

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 10-0267PL
)
PETER JOSEPH ESPOSITO,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice to all parties, a final hearing was conducted in this case on March 11, 2010, via video teleconference with sites in Tallahassee and Orlando, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings. The parties were represented as set forth below.

APPEARANCES

For Petitioner: Donna Christine Lindamood, Esquire
Department of Business and
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400 West Robinson Street
Orlando, Florida 32801-1757

For Respondent: Daniel Villazon, Esquire
Daniel Villazon, P.A.
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Celebration, Florida 34747

STATEMENT OF THE ISSUES

The issues in this case are stated in two counts set forth in the Administrative Complaint: Count I--whether Respondent is guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest conduct, culpable negligence, or breach of trust in a business transaction in violation of Subsection 475.624(2), Florida Statutes (2006); and Count II--whether Respondent is guilty of failing to exercise reasonable diligence in developing an appraisal report in violation of Subsection 475.624(15), Florida Statutes (2006). Counts III through IX of the Administrative Complaint were dismissed on the day of the final hearing held in this matter.

PRELIMINARY STATEMENT

On or about July 8, 2009, Petitioner, Department of Business and Professional Regulation, Division of Real Estate (hereinafter the "Division"), filed an Administrative Complaint against Respondent, Peter Joseph Esposito. Respondent returned the Election of Rights form seeking a formal administrative hearing. The Administrative Complaint and Election of Rights form were forwarded to the Division of Administrative Hearings ("DOAH") on January 19, 2010, and assigned to the undersigned Administrative Law Judge so that a formal administrative hearing could be conducted. The hearing was held on the date set forth above, and both parties were present and represented by counsel.

At the final hearing, the Division called two witnesses: Sara Kimmig, an investigative specialist with the Division; and Ben Cole, III, a certified general real estate appraiser. Petitioner's Exhibits 1, 2, 3 (subject to corroboration by non-hearsay evidence), 4, and 8 were admitted into evidence. Official recognition was taken of Petitioner's Exhibits 5, 6 and 7.

Respondent called one witness: Peter Joseph Esposito. No independent exhibits were offered into evidence by Respondent.

A transcript of the final hearing was ordered by the parties. The Transcript was filed at DOAH on April 8, 2010. The parties requested and were allowed 30 days, i.e., until May 10, 2010, to submit proposed recommended orders. Each party timely submitted a Proposed Recommended Order, and each was duly considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Division is responsible for monitoring all licensed and certified real estate appraisers in the state. It is the Division's duty to ensure that all appraisers comply with the standards set forth in relevant statutes and rules.

2. Respondent is a certified residential real estate appraiser. He has been an appraiser since 1998 and has been certified since 2002. There have been no prior actions taken against his professional license or certification. Respondent

moved to Orange County, Florida, in 1980 and his entire appraiser practice has been in the greater Orlando area.

3. On or about May 25, 2006, Respondent issued a real estate appraisal report (the "Appraisal") on a property located at 2119 Blossom Lane, Winter Park, Florida ("the Subject Property"). Several different approaches can be utilized by appraisers when assessing a property's value. Using the sales comparison approach for appraising residential properties, Respondent assigned a value of \$750,000 to the Subject Property. When Respondent applied the cost approach to the property, it resulted in a value of \$765,000. The income approach was not used in the Appraisal.

4. The Division received an anonymous complaint about the Appraisal some time after it was completed.¹ After conducting its investigation pursuant to the complaint, the Division asserts that in preparing and issuing the Appraisal, Respondent engaged in fraud, misrepresentation, concealment, false promises, false pretenses, dishonest conduct, culpable negligence, or breach of trust. The Division also alleges that Respondent is guilty of having failed to exercise reasonable diligence in developing the Appraisal.

The Subject Property

5. The Subject Property is a one-story, single-family residence located on .42 acres in Winter Park, Florida. The

Subject Property is located one block away from Lee Road, a heavily traveled four-lane road. The rear of the Subject Property is located on a finger of water identified as a canal that connects the property to Lake Killarney. Lake Killarney is a large lake suitable for motorboats and skiing. There is a dock on the rear of the Subject Property which can be used to secure a boat.

