

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION OF REAL ESTATE, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 09-2491PL  
 )  
MIGUEL A. MURCIANO, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes,<sup>1</sup> before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings (DOAH), on August 21, 2009, by video teleconference at sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Donna C. Lindamood, Esquire  
Senior Attorney  
Department of Business and  
Professional Regulation  
400 West Robinson Street, N#802  
Orlando, Florida 32801-1900

For Respondent: Steven W. Johnson, Esquire  
20 North Orange Avenue, Suite 700  
Orlando, Florida 32801

STATEMENT OF THE ISSUE

Whether Respondent committed the violations alleged in the Amended Administrative Complaint issued against him and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On or about March 2, 2009, Petitioner issued a five-count Amended Administrative Complaint alleging that, in connection with an appraisal he conducted of property located at 7150 Southwest 5th Street in Miami, Florida (Subject Property) on or about January 27, 2006, Respondent violated Standards Rule 1-1(a), (b), and (c) of the Uniform Standards of Professional Appraisal Practice (2005) and therefore also Section 475.624(14), Florida Statutes (2005) (Count I); Standards Rule 2-1(a) of the Uniform Standards of Professional Appraisal Practice (2005) and therefore also Section 475.624(14), Florida Statutes (2005) (Count II); Standards Rule 2-2(b)(ix) of the Uniform Standards of Professional Appraisal Practice (2005) and therefore also Section 475.624(14), Florida Statutes (2005) (Count III); Section 475.629, Florida Statutes (2005) and therefore also Section 475.624(4), Florida Statutes (Count IV); and Section 475.624(15), Florida Statutes (2005) (Count V). The Amended Administrative Complaint contained 23 numbered paragraphs of "Essential Allegations of Material Fact" upon which these charges were based.

On or about April 1, 2009, Respondent, through his attorney, filed a Renewed Petition for Formal Hearing. On May 13, 2009, the matter was referred to DOAH to conduct the hearing Respondent had requested.

As noted above, the hearing was held on August 21, 2009.<sup>2</sup> Five witnesses testified at the hearing: Brian Piper, Maria Lugo, Philip Spool, Respondent, and Julio Potestad. Of these witnesses, only Mr. Spool, a Florida-certified general real estate appraiser who testified on behalf of Petitioner, gave expert testimony concerning appraisal development and communication standards.<sup>3</sup> In addition to the foregoing testimonial evidence, 13 exhibits (Petitioner's Exhibits 1 through 12, and Respondent's Exhibit 1) were offered and received into evidence.

At the request of the parties, the undersigned set the proposed recommended order filing deadline at 30 days from the date of the filing with DOAH of the hearing transcript.

The hearing Transcript (consisting of one volume) was filed with DOAH on September 18, 2009. Respondent and Petitioner filed their Proposed Recommended Orders on October 15 and 16, 2009, respectively.

#### FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made:

1. Respondent is now, and has been since January 12, 2005, a Florida-certified residential real estate appraiser, holding license number RD 4946. He has not been the subject of any prior disciplinary action.

2. During the time he has been licensed, Respondent has supervised various registered trainee appraisers, including Julio Potestad, who worked under Respondent's supervision from March 17, 2006, through February 26, 2007, and has remained "very good friends" with him.<sup>4</sup>

3. At all times material to the instant case, the Subject Property has been zoned by the City of Miami as R-1, which allows only single-family residences.

4. In January of 2006, Respondent was working as a residential real estate appraiser for Appraisals of South Florida, Inc., a business owned by Anthony Pena, when he received an assignment to conduct an appraisal of the Subject Property for Coast to Coast Mortgage Brokerage, Inc. (Coast). Gustavo Ceballos had agreed to buy the Subject Property from Jorge Vazquez for \$395,000, and Mr. Ceballos had applied for a mortgage loan from Coast to make the purchase. The purpose of the appraisal was to determine whether the market value of the Subject Property justified Coast's making the loan.

5. The written appraisal request from Coast was dated January 24, 2006, and directed to Mr. Potestad, who was working

for Mr. Pena at the time. It indicated that the "[p]roperty [t]ype" of the Subject Property was "SFR" (meaning single-family residence). Attached to the request was a copy of a signed, but undated, copy of a "[s]ales contract" for the Subject Property.

6. Using a pre-printed form, Respondent completed a Summary Appraisal Report (Report), dated January 31, 2006, containing his opinion that the market value of the Subject Property as of January 27, 2006 (the reported "date of [Respondent's] inspection" of the Subject Property) was \$395,000 (which happened to be the contract price). He arrived at his opinion by conducting a sales comparison analysis and a cost analysis (but not an income analysis).

7. On January 5, 2006, just three weeks and a day prior to the reported "date of [Respondent's] inspection," City of Miami Code Enforcement Officer Maria Lugo had inspected the interior and exterior of the Subject Property at the request of the owner, Mr. Vazquez, who had contacted Ms. Lugo after she had "posted on the property" a code violation notice.

8. Ms. Lugo's January 6, 2006, inspection had revealed that the Subject Property was not a single-family residence, but rather a nonconforming four-unit, multi-family structure (with each unit having an exterior door and there being no interior access between units) and, further, that various additions and improvements (including additional bathrooms and kitchens, a

metal awning and concrete slab in the rear of the property, a driveway on the west side of the front of the property, and a "garage conversion") had been made without a building permit having been obtained.

9. These were City of Miami code violations for which the owner of the property could be fined.

10. Extensive work (including demolition work), requiring building permits, needed to be done to correct these code violations and reconvert the structure to a legal, single-family dwelling.

11. As of January 27, 2006 (the reported "date of [Respondent's] inspection"), no building permit to perform work on the Subject Property had been obtained, and the code violations Ms. Lugo had found 22 days earlier had not yet been corrected.

12. As he indicated in the Report, Respondent appraised the Subject Property as a single-family residence (with four bedrooms and three baths), even though, as of January 27, 2006, it was a multi-family structure (as an appropriate inspection by a reasonably prudent residential real estate appraiser would have revealed).<sup>5</sup> Doing so was a substantial and fundamental error that was fatal to the credibility of Respondent's market value opinion.

13. The first page of Respondent's Report contained five

sections: "Subject," "Contract," "Neighborhood," "Site," and "Improvements."

14. The "Subject" section of the Report read, in pertinent part, as follows:

Property Address: 7150 SW 5th Street  
City: Miami  
State: FL  
Zip Code: 33144-2709

\* \* \*

Occupant:  Owner  Tenant  Vacant

\* \* \*

Assignment Type:  Purchase Transaction  
 Refinance Transaction  
 Other (describe)

Lender/Client: Coast to Coast Mortgage  
Brokerage, Inc. . . . .

Is the subject property currently offered for sale or has it been offered for sale in the twelve months prior to the effective date of this appraisal?  Yes  No

Report data source(s) used, offering price(s), and date(s): The subject property has a prior sale on July 2005 for \$349,000.

