

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case Nos. 09-6821PL
) 09-6823PL
FRED R. CATCHPOLE AND)
GWENDOLYN BARKER,)
)
Respondents.)
)

RECOMMENDED ORDER

An administrative hearing was conducted in this case on March 16, 2010, in Jacksonville, Florida, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Robert Minarcin, Esquire
Department of Business and
Professional Regulation
Division of Real Estate
400 West Robinson Street, Suite N-801
Orlando, Florida 32801

For Respondent: Fred Catchpole, pro se
5449 Marcia Circle
Jacksonville, Florida 32210

Gwendolyn Barker, pro se
2005 Cardiff Lane
Middleburg, Florida 32068

STATEMENT OF THE ISSUE

Whether Fred Catchpole and Gwendolyn Barker (Respondents) should be subject to disciplinary action as licensed residential real estate appraisers by the Department of Business and Professional Regulation, Division of Real Estate (Petitioner) for failure to exercise reasonable diligence in developing an appraisal report in violation of Section 475.623(15), Florida Statutes (2004).^{1/}

PRELIMINARY STATEMENT

In October 2009, Petitioner filed an Administrative Complaint against Respondent, Fred Catchpole, and an Administrative Complaint against Respondent, Gwendolyn Barker. Both complaints were based upon the same appraisal report and contained 12 identical counts against Respondents. Respondents timely filed requests for administrative hearings and, on December 15, 2009, the cases were forwarded by Petitioner to the Division of Administrative Hearings (DOAH). The cases were originally assigned to Administrative Law Judge Lisa Shearer Nelson, who consolidated the two cases. On February 19, 2010, the consolidated cases were transferred to the undersigned to conduct the administrative hearing.

At the beginning of the administrative hearing in this matter held on March 16, 2010, Petitioner withdrew Counts 2 through 12 of both Administrative Complaints (Administrative Complaints) and announced that it was proceeding against

Respondents on Count One only, alleging that Respondents "failed to exercise reasonable diligence" in preparing an appraisal report. Petitioner presented the testimony of two witnesses and offered eight exhibits that were received into evidence as Petitioner's Exhibits P-1 through P-8. Exhibits P-1 (complaint against Respondent Catchpole) and P-5 (complaint against Respondent Barker) were received with the caveat that any hearsay within the exhibits would not be used as a basis for a finding of fact unless corroborative of admissible evidence. Both Respondents testified on their own behalf and offered 34 exhibits that were received into evidence as Respondents' exhibits R-1 through R-3, R-7, R-9, R-11, R-12, R-14, R-15, R-16 (pages 48 and 49), R-18, R-23 (excluding hearsay within R-23 unless corroborative of admissible evidence), R-26, R-30, R-37, RA-1 through RA-12, RB-1, and RC-1 through RC-8.

The evidentiary portion of the hearing concluded on March 16, 2010. The parties were given until April 21, 2010, to file their respective proposed recommended orders. The transcript (T.) of the final hearing was filed on April 5, 2010. Petitioner and Respondents timely filed their Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is the licensing authority for real estate appraisers in Florida with revocation and disciplinary authority over its licensees pursuant to Section 20.165 and Chapter 475, Florida Statutes.

2. On or about September 16, 2004, Respondents Fred Catchpole and Gwendolyn Barker prepared, signed and communicated an appraisal report (Report) for the property, including a manufactured home, located at 209 Ponderosa Pine Court, Georgetown, Florida 32139 (Subject Property).

3. At the time of the Report, Respondent Catchpole was licensed by Petitioner as a State Licensed Real Estate Appraiser, and Respondent Barker was licensed by Petitioner as a State Certified Residential Real Estate Appraiser. Both Respondents are currently licensed by Petitioner as State Certified Residential Real Estate Appraisers.

4. The Report was prepared for Pass and Associates in connection with refinance of a loan secured by the Subject Property. Respondents issued a corrected version of the Report (Corrected Report) with changes and additions requested by the client in 2004, prior to refinancing the loan on the Subject Property.

5. In October 2004, a One-Unit Residential Appraisal Field Review (Field Review) of the Report was conducted on behalf of

Chase Manhattan Mortgage Corp., who was listed in the Field Review as the "Lender/Client."

