

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
DIVISION OF REAL ESTATE,)	
)	
Petitioner,)	
)	
vs.)	Case No. 08-2721PL
)	
KATHLEEN GREEN,)	
)	
Respondent.)	
_____)	
DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
DIVISION OF REAL ESTATE,)	
)	
Petitioner,)	
)	
vs.)	Case No. 08-2722PL
)	
LEE ANN MOODY,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

This cause came on for final hearing before Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings, on November 5, 2008, in Pensacola, Florida.

APPEARANCES

For Petitioner: Robert Minarcin, Esquire
Department of Business &
Professional Regulation
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Orlando, Florida 32801-1757

For Respondent: Thomas M. Brady, Esquire
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STATEMENT OF THE ISSUE

The issue is whether either Respondent committed the violations alleged in Counts I through VIII of their respective Administrative Complaints.

PRELIMINARY STATEMENT

The Florida Department of Business and Professional Regulation, Division of Real Estate (Division), filed Administrative Complaints in the cases of Respondent Kathleen Green (Ms. Green), a certified residential real estate appraiser; and Respondent Lee Ann Moody (Ms. Moody), a registered trainee appraiser, on March 4, 2008. Ms. Green and Ms. Moody will also be referred to collectively as the Respondents. The Administrative Complaints sought disciplinary action by the Florida Real Estate Appraisal Board (Board).

The Administrative Complaints charged as follows: Count I, violating Subsection 475.624(15), Florida Statutes, by failing to exercise reasonable diligence in developing an appraisal report; Count II, violating Subsection 475.624(4), Florida Statutes, by failing to retain records for at least five years of any contracts engaging the appraiser's services, appraisal reports, and supporting data assembled and formulated by the

appraiser in preparing the appraisal report; Count III, violating Subsection 475.624(2), Florida Statutes, by misrepresentation, culpable negligence, or breach of trust in a business transaction; Count IV, violating Subsection 475.624(14), Florida Statutes, by violating the Conduct Section of the Ethics Rule, or other provision of the Uniform Standards of Professional Appraisal Practice (2006) (USPAP); Count V, violating Subsection 475.624(14), Florida Statutes, by violating a standard for the development or communication of a real estate appraisal, specifically the record keeping section of the Ethics Rule or other provision of the USPAP; Count VI, violating Subsection 475.624(14), Florida Statutes, by violating a standard for the development or communication of a real estate appraisal, specifically Standards Rule 1-1(c), or other provision of the USPAP; Count VII, violating Subsection 475.624(14), Florida Statutes, by violating a standard for the development or communication of a real estate appraisal, specifically Standards Rule 2-1(a) and (b), or other provision of the USPAP; Count VIII, violating Subsection 475.624(14), Florida Statutes, by violating a standard for the development or communication of a real estate appraisal, specifically Standards Rule 2-2(b)(viii), or other provision of the USPAP.

Both Respondents served answers on April 29, 2008.

The matter was filed with the Division of Administrative Hearings on June 9, 2008. The cases were consolidated on June 25, 2008, and set for hearing on August 19 and 20, 2008. Pursuant to Petitioner's motion, the hearing was set for October 15 and 16, 2008, in Pensacola, Florida. Pursuant to a Joint Motion to Continue, the hearing was scheduled for November 5 and 6, 2008, and was heard in its entirety on November 5, 2008.

At the hearing, Petitioner presented the testimony of Jack Case, an investigator specialist for the Division; and Sylvia Storm, an expert in real estate appraisal, and offered seven exhibits that were accepted into evidence. Respondents presented the testimony of Ms. Moody and Ms. Green. Victor Harrison was qualified as an expert witness in the field of real estate appraisal. His testimony was presented by Ms. Moody and Ms. Green. Respondents offered 17 exhibits that were accepted into evidence.

A Transcript was filed on December 1, 2008. Subsequently, the Division filed an Amended Motion for Extension of Time for filing proposed recommended orders. Counsel for Respondents agreed. The Amended Motion for Extension of Time was granted, and the deadline was set for December 23, 2008, as requested by the Division. The Petitioner and Respondents timely filed their Proposed Recommended Orders.

References to statutes are to Florida Statutes (2006) unless otherwise noted.

FINDINGS OF FACT

1. The Florida Real Estate Appraisal 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.

2. At all times pertinent, Ms. Green was licensed as a certified residential real estate appraiser. Ms. Green held license number 3236 in accordance with Chapter 475, Part II, Florida Statutes. Ms. Moody was licensed as a registered trainee appraiser. Ms Moody held license number 16667 in accordance with Chapter 475, Part II, Florida Statutes. In October 2008, Ms. Moody received a license as a certified residential appraiser, license number RD 7444.