Although he provided the "offering price" and "date" of the "prior sale," Respondent did not reveal, in this section, the "data source(s) [he] used" to obtain this information. He did, however, disclose this "data source" (ISC NET<sup>6</sup>) in a subsequent section of the Report (the "Sales Comparison Approach" section).

15. The "Contract" section of the Report read, in

pertinent part, as follows:

I  did  did not analyze the contract for sale for the subject purchase transaction.

Explain the results of the analysis of the contract for sale or why the analysis was not performed. The subject property is under contract for \$395,000[;] financial assistance noted.

Contract Price: \$395,000  
Date of Contract: No[t] Provided  
Is the property seller the owner of public record:  Yes  No  
Data Sources: Public Records

Is there any financial assistance (loan charges, sale concessions, gift or down payment assistance, etc.) to be paid by any party on behalf of the borrower?  
 Yes  No

If Yes, report the total dollar amount and describe the items to be paid: 4% seller contribution for closing costs and prepaids.

16. As part of the appraisal development process, "[a]ppraisers are required to obtain a full copy of the contract [for sale] that's signed and dated." The contract for sale that Respondent analyzed, and which he has maintained in his work file on the Subject Property (Work File), however, while signed by Mr. Vazquez and Mr. Ceballos, was incomplete and not dated.

17. Paragraph 21 of this incomplete and undated contract for sale provided as follows:

ADDITIONAL TERMS  
SELLER WILL PAY 4% OF PURCHASE PRICE  
FOR BUYER CLOSING COSTS  
PROPERTY SOLD AS IS CONDITIONS



18. In the "Neighborhood" section of the Report, Respondent identified the boundaries of the "neighborhood" in which the Subject Property was located, and he stated that the properties in the neighborhood were either "One-Unit" (95%) or "Commercial" (5%) properties and that the neighborhood had no "2-4 Unit" or other "Multi-Family" structures.<sup>7</sup> The following further representations, among others, were made in the "Neighborhood" section:

Neighborhood Description: The subject is located in an established neighborhood consisting of 1 story ranch style homes similar to the subject in age, size and appeal. The subject neighborhood provides a good environment for the house being appraised. There are no factors that will negatively affect marketability of the subject property. Employment stability and convenience are reasonable.

Market Conditions (including support for the above conclusions): The subject is in a market place in which residential properties similar to the subject take approximately 3 months to sell. Demand and [s]upply are in balance with a stable growth rate. These figures were obtained from the appraiser[']s observation of the marketing time for listing and sales within the immediate area and the ratio of the number of listings to sales.

19. The "Site" section of the Report read, in pertinent part, as follows:

\* \* \*

View: Residential

Specific Zoning Classification: R-1

Zoning Description: Single Family  
Residential

Zoning Compliance:  Legal  Legal  
Nonconforming (Grandfathered Use)  
 No Zoning  Illegal (describe)

Is the highest and best use of subject  
property as improved (or as proposed per  
plans and specifications) the present use?  
 Yes  No If no, describe.

\* \* \*

Are there any adverse site conditions or  
external factors (easements, encroachments,  
environmental conditions, land use, etc.)?  
 Yes  No If Yes, describe

\* \* \*

20. In the "Improvements" section of the Report,  
Respondent indicated, among other things, that the Subject  
Property was a one-unit, ranch-style structure built in 1948,  
with an "effective age" of 20 years. Next to "Roof Surface"  
Respondent entered, "Shingles/Avg." Other information provided  
in this section included the following:

Finished area above grade contains: 7  
Rooms, 4 Bedrooms, 3 Bath(s) 2,249 Square  
Feet of Gross Living Area Above Grade.

\* \* \*

Describe the condition of the property  
(including needed repairs, deterioration,  
renovation, remodeling, etc.). The subject  
conforms to the neighborhood in terms of  
age, design and construction. Based upon an  
inspection performed by the appraiser on the

subject property[,] [it] does appear to have roof damage resulting from Hurricane Wilma. The property's roof exhibits many missing and/or detached roof shingles.[<sup>8</sup>] The appraiser bases these findings only upon a visual inspection of the subject. A thorough roof inspection should be done to properly assess the full extent of the damage. The Hurricane does not appear to have negatively affected the subject area's economic base.

Are there any physical deficiencies or adverse conditions that affect livability, soundness, or structural integrity of the property? \_ Yes X No If Yes, describe

Does the property generally conform to the neighborhood (functional utility, style, condition, use, construction, etc.)? X Yes \_ No If No, describe[<sup>9</sup>]

21. The second page of Respondent's Report contained two sections: "Sales Comparison Approach" and "Reconciliation."

22. In the "Sales Comparison Approach" section of the Report, Respondent identified the three "comparable" properties that he examined to estimate (using a sales comparison analysis) the market value of the Subject Property, and he provided information about these comparables, as well as the Subject Property.

23. The following were the three "comparables" Respondent selected for his sales comparison analysis: Comparable Sale 1, located at 7140 Southwest 7th Avenue in Miami (.14 miles from the Subject Property); Comparable Sale 2, located at 240 Southwest 69th Avenue in Miami (.28 miles from the Subject

Property); and Comparable Sale 3, located at 7161 Southwest 5th Terrace in Miami (.06 miles from the Subject Property).

According to the Report, these "comparables," as well as the Subject Property, were 56 to 58-year-old, single-family (one-unit) ranch-style residences in "average condition" situated on lots ranging in size from 6,000 square feet (the Subject Property and Comparable Sale 3) to 6,565 square feet (Comparable Sale 1).

24. Comparative information relating to these "comparables" and the Subject Property was set forth in a grid (Sales Comparison Grid).

25. On the "Date of Sale/Time" line on the Sales Comparison Grid, Respondent entered the following:

Comparable Sale 1:	December 2005
Comparable Sale 2:	November 2005
Comparable Sale 3:	Sept. 2005

26. On the "Sale Price" line on the Sales Comparison Grid, Respondent entered the following:

Subject Property:	\$395,000
Comparable Sale 1:	\$380,000
Comparable Sale 2:	\$387,000
Comparable Sale 3:	\$390,000

27. On the "Sale Price/Gross Liv" line on the Sales Comparison Grid, Respondent entered the following:

Subject Property:	\$236.39 sq. ft. <sup>[10]</sup>
Comparable Sale 1:	\$254.01 sq. ft.
Comparable Sale 2:	\$195.65 sq. ft.
Comparable Sale 3:	\$195.00 sq. ft.