6. Between 2004 and 2009, Respondents provided rebuttal and rebuttal materials to address the Field Review.

7. In 2009, Chase Home Lending (Chase Manhattan Mortgage Corp. and Chase Home Lending are both referred to herein as "Chase") filed a complaint with Petitioner regarding the Report. The complaint consisted of a cover letter from Larry Handley with Chase Home Lending, a copy of the Report, and a copy of the Field Review.

8. The complaint was found legally sufficient and forwarded to Petitioner's investigator. Petitioner's investigator did not receive a copy of the Corrected Report. T. 15, 204. Following the investigation, the Administrative Complaints were filed against Respondents.

9. Count I of the Administrative Complaints relies on a number of alleged problems with the Report or the supporting workfiles (Workfiles), as detailed in the "Essential Allegations of Material Fact" section of the Administrative Complaints. After dismissing Counts 2 through 12 of the Administrative Complaints at the beginning of the hearing, Petitioner did not provide an Amended Administrative Complaint for either Respondent. Count I of the Administrative Complaints is based solely upon Respondents' alleged failure "to exercise reasonable

diligence in developing an appraisal report in violation of Section 475.624(15)." Instead of providing Amended Administrative Complaints, during the final hearing and in its proposed recommended order, Petitioner addressed the following alleged problems with the Report or Workfiles:

- a. The address of comparative sale 2, listed in the Sales Comparison Analysis section of the Report, was incorrect.
- b. The Subject Property has a zoning classification of R-2, which is mixed residential, which was incorrectly stated in the Report.
- c. The Workfiles for comparable sales 1, 2, 3, 4, 5 and 6 listed in the Sales Comparison Analysis section of the Report are not supported by documentation contemporaneous to the effective date of the Report.
- d. Multiple Listing Services (MLS) is listed as a data source in the Sales Comparison Analysis section of the Report for comparable sales 3, 5 and 6, but the Workfiles lack MLS documentation for those comparative sales.
- e. The Sales Comparison Analysis section of the Report failed to identify features for comparable sale 2 that were noted in the Workfiles.
- f. The Workfiles lack data to support the gross living area for comparable sale 6 noted in the Sales Comparison Analysis of the Report.
- g. The Report failed to note fences on the comparable sales, failed to make adjustments for the fences in the Sales Comparison Analysis section of the Report, and failed

to address whether the fences had an influence on the price.

h. The Report contains inconsistent Cost Approach data.

i. The Workfiles lack documentation supporting the Estimated Site Value, Lump Sum, and As-Is Value data for the Subject Property in the Cost Approach sections of the Report.

j. The Workfiles lack documentation supporting the Site Value for the Subject Property listed in the Cost Approach sections of the Report.

k. The Workfiles lack documentation supporting the market trends outlined in the Sales Comparison Analysis section of the Report.

l. The Report lacks internal consistency.

10. At the final hearing, Respondents addressed each of the above-listed allegations.

Alleged Incorrect Address in Comparable Sale 2

11. The incorrect address was a minor typographical error.

The address listed for comparable sale 2 was only one number off the actual street address. The Report listed the street address as 815 CR 309B instead of the correct street address of 815 CR 308B. [underlines added]. The Corrected Report corrected the typographical error in the street address.

Alleged Wrong Zoning Classification for the Subject Property

12. The Subject Property is zoned "R-2, mixed residential" in the public records of Putnam County. Page one of the Report,

consisting of the first page of the Uniform Residential Appraisal Report, Freddie Mac Form 70, revised 6-93, the Report lists as the specific zoning classification and description, "single family residential R-2." At the final hearing, Respondent's investigator, who pointed out the alleged error in the Report, admitted that he had not had training in filling out the Freddie Mac Form 70.

13. The description used in the Report is consistent with the public tax record information on the web, which describes the Subject Property as "residential" with a zoning of "R-2." Exhibit R-18.

14. In addition, the One-Unit Residential Appraisal Field Review Report of the Report, which was prepared to determine the correctness of the procedures used by the original appraisal, specifically stated, "The zoning is correct." Exhibit R-37.

Alleged Lack of Contemporaneous
Documentation Supporting Comparative Sales

15. Petitioner's witness, Francois K. Gregoire, a real estate appraiser who reviewed the Report, provided testimony to support a number of the factual allegations in the Administrative Complaints. Based upon his credentials, Mr. Gregoire was allowed to offer opinions on the Report as an expert in residential real estate appraisals.