3. On March 8, 2007, Ms. Moody signed an appraisal of real property located at 11735 Chanticleer Drive, Lot 16, Block B Grand Lagoon, in Pensacola, Florida. She signed as appraiser. Ms. Green signed the report as supervisory appraiser. The listed borrower was James W. Cobb, and the lender was Premier Mortgage Capital. Respondents developed, signed, and communicated this report.

4. Subsequently, the borrower, Mr. Cobb, who was also the buyer, complained to the Division with regard to the appraisal

on the property, and the Division investigated the matter. The investigation resulted in an investigative report dated December 21, 2007.

5. According to the appraisal, the property was listed for \$1,030,000 in the multiple listing service, and the contract price was \$790,000. The appraisal report valued the property using both the sales comparison approach and the cost approach. Both approaches resulted in a value of \$1,030,000. These facts were reported in a six-page Uniform Residential Appraisal Report, Fannie Mae Form 1004 March 2005. At the time of the hearing, the property was the subject of a foreclosure action.

6. The USPAP provides guidance to those involved in the business of conducting real estate appraisals. Real estate appraisers typically use both a "sales comparison approach" and a "cost approach" in attempting to arrive at a value. A "sales comparison approach" uses data obtained from sales of similar properties and adjusts for differences. A "cost approach" starts with the cost of an empty building site and adds to that the cost of building an identical structure and adjusts for enhancements and depreciation. Both approaches were used by Respondents and were reported on the Form 1004.

7. The Division's expert witness, Sylvia G. Storm, reviewed the Form 1004 and all of the available supporting data. She did not make an appraisal herself and did not visit the

property in question. Ms. Storm was accepted as an expert as provided by Section 90.702, Florida Statutes, because she had "specialized knowledge" regarding real estate appraisals. This was the first time that Ms. Storm testified as an expert witness in a case involving appraisals. The same was true in the case of the expert witness presented by Respondents, Victor Harrison. It is noted that these experts were only minimally qualified, and their testimony is given little weight.

8. Ms. Storm commented on the fact that the property was called "new" in the improvements section yet on the following sales comparison approach it was listed under actual age, "27/E New-2." This suggests the property with improvements is 27 years old, but has an effective age of new to two years. In fact, in the improvements section it was noted that the property has been completely reconstructed. It is clear from the Form 1004, and the hearing record, that the property was essentially destroyed during Hurricane Ivan and was rebuilt above the surviving foundation. It is found that the house was essentially new at the time of the appraisal.

9. Ms. Storm believes some of the deficiencies she noted in the Form 1004, discussed in more detail below, and the supporting documentation contained in the work file, affect the credibility of the report. She believes that some of these deficiencies amounted to a violation of USPAP.

10. Ms. Storm stated that an appraiser should do a complete analysis of the contract and that if it is not done the appraiser is not being reasonably diligent. She also testified that an appraiser, who failed to discuss the large difference between the contract price and appraised value, and who failed to document the analysis, is not being reasonably diligent. Mr. Harrison, on the other hand, testified that after his analysis of the report he found no indication at all of a lack of reasonable diligence.

11. Ms. Storm opined that two or more appraisers, appraising the same property may arrive at two or more numbers and that there is nothing unusual when that occurs.

12. Ms. Moody testified under oath that the supporting information contained in the work file was adequate and that references to other documents, such as public records, were plentiful and complied with the requirements of USPAP. This testimony was adopted by Ms. Green.

13. In order to provide clarity, actual allegations contained in the Administrative Complaints will be discussed in seriatim. As will be addressed more fully in the Conclusions of Law, the Division must prove its factual allegations by clear and convincing evidence. In evaluating the evidence presented, that standard will be used below. The factual allegations will

be presented in bold face type, and the discussion of the proof will be in regular type:

6. Respondent made the following errors and omission in the Report:

A) "Failure to discuss or explain why the Subject Property was listed for sale for \$1,030,000 and the contract price was \$790,000."

Ms. Storm opined that the discussion of the contract price did not go into the details as to the history of the property, or list price history, or who the contracting parties were or any fees to be paid by either party. She believes the Form 1004 should have reported when the property was listed and how many days it had been on the market. She believes that USPAP requires the appraiser to analyze the contract completely. She believes the Form 1004 should have commented on the large difference between the sales price and the appraised price. The Form 1004 states, "I did analyze the contract for sale for the subject purchase transaction." Ms. Moody testified under oath that they analyzed the difference between the appraisal price and the selling price. She stated that there was no requirement to discuss it in the Form 1004. Ms. Green adopted this testimony. Ms. Moody also stated that the contract price of a piece of property does not affect the value of the property as

reported in the Form 1004. This factual allegation was not proven.

B) "Use of an outdated FEMA map for the Subject Property."