28. On the "Data Source(s)" line on the Sales Comparison Grid, Respondent entered the following:

Comparable Sale 1: ISC NET/MLX<sup>[11]</sup>  
Comparable Sale 2: ISC NET  
Comparable Sale 3: ISC NET/MLX

29. On the "Verification Source(s)" line on the Sales Comparison Grid, Respondent entered the following:

Comparable Sale 1: Observation from street  
Comparable Sale 2: Observation from street  
Comparable Sale 3: Observation from street

"Observation from street" is an unacceptable means of verifying sales price information. An appropriate "Verification Source" would be an individual involved in some way in the transaction or, alternatively, a public record.

30. On the "Above Grade Room Count" line of the Sales Comparison Grid, Respondent entered the following:

Subject Property: 7 (Total); 4 (bdrms.);  
3 (Baths).  
Comparable Sale 1: 7 (Total); 4 (bdrms.);  
3 (Baths).  
Comparable Sale 2: 6 (Total); 3 (bdrms.);  
2 (Baths).  
Comparable Sale 3: 8 (Total); 5 (bdrms.);  
4 (Baths).

31. Immediately to the right of the "Above Grade Room Count" entries for Comparable Sale 2, in the "+(-) \$ Adjustment" column, Respondent entered "+3,000."

32. Immediately to the right of the "Above Grade Room Count" entries for Comparable Sale 3, in the "+(-) \$ Adjustment" column, Respondent entered "-3,000."

33. On the "Gross Living Area" line of the Sales Comparison Grid, Respondent entered the following:

Subject Property:	2,249 sq. ft.
Comparable Sale 1:	1,496 sq. ft.
Comparable Sale 2:	1,978 sq. ft.
Comparable Sale 3:	2,000 sq. ft.

34. Because its "Gross Living Area" was 753 square feet (or approximately one-third) less than that of the Subject Property, Comparable Sale 1 was "way too small in comparison to the Subject Property to [have] be[een] utilized as a comparable sale."

35. Immediately to the right of the "Gross Living Area" square footage entered for Comparable Sale 1, in the "+(-) \$ Adjustment" column, was the entry "+18,825."

36. Immediately to the right of the "Gross Living Area" square footage entered for Comparable Sale 2, in the "+(-) \$ Adjustment" column, was the entry "+6,775."

37. Immediately to the right of the "Gross Living Area" square footage entered for Comparable Sale 3, in the "+(-) \$ Adjustment" column, was the entry "+6,225."

38. The upward adjustments Respondent made to the "comparables'" sales prices to account for the Subject

Property's larger "Gross Living Area" amounted to \$25 for each square foot that the "Gross Living Area" of the Subject Property exceeded that of the "comparables." Nowhere in the Report, or in Respondent's Work File, is there any indication of how or why Respondent selected this \$25 a square foot price adjustment.

39. While ISC NET/FARES provides "Gross Living Area" square footage information (that is gleaned from public records), MLX does not. In his appraisal of the Subject Property, Respondent appropriately used "Gross Living Area" square footage information from ISC NET/FARES for Comparable Sales 1 and 2; however, for Comparable Sale 3, rather than using the ISC NET/FARES "Gross Living Area" square footage (which was 1,512 square feet), he instead inappropriately relied on the square footage figure (2,000) for "Total Area" (which is different than "Gross Living Area") found in the MLX listing for the property. This was a substantial error negatively impacting the soundness of the adjustment he made for "Gross Living Area" to obtain an "Adjusted Sale Price" for Comparable Sale 3.

40. The MLX listing for Comparable Sale 3 also contained the following "remarks":

DON'T MISS THIS BEAUTY. PLENTY OF SPACE FOR THE IN-LAWS. CALL LISTING AGENT. CAN USE LIKE 2 IN LAWS AND MAIN HOUSE APPROXIMATELY 2000 SF. HOUSE HAVE 3 BEDROOMS 2 BATHS. YOU CAN USE 2 EFFICIENCIES AND THE HOUSE. HOUSE TOTALLY REMODELED NEW BATH, NEW KITCHEN.

These "remarks" suggest that Comparable Sale 3 actually consisted of not one, but three separate dwelling units ("2 efficiencies" and a "main house"), contrary to the representation made by Respondent in the Report, and it therefore should not have been used as a "comparable" to appraise a single-family residence (which Respondent, in his Report, mistakenly represented the Subject Property to be).

41. The following "Adjusted Sale Price[s]" for the three "comparables" were set forth on the last line of the Sales Comparison Grid: Comparable Sale 1: \$398,825; Comparable Sale 2: \$396,775; and Comparable Sale 3: \$393,225.

42. At the end of the "Sales Comparison Approach" section (beneath the grid) was the following "Summary of Sales Comparison Approach":

The subject property is similar to all of the comparable sales which were carefully selected after an extensive search in and out of the subject's defined market. This search consisted of analyzing numerous closed sales and narrowing the list down to the most similar. After close evaluation of the comparable sales utilized, equal consideration was given to all comparable sales in formulating an opinion of market value.

Indicated Value by Sales Comparison Approach: \$395,000.

43. In arriving at this appraised "value" of \$395,000, Respondent made no adjustments for the damage to the Subject



Property's roof noted in the "Improvements" section of the Report or for the "4% seller contribution for closing costs" mentioned in the "Contract" section of the Report; neither did he provide an explanation as to why he had not made such adjustments.

44. The first part of the "Reconciliation" section of the Report read as follows:

Indicated Value by Sales Comparison  
Approach: \$395,000; Cost Approach (if  
developed): \$395,614; Income Approach (if  
developed): N/A

Final reliance is given to the Sales  
Comparison Analysis due to the reliability  
of market data and which represents the  
motives of the typical purchaser [sic]. The  
Cost Approach although not as accurate,  
supports value. The Income Approach was not  
appropriate for this assignment.

45. In developing his "Cost Approach" estimate of the market value of the Subject Property (referenced in the first part of the "Reconciliation" section), Respondent used a "replacement cost new" figure of \$90 a square foot. There was nothing in the Report or Work File to support or explain his use of this figure.

46. The second and final part of the "Reconciliation" section of the Report read as follows:

This appraisal is made x "as is," \_ subject to completion per plans and specifications on the basis of a hypothetical condition that the improvements have been completed,

\_ subject to the following repairs or alterations on the basis of a hypothetical condition that the repairs or alterations have been completed, or \_ subject to the following required inspection based on the extraordinary assumption that condition or deficiency does not require alteration or repair: Subject to the Statement of Limiting Conditions and Appraiser's Certification attached.

Based on a complete visual inspection of the interior and exterior areas of the subject property,[<sup>12</sup>] defined scope of work, statement of assumptions and limiting conditions, and appraiser's certification, my (our) opinion of the market value, as defined, of the real property that is the subject of this report is \$395,000, as of January 27, 2006, which is the date of inspection and the effective date of this appraisal.

47. The fourth page of the Report contained pre-printed boilerplate, including the following:

This report form is designed to report an appraisal of a one-unit property or a one-unit property with an accessory unit . . . .