16. An appraiser's workfile must be contemporaneous with the development and communication of the appraisal report.

17. In addressing this allegation, Mr. Gregoire referenced comparable sales data in the Workfiles taken from Win2Data and Putnam County tax rolls in 2008, approximately four years after the effective date of the Report, which was issued in September 2004.

18. Although Petitioner's expert opined that since the data was retrieved in 2008, it could not be contemporaneous, the 2008 data included comparable sales contemporaneous with the Report.

19. The fall 2004 issue of the Florida Real Estate Appraisal Board News & Report included a question and answer from the Appraisal Standards Board (ASB) relating to the Uniform Standards of Professional Appraisal Practice (USPAP). The question and pertinent parts of the answer stated:

Question:

Recently I have considered maintaining only electronic workfiles (i.e. saving only electronic versions of my reports and supporting data, and scanning any paper documents used so that copies may be stored on electronic media). Is this prohibited by USPAP?

Response:

No. There is nothing in USPAP that would prohibit an appraiser from maintaining only electronic versions of workfiles. The Record Keeping section of the ETHICS RULE states, in part:

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.*

As long as an electronic workfile contained these items, it would be sufficient. An appraiser must also be mindful of the requirement to have access to the workfile for the applicable required time period. The appraiser must ensure that the proper software is maintained to allow access to the electronic files. (Italics in original.)

20. October 2008, the ASB issued a sequel its 2004 opinion, in the following response to the following question:

Question:

In the course of preparing my appraisals, I often research Multiple listing Service (MLS) and other data sources. I use this information to develop conclusions regarding neighborhood value ranges and market trends. Is it necessary for me to include copies of this information in my workfile? Alternatively, can I simply reference the data sources in my workfile.

Response:

References in the workfile to the location of documentation used to support an

appraiser's analysis, opinions, and conclusions can be adequate. It is not always necessary for the appraisal workfile to include all the documentation provided the referenced material is retrievable by the appraiser throughout the workfile retention period. Care should be exercised in the selection of the format and location of documentation.

21. The Workfiles reflect that Respondents used MLS, Win2Data, and MLS public records to support the Report. While contemporaneous paper copies may not have been maintained of all the data, they were retrievable as reflected in the workfiles.

Alleged failure to include MLS Listings in the Workfiles When Listed as a Source for Comparative Sales 3, 5 and 6

22. As noted in Finding of Fact 21, supra, while MLS and other supporting data contemporary with comparative sales 3 and 5 listed in the Report may not have been kept in the Workfiles, they were retrievable. See, e.g., Exhibit R-20, pp. 74-75 (listing 2009 tax data showing comparative sale 5 on 6/8/2004 for \$92,000 and MLS data retrieved on 2/28/10 showing subsequent sale of the property on 7/20/05 for \$110,000).

23. Moreover, contrary to the allegation, the Report does not list MLS as a data source for comparative sale 6. Rather, the Sales Comparison Analysis section of the Report lists "WINDAT/PUB REC/DRIVEBY" as the data and/or verification source for comparative sale 6. See Exhibit P-2, p. 3.

Alleged Failure of Report to Identify
Features for Comparable Sale 2 Noted in the Workfiles

24. Paragraphs 6(R) and 6(S) of the Administrative Complaints allege that the Report failed "to note that comparable sale 2 had a hot tub," and failed "to note the renovated status of comparable sale 2, as outlined in workfile documentation."

25. According to Mr. Gregoire, "in Comparable Sale Number 2, the MLS printout indicates some features that were not described in the appraisal report. There's inconsistency between the work file data and what was reported in the appraisal." T. 93-94.

26. While the MLS listing in the Workfiles provided additional information, there is no indication that the information was "inconsistent" with the Report.

27. At the final hearing, Respondent Catchpole explained their rating in the Report of comparative sale 2 as "good," accurately reflected recent renovations in that sale when compared to the "good" rating given to the Subject Property, which, at the time of the Report, had new floors, new carpets, and a new AC system. T. 202.

