

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 06-3720PL
)
DONALD LEE PRICE,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Notice was provided and on February 16, 2007, a formal hearing was held in this case in accordance with Sections 120.569 and 120.57(1), Florida Statutes (2006). The hearing was conducted by video-teleconferencing between sites in Tallahassee and Jacksonville, Florida. The case was heard by Charles C. Adams, Administrative Law Judge.

APPEARANCES

For Petitioner: Racquel A. White, Esquire
Department of Business and
Professional Regulation
Hurston Building, North Tower
400 West Robinson Street, Suite N 801
Orlando, Florida 32801

For Respondent: Martin A. Pedata, Esquire
Martin A. Pedata, P.A.
150 Wildwood Road
Deland, Florida 32720

STATEMENT OF THE ISSUE

Should the Florida Real Estate Appraisal Board (the Board) take action against Respondent, a certified residential appraiser (appraiser) for violations under Chapter 475, Part II, Florida Statutes (2005).

PRELIMINARY STATEMENT

On April 6, 2006, the Board in Florida Department of Business and Professional, Division of Real Estate, Petitioner, vs. Donald Lee Price, Respondent, FDBPR Case No. 2005044720, charged Respondent with violations of Chapter 475, Part II, Florida Statutes (2005), in his capacity as an appraiser. The Administrative Complaint alleged in pertinent part:

4. On or about July 19, 2005, Donald Lee Price (Respondent) developed and communicated an appraisal report for property commonly known as 4409 Moncrief Road, Jacksonville, FL 32209 (Subject Property), and estimated its value at \$27,000. . . .

5. Respondent failed to state in the Report that the Subject Project subdivision is 58% investor owned, and only 42% owner occupied. Respondent failed to utilize the Income Approach in the Report.

6. Respondent misstated that the price range in the Subject Property neighborhood was between \$12,000 and \$216,000. This was a typographical error; the high end number was supposed to have been '\$21,6000.'

7. Respondent misstated that the Subject Property was attached, when it is actually a detached townhouse.

8. Respondent misstated that the Subject Property had four (4) window air conditioning units, when it actually has three (3).

9. There was no documentation in the work file to support the land value and site improvement estimates reached in the Cost Approach section of the Report.

10. There was no documentation in the work file to support the \$500 negative adjustment made to comparable sale 3 for its screened-in porch in the Sales Comparison Analysis section of the Report.

Based upon those alleged facts, the Board in six separate counts accuses the Respondent of violating Chapter 475, Part II, Florida Statutes (2005), together with standards rules within the Uniform Standards of Professional Appraisal Practice (2005), commonly known as USPAP. Those counts to the Administrative Complaint are explained in the conclusions of law.

Respondent was provided a form referred to as an "Election of Rights." It allowed Respondent to decide among options in addressing the Administrative Complaint. He chose to dispute the allegations of fact contained in the Administrative Complaint. By that choice he was perceived as petitioning for a formal hearing pursuant to Section 120.57(1), Florida Statutes, by signing his election under oath on June 20, 2006.

On October 2, 2006, the Division of Administrative Hearings (DOAH), in the person of Robert Cohen, Director and Chief Judge, received the request for formal hearing, together with a copy of

the Administrative Complaint and Election of Rights form. The case was assigned to the present administrative law judge as DOAH Case No. 06-3720PL.

The case was originally set to be heard on December 19, 2006. Respondent, pro se, filed a request for continuance, which was opposed. On October 24, 2006, an order was entered denying the request for continuance.

Respondent, pro se, filed a "Request for Subpoena Order to Compel." Petitioner filed a response in opposition to that request. On December 6, 2006, an order was entered denying the request to compel.

On December 12, 2006, Respondent's attorney filed his appearance. On that date Respondent moved to continue the hearing. That motion was unopposed. On December 15, 2006, an order was entered granting the continuance and rescheduling the hearing to be heard on February 16, 2007.