6. There are 2,551 gross square feet of living area in the Subject Property. The house has a two-car garage, two screened porches, and a fireplace. The home is 15 years old, with an "effective" age of three years. An effective age indicates how well a home has been maintained, upgraded and taken care of during its existence.

7. While the Subject Property is located in a nice, upscale neighborhood, the value of its location is somewhat diminished by the view across the canal. The far side of the canal houses a two-story, red brick office building with an asphalt parking lot. The view is not completely consistent with a typical neighborhood environment. At the time of the Appraisal, however (according to uncontroverted testimony by Respondent), the view across the canal was obscured by foliage and trees located on the bank of the canal near the boat dock.

Ownership and Sale History of the Subject Property

8. At the time Respondent prepared the Appraisal on behalf of his client, American Heritage, the Seller's Disclosure and Latent Defects Statement indicated the owners were a couple by the name of Huong Thu Do and Nguyen Do. The Sales Contract itself listed the seller as the Thu/Nguyen Trust. No buyer is listed on the Sales Contract. Mr. and Mrs. Do had not signed the contract. It is not unusual for Respondent to have an unsigned contract; his client is normally the lender,² rather than the buyers or sellers. The contract price on the Thu/Nguyen contract was \$699,000.

9. There were also other sales contracts associated with the Subject Property at about the same time. An "As Is Contract for Sale and Purchase" listed Do Huong Thu and Do Nguyen (presumably the same persons named in the unsigned contract mentioned above) and Beth Schuldiner/SPI, Inc., and/or Assigns as the Seller. This contract, signed by someone as Attorney in Fact for the Sellers, had a contract price of \$575,000. There is then an Assignment of the Contract to Beth Schuldiner/SPI, Inc., on April 29, 2006.

10. At the time of the Appraisal, the Subject Property was listed in the MLS report as having sold for \$575,000 in March 2006. The Appraisal mentioned the MLS report and the sale date, but did not indicate the sale price. It was an oversight by

Respondent not to put the sale price in the Appraisal. The \$575,000 sale of the Subject Property, however, was never recorded in the public records of Orange County, Florida.

11. The Closing Settlement Statement for the sale transaction listed Huong Thu Do and Nguyen Do as Seller and Aracely McFarland (yet another person involved in the transaction) as Buyer. The settlement statement indicates a contract sales price of \$699,000 and states that \$123,079.50 is due to Seller as an "Assignment Fee to Steele Property Investments" (which the Division opines is the SPI, Inc., mentioned in conjunction with Beth Schuldiner in the sales contracts). Taking away the assignment fee, the price would be approximately \$575,000.

12. Ultimately, a general warranty deed was recorded which listed Huong Thu Do and Nguyen Do as Sellers, and Aracely McFarland as the Buyer. The warranty deed was recorded in the Orange County public records on June 27, 2006. By way of a Quit Claim Deed recorded August 8, 2006, McFarland deeded the property to Beth Schuldiner as trustee of McFarland Trust.

13. The confusing and somewhat contradictory sales contracts and deeds may suggest some degree of shenanigans surrounding the sale of the Subject Property. It is clear Respondent knew of and had done work for Schuldiner previously. He said that Schuldiner sometimes gave him a bonus of up to \$100

to expedite his appraisal work. (Interestingly, Respondent made only about \$350 for the Appraisal at issue.) There is no evidence that Respondent was involved in or aware of the various transactions mentioned. Respondent was hired by a lender to appraise the Subject Property.

14. It is unsubstantiated conjecture to suggest that some collusion between Respondent and anyone else related to the sale was going on in this transaction. There is, in fact, no proof whatsoever that the allegedly shady deal was actually improper at all.