Respondents used a FEMA flood map that was outdated. This occurred because the computer program Respondents were using, InterFlood.com, presented an out-of-date map. The map used in the appraisal was dated February 23, 2000, but the most current edition of the map available at the time of the appraisal was dated September 26, 2006. The later map was no different from the map Respondents used. The Form 1004 notes, with regard to the flood status, "It appears to be located in FEMA Flood Zones X and AE. A survey would be needed to confirm flood zones." In sum, there is nothing incorrect or misleading with regard to flooding potential. The Division's expert witness, Ms. Storm, concluded that Respondents did not err with regard to the FEMA flood map. This factual allegation was not proven.

C) "Misstatement of PUD Homeowner's Association Fees for the Subject Property."

Respondents asserted the homeowner's association fee to be \$100 annually. The by-laws of the Grande Lagoon Community Association, Inc., in effect during all times pertinent, state unequivocally that annual dues of the Association are \$100. The Division's investigator stated that he learned through a

telephone call with a "Mr. Broome," who was possibly an officer in the homeowner's association, that at the time of the appraisal there was an annual assessment by the homeowner's association of \$250 for canal maintenance, and that this amount was to increase to \$500 annually in 2008. Information about this assessment was not readily available to Respondents. An assessment is different from a homeowner's fee. The Division's expert witness stated that if there is a homeowner's fee it should be stated on the Form 1004, but that it is not a USPAP requirement. This factual allegation was not proven.

D) "Failure to differentiate view of Subject Property and comparable sale 2, when the Subject Property is located on a canal and the comparable had an open water location."

Comparable Sale 2 is located on Star Lake, a small, lagoon-like body of water with access to Pensacola Bay, similar to the location of the appraised property, which is on a canal with access to open water on Big Lagoon. The views on these properties are sufficiently similar that no adjustment is required. This factual allegation was not proven.

E) "Failure to note financial assistance in the sales contract, where seller was to pay all closing costs."

The agreement whereby seller would pay \$20,000 in closing costs was not made until March 28, 2007, 20 days after the

appraisal was completed. This factual allegation was not proven.

F) "Failure to note consulting fee to Investor's Rehab in the sales contract."

This allegation is true in that the consulting fee was not mentioned. Ms. Storm opined that it should be analyzed in the appraisal report. She asserted that persons who were not privy to the contract might make decisions in reliance upon the appraisal report and, therefore, the Form 1004 should mention the consulting fee. However, Ms. Moody pointed out that the consulting fee had no effect on the value of the property and stated that it was intentionally omitted. This factual allegation was proven to the extent that the consulting fee was not mentioned, but this omission did not affect the accuracy or credibility of the appraisal report.

G) "Failure to explain range of effective age dates for the Subject Property and comparable sale 1."

As discussed in Finding of Fact 8, the subject property was essentially new at the time it was appraised. As pointed out by Mr. Harrison, the effective age was new. Effective age is an estimate of the physical condition of a building. The actual age of the building may be shorter or longer than the effective age. The determination of effective age is largely a matter of judgment. In the case of Comparable Sale 1, it was built in

1980 and last sold in August 2005. Respondents reported the age in 2007 as 26 years with an effective age of 1-5 years. The Form 1004, therefore, presented a one year error as to actual age, which is insignificant. The allegation is that Respondents failed to explain the range of effective age dates. However, it is found that the Form 1004 adequately informs anyone reading it. Accordingly, this factual allegation is not proven.

H) "Failure to make an adjustment or provide an explanation for no adjustment on comparable sale 1 for its effective age difference."

No evidence supporting this allegation was presented. The un rebutted testimony of Ms. Moody, adopted by Ms. Green, was that there was no market data suggesting that there was a need for adjustment. There was no evidence that an explanation for no adjustment was required. Accordingly, this factual allegation is not proven.

I) "Incorrect site size adjustment for comparable sale 1; the \$17,000 should be in the positive direction."

The site size adjustment for Comparable Sale 1 is in the amount of \$40,000. It appears that the intentions of the Administrative Complaints were to allege an error in gross living area. The result is that the record provides no proof of this allegation.

J) "Adjustment for both the room count and square footage, without explanation of its necessity or market support of its accuracy, for comparable sale 1."

The Division's expert found this to be inconsequential. There was no proof adduced indicating that this was a violation of any standard.

K) "Incorrect actual age for comparable sale 1."

In the case of Comparable Sale 1, it was built in 1980 and last sold in August 2005. Respondents reported the age in 2007 as 26 years with an effective age of 1-5. The Form 1004 therefore presented a one-year error. This error is insignificant.

L) "Failure to explain inconsistent site size adjustments made to comparable sale 1, comparable sale 2, and comparable sale 3."