Petitioner presented James Love and James Pierce as its witnesses. Petitioner's Exhibit numbered 2, pages 73 through 210 and Petitioner's Exhibit numbered 9 were admitted. Respondent testified in his own defense. Respondent's Exhibit numbered 1 was admitted. Respondent's Exhibit numbered 2 was denied admission. All exhibits are included with this record.

Petitioner requested official recognition of Sections 475.624 and 475.629, Florida Statutes (2005) and standards rules

1-1, 1-4, 1-6, and 2-1, USPAP (2005), as mentioned in the Administrative Complaint. Official recognition was made in relation to the statutes and standards rules.

On March 22, 2007, the hearing transcript was filed. On April 2, 2007, the parties filed proposed recommended orders, which have been considered in preparing the Recommended Order.

FINDINGS OF FACT

1. Respondent holds certificate no. RD-3933, as a certified residential appraiser issued by the Department of Business and Professional Regulation in accordance with Chapter 475, Part II, Florida Statutes (2005).

2. Respondent's certificate is in an active status. His business address is 2302 Mitchell Place, Jacksonville, Florida, according to Petitioner's records.

3. Kadrina E. Jackson owned property at 4409 Moncrief Road, Jacksonville, Florida, in Washington Heights Estates. A town home was located on the property. James F. Love attempted to purchase the property from Ms. Jackson. As part of the transaction Respondent performed a residential appraisal in relation to the property and rendered a Uniform Residential Appraisal Report (report) for which he charged \$300. On July 19, 2005, the report was signed.

4. The sales price for the property was \$27,000. The appraised value was \$27,000.

5. Mr. Love believed that the appraisal was incorrect and filed a complaint with Petitioner.

6. James Pierce is Petitioner's investigator assigned to the case. He has worked with the agency for over 12 years. His background includes several instructional courses sponsored by the Division of Real Estate. He has taken the approved AB-1 appraisal course and successfully completed the program. The AB-1 appraisal course is for persons who wish to become licensed trainee appraisers. He has conducted approximately 50 appraisal investigations.

7. As part of the investigation of the complaint by Mr. Love, Investigator Pierce interviewed Respondent and others. Mr. Pierce conducted a physical inspection of the property in question from the outside and did research concerning the underlying information within the report.

8. Investigator Pierce requested Respondent to provide a true and complete copy of the report under consideration, in addition to a complete copy of the work file of the work done in completing that report. Mr. Pierce also requested Respondent to provide the investigator a complete copy of previous reports that have been conducted by River City Appraiser Services, Inc. (River City) where Respondent worked. As requested, Respondent provided information for the Moncrief property associated with the July 9, 2005 report but not previous reports as completed by River City.

9. In relation to the section of the report dealing with the cost approach, it was commented:

Due to the age of the subject improvements, development of reproduction costs (an exact replica) or replacement costs (new construction) could be misleading because the building codes have changed and building labor and material costs fluctuate. This section was used to determine land value only. Estimated remaining economic life: 40 years.

The cost approach did not lead to a determination of the appraised value as \$27,000. It referred to site value at \$5,000 and the "as is" value of site improvements as \$5,000.

10. When Mr. Pierce reviewed materials submitted by Respondent, he did not find separate calculations that would support the land value and site improvement estimates listed in the cost approach section found in the report.

11. Three comparable sales are listed in the report. Comparable sale one dates from February 2005. Comparable sale two dates from January 2005. Comparable sale three dates from May 2005.

12. All comparable properties in the report were in the same subdivision where the Subject Property is found. The sale prices ranged from \$23,000 to \$27,000, with the median sales price being \$24,500.

13. Investigator Pierce did not find documentation designed to support a \$500 negative adjustment for the screen porch in comparable sale three within the sales comparison section to the report.

14. The report indicates that predominate occupancy in the neighborhood is owner-occupancy with 0 to 5% vacancy. Respondent told Mr. Price that no research had been done in relation to that determination and no supporting documentation was found in the work file that would indicate the predominant occupancy as being owner occupancy.

15. The report indicates information about single-family housing sales and a price range from \$12,000 to \$216,000, whereas Respondent's work file provided information on several properties that were available and had been sold recently as being a range between \$12,000 and \$69,000, excluding the \$216,000 reference.