\* \* \*

SCOPE OF WORK: The scope of work for this appraisal is defined by the complexity of this appraisal assignment and the reporting requirements of this appraisal report form . . . . The appraiser must, at a minimum: (1) perform a complete visual inspection of the interior and exterior areas of the subject property, (2) inspect the neighborhood, (3) inspect each of the comparable sales from at least the street, (4) research, verify, and analyze data from reliable public and/or private sources, and (5) report his or her analysis, opinions, and conclusions in this appraisal report.

INTENDED USE: The intended use of this appraisal report is for the lender/client to evaluate the property that is the subject of the appraisal for a mortgage finance transaction.

INTENDED USER: The intended user of this appraisal report is the lender/client.

\* \* \*

STATEMENT OF ASSUMPTIONS AND LIMITING CONDITIONS: The appraiser's certification in this report is subject to the following assumptions and limiting conditions:

\* \* \*

2. The appraiser has provided a sketch in this appraisal report to show the approximate dimensions of the improvements. The sketch is included only to assist the reader in visualizing the property and understanding the appraiser's determination of its size.

\* \* \*

5. The appraiser has noted in this appraisal any adverse conditions (such as needed repairs, deterioration, the presence of hazardous wastes, toxic substances, etc.) observed during the inspection of the subject property or that he or she became aware of during the research involved in performing the appraisal. Unless otherwise stated in this appraisal report, the appraiser has no knowledge of any hidden or unapparent physical deficiencies or adverse conditions of the property (such as, but not limited to, needed repairs, deterioration, the presence of hazardous wastes, toxic substances, adverse environmental conditions, etc.) that would make the property less valuable, and has assumed that there are no such conditions and makes no

guarantees or warranties, express or implied. The appraiser will not be responsible for any such conditions that do exist and for any engineering or testing that might be required to discover whether such conditions exist. Because the appraiser is not an expert in the field of environmental hazards, this appraisal report must not be considered as an environmental assessment of the property.

6. The appraiser has based his or her appraisal report and valuation conclusions for an appraisal that is subject to satisfactory completion, repairs, or alterations on the assumption that the completion, repairs, or alterations of the subject property will be performed in a professional manner.

48. The fifth page of the Report contained additional pre-printed boilerplate in the form of an "Appraiser's Certification," wherein "the Appraiser [Respondent] certifie[d] and agree[d] that," among other things:

1. I have, at a minimum, developed and reported this appraisal in accordance with the scope of work requirements stated in this appraisal report.

2. I performed a complete visual inspection of the interior and exterior areas of the subject property. I reported the condition of the improvements in factual, specific terms. I identified and reported the physical deficiencies that could affect the livability, soundness or structural integrity of the property.

3. I performed this appraisal in accordance with the requirements of the Uniform Standards of Professional Appraisal Practice that were adopted and promulgated by the Appraisal Standards Board of The Appraisal

Foundation and that were in place at the time this appraisal report was prepared.

4. I developed my opinion of the market value of the real property that is the subject of this report based on the sales comparison approach to value. I have adequate comparable market data to develop a reliable sales comparison approach for this appraisal assignment. I further certify that I considered the cost and income approaches to value but did not develop them, unless otherwise indicated in this report.

5. I researched, verified, analyzed, and reported on any current agreement for sale for the subject property, any offering for sale of the subject property in the twelve months prior to the effective date of this appraisal, and the prior sales of the subject property for a minimum of three years prior to the effective date of this appraisal, unless otherwise indicated in this report.

6. I researched, verified, analyzed, and reported on the prior sales of the comparable sales for a minimum of one year prior to the date of sale of the comparable sale, unless otherwise indicated in the report.

7. I selected and used comparable sales that are locationally, physically, and functionally the most similar to the subject property.

8. I have not used comparable sales that were the result of combining a land sale with the contract purchase price of a home that has been built or will be built on the land.

9. I have reported adjustments to the comparable sales that reflect the market's

reaction to the differences between the subject property and the comparable sales.

10. I verified, from a disinterested source, all information in this report that was provided by parties who have a financial interest in the sale or financing of the subject property.

11. I have knowledge and experience in appraising this type of property in this market area.

12. I am aware of, and have access to, the necessary and appropriate public and private data sources, such as multiple listing services, tax assessment records, public land records and other such data sources for the area in which the property is located.

13. I obtained the information, estimates, and opinions furnished by other parties and expressed in this appraisal report from reliable sources that I believe to be true and correct.

14. I have taken into consideration factors that have an impact on value with respect to the subject neighborhood, subject property, and the proximity of the subject property to adverse influences in the development of my opinion of market value. I have noted in this appraisal report any adverse conditions (such as, but not limited to, needed repairs, deterioration, the presence of hazardous wastes, toxic substances, adverse environmental conditions, etc.) observed during the inspection of the subject property or that I became aware of during research involved in performing this appraisal. I have considered these adverse conditions in my analysis of the property value, and have reported on the effect of the conditions on the value and marketability of the subject property.

15. I have not knowingly withheld any significant information from this appraisal and, to the best of my knowledge, all statements and information in this appraisal report are true and correct.

16. I stated in this appraisal report my own personal, unbiased, and professional analysis, opinions, and conclusions, which are subject only to the assumptions and limiting conditions in this appraisal report.

17. I have no present or prospective interest in the property that is the subject of this report, and I have no present or prospective personal interest or bias with respect to the participants in the transaction. I did not base, either partially or completely, my analysis and/or opinion of market value in this appraisal report on the race, color, religion, sex, age, marital status, handicap, familial status, or national origin of either the prospective owners or occupants of the subject property or of the present owner or occupants of the properties in the vicinity of the subject property or on any other basis prohibited by law.

18. My employment and/or compensation for performing this appraisal or any future or anticipated appraisals was not conditioned on any agreement or understanding, written or otherwise, that I would report (or present analysis supporting) a predetermined specific value, a predetermined minimum value, a range or direction in value, a value that favors the cause of any party, or the attainment of a specific result or occurrence of a specific subsequent event (such as approval of a pending mortgage loan application).

19. I personally prepared all conclusions and opinions about the real estate that were set forth in this appraisal report. If I

relied on significant real property appraisal assistance from any individual or individuals in the performance of this appraisal or the preparation of this appraisal report, I have named such individual(s) and disclosed the specific tasks performed in this appraisal report.<sup>[13]</sup> I certify that any individual so named is qualified to perform the tasks. I have not authorized anyone to make a change to any item in this appraisal report; therefore any change made to this appraisal is unauthorized and I will take no responsibility for it.

20. I identified the lender/client in this appraisal report who is the individual, organization, or agent for the organization that ordered and will receive this appraisal report.