The subject property was located on a site (or lot) that was .3 acres. Comparable Sale 1 was located on a site that was .52 acres. Respondents subtracted \$40,000 from the sale price of Comparable Sale 1. Comparable Sale 2 was located on a site that was .7 acres. Respondents subtracted \$60,000 from the sale price of Comparable Sale 2. Comparable Sale 3 was located on a site that was .44 acres. Respondents added \$25,000 to the sale price of Comparable Sale 3. It is the appraiser's duty to value a comparable in such a way that differences between the

comparable and the subject property are accounted so that a common denominator may be found. For example, Comparable Sale 1 was approximately .2 of an acre larger than the subject property and thus more valuable solely because it is on a larger site. To equalize the situation, the price of Comparable Sale 1 must be reduced, and it was. Comparable Sale 2 also was reduced, but Comparable Sale 3 that was on a larger lot than the subject property, was credited with a \$25,000 addition to its price. Nothing in Respondents' work file provides how the figures for the comparables were found. Moreover, if two of the comparables experienced a downward adjustment because of a larger lot size, then the third comparable, having a larger lot size, should have been adjusted downward also. Therefore, there were inconsistencies requiring explanation, and no explanation was found in the file.

M) "Failure to note that comparable sale 1 has a fireplace."

The Division's expert witness said that the failure to adjust for the fireplaces was of no consequence. No evidence was adduced to demonstrate that the failure to adjust for fireplaces was necessary. Accordingly, this factual allegation was not proven.

N) "Failure to make an adjustment or provide an explanation for no adjustment on comparable sale 1 for its fireplace."

The Division's expert witness said that the failure to adjust for the fireplaces was of no consequence. No evidence was adduced to demonstrate that the failure to adjust for fireplaces was necessary. Accordingly, this factual allegation was not proven.

O) "Incorrect actual age for comparable sale 2."

Comparable Sale 2 was built in 1990. At the time of the appraisal, it was approximately 17 years old. It last sold November 2006. It was reported to be 16 years of age with an effective age of five years on the Form 1004. This is both incorrect and insignificant.

P) "Adjustment for both room count and square footage, without explanation of its necessity or market support of its accuracy, for comparable sale 2."

The Division's expert found this to be inconsequential. There was no proof adduced indicating that this was a violation of any standard.

Q) "Incorrect actual age for comparable sale 2."

This allegation repeats that stated in "O" above.

R) "Failure to not [sic] that comparable sale 2 has three fireplaces."

The Division's expert witness said that the failure to adjust for the fireplaces was of no consequence. No evidence was adduced to demonstrate that the failure to adjust for fireplaces was necessary. Accordingly, this allegation was not proven.

S) "Failure to make an adjustment or provide an explanation for no adjustment on comparable sale 2 for its multiple fireplaces."

The Division's expert witness said that the failure to adjust for the fireplaces was of no consequence. No evidence was adduced to demonstrate that the failure to adjust for fireplaces was necessary. Accordingly, this allegation was not proven.

T) "Failure to make an adjustment or provide an explanation for no adjustment on comparable sale 2 for its lake view."

Comparable Sale 2 is located on Star Lake, a lagoon-like body of water with access to open water, similar to the location of the appraised property, which is on a canal with access to open water on Big Lagoon. The views on these properties are sufficiently similar that no adjustment is required. This allegation was not proven.

U) "Incorrect actual age of comparable sale 3."

Comparable Sale 3 was built in 1989. At the time of the appraisal, it was approximately 18 years old. It last sold in August of 2005. It was reported to be 16 years of age with an effective age of 10 years on the Form 1004. This age was reported incorrectly.

V) "Use of comparable sale 3 which sold 19 months prior to the Report."

The Form 1004 noted that finding comparables was difficult due to market disruption caused by Hurricane Ivan. As noted by Ms. Storm, the change in the real estate market during the years 2004, 2005, and 2006, have been profound everywhere. Primarily, market prices have declined during those years. She was of the opinion that the August 18, 2005, sale date of Comparable Sale 3 was too remote. She stated, correctly, that a market condition adjustment should have been made to the price reported for Comparable Sale 3. Ms. Storm found in the work file analyst listings of the comparables that were utilized, and pages from the Marshall and Swift, but did not see any actual paired sale analyses for any of the adjustments that were used in the report. She could not determine from where they obtained these sales and the adjustments for differences. She opined that this made the report less credible. According to Ms. Storm, the insufficient analysis runs afoul of USPAP. The opinion of Ms.

Storm, however, fails to take into account the insufficient data in the Pensacola area that resulted from hurricane-induced market disruption and the consequent lack of sales. Because of the lack of viable alternatives, using this property as a comparable was necessary. This factual allegation was not proven.

W) "Adjustment for both room count and square footage, without explanation of its necessity or market support of its accuracy, for comparable sale 3."

The Division's expert found this to be inconsequential. There was no proof adduced indicating that this was a violation of any standard.