16. The report under general description indicated that the house is attached. From his most recent observation Mr. Pierce considered the townhouse to be detached. Investigator Pierce's prior knowledge of the neighborhood is that individual housing units have exterior walls, which when originally built were approximately one inch in separation from the next unit. He is not sure whether that condition (one inch separation) exists today. He cannot attest to it with certainty.

17. The report refers to four window a/c units in the townhouse. Mr. Pierce in his physical inspection of the property from the outside of the property and based upon photos of the property found within the report, believes that there are only three window air-conditioning units.

18. The neighborhood where the subject home is found has several types of property: two-story town home properties with two to four bedrooms; single-story units that have two bedrooms and one bath; and properties that are designed as duplexes with common walls. With the exception of the duplexes, the lots are zero lot line properties. The reference to zero lot line in this case refers to the lot line beginning and ending at the exterior walls of an individual unit.

19. Respondent's reason for describing the property as an attached unit is based upon his observation that the unit exterior wall touches the next door property wall. He observed that when you stand in front of the property you cannot see between those two buildings.

20. In deciding that the property was a townhouse, Respondent used the Marshall and Swift Residential Cost Handbook. The definition within that reference source considers townhouses to be single-family attached residences.

21. Respondent determined that the predominant occupancy in the neighborhood was owner-occupancy based upon by driving through the neighborhood. The determination of predominant occupancy involved looking at some public records and the Multiple Listing Service (MLS). When someone let Respondent in the home that is at issue, he asked the question "Hey are there a lot of renters in here or people own." That person believed that most people in the neighborhood owned the homes. He arrived at an occupancy rate by that same process of driving around the neighborhood.

22. Following the inspection of the Subject Property, Respondent looked into comparables through information pulled from the MLS.

23. The Subject Property had not been renovated. It had not be updated. It had no central heating or air. In trying to locate comparables, Respondent looked for properties that were similar in their condition.

24. The first comparable was half a mile from the Subject Property.

25. In comparing comparable two with the Subject Property, Respondent recognized that each had two bedrooms and a single bath.

26. The reference to the minus \$500 within the report for comparable three and the screen porch, was to reflect the fact that the Subject Property did not have a screen porch. It is inferred that Respondent was attempting to reflect similarities for comparison purposes by deleting a feature that is found in the comparable, not found in the Subject Property. The value of the screen porch was determined on the basis of Respondent's experience and use of the Marshall and Swift Handbook. Concerning the lack of documentation in Respondent's work file, Respondent did not believe that it was necessary to do anything other than utilize the reference book to arrive at his determination.

27. As he explained, Respondent determined the \$12,000 to \$216,000 range of prices in his report by resort to the MLS. The reference source reflected a \$216,000 amount at the extreme. The range of prices for sales in neighborhoods like the Washington Heights subdivision were from \$12,500 through the \$216,000 according to the MLS. The next highest was \$69,000. The reference to \$216,000 for a sale in the MLS seemed "odd" to Respondent. He did not double check to verify that the sale of the home was \$216,000 through a review of public records, not believing that this was necessary in the conduct of his business.

28. The basis for indicating that four a/c units were located at the townhouse, was Respondent's observation that there were two in the front and two in the back. Whether three or four units were found at the home would not affect the appraisal from Respondent's perspective. The a/c units were not part of his determination of \$27,000 appraised value.

29. In preparing the report Respondent did not utilize the cost approach. The only reason for referring to the cost approach in the report was that the lender had requested an opinion of the land value for insurance purposes.

30. There was an earlier version of the report on the Subject Property that did not reflect the site value or land value which had been requested to be included later on. The earlier version without the indication of the site value with improvements was not provided to Investigator Pierce. With the change requested by the lender, to include the site value with improvements, Respondent did not maintain the earlier report that did not reflect the site value.

31. The determination of the appraised value did not utilize the income approach either.

32. The basis for determination was the sales comparison approach.

33. Given that there was no determination utilizing the cost approach or income approach, Respondent had no documentation available to explain those approaches.