21. The lender/client may disclose or distribute this appraisal to the borrower; another lender at the request of the borrower; the mortgagee or its successors and assigns; mortgage insurers; government sponsored enterprises; other secondary market participants; data collection or reporting services; professional appraisal organizations; any department, agency, or instrumentality of the United States; and any state, the District of Columbia, or other jurisdictions; without having to obtain the appraiser's or supervisory appraiser's (if applicable) consent. Such consent must be obtained before this appraisal report may be disclosed or distributed to any other party, including, but not limited to, the public through advertising, public relations, news, sales, or other media.

22. I am aware that any disclosure or distribution of this appraisal report by me or the lender/client may be subject to certain laws and regulations. Further, I am also subject to the provisions of the



Uniform Standards of Professional Appraisal Practice that pertain to disclosure or distribution by me.

23. The borrower, another lender at the request of the borrower, the mortgagee or its successors and assigns, mortgage insurers, government sponsored enterprises, and other secondary market participants may rely on this appraisal report as part of any mortgage finance transaction that involves any one or more of these parties.

24. If this appraisal was transmitted as an "electronic record" containing my "electronic signature," as those terms are defined in applicable federal and/or state laws (excluding audio and video recordings), or a facsimile transmission of this appraisal report containing a copy or representation of my signature, the appraisal report shall be as effective, enforceable and valid as if a paper version of this appraisal report were delivered containing my original hand written signature.

25. Any intentional or negligent misrepresentation contained in this appraisal report may result in civil liability and/or criminal penalties including, but not limited to, fine or imprisonment or both under the provisions of Title 18, United States Code, Section 1001, et seq., or similar state laws.

49. Directly beneath the foregoing boilerplate was Respondent's signature. No one else signed the Report, nor was any individual identified in the Report as having assisted Respondent.

50. Appended to the Report was an pre-printed "Addendum," which read, in pertinent part, as follows:

## SCOPE OF APPRAISAL

The appraisal is based on the information gathered by the appraiser from public records, other identified sources, inspection of the subject property and neighborhood, and selection of comparable sales within the market area. The original source of the comparables is shown in the Data Source section of the market grid along with the source of confirmation, if available. The original source is presented first. The sources and data are considered reliable. When conflicting information was provided, the source deemed most reliable has been used. Data believed to be unbelievable was not included in this report nor was [it] used as a basis for the value conclusion.

The Reproduction Cost is based on published cost indexes, such as Marshall Valuation Service, and supplemented by the appraiser's knowledge of the local market.

\* \* \*

## HIGHEST AND BEST USE

The Highest and Best Use of a site is that reasonable and probable use that supports the highest present value, as defined, as of the effective date of the appraisal. For improvements to represent[] the highest and best use of a site, they must be legally permitted, be financially feasible, be physically possible and provide[] more profit than any other use of the site would generate.

## SITE

The improvements on the property are legal and conform to current zoning regulations. In the event of a loss by fire [] all improvements could be rebuilt without obtaining a zoning variance.

The opinion of zoning compliance requirements expressed in this appraisal is based on the appraiser's inspections of the subject property and comparison to the appropriate zoning ordinance. This opinion does not represent a certification which can only be obtained from the proper jurisdictional authority.

\* \* \*

#### ROOM LISTS

The number of rooms, bedrooms, baths and lavatories is typical of houses in this neighborhood. Foyers, laundry rooms and all rooms below grade are excluded from the total room count.

\* \* \*

#### CONDITION OF COMPONENTS

Any opinion expressed in this appraisal pertaining to the condition of the appraised property's, or comparable property's components, is based on observation[s] made at the time of inspection. They rely on visual indicators as well as reasonable expectations as to adequacy and dictated by neighborhood standards relative to marketability. These observations do not constitute certification of condition, including roof or termite problems, which may exist. If certification is required, a properly licensed or qualified individual should be consulted.

#### COST APPROACH

The Cost Approach includes a land value analysis and the estimated replacement cost to construct, at current prices, a building with utility equivalent to the building being appraised, using modern materials, design, layout and current construction

standards. Rates for the Cost Approach were calculated using Marshall & Swift Residential Cost Handbook. Physical, functional and external inadequacies, as measured in the market, are deducted accordingly. The "as is" value of site improvements (driveway, Landscaping, etc.). represents their market contributory value as measured by a paired sales analysis. The Cost Approach is considered a supportive indicator of value.

The subject[] site['s] value has been derived from market abstractions techniques applied to improved land sales from the subject market area, land sales as well as analysis of assessed value. [S]ubject[] land['s] total value ratio is common for properties in the subject[] market area and does not adversely affect marketability and/or value.

#### DIRECT SALES COMPARISON APPROACH

Direct Sales Comparison Approach is based on the comparison of the subject with sales of similar type properties. Adjustments are made to these sales for differences with the subject. [T]his is generally considered the best indicator of value.

\* \* \*

#### ADDITIONAL COMMENTS

##### LIVING AREAS:

The appraisal uses actual living area in the market analysis for both the subject and comparable sales properties. The living area utilized for the sales data has been abstracted from the Public Records/Tax Rolls listed square foot area data and may have been further modified by the field appraiser's observation of the actual improvements.

DIGITAL PHOTOGRAPHS

Digital photographs taken of the subject property and sales comparables were not enhanced or altered in any way, shape, or form.

\* \* \*

ITEMS LEFT BLANK

For the purpose of this appraisal report, an item left blank indicates this item does not apply to the subject property, indicates a (No or None) response, or indicates that the appraiser is not able to ascertain and/or is not qualified to furnish this information.

\* \* \*

DATE OF APPRAISAL

The date of the appraisal is the date of the last site inspection of the subject property.

SUBJECT'S SKETCH

All measurements of the subject's improvements have been rounded and the appraiser has tried to determine actual measurements as accurately as possible. This is not a survey and is not to be interpreted as a survey of the subject property.

\* \* \*

51. The "sketch" of the Subject Property that Respondent appended to the Report did not accurately reflect the configuration and layout of the property, as of the effective date of the appraisal.

52. On or about February 13, 2009, notwithstanding that Respondent had indicated in the Report (in the "Reconciliation" section thereof) that the appraisal was "made 'as is'" and not "subject to completion per plans and specifications," nor subject to any "repairs or alterations" being made, Respondent inexplicably issued an "Appraisal Update and/or Completion Report" (Supplemental Report) containing a "Certification of Completion," which read as follows:

INTENDED USE: The intended use of this certificate of completion is for the lender/client to confirm that the requirements or conditions stated in the appraisal report referenced above have been met.

INTENDED USER: The intended user of this certification of completion is the lender/client.

HAVE THE IMPROVEMENTS BEEN COMPLETED IN ACCORDANCE WITH THE REQUIREMENTS AND CONDITIONS STATED IN THE ORIGINAL APPRAISAL REPORT?  Yes  No If No, describe any impact on the opinion of market value.

The subject property has been ready per plans and specifications.