X) "Failure to calculate and list the net adjustment and gross adjustment totals for comparable sale 1, comparable sale 2, and comparable sale 3."

The Division's expert found this to be inconsequential. There was no proof adduced indicating that this was a violation of any standard.

Y) "Failure to utilize current Marshall & Swift information for the Cost Approach section of the Report."

Marshall and Swift is a reference service that is used to develop information in the cost approach analysis. It provides "local multipliers" to provide for cost differentials in various geographic areas, including differentials for garages and

two-story houses. It also provides "local multipliers" for the cost per square foot for construction. The pages used by Respondents expired at the end of February 2007, eight days before the Form 1004 issued. Respondents receive quarterly updates. The issue after February 2007 showed no change. To the extent Respondents failed to get the most current information, it had no impact on the appraisal amount.

Z) "Failure to complete the PUD information section of the Report, when Subject Property, as noted by Respondent in Report, is located in a PUD."

The Division acknowledged during the hearing that there was no support for this allegation, and withdrew it.

AA) "Failure to date when Respondent inspected the Subject Property and comparable sales listed in the Report." (This allegation was made in the case of Ms. Green, but not in the case of Ms. Moody.)

In the blocks on the Form 1004, below the Supervisory Appraiser's signature, Ms. Green signed statements indicating that she inspected the interior and exterior of the subject property and that she inspected the exterior of the comparable sales properties. She did not date either of these statements.

7. There is no documentation in the work file to support the \$40,000 "site size" adjustment made to comparable sale 1 in the Sales Comparison section of the Report.

Respondents' work file, attached as Exhibit 1 to the Administrative Complaints, does not contain documentation for this adjustment to the "site size" of Comparable Sale 1.

8. There is no documentation in the work file to support the \$60,000 "site size" adjustment made to comparable sale 2 in the Sales Comparison section of the Report.

Respondents' work file, attached as Exhibit 1 to the Administrative Complaints, does not contain documentation for this adjustment to the "site size" of Comparable Sale 2.

9. There is no documentation in the work file to support the \$25,000 "site size" adjustment made to comparable sale 3 in the Sales Comparison section of the Report.

Respondents' work file, attached as Exhibit 1 to the Administrative Complaints, does not contain documentation for this adjustment to the "site size" of Comparable Sale 3.

10. There is no documentation in the work file to support the \$50,000 "view" adjustment made to comparable sale 1 in the Sales Comparison section of the Report.

Comparable Sale 1 is on Big River. The Form 1004 notes that Big River is similar to Big Lagoon. A \$50,000 downward adjustment was made in the "view" category. Ms. Storm stated that she had searched for documentation and did not find it. The work file does not have documentary support for the adjustments. Respondents and Ms. Storm agreed that the lack of

sales in the area made such adjustments like this problematic. As Ms. Storm said, "I know there haven't been that many sales of waterfronts so it's really difficult to arrive at that data." Nevertheless, the lack of any information in the work file to support the adjustment means that this factual allegation is proven.

11. There is no documentation in the work file to support the \$5,000 "age" adjustment made to comparable sale 2 in the Sales Comparison section of the Report.

Respondents' work file, attached as Exhibit 1 to the Administrative Complaints, does not contain documentation for this adjustment to the "age" of Comparable Sale 2.

12. There is no documentation in the work file to support the \$10,000 "age" adjustment made to comparable sale 3 in the Sales Comparison section of the Report.

Respondents' work file, attached as Exhibit 1 to the Administrative Complaints, does not contain documentation for this adjustment to the "age" of Comparable Sale 3.

13. There is no documentation in the work file to support the \$3,000 "triple garage" adjustment made to comparable sale 3 in the Sales Comparison section of the Report.

A downward adjustment of \$3,000 was made to Comparable Sale 3 because of its triple garage. No testimony supporting this allegation was presented. Respondents' work file, attached as

Exhibit 1 to the Administrative Complaints, includes Marshall and Swift data for garages. Although exactly how the \$3,000 adjustment was calculated is not clear, the Marshall and Swift information was in the file and provided a method for making the calculation.

14. There is no documentation in the work file to support the \$10,000 "dock/pier" adjustment made to comparable sale 1 in the Sales Comparison section of the Report.

A downward adjustment of \$10,000 was made to Comparable Sale 1 because of the presence of a "dock/pier." No testimony supporting this allegation was presented. Respondents' work file, attached as Exhibit 1 to the Administrative Complaints, does not contain documentation for this adjustment.

15. There is no documentation in the work file to support the \$15,000 "pool" adjustment made to comparable sale 2 in the Sales Comparison section of the Report.

A downward adjustment of \$15,000 was made to Comparable Sale 2 because of the presence of a pool on the property. No testimony supporting this allegation was presented. Respondents' work file, attached as Exhibit 1 to the Administrative Complaints, does not contain documentation for this adjustment.