Alleged Lack of Data in the Workfiles to Support
Gross Living Area Listed in Report for Comparable Sale 6

28. The gross living area reported in the Report for comparable sale 6 is 840 square feet. At the final hearing,

Petitioner's expert, Mr. Gregoire, testified that there is no contemporaneous data to support that figure, and noted that the contemporaneous Win2Data in the Workfiles lists the square footage for comparable sale 6 as 2,380 square feet. In making his observation, however, Mr. Gregoire conceded that Win2Data sometimes rolls non-living areas into the reported living area.

T. 99.

29. The 2008 tax data in Respondents' Workfiles for comparative sale 6 shows that the "base" square footage for the mobile home on comparative sale 6 was 840 square feet, which is the same square footage reported in the Report. Exhibit P-3, p. 60

30. While the tax data print-out is not contemporaneous with the sale, the tax data on that print-out reflects the 2003 sale for \$89,000 listed in the Report, and provides a basis for the reported 840 square feet for comparable sale 6. As noted above, electronic data that has retrievable information contemporaneous with the Report is acceptable.

Alleged Failure of the Report to Note
or Make Adjustments for Fences on the Comparable Sales

31. Respondent Catchpole explained at the final hearing that, in addition to reviewing public sources and MLS listings, Respondents based their Report on actual drive-bys of the comparative sales. According to Mr. Catchpole, as memory served

him from six years before when the Report was written, only one fence was visible from the road.

32. Mr. Catchpole further explained that they did not add any value to the comparative sales for the fences which they saw because they considered them to be personal property and were not a 100 percent sure that the fences they observed belonged on the comparative sale property, as opposed to adjacent land.

33. According to Mr. Gregoire, whether or not comparative sales had fences should have been reported in the Report, "because to some buyers, that may have had an influence on the price." T. 101. Mr. Gregoire conceded, however, that "I can't say whether or not there should have been an adjustment, because I haven't done an appraisal in this area." Id.

Alleged Inconsistent Cost Approach data in the Report

34. Petitioner's expert witness, Mr. Gregoire, noted during his direct examination that there were inconsistent values between the Estimated Site Value of \$15,000 set forth on page 2 of the Report and the Market Value of Subject Site reported as \$10,000 on page 5 of the Report. He also noted that the value for "Lump Sum" of \$8,000 set forth on page 2 of the Report was different from the \$5,000 value for "Lump Sum" reported on page 5 of the Report. Finally, he noted that the "As is" value of \$15,000 for site improvements set forth on page 2 of the Report was different from the \$10,000 value reported on

page 5 of the Report for "other depreciated site improvements."

Exhibit P-2, pp. 2, 5. According to Mr. Gregoire, these internal inconsistencies made the Report misleading and demonstrated a lack of due diligence in its preparation.

T. 107-110.

35. Mr. Gregoire's observations, however, did not take into account the fact that Respondents issued a Corrected Report with changes and additions requested by the client in 2004, prior to refinancing the loan on the Subject Property. T. 15; Exhibit R-1. The Corrected Report corrected the inconsistencies pointed out by Mr. Gregoire. Exhibit R-1, pp. 2, 9 (the Corrected Report lists both "Estimated Site Value" and "Market Value of Subject Site" as \$15K; reports the "Lump Sum" value consistently as \$8K; and consistently reports both "As is Value of Site improvements" and "Market Value of Subject Site" as \$15K).

Alleged lack of documentation in Workfiles supporting the Estimated Site Value, Lump Sum, and As-Is Value data for the Subject Property in the Cost Approach sections of the Report.

36. The record citations provided in the Proposed Recommended Order submitted by Petitioner do not clearly indicate the alleged problem with the estimated site value, other than the inconsistency, which was corrected in the Corrected Report. Petitioner's PRO, ¶ 22. Nevertheless, there were six comparable sales listed in the Report, and Corrected

Report, with supporting data in the Workfiles from which estimated site cost data could be derived. As further noted by Respondent Catchpole, site data was addressed in an addendum to the Workfiles noting:

Where difference in the size of the site did not afford additional utility, there was no adjustment taken, it was considered excess land. (P-3, p. 4)

37. Mr. Gregoire also stated that there was no identification as to what "lump sum" is, either in the Report or the Workfiles. T. 109. At the final hearing, in his cross-examination of Mr. Gregoire, Respondent Catchpole indicated that the lump sum figure included porches and the air-conditioning system. In response, Mr. Gregoire stated that, if that was the case, it should have been disclosed. T. 139. There is no evidence, however, in the Field Review, that the "lump sum" category was criticized. In fact, the Field Review reported that "the data in the improvements section [is] complete and accurate." Exhibit R-37, p. 1, § II, ¶ 4. Further, there is no evidence that the lender asked for further explanation prior to refinancing the loan on the Subject Property.