34. In the addendum to the report under the final reconciliation Respondent did comment, "Investors are active in the area with possible unrecorded sales."

CONCLUSIONS OF LAW

35. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding in accordance with Sections 120.569, 120.57(1), and 455.225, Florida Statutes (2006).

36. In this case the Board has disciplinary authority in accordance with Section 475.624, Florida Statutes (2005), which states:

Discipline.-The board . . . 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 ten years . . . certification of any such appraiser, or place any such appraiser on probation . . .

That provision goes on to describe specific grounds for discipline, some of which are implicated in this action.

37. Respondent is a "certified residential appraiser" who holds certificate number RD-3933 issued by the Department on February 12, 2003. § 475.612 Fla. Stat. (2006).

38. In relation to this case the following definitions
pertain. § 475.611, Florida Statutes (2005):

(1) As used in this part, the term:

(a) "Appraisal" or "appraisal services" means the services provided by certified or licensed appraisers or registered trainee appraisers, and includes:

1. "Appraisal assignment" denotes an engagement for which a person is employed or retained to act, or could be perceived by third parties or the public as acting, as an agent or a disinterested third party in rendering an unbiased analysis, opinion, review, or conclusion relating to the nature, quality, value, or utility of specified interests in, or aspects of, identified real property.

* * *

(c) "Appraisal report" means any communication, written or oral, of an appraisal, appraisal review, appraisal consulting service, analysis, opinion, or conclusion relating to the nature, quality, value, or utility of a specified interest in, or aspect of, identified real property, and includes any report communicating an appraisal analysis, opinion, or conclusion of value, regardless of title. However, in order to be recognized in a federally related transaction, an appraisal report must be written.

* * *

(f) "Appraiser" means any person who is a registered trainee real estate appraiser, licensed real estate appraiser, or a certified real estate appraiser. An appraiser renders a professional service and is a professional within the meaning of s. 95.11(4)(a).

(g) "Board" means the Florida Real Estate Appraisal Board established under this section.

* * *

(i) "Certified residential appraiser" means a person who is certified by the department as qualified to issue appraisal reports for residential real property of one to four residential units, without regard to transaction value or complexity, or real property as may be authorized by federal regulation.

(j) "Department" means the Department of Business and Professional Regulation.

* * *

(o) "Uniform Standards of Professional Appraisal Practice" means the most recent standards approved and adopted by the Appraisal Standards Board of the Appraisal Foundation.

* * *

(q) "Work file" means the documentation necessary to support an appraiser's analysis, opinions, and conclusions.

39. Petitioner bears the burden of proof in this disciplinary case. Proof sufficient to sustain the allegations in the Administrative Complaint must be by clear and convincing evidence. See § 120.57(1)(j), Fla. Stat. (2006), and Department of Banking and Finance Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996) and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

The term clear and convincing evidence is explained in the case In re: Davey, 645 So. 2d 398 (Fla. 1994), quoting with approval from Slomowitz v. Walker, 429 So. 2d 797 (Fla. 4th DCA 1983).

40. Recognizing the disciplinary nature of this case Section 475.624, Florida Statutes (2005), in pertinent part, is

strictly construed in determining whether a violation has occurred. See State v. Pattishall, 99 Fla. 296 and 126 So. 147 (Fla. 1930); Munch v. Dept. of Bus. and Prof. Reg., 592 So. 2d 1136 (Fla. 1st DCA 1992); Fleishman v. Dept. of Bus. and Prof. Reg., 441 So. 2d 1221 (Fla. 3rd DCA 1983); and Lester v. Department of Professional and Occupational Regulation, State Board of Medical Examiners, 348 So. 2d 923 (Fla. 1st DCA 1977).

41. Based upon the factual allegations in the Administrative Complaint set out in the preliminary statement, Respondent is charged in Counts I through VI with statutory violations.