APPRAISER'S CERTIFICATION: I certify that I have performed a visual inspection on the subject property to determine if the conditions or requirements stated in the original appraisal have been satisfied.

According to the Supplemental Report, Respondent conducted this "visual inspection" of the Subject Property on February 13, 2006.

53. Contrary to the assertions made in the "Intended Use" and "Appraiser's Certification" sections of the "Certification of Completion," there were no "conditions" or "requirements" "stated in the original appraisal [report]."

54. Any "plans and specifications" referenced in an original or updated appraisal report must be maintained in the appraiser's work file. Respondent's Work File contains no "plans and specifications," nor any other indication as to what, if any, post-Report repair or renovation work had been done on the Subject Property at the time of the issuance of the Supplemental Report.

#### CONCLUSIONS OF LAW

55. DOAH has jurisdiction over the subject matter of this proceeding and of the parties hereto pursuant to Chapter 120, Florida Statutes.

56. At all times material to the instant case, the Florida Real Estate Appraisal Board (Board) has been statutorily empowered to take disciplinary action against Florida-certified real estate appraisers based upon any of the grounds enumerated in Section 475.624, Florida Statutes.

57. The Board may impose one or more of the following penalties, and no others: license revocation; license suspension (for a period not exceeding ten years); imposition of an administrative fine not to exceed \$5,000.00 for each count or

separate offense; issuance of a reprimand; and placement of the licensee on probation. § 475.624, Fla. Stat.

58. The Board may take such action only after the licensee has been given reasonable written notice of the charges and an adequate opportunity to request a proceeding pursuant to Sections 120.569 and 120.57, Florida Statutes. See § 120.60(5), Fla. Stat.

59. An evidentiary hearing must be held if requested by the licensee when there are disputed issues of material fact. See Hollis v. Department of Business and Professional Regulation, 982 So. 2d 1237, 1239 (Fla. 5th DCA 2008); and §§ 120.569(1) and 120.57(1), Fla. Stat.

60. At the hearing, Petitioner bears the burden of proving that the licensee engaged in the conduct, and thereby committed the violations, alleged in the charging instrument. Clear and convincing evidence of the licensee's guilt must be presented for Petitioner to meet its burden of proof. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); Fox v. Department of Health, 994 So. 2d 416, 418 (Fla. 1st DCA 2008); Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652, 655 (Fla. 5th DCA 1998); and § 120.57(1)(j), Fla. Stat. ("Findings of fact shall



be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings . . . .").

61. Clear and convincing evidence is an "intermediate standard," "requir[ing] more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). 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)(citing with approval, Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)); see also In re Adoption of Baby E. A. W., 658 So. 2d 961, 967 (Fla. 1995)("The evidence [in order to be clear and convincing] must be sufficient to convince the trier of fact without hesitancy."). "Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Electric Corporation, Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991).

62. 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 Trevisani v. Department of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005); Aldrete v. Department of Health, Board of Medicine, 879 So. 2d 1244, 1246 (Fla. 1st DCA 2004); Shore Village Property Owners' Association, Inc. v. Department of Environmental Protection, 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).

63. 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. See Djokic v. Department of Business and Professional Regulation, Division of Real Estate, 875 So. 2d 693, 695 (Fla. 4th DCA 2004); Elmariah v. Department of Professional Regulation, Board of Medicine, 574 So. 2d 164, 165 (Fla. 1st DCA 1990); and Lester v. Department of

Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

64. In those cases where the proof is sufficient to establish that the licensee committed the violation(s) alleged in the charging instrument and that therefore disciplinary action is warranted, it is necessary, in determining what disciplinary action should be taken against the licensee, to consult the Board's "disciplinary guidelines," as they existed at the time of the violation(s). See Parrot Heads, Inc. v. Department of Business and Professional Regulation, 741 So. 2d 1231, 1233 (Fla. 5th DCA 1999)("An administrative agency is bound by its own rules . . . creat[ing] guidelines for disciplinary penalties."); and Orasan v. Agency for Health Care Administration, Board of Medicine, 668 So. 2d 1062, 1063 (Fla. 1st DCA 1996)("[T]he case was properly decided under the disciplinary guidelines in effect at the time of the alleged violations."); see also State v. Jenkins, 469 So. 2d 733, 734 (Fla. 1985)("[A]gency rules and regulations, duly promulgated under the authority of law, have the effect of law."); Buffa v. Singletary, 652 So. 2d 885, 886 (Fla. 1st DCA 1995)("An agency must comply with its own rules."); and Williams v. Department of Transportation, 531 So. 2d 994, 996 (Fla. 1st DCA 1988)(agency is required to comply with its disciplinary guidelines in taking disciplinary action against its employees).

65. At all times material to the instant case, the Board's "disciplinary guidelines" have been set forth in Florida Administrative Code Rule 61J1-8.002. The version of Florida Administrative Code Rule 61J1-8.002 in effect at the time of the violations alleged in the Administrative Complaint provided, in pertinent part, as follows:

(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. . . .

(2) As provided in Section 475.624, F.S., the Florida Real Estate Appraisal Board may, in addition to other disciplinary penalties, place a licensee on probation. The placement of the licensee on probation shall be for such a period of time and subject to such conditions as the Board may specify. Standard probationary conditions may include, but are not limited to, requiring the licensee: to attend pre-licensure courses; to satisfactorily complete a pre-licensure course; to attend and satisfactorily complete continuing education courses; to submit to reexamination through the state-administered examination, which must be successfully completed; to be

subject to periodic inspections and interviews by an investigator of the Department of Business and Professional Regulation.

\* \* \*

(3) The penalties are as listed unless aggravating or mitigating circumstances apply pursuant to subsection (4):

\* \* \*

(g) Section 475.624(4), F.S. Violated any of the provisions of this section or any lawful order or rule issued under the provisions of this section or Chapter 455, F.S.- The usual action of the Board shall be to impose a penalty up to revocation and an administrative fine up to \$5,000.

\* \* \*

(q) Section 475.624(14), F.S. 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- 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.

(r) Section 475.624(15), F.S. Has failed or refused to exercise reasonable diligence in developing or preparing an appraisal report- 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.

\* \* \*

(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. . . .

(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.

66. The Administrative Complaint issued in the instant case alleges that, in connection with the development and communication of his appraisal of the Subject Property, Respondent violated: Standards Rule 1-1(a), (b), and (c) of the Uniform Standards of Professional Appraisal Practice (2005) and therefore also Section 475.624(14), Florida Statutes (2005) (Count I); Standards Rule 2-1(a) of the Uniform Standards of Professional Appraisal Practice (2005) and therefore also

Section 475.624(14), Florida Statutes (2005) (Count II); Standards Rule 2-2(b)(ix) of the Uniform Standards of Professional Appraisal Practice (2005) and therefore also Section 475.624(14), Florida Statutes (2005) (Count III); Section 475.629, Florida Statutes (2005) and therefore also Section 475.624(4), Florida Statutes (Count IV); and Section 475.624(15), Florida Statutes (2005) (Count V).