38. As far as the alleged failure of supporting documentation for the "as is" value of site improvements on page 2 of the Report, although noting that it was not specifically identified in the report, Mr. Gregoire conceded that the value

"easily corresponds with the way it's described on Page 5 of [the Report] as Other Depreciated Site Improvements. But there is no explanation as to why in one -- it goes from \$15,000 [on page 2] to \$10,000 [on page 5 of the Report]." T. 110. As noted above, however, the Corrected Report, which Mr. Gregoire did not review, corrected the inconsistency between the two "as is" values set forth in the Report.

Alleged Lack of Support for the Site Value for the Subject Property listed in the Cost Approach sections of the Report

39. As noted in Finding of Fact 30, supra, the Workfiles contain comparable sales supporting the site value for the Subject Property, with an explanation in an addendum in the Workfiles.

40. In addition, the Field Review of the Report prepared in 2004 marked "Yes" to the inquiry, "Did the appraisal report contain the appropriate prior sale(s) and/or prior listings(s) of the subject property and comparable sales?" Exhibit R-37, p. 1.

41. Aside from the comparative sales, there was also data in the Workfiles showing other land sales in the area. Exhibit P-3, pp. 64-65.

Alleged lack of documentation supporting the Market Trends outlined in the Sales Comparison Analysis section of the Report.

42. The Neighborhood section of the Report indicates that the subject property is in a suburban area with 25 to 75 percent

build-up and stable growth, and with stable property values, demand and supply in balance, and a marketing time of three to six months. Exhibit P-3, p. 1 (top third); T. 110.

43. The Report finds that the following factors affect the marketability of the properties in the neighborhood:

MSA 3600 the area located in south Putnam County, is convenient to major transportation routes which offer easy access to employment opportunities, schools, and most residential services. The homes in the area exhibit average to good quality and appeal and are typically frame, manufactured or masonry construction and are generally well maintained. P-3, p. 1.

44. The Report states as market conditions in the subject neighborhood:

The market is currently stable with mortgage funds available to qualified buyers at competitive rates. There is no evidence of concessions, buydowns, or discounts which would affect market value. Property values are relatively stable with no changes expected in the market in the near term. Recent fluctuations in mortgage lending rates do not appear to have affected market values in the subject market. Exhibit P-3, p. 1.

45. According to Mr. Gregoire, referring to the Workfiles, he "couldn't develop any trend here based on the way it's maintained, whether it's stable or not." In addition, Mr. Gregoire opined that the Workfiles contain poor support for the reported single-family price range. T. 111.

46. Mr. Gregoire acknowledged, however, that the Workfiles include, "in addition to the comparable sales that we discussed, some what I call on-line printouts." Mr. Gregoire also acknowledged that the Workfiles contained several sales in the above \$200,000 price which are indicated as being the high price. According to Mr. Gregoire, however, "it doesn't necessarily show a predominant value there." T. 110-111.

47. The on-line printouts referenced by Mr. Gregoire appear on pages 26 through 30 of the Workfiles for improved property, and pages 64 and 65 of the Workfiles for land sales. Exhibit P-1, pp. 26-30, 64-65. The on-line printouts were derived from Win2Data, which Mr. Gregoire admitted was a recognized service for extracting market data. While Mr. Gregoire suggested that the "RealQuest" data source he utilizes was superior because it has updated on-line data, on-line Win2Data is also available and was utilized by Respondents. T. 150. The evidence did not show that the market data utilized by Respondents was deficient.

48. Respondent Catchpole is also expert in real estate appraisal. He has a master's degree in business administration, has testified as an expert before Congress, the United States District Courts in Georgia and Florida, and before the United States Bankruptcy Court in the Middle District of Florida. He has testified in numerous circuit courts in Florida. He has

been a member of the Appraisal Institute. He has appraised nuclear power plants, been an advisor for real estate investment trusts, and has been an appraiser for Whirlpool, Citi Corp and Shearson Lehman.