42. Count I states:

. . . Respondent has violated a standard for the development or communication of a real estate appraisal, specifically Standard Rule 1-1(a), (b) and (c), or other provision of the Uniform Standards of Professional Appraisal Practice (2005) in violation of Section 475.624(14), Florida Statutes.^[1]

43. Section 475.624(14), Florida Statutes (2005), allows discipline if Respondent:

(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.

44. In relation to USPAP (2005) it states:

Standards Rule 1-1 (This Standards Rule contains binding requirements for 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;

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.

(b) not commit a substantial error of omission or commission that significantly affects an appraisal; and

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.

(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.

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.

45. Petitioner failed to present a witness that was established as competent to explain the expectations for certified real estate residential appraisers concerning awareness, understanding and correct implementation of recognized methods and techniques necessary to produce a credible appraisal as contemplated in USPAP Standards Rule 1-1(a). Similarly, Petitioner did not present competent evidence concerning the expectation that a certified residential appraiser not commit substantial error involving omission or commission that significantly affects the appraisal as addressed in USPAP Standards Rule 1-1(b). Finally, Petitioner did not present competent evidence concerning careless or negligent rendition of the appraisal services through a series of errors that in the

aggregate affects the credibility of the results as addressed in USPAP Standards Rule 1-1(c). Nothing in Respondent's testimony serves to support Petitioner's case so that clear and convincing evidence may be found that Respondent violated USPAP Standards Rule 1-1(a) through (c) reflected in Count I. Therefore, no violation has been established pertaining to Count I.

46. Count II states:

. . . Respondent has violated a standard for the development or communication of a real estate appraisal, specifically Standard Rule 1-4(b) and (c), or other provision of the Uniform Standards of Professional Appraisal Practice (2005) in violation of Section 475.624(14), Florida Statutes.

47. In relation to USPAP (2005) it states:

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).

* * *

(b) When a cost approach is applicable, an appraiser must:

(i) develop an opinion of site value by an appropriate appraisal method or technique;

(ii) analyze such comparable costs data as are available to estimate the cost new of the improvements (if any); and

(iii) analyze such comparable data as are available to estimate the difference between the cost new and the present worth of the improvements (accrued depreciation).

(c) When an income approach is applicable, an appraiser must:

(i) analyze such comparable rental data as are available and/or the potential earnings capacity of the property to estimate the gross income potential of the property;

(ii) analyze such comparable operating expense data as are available to estimate the operating expenses of the property;

(iii) analyze such comparable data as are available to estimate rates of capitalization and/or rates of discount; and

(iv) base projections of future rent and/or income potential and expenses on reasonably clear and appropriate evidence.

Comment: In developing income and expense statements and cash flow projections, an appraiser must weigh historical information and trends, current supply and demand factors affecting such trends, and anticipated events such as competition from developments under construction.

48. As before, no competent evidence was presented concerning the occasion in which a certified residential appraiser would find a cost approach or an income approach applicable that would impose the substantive requirements within the rule. The only competent evidence on this subject was provided by Respondent who gave reasons for not applying the cost

approach and income approach in this appraisal. Therefore, clear and convincing evidence has not been presented to show a violation as alleged in Count II.

49. Count III alleges that:

. . . Respondent has violated a standard for the development or communication of a real estate appraisal, specifically Standard Rule 1-6(a) and (b), or other provision of the Uniform Standards of Professional Appraisal Practice (2005) in violation of Section 475.624(14), Florida Statutes.

50. In relation to USPAP (2005) it states:

Standards Rule 1-6 (This Standards Rule contains binding requirements from which departure is not permitted.)

In developing a real property appraisal, an appraiser must:

(a) reconcile the quality and quantity of data available and analyzed within the approaches used; and

(b) reconcile the applicability or suitability of the approaches used to arrive at the value conclusion(s).

Comment: See the Comments to Standards Rules 2-2(a)(ix), 2-2(b)(ix), and 2-2(c)(ix) for corresponding reporting requirements.