67. At all times material to the instant case, Section 475.624(14), Florida Statutes, has authorized the Board to take disciplinary action against a Florida-certified residential real estate appraiser who "[h]as violated any standard for the development or communication of a real estate appraisal or other provision of the Uniform Standards of Professional Appraisal Practice."

68. Standards Rules 1-1(a), (b), and (c), 2-1(a), and 2-2(b)(ix) of the 2005 version of the Uniform Standards of Professional Appraisal Practice (USPAP 2005), which was in effect at the time of the violations alleged in Counts I through III of the Administrative Complaint in the instant case,<sup>14</sup> provided as follows:

STANDARD 1: REAL PROPERTY APPRAISAL,  
DEVELOPMENT

In developing a real property appraisal, an appraiser must identify the problem to be solved and the scope of work necessary to solve the problem, and correctly complete

research and analysis necessary to produce a credible appraisal.

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

(a) be aware of, understand, and correctly employ those recognized methods and techniques that are necessary to produce a credible appraisal;[<sup>15</sup>]

(b) not commit a substantial error of omission or commission that significantly affects an appraisal;[<sup>16</sup>] and

(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.[<sup>17</sup>]

\* \* \*

STANDARD 2: REAL PROPERTY APPRAISAL,  
REPORTING

In reporting the results of a real property appraisal, an appraiser must communicate each analysis, opinion, and conclusion in a manner that is not misleading.

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

\* \* \*



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, and Restricted Use Appraisal Report.

\* \* \*

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

\* \* \*

(ix) summarize the information analyzed, the appraisal procedures followed, and the reasoning that supports the analyses, opinions, and conclusions.<sup>[18]</sup>

69. At all times material to the instant case, Section 475.624(4), Florida Statutes, has authorized the Board to take disciplinary action against a Florida-certified residential real estate appraiser who "[h]as violated any of the provisions of [Part II of Chapter 475, Florida Statutes]," including the following provision found in Section 475.629, Florida Statutes:

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.

70. At all times material to the instant case, Section 475.624(15), Florida Statutes, has authorized the Board to take disciplinary action against a Florida-certified residential real estate appraiser who "[h]as failed or refused to exercise reasonable diligence in developing an appraisal or preparing an appraisal report."

71. "There is no statute, rule, or USPAP standard that defines 'reasonable diligence.'" Department of Business and Professional Regulation, Division of Real Estate v. Guilfoyle, No. 07-0683PL, 2007 Fla. Div. Adm. Hear. LEXIS 469 \*13 (Fla. DOAH August 22, 2007)(Recommended Order). It was therefore incumbent upon Petitioner, in order to meet its burden of proving that Respondent deviated from the required standard of diligence in violation of Section 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 Respondent faced in the instant case.

Department of Business and Professional Regulation, Division of Real Estate v. Harrison, No. 06-3387PL, 2007 Fla. Div. Adm. Hear. LEXIS 315 \*24-25 (Fla. DOAH May 30, 2007)(Recommended Order); Department of Business and Professional Regulation, Division of Real Estate v. Catchpole, No. 06-3389PL, 2007 Fla. Div. Adm. Hear. LEXIS 316 \*22-23 (Fla. DOAH May 30, 2007)(Recommended Order); and Department of Business and Professional Regulation, Division of Real Estate v. Price, No. 06-3720PL, 2007 Fla. Div. Adm. Hear. LEXIS 249 \*26-27 (Fla. DOAH May 3, 2007)(Recommended Order); see also McDonald v. Department of Professional Regulation, 582 So. 2d 660, 670 (Fla. 1st DCA 1991)(Zehmer, J., specially concurring)("[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."); and Purvis v. Department of Professional Regulation, Board of Veterinary Medicine, 461 So. 2d 134, 136 (Fla. 1st DCA 1984)("Section 474.214(1)(q), Florida Statutes, sets forth 'negligence, incompetency or misconduct, in the practice of veterinary medicine' as a ground for disciplinary action. The parties to this appeal have treated 'negligence' and 'incompetency' as meaning a failure to comply with the minimum standard of care or

treatment required of a veterinarian under the circumstances. We accept that construction of this penal statute. Unlike a charge of violating a statute or rule under section 474.214(1)(g), which requires no proof of a standard of care, the charge against Dr. Purvis necessarily required evidentiary proof of some standard of professional conduct as well as deviation therefrom. . . . [T]he Board never introduced any evidence at the administrative hearing to show the appropriate standard of care which it contends Dr. Purvis failed to meet. The Board introduced no expert testimony, no statute, no rule, nor any other type of evidence to establish the appropriate standard of care or that Dr. Purvis fell below that standard."). Petitioner presented such evidence in the instant case through the un rebutted expert testimony of Mr. Spool, which the undersigned has accepted.

72. With respect to each of the five counts of the Amended Administrative Complaint, Petitioner met its burden of proof.

73. Through its evidentiary presentation, it clearly and convincingly established that, in connection with the development and communication of his appraisal of the Subject Property, Respondent violated the USPAP 2005 and statutory provisions cited in Counts I through V of the Amended Administrative Complaint by committing the following acts and omissions (which were described in the "Essential Allegations of

Material Fact" set forth in the Amended Administrative Complaint): treating the Subject Property for purposes of the appraisal, and identifying it in the Report, as a legal single-family residence, when it actually was, on the effective date of the appraisal, an "illegally subdivided," multi-unit residential property that was in violation of the City of Miami zoning code; including an inaccurate sketch of the Subject Property in the Report; using Comparable Sale 1 as a "comparable" in his sales comparison analysis, despite its being 753 square feet smaller than the 2,249 square foot Subject Property; in determining an "Adjusted Sale Price" for Comparable Sale 3, relying on the "Total Area" square footage (2,000) reported in the MLX listing for the property, instead of the "Gross Living Area" square footage (1,512) reported in ICS NET/FARES; not taking into account that the "remarks" section of the MLX listing for Comparable Sale 3 indicated that Comparable Sale 3, contrary to the representation he made in the Report, was not a one unit residential property, but rather consisted of three separate dwelling units; failing to obtain and analyze, as part of the appraisal process, a complete copy of the sales contract between Mr. Vazquez and Mr. Ceballos that was signed and dated; not employing an appropriate method of verifying sales price information for Comparable Sales 1, 2, and 3; failing to provide in his Report or Work File: any support or explanation for

making a \$25 per square foot upward adjustment in calculating the "Adjusted Sales Price[s] of Comparables," using a "replacement cost new" figure of \$90 a square foot in developing his "Cost Approach" estimate of the market value of the Subject Property, and not making any adjustments in his sales comparison analysis to account for the provision in the sales contract between Mr. Vazquez and Mr. Ceballos that the "seller will pay 4% of purchase price for buyer closing costs"; stating in the Report that the Subject Property was in "average" condition and appraising it accordingly, notwithstanding that its roof, as Respondent noted in the Report, "had many missing and/or detached roof shingles"; stating in the Report that the appraisal was "made 'as is'" and not "subject to completion per plans and specifications," nor subject to any "repairs or alterations," but then subsequently issuing a Supplemental Report in which he indicated otherwise; and not retaining in his Work File the "plans and specifications" referenced in the Supplemental Report, nor any other documentation concerning post-Report repair or renovation work on the Subject Property.