49. In the exchange during Mr. Gregoire's cross-examination by Respondent Catchpole, it was clear that they had a difference of opinion as to how to best support an appraisal. See T. 115-167; see also T. 196-198. The evidence was insufficient to show that Mr. Gregoire's approach was superior to the method utilized by Respondents in conducting the appraisal reflected in the Report or that Respondents did not use reasonable diligence in its preparation.

Alleged Failure of Respondents
to Maintain Internal Consistency in the Report

50. In support of this allegation, Petitioner cites to Mr. Gregoire's testimony at the final hearing that "it is the appraiser's responsibility to ensure internal consistency and to ensure that the report reflects their opinions and conclusion before they affix their name to the report or certification. Petitioner's PRO, p. 12; T. 135.

51. Aside from the fact that Mr. Gregoire's opinion did not reflect the Corrected Report, it is apparent his opinion did not consider other information provided by Respondents in support of the Report.

52. While the Field Review was critical of a number of aspects of the Report, Respondents provided rebuttal to that Field Review prior to the complaint by Chase initiating this action.

53. Some of the rebuttal included information indicating that the reviewer who prepared the Field Review had used comparable sales that were not arm's length transactions. Although Petitioner's investigator saw the information provided by Respondent Catchpole indicating that the reviewer's comparables were not arm's length transactions (T. 53), Mr. Gregoire did not review that information.

54. Mr. Gregoire admitted that he was aware that Respondents provided a written rebuttal with documentation to Chase to the Field Review conducted in 2004. At the time of his testimony in this case, however, Mr. Gregoire had not reviewed any correspondence related to the rebuttal. T. 117-118.

55. One document in particular, Exhibit R-30, that was provided to Petitioner's investigator from Respondents' Workfiles, contained notes from Respondent Catchpole contemporaneous to the Report indicating that Respondent Catchpole had contacted the property appraiser's office to resolve differences in comparable sale 2 between the MLS listing and public records. T. 65-66. Mr. Gregoire was not provided

this further evidence of Respondents' diligence prior to his testimony. T. 121-122.

56. In addition, the Workfiles submitted as Exhibits P-3 and P-7, were offered as the same documents. T. 25. It is clear, however, that a number of documents in P-7 were not in P-3. P-3 consists of 78 pages, whereas P-7 has 94 pages. It is apparent from Mr. Gregoire's testimony and reference to Exhibit P-3, that his opinions were based upon his review of P-3.

57. There was also evidence that there were a number of documents provided to Petitioner's investigator, but not placed in Exhibit P-3 for review by Mr. Gregoire for his analysis. Exhibits RA-1 through RA-12, RB-1, and RC-1 through RC-8. While ultimately not used as comparative sales, the documents are additional evidence of Respondents' efforts and diligence in preparing the Report.

58. In addition, the refinanced loan for which the Report was provided has never gone into default.

59. In sum, the evidence adduced at the final hearing was far less than convincing that Respondents did not use reasonable diligence in preparing the Report.

CONCLUSIONS OF LAW

60. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this

proceeding. See §§ 120.569, 120.57(1), 120.60(5), and 455.225(5), Florida Statutes (2009).

61. Petitioner is responsible for prosecuting disciplinary cases against licensed real estate appraisers. See § 475.021(1), Fla. Stat. (2009).

62. The Florida Real Estate Appraisal Board (Board) is responsible for taking agency action in disciplinary cases against licensed real estate appraisers. See §§ 475.613(2), 475.624, Fla. Stat. (2009).

63. Petitioner, as the party asserting the affirmative in this proceeding, has the burden of proof. See, e.g., Balino v. Dept. of Health & Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977). Because the Petitioner is seeking to prove violations of a statute and impose administrative fines or other penalties, it has the burden to prove the allegations in the complaint by clear and convincing evidence. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

64. Clear and convincing evidence:

requires that 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 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 Henson, 913 So. 2d 579, 590 (Fla. 2005), quoting Slomowitz v. Walker, 429 So. 797, 800 (Fla. 4th DCA 1983).