No competent evidence was presented concerning attempts by Respondent to reconcile the quality and quantity of the data available and the data analyzed within the approach used in performing the appraisal. Respondent's testimony concerning the quality and quantity of data available and analyzed in the sales

comparison approach used did not point to a lack of reconciliation between the quality and quantity of data available and analyzed in performing the appraisal. No competent evidence was presented by Petitioner to prove the lack of reconciliation as to the applicability or suitability of the approach used to arrive at the value conclusion in the appraisal. Respondent in his testimony explained the approach in arriving at the value and the reason for the approach without conceding a lack of reconciliation. No violation in relation to Count III has been established.

51. Concerning the allegations in Count IV it is alleged:

. . . Respondent has violated a standard for the development or communication of a real estate appraisal, specifically Standard Rule 2-1(a) and (b), or other provision of the Uniform Standards of Professional Appraisal Practice (2005) in violation of Section 475.624(14), Florida Statutes.

52. In relation to USPAP (2005) it states:

Standards Rule 2-1 (This Standards Rule contains binding requirements from which departure is not permitted.)

Each written or oral real property appraisal report must:

(a) clearly and accurately set forth the appraisal in a manner that will not be misleading;

(b) contain sufficient information to enable the intended users of the appraisal to understand the report properly;

* * *

No competent evidence was presented that would prove lack of clarity or accuracy in setting forth the appraisal such as not to mislead. Respondent's testimony offered no concession as to the clarity and accuracy of the appraisal in the interest of avoiding a misleading impression. No competent evidence was presented concerning the sufficiency of the information as it might enable the intended user of the appraisal to properly understand the report; this from the side of Petitioner. Respondent's testimony did not concede that the report was not sufficient in its information to allow the intended user to properly understand the report. Petitioner has failed to prove a violation in Count IV.

53. Count V states:

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

54. Section 475.624(15), Florida Statutes (2005), allows discipline if Respondent:

Has failed or refused to exercise reasonable diligence in developing an appraisal or preparing an appraisal report.

Again, no competent evidence was presented from a person with sufficient insight into what constitutes reasonable diligence on

the part of a certified residential appraiser when developing an appraisal or in preparing a report to allow a legal conclusion to be reached. No competent proof was presented by Petitioner in that regard. Respondent in his testimony did not concede a lack of reasonable diligence in the development of the appraisal in preparation of the report. Therefore, no violation has been shown concerning Count V.

55. To summarize, Counts I through V contemplate the need to place Respondent's acts in the context of conformance with standards appropriate for certified residential appraisers. Without testimony from a certified residential appraiser or someone with equivalent credentials who has been qualified to express an opinion concerning Respondent's compliance with applicable standards related in the statute and USPAP it cannot be determined whether a violation(s) occurred. Petitioner did not present a person who was qualified to testify in that manner. Investigator Pierce was presented as a witness. His background was established in the record and reported in the findings of fact. He gathered facts and testified concerning those facts. He explained his understanding of certain terminology given his background. He was not qualified as an expert for purposes of offering opinion testimony concerning Respondent's compliance with standards applicable to a certified residential appraiser. It would be inappropriate to infer from his testimony that it

constituted an opinion concerning Respondent's performance in relation to those standards.

56. On the subject of the underlying facts alleged in the Administrative Complaint, it was not established that the Subject Property is found within a subdivision which is 58 percent investor-owned and 42 percent owner occupied as alleged. Respondent did not use the income approach in the report (but it was not shown to have legal significance). There was a basis for Respondent's belief that the price range for sales in the neighborhood was between \$12,500 and \$216,000, taken from the MLS. Clear and convincing evidence was not presented to prove that the townhouse was detached when Respondent had claimed that it was attached. Clear and convincing evidence was not presented to prove that the Subject Property had three air-conditioning window units when the appraisal was performed, as contrasted with the four air-conditioning units that Respondent noted in the report. Separate documentation in the work file that explains the land value and site improvement estimates in the cost approach section to the report was not found. Nor was there documentation in the work file to support the \$500 negative adjustment on comparable sale three in relation to the screen porch and the sales comparison analysis section of the report (but it was not shown to have legal significance).

