due diligence and due care.

[19]/ Comment: When the intended users include parties other than the client, either a Self-Contained Appraisal Report or a Summary Appraisal Report must be provided. When the intended users do not include parties other than the client, a Restricted Use Appraisal Report may be provided.

The essential difference among these three options is in the content and level of information provided.

An appraiser must use care when characterizing the type of report and level of information communicated upon completion of an assignment. An appraiser may use any other label in addition to, but not in place of, the label set forth in this Standard for the type of report provided.

The report content and level of information requirements set forth in this Standard are minimums for each type of report. An appraiser must supplement a report form, when necessary, to ensure that any intended user of the appraisal is not misled and that the report complies with the applicable content requirements set forth in this Standards Rule.

A party receiving a copy of a Self-Contained Appraisal Report, Summary Appraisal Report, or Restricted Use Appraisal Report in order to satisfy disclosure requirements does not become an intended user of the appraisal unless the appraiser identifies such party as an intended user as part of the assignment.

[20]/ Comment: The essential difference between the Self-Contained Appraisal Report and the Summary Appraisal Report is the level of detail of presentation.

[21]/ Comment: The effective date of the appraisal establishes the context for the value opinion, while the date of the report indicates whether the perspective of the appraiser on the market or property use conditions as of the effective date of the appraisal was prospective, current, or retrospective.

Reiteration of the date of the report and the effective date of the appraisal at various stages of the report in tandem is important for the clear understanding of the reader whenever market or property use conditions on the date of the report are different from such conditions on the effective date of the appraisal.

[22]/ Comment: The appraiser must be certain that the information provided is sufficient for the client and intended users to adequately understand the rationale for the opinions and conclusions.

When the purpose of an assignment is to develop an opinion of market value, a summary of the results of analyzing the information required in Standards Rules 1-5 and 1-6 is required. If such information is unobtainable, a statement on the efforts undertaken by the appraiser to obtain the information is required. If such information is irrelevant, a statement acknowledging the existence of the information and citing its lack of relevance is required.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.