65. Section 475.624(15), Florida Statutes, provides:

475.624 Discipline.--The [B]oard may deny an application for registration, licensure, or certification; may investigate the actions of any appraiser registered, licensed, or certified under this part; may reprimand or impose an administrative fine not to exceed \$5,000 for each count or separate offense against any such appraiser; and may revoke or suspend, for a period not to exceed 10 years, the registration, license, or certification of any such appraiser, or place any such appraiser on probation, if it finds that the registered trainee, licensee, or certificateholder:

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

66. "There is no statute, rule or USPAP [Uniform Standards of Professional Appraisal Practice] standard that defines 'reasonable diligence.'" Dep't of Bus. & Prof'l Reg., Div. of Real Estate v. Guilfoyle, Case No. 07-0683PL (DOAH August 22, 2007), adopted in toto (DBPR Final Order October 24, 2007). In this case, Count I of the Administrative Complaints relies solely on an alleged violation of Section 475.624(15), Florida Statutes (2004). As noted in Dep't of Bus. & Prof'l Reg., Div. of Real Estate v. Murciano, Case No. 09-2491PL (DOAH November 2, 2009), adopted in toto (DBPR Final Order February 9, 2010):

It was therefore incumbent upon Petitioner, in order to meet its burden of burden of

proving that Respondent[s] 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[s] faced in the instant case.

Id., ¶ 71; cf. Purvis v. Dep't of Bus. & Prof'l Reg., 461 So. 2d 134, 136 (Fla. 1st DCA 1984) (expert testimony or other competent evidence of applicable standard required prior to establishing deviation from that standard).

67. In any event, disciplinary statutes such as Section 475.624(15), Florida Statutes (2004), are penal in nature, and must be construed in favor of the one against whom the penalty would be imposed. Munch v. Dep't of Prof'l Reg., 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992). A statute imposing a penalty is never to be construed in a manner that expands the statute.

Hotel & Restaurant Comm'n v. Sunny Seas No. One, 104 So. 2d 570, 571 (1958).

68. In this case, Petitioner failed to prove by clear and convincing evidence that Respondents violated Section 475.624(15), Florida Statutes, in preparing the Report. Petitioner's expert did not review the Corrected Report,²⁷ did not see rebuttal materials submitted by Respondents in the years prior to the Administrative Complaints, and did not review

Respondents' complete Workfiles. Therefore, Petitioner's expert's opinion expressed in this proceeding as to whether Respondents used reasonable diligence in preparing the Report lacked persuasiveness as well as credibility. Moreover, the expert opinion of Respondent Catchpole, a real estate appraisal expert in his own right,^{3/} having firsthand knowledge of the Subject Property and Report at issue, was more persuasive than that of Petitioner's expert regarding the Report and Workfiles at issue. Because Petitioner has not proven the violation as alleged in Count I of the Administrative Complaints, and all other counts of the Administrative Complaints were withdrawn at the beginning of the administrative hearing in this case, the Administrative Complaints should be dismissed.

RECOMMENDATION

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

RECOMMENDED that the Department of Business and Professional Regulation, Division of Real Estate, enter a Final Order dismissing the Administrative Complaints.

DONE AND ENTERED this 19th day of May, 2010, in
Tallahassee, Leon County, Florida.



JAMES H. PETERSON, III
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of May, 2010.

ENDNOTES

^{1/} Unless otherwise indicated, all references to the Florida Statutes are to the 2004 version, the year in which the appraisal report at issue was prepared.

^{2/} The corrected report was backdated to the date of the inspection. Many lenders require the signature date on an appraisal report to be the same as the date of the inspection. T. 219. Petitioner, in its PRO, argues that backdating the Corrected Report "demonstrates a complete lack of reasonable diligence on the part of Respondents." Petitioner's PRO, ¶ 39. Petitioner submitted no evidence whatsoever to support its contention that backdating the Corrected Report demonstrates a lack of reasonable diligence or violation of any other applicable standard.

^{3/} See, e.g., Martuccio v. Dep't of Prof'l Reg., 622 So. 2d 607, 609-10 (person with pecuniary interest in the proceeding is not disqualified from testifying as an expert under § 90.702, Fla. Stat.); cf. Falk v. Beard, 614 So. 2d 1086, 1089 (Fla. 1993) ("It would be an anomalous situation indeed if the testimony of one against whom a complaint is lodged could never form the basis for competent, substantial evidence").

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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.