57. Count VI states:

. . . Respondent is guilty of failing to retain, for at least five years, original or true copies of any contracts engaging the appraiser's services, appraisal reports, and supporting data assembled and formulated by the appraiser in preparing appraisal reports in violation of Section 475.629, Florida Statutes and, therefore, in violation of Section 475.624(4), Florida Statutes.

58. Section 475.629, Florida Statutes (2005), states:

Retention of records.--An appraiser registered, licensed, or certified under this part shall retain, for at least 5 years, original or true copies of any contracts engaging the appraiser's services, appraisal reports, and supporting data assembled and formulated by the appraiser in preparing appraisal reports. The period for retention of the records applicable to each engagement of the services of the appraiser runs from the date of the submission of the appraisal report to the client. These records must be made available by the appraiser for inspection and copying by the department on reasonable notice to the appraiser. If an appraisal has been the subject of or has served as evidence for litigation, reports and records must be retained for at least 2 years after the trial.

59. Section 475.624(4), Florida Statutes (2005), allows discipline if Respondent:

Has violated any of the provisions of this section or any lawful order or rule issued under the provisions of this section or chapter 455.

60. The failure to comply with the retention requirements at Section 475.629, Florida Statutes (2005), does not constitute a violation of a lawful order or rule issued under the provisions of the aforementioned section or Chapter 455. By extension it

could arguably be considered a violation of Section 475.624(1), Florida Statutes (2005), that allows discipline if Respondent:

(1) Has violated any provisions of this part or s. 455.227(1); however, certificate-holders, registrants, and licensees under this part are exempt from the provisions of s. 455.227(1)(i).

Section 475.629, Florida Statutes (2005), is found within Chapter 475, Part II, Florida Statutes (2005).

61. When considering the factual allegations in the Administrative Complaint, no facts were alleged concerning the lack of retention of "contracts engaging the appraiser's services, reports, and supporting data assembled and formulated by the appraiser in preparing the appraisal reports." See Cottrill, supra. The allegations are related to other acts or omissions on Respondent's part as explained. They do not involve retention per se of the various categories of information set out in Section 475.629, Florida Statutes (2005). See Trevisani v. Department of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005).

62. Without a relationship between what the Administrative Complaint refers to as the "foregoing", meaning the Essential Allegations of Material Fact, and Count VI to the Administrative Complaint with some precision, a violation should not be found.^{2/} No violation has been proven in accordance with Count VI.

RECOMMENDATION

Based upon the facts found and the conclusions of law reached, it is

RECOMMENDED:

That a final order be entered dismissing the Administrative Complaint against Respondent.

DONE AND ENTERED this 3rd day of May, 2007, in Tallahassee, Leon County, Florida.

S

CHARLES C. ADAMS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of May, 2007.

ENDNOTES

1/ The reference within Counts I through IV to violations of "other provisions of the Uniform Standards of Professional Appraisal Practice (2005)" is understood to mean the specific allegations found within those Counts and not otherwise, when considering the need to provide Respondent reasonable notice of the conduct that would warrant the imposition of discipline. See Cottrill v. Department of Insurance, 685 So. 2d 1371 (Fla. 1st DCA 1996).

2/ The suggestion in Petitioner's proposed recommended order that the problem pertaining to Count VI is associated with the failure to retain documentation in the work file on predominate

ownership/occupancy in the Subject Property neighborhood, to support land value and site improvement estimates and the determination of the \$500 negative adjustment on comparable sale three when it was never there to begin with makes no sense.

COPIES FURNISHED:

Racquel A. White, Esquire
Department of Business and
Professional Regulation
Hurston Building, North Tower
400 West Robinson Street, Suite N 801
Orlando, Florida 32801

Martin A. Pedata, Esquire
Martin A. Pedata, P.A.
150 Wildwood Road
Deland, Florida 32720

Michael Martinez, Acting General Counsel
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-0792

Michael E. Murphy, Director
Division of Real Estate
Department of Business and
Professional Regulation
Hurston Building, North Tower
400 West Robinson Street, Suite N 802
Orlando, Florida 32801

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.