16. There is no documentation in the work file to support the \$39/square foot adjustment for gross living area made to

comparable sale 1, comparable sale 2, and comparable sale 3 in the Sales Comparison section of the Report.

No testimony supporting this allegation was presented. The Division has not directed the attention of the Administrative Law Judge to any reference in the record to a "\$39/square foot adjustment for gross living area." An independent search of Respondents' work file, attached as Exhibit 1 to the Administrative Complaints, did not reveal documentation for this adjustment or any documentation mentioning it. Accordingly, this allegation is not proven.

17. The work file lacks current Marshall and Swift pages for the time frame that the Reports were completed, as well as any local builder information, to justify the dwelling square footage price in the Cost Approach section of the Report.

Marshall and Swift is a reference service that is used to develop information for use in the cost approach. It provides "local multipliers" to provide for cost differentials in various geographic areas, including differentials for garages and two-story houses. It also provides information used to calculate the construction cost per square foot. The pages used by Respondents expired at the end of February 2007, eight days before the report issued. Respondents receive quarterly updates. The issue subsequent to February 2007 showed no

change. To the extent Respondents failed to get the most current information, it had no impact on the appraisal amount.

18. The work file lacks any documentation to support the \$30,000 As-Is Value of Site Improvements adjustment in the Cost Approach section of the Report.

As-is value of site improvements adjustment, in the cost approach section, is a positive value of \$30,000. There is no explanation in the record as to what an "as-is value of site improvements adjustment" is or from what source came the \$30,000 value.

19. The work file lacks any documentation to support the \$60,000 Porches/Appliances adjustment in the Cost Approach section of the Report

Respondents' work file, attached as Exhibit 1 to the Administrative Complaints, contains Marshall and Swift information for porches and appliances. Thus, documentation is present.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. § 120.57(1), Fla. Stat. (2008).

15. As a disciplinary statute, Section 475.624, Florida Statutes "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).

16. Agencies seeking disciplinary actions against licenses must prove the factual allegations by clear and convincing evidence. Department of Bank. and Fin., Div. of Securities & Investor Protection v. Osborne Stern and Co., 670 So. 2d 932, 933 (Fla. 1996) and Subsection 120.57(1)(j), Florida Statutes (2008).

17. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but the [sic] less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). It is an "intermediate standard." Id. For proof to be considered "'clear and convincing' . . . 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." In re Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

18. In determining whether Petitioner has met its burden of proof, it is necessary to evaluate its evidentiary presentation in light of the specific allegations of wrongdoing made in the charging instrument. Due process prohibits the Board from taking disciplinary action against a licensee based on conduct not specifically alleged in the charging instrument, unless those matters have been tried by consent. See Aldrete v. Department of Health, Board of Medicine, 879 So. 2d 1244, 1246 (Fla. 1st DCA 2004); Shore Village Property Owners' Association, Inc., et al. v. Department of Environmental Protection, et al., 824 So. 2d 208, 210 (Fla. 4th DCA 2002); and Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

19. Furthermore, "the conduct proved must legally fall within the statute or rule claimed [in the charging instrument] to have been violated." Delk, 595 So. 2d at 967. In deciding whether "the statute or rule claimed [in the charging instrument] to have been violated" was in fact violated, as alleged by Petitioner, if there is any reasonable doubt, that doubt must be resolved in favor of the licensee.

20. The following factual allegations were proven by clear and convincing evidence: 6L, 6U, 6AA, 7, 8, 9, 10, 11, 12, 14, 15, and 18.

21. Section 475.624, Florida Statutes, provides in part as follows:

475.624 Discipline.--The board may deny an application for registration 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.

* * *

(4) Has violated any of the provisions of this part or any lawful order or rule issued under the provisions of this part or chapter 455.

* * *

(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.

* * *

22. Section 475.629, Florida Statutes, provides as follows:

475.629 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.

23. Count I of the Administrative Complaints alleges that Respondents failed to exercise reasonable diligence in developing an appraisal report in violation of Subsection 475.624(15), Florida Statutes.