74. In its Proposed Recommended Order, Petitioner has proposed that the undersigned recommend to the Board that it revoke Respondent's residential real estate appraiser license for his having committed the violations alleged in Counts I through V of the Amended Administrative Complaint. Having

carefully considered the facts of the instant case in light of the "disciplinary guidelines" set forth in the version of Florida Administrative Code Rule 61J1-8.002 in effect at the time of the commission of these violations, the undersigned agrees that, given what the violations collectively reflect concerning Respondent's ability to competently make residential real estate appraisals with safety to clients and the general public and in accordance with required professional standards, the revocation of Respondent's license is the appropriate disciplinary action for the Board to take in the instant case.

#### RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

RECOMMENDED that the Board issue a Final Order finding Respondent guilty of the violations alleged in Counts I through V of the Amended Administrative Complaint and revoking his residential real estate appraiser license.

DONE AND ENTERED this 2nd day of November, 2009, in  
Tallahassee, Leon County, Florida.



---

STUART M. LERNER  
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 2nd day of November, 2009.

ENDNOTES

<sup>1</sup> Unless otherwise noted, all references in this Recommended Order to Florida Statutes are to Florida Statutes (2009).

<sup>2</sup> The hearing was originally scheduled for August 4, 2009, but was continued at Petitioner's request.

<sup>3</sup> "[C]aselaw indicates that a fact-finder should not arbitrarily reject un rebutted testimony." The Florida Bar v. Clement, 662 So. 2d 690, 696 (Fla. 1995); see also Wiederhold v. Wiederhold, 696 So. 2d 923, 924 (Fla. 4th DCA 1997)("[W]hile the trial court can reject un rebutted expert testimony, it must offer a reasonable explanation for doing so. In other words, the trial court as fact-finder cannot arbitrarily reject un rebutted expert testimony.")(citation omitted); and Long v. Moore, 626 So. 2d 1387, 1389 (Fla. 1st DCA 1993)("The trial court should accept un rebutted expert testimony on highly technical matters, unless it is so palpably incredible, illogical and unreasonable as to be unworthy of belief or otherwise open to doubt from some reasonable point of view.").

<sup>4</sup> Mr. Potestad is now himself a Florida-certified residential real estate appraiser.



<sup>5</sup> While none of Petitioner's witnesses, including Ms. Lugo, was able to give eyewitness testimony as to the state and condition of the Subject Property on January 27, 2006, the evidentiary record nonetheless clearly and convincingly establishes (contrary to Respondent's and Mr. Potestad's testimony on the matter, which the undersigned has rejected as unworthy of belief) that the Subject Property was a multi-unit structure, not a single-family residence, on that date. The evidence supporting this finding includes Ms. Lugo's testimony as to the observations she made during her January 5, 2006, and post-January 27, 2006, follow-up visits to the Subject Property; her testimony as to what needed to be done to convert the multi-unit structure she saw on January 5, 2006, to a legal, single-family residence; her testimony as to there having been no building permit for work on the Subject Property issued between January 5, 2006, and her next visit to the property on or about June 6, 2006; and the hearsay statements of Mr. Ceballos concerning what existed on the Subject Property at the time of his purchase in February 2006 (which supplemented Ms. Lugo's testimony). See Dieguez v. Department of Law Enforcement, Criminal Justice Standards and Training Commission, 947 So. 2d 591, 596 (Fla. 3d DCA 2007) ("The victim's hearsay statements were properly considered by the Administrative Law Judge to supplement and explain the documents. Based on this, the Administrative Law Judge could reasonably find (as she did) that the case had been proven by clear and convincing evidence."); and § 120.57(1)(c), Fla. Stat. ("Hearsay evidence may be used for the purpose of supplementing or explaining other evidence [in administrative proceedings], but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.").

<sup>6</sup> ISC NET is also known as "FARES" (which is an acronym for First American Real Estate Solutions).

<sup>7</sup> As Ms. Lugo credibly testified, the "neighborhood" actually had numerous former single-family residences (including the Subject Property) that had been illegally subdivided and converted into multi-unit structures.

<sup>8</sup> It is unclear how a shingle roof having "many missing and/or detached roof shingles" could be said to be "Avg.," which (as noted above) is how, in an earlier part of the "Improvements" section of the Report, Respondent described the condition of the Subject Property's roof.

<sup>9</sup> A property with outstanding code violations, as the Subject Property had, does not "generally conform to the neighborhood."

<sup>10</sup> This figure is inaccurate: \$395,000 (the reported "Sale Price" of the Subject Property) ÷ 2,249 square feet (the reported "Gross Living Area" of the Subject Property) = \$175.63 per square foot.

<sup>11</sup> MLX is an online multiple listing service.

<sup>12</sup> It is difficult to imagine how Respondent could have conducted, with reasonable diligence, "a complete visual inspection of the interior and exterior areas of the [S]ubject [P]roperty" and not have observed that the Subject Property was an illegally subdivided multi-unit property, rather than (as he represented in the Report) a legal single-family residence.

<sup>13</sup> No such individuals were named in the Report.

<sup>14</sup> The parties agree that USPAP 2005 provides the standards against which Respondent's conduct should be measured in the instant case.

<sup>15</sup> The "comment" to Standards Rule 1-1(a) read as follows:

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.

<sup>16</sup> The "comment" to Standards Rule 1-1(b) read as follows:

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.

<sup>17</sup> The "comment" to Standards Rule 1-1(c) read as follows:

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.

<sup>18</sup> The "comment" to Standards Rule 2-2(b)(ix) read as follows:

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, including reconciliation of the data and approaches, in accordance with Standards Rule 1-6.

COPIES FURNISHED:

Donna C. Lindamood, Esquire  
Senior Attorney  
Department of Business and  
Professional Regulation  
400 West Robinson Street, N#802  
Orlando, Florida 32801-1900

Steven W. Johnson, Esquire  
20 North Orange Avenue, Suite 700  
Orlando, Florida 32801

Thomas W. O'Bryant, Jr., Director  
Division of Real Estate  
Department of Business and  
Professional Regulation  
400 West Robinson Street  
Suite 802 North  
Orlando, Florida 32801

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

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.