24. "There is no statute, rule, or USPAP standard that defines 'reasonable diligence.'" Department of Business and Professional Regulation, Division of Real Estate v. Guilfoyle, Case No. 07-0683PL (DOAH August 22, 2007). It was therefore incumbent upon the Division, in order to meet its burden of proving that Respondents deviated from the required standard of diligence in violation of Subsection 475.624(15), Florida Statutes, to present "competent evidence . . . from a person with sufficient insight into what constitutes reasonable diligence on the part of a certified real estate appraiser when developing an appraisal or in preparing an appraisal report" under the circumstances that Respondents faced in the instant case. Department of Business and Professional Regulation, Division of Real Estate v. Harrison, Case No. 06-3387PL (DOAH May 30, 2007); Department of Business and Professional Regulation, Division of Real Estate v. Catchpole, Case No. 06-3389PL (DOAH May 30, 2007); and Department of Business and Professional Regulation, Division of Real Estate v. Price,

Case No. 06-3720PL (DOAH May 3, 2007). See also McDonald v. Department of Professional Regulation, 582 So. 2d 660, 670 (Zehmer, J., specially concurring), citing Purvis v. Department of Professional Regulation, 461 So. 2d 134 (Fla. 1st DCA 1984) ("[W]here the agency charges negligent violation of general standards of professional conduct, i.e., the negligent failure to exercise the degree of care reasonably expected of a professional, the agency must present expert testimony that proves the required professional conduct as well as the deviation therefrom.").

25. Neither expert was competent to provide sufficient insight into what constitutes reasonable diligence. Ms. Storm opined that Respondents failed to be reasonably diligent in two different areas, analyzing the sales contract and the failure to discuss the difference between the sales price and the appraisal price. Mr. Harrison found Respondents used reasonable diligence throughout their efforts. The Division did not demonstrate that Respondents failed or refused to exercise reasonable diligence in developing an appraisal or preparing an appraisal report. Count I should be dismissed.

26. Count II of the Administrative Complaints alleges that Respondents were guilty of a failure to retain records for at least five years of any contracts engaging the appraisers' 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 Subsection 475.624(4), Florida Statutes.

27. The time period for retention of appraisal and supporting documents, according to Section 475.629, Florida Statutes, "runs from the date of the submission of the appraisal report to the client." Because this must have occurred after the date appearing on the cover of the appraisal report, which was March 8, 2007, five years has not yet passed. Section 475.629, Florida Statutes, does not address the quality or completeness of the work file. It only addresses the retention period of the file. Accordingly, Count II should be dismissed.

28. Count III alleges that Respondents engaged in misrepresentation, culpable negligence, or breach of trust in any business transaction in violation of Subsection 475.624(2), Florida Statutes.

29. "An intentional act must be established before a violation of the . . . statute proscribing . . . , misrepresentation, . . . culpable negligence, or breach of trust in a business transaction may be established." See Munch v. Department of Professional Regulation, Division of Real Estate, 592 So. 2d. 1136 (Fla. 1st DCA 1992). It must be determined, therefore, whether the Respondents' actions rise to that level of intentional conduct necessary to prove a violation of this

subsection. No such proof was provided. See also Department of Professional Regulation, Florida Real Estate Commission v. James J. Baruch, Case No. 81-2398 (DOAH 1982). Count III should be dismissed.

30. Count IV of the Administrative Complaints alleged a violation of a standard for the development or communication of a real estate appraisal, specifically the Conduct Section of the Ethics Rule, or other provision of the USPAP in violation of Subsection 475.624(14), Florida Statutes.

31. The USPAP is a set of guidelines established for property appraisals by the Appraisals Standards Board. It has the effect of law in Florida. The Division urges, through its Proposed Recommended Order, that Respondents violated the part of the Conduct Section that recites, "An appraiser must not communicate assignment results in a misleading or fraudulent manner. An appraiser must not use or communicate a misleading or fraudulent report or knowingly permit an employee or other person to communicate a misleading or fraudulent report."

32. The Division asserts that Respondents violated this admonition in a number of instances. Proof of only two of the matters listed was established by the evidence: a failure to support the adjustments made in the sales comparison approach and cost approach section of the appraisal report and the failure of Ms. Green to note the date she inspected the subject

property and the comparable sales listed in the appraisal report.

33. The failure to support the adjustments made in the sales price was an error of omission that did not mislead. The adjustments made were clearly set forth in Form 1004 although there was no evidence on the Form 1004 or the work file as to how Respondents arrived at the figures. In the case of the site size adjustments, there was a clear error as demonstrated by the inconsistency between adjustments. The failure to support the adjustments cannot be deemed fraudulent because an element of fraud is intent, and there was no proof in the record that Respondents intended to misrepresent any fact. The failure to provide the date of inspections did not mislead or defraud anyone. Count IV should be dismissed.

34. Count V alleged that Respondents violated the Record Keeping Section of the USPAP Ethics Rule. It is recited in its entirety below:

An appraiser must prepare a workfile for each appraisal, appraisal review, or appraisal consulting assignment. The workfile must include:

- the name of the client and the identity, by name or type, of any other intended users;
- true copies of any written reports, documented on any type of media;
- summaries of any oral reports or testimony, or a transcript of testimony, including the appraiser's signed and dated certification; and

all other data, information, and documentation necessary to support the appraiser's opinions and conclusions and to show compliance with this Rule and all other applicable Standards, or references to the location(s) of such other documentation. An appraiser must retain the workfile for a period of at least five (5) years after preparation or at least two (2) years after final disposition of any judicial proceeding in which the appraiser provided testimony related to the assignment, whichever period expires last.

An appraiser must have custody of his or her workfile, or make appropriate workfile retention, access, and retrieval arrangements with the party having custody of the workfile.

35. Respondents failed to maintain all data necessary to support the adjustments made to the comparable sales, and in one case, the cost adjustment in the cost approach. The comment section to this Standard recites as follows: "A workfile supplies evidence of the appraiser's consideration of all applicable data and statements required by USPAP and other information as may be required to support the appraiser's opinions, conclusions, and recommendations." Clearly, the purpose of the rule is to preserve data so that in cases such as this one, evidence can be produced that demonstrates how figures were generated. Proof of allegations of fact 7, 8, 9, 10, 11, 12, 14, 15, and 18 coupled with the requirements of the USPAP Ethics Record Keeping Rule require finding Respondents guilty of Count V.

36. Count VI alleged that Respondents violated Standards Rule 1-1(c) that provides that an appraiser must "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." The comment to the section notes: "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."

37. To the extent there were some errors in the appraisal report they were not serious. Respondents were engaged in making an appraisal in a difficult market environment that had experienced disruption caused by a hurricane and a serious decline in demand, and, therefore, price for waterfront properties. The appraisal report and the extensive work file indicate Respondents' due diligence and due care. Count VI should be dismissed.

38. Count VII alleged that Respondents violated Standards Rule 2-1(a) and (b), or other provision of the USPAP in violation of Subsection 475.624(14), Florida Statutes. Standards Rule 2-1(a) and (b) state that, "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;"

These standards address the appraisal report, not the work file.
The appraisal report was not at all misleading and it contained
sufficient information for the intended users to understand the
report. Count VI should be dismissed.

39. Count VIII alleged that Respondents violated Standards
Rule 2-2(b)(viii), in violation of Subsection 475.624(14),
Florida Statutes. The pertinent part of this Rule states:

(b) The content of a Summary Appraisal
Report must be consistent with the intended
use of the appraisal and, at a minimum:

* * *

(viii) summarize the information analyzed,
the appraisal methods and techniques
employed, and the reasoning that supports
the analyses, opinions, and conclusions;
exclusion of the sales comparison approach,
cost approach, or income approach must be
explained;

* * *

40. This rule refers to the content of the Summary
Appraisal Report, not the work file. The report adequately
summarized the information analyzed; the appraisal methods and
techniques employed; and the reasoning that supports the
analyses, opinions, and conclusions. It used the sales
comparison approach and cost approach and noted, with regard to

the income approach, "The income approach to value has not been used due to its limited utility when appraising single family homes." Count VIII should be dismissed.

41. The legislature has directed the regulatory boards falling under the Department of Business and Professional Regulation'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.

42. Florida Administrative Code Rule 61J1-8.002(1) provides, in part, as follows:

61J1-8.002 Disciplinary Guidelines.

(1) Pursuant to Section 455.2273, F.S., the Florida Real Estate Appraisal Board sets forth below a range of disciplinary guidelines from which disciplinary penalties will be imposed upon licensees guilty of violating Chapter 455 or Part II, Chapter 475, F.S. (For purposes of this rule, the term licensee shall refer to registrants, license holders or certificate holders.) The purpose of the disciplinary guidelines is to give notice to licensees of the range of penalties which normally will be imposed for each count during a formal or an informal hearing. For purposes of this rule, the order of penalties, ranging from lowest to highest, is: reprimand, fine, probation, suspension, and revocation or denial. Pursuant to Section 475.624, F.S., combinations of these penalties are permissible by law. Nothing in this rule shall preclude any discipline imposed upon a licensee pursuant to a stipulation or

settlement agreement, nor shall the ranges of penalties set forth in this rule preclude the probable cause panel from issuing a letter of guidance upon a finding of probable cause, where appropriate.

* * *

43. Florida Administrative Code Rule 61J1-8.002(3)(g) provides that for a violation of Subsection 475.624(14), Florida Statutes: "The usual action of the Board shall be to impose a penalty from a 5-year suspension to revocation and an administrative fine of \$1,000." Upon consideration of the facts of this case, a reprimand, which is the lowest possible penalty, should be imposed.

RECOMMENDATION

RECOMMENDED that the Florida Real Estate Appraisal Board find Respondents guilty of violating Subsection 475.624(14), Florida Statutes, by failing to document adjustments made to comparable sales and reprimand Respondents.

DONE AND ENTERED this 27th day of January, 2009, in Tallahassee, Leon County, Florida.



HARRY L. HOOPER
Administrative Law Judge
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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.