The Appraisal

15. Respondent, in his cost approach valuation of the Subject Property, listed the site value at \$250,000. A general appraiser who viewed the Subject Property to review Respondent's findings determined the site value to be \$160,000. The general appraiser's finding was based on the amount appearing in the county property appraiser's records. Such records, while they are some indication of the value of a property, are not meant to be a final word or completely reliable source. Respondent, conversely, took the property appraiser's value and compared it to other properties in the area, e.g., the site at 115 Killarney was valued at \$229,000; the one at 139 Killarney was \$224,000; a Rippling Avenue site was \$292,000; and an Interlachen site was listed at \$301,000. Based on those property values, plus the

phenomenon of great growth in land values at that time, Respondent made a good faith estimate of the site value for the Subject Property. His approach is reasonable.

16. Respondent's sales comparison approach to the appraisal used five comparable properties (or Comps) for comparison purposes. It is typical to use at least three comparables, but in special cases an appraiser would use more. Respondent considered this a special case.

17. Comp 1 was a much smaller, older home³ located directly across from, but not directly on, Lake Killarney. There is no commercial property nearby. That being the case, Respondent discounted the location value for Comp 1 by \$35,000 in an effort to make its overall value similar to the Subject Property. Respondent explains this discount as a necessary adjustment based on location and difference in land values. Other positive and negative adjustments were made, but the net adjustment for the property (vis-à-vis the Subject Property) was \$10,000.

18. Comp 2 was a somewhat smaller home than the Subject Property but with actual lake frontage, as opposed to a canal connecting to the lake, on Lake Killarney. This property is located some two miles from the Subject Property in a different neighborhood. Adjustments were made to this property totaling \$27,400, although no adjustment was made for the site, even though Comp 2 is directly on the lake, rather than on a canal.

19. Comp 3 was a somewhat larger home located less than half-a-mile from the Subject Property. An \$85,700 adjustment was made to make this Comp more comparable to the Subject Property.

20. Comp 4 is considerably larger than the Subject Property and is not located directly on the water. This property has access to Lake Catherine, but that lake is a much smaller and less usable body of water than Lake Killarney. An adjustment was made by Respondent to account for the larger size of this Comp, but such adjustments are a judgment call made by the appraiser.

21. Comp 5 is a similarly sized, though older, two-story home located a little over two miles from the Subject Property. This property is located in a much nicer neighborhood, on a much larger lot than the Subject Property. Again, an adjustment was made to make the property more comparable to the Subject Property.

22. Respondent did not use a very similar property located on the same street as the Subject Property, because he was concerned as to whether the sale of that home had been an arm's length transaction. His refusal to use this property as a Comp is reasonable.

23. Respondent's cost approach method of appraising the property involved an estimation of the cost of the site on which

the home was located; the cost of the house itself, minus depreciation; and the addition of any improvements. A site value can be derived using any one of various methods. If a vacant comparable site exists in the area, it can be used to estimate value of the site being appraised. However appraisers are seldom lucky enough to find such a vacant lot. The abstraction method is another approach, using a comparable site and subtracting the contributory value of improvements. Also, a county tax assessor's estimate on the tax rolls could be used.

24. The tax rolls at that time listed a value of \$160,000 for the Subject Property. Respondent assigned a value of \$250,000 for the site, based on his review of various properties listed in the Microbase (a tool used by appraisers to ascertain site values of properties). The Microbase property values should generally be consistent with county records, but that is not always the case. The figure decided upon by Respondent was an extrapolation of existing site values using recent trends. There were no specific references made in the Appraisal as to the use of those existing sites, however.

25. A sales comparison approach to appraise the Subject Property was later done by a certified general appraiser (in 2009). Respondent is a certified residential appraiser. The general appraiser used one of Respondent's comparative sales (Comp 1) and four other homes for comparison purposes. While

opining that appraisals are a judgment call and not an exact science, the general appraiser felt like the comparable sales he used were more closely alike the Subject Property than the comparative sales used by Respondent.

26. The general appraiser's comparative properties, while certainly having merit as more similar to the Subject Property, were not contemporaneously reviewed with the Subject Property in 2006 (when Respondent did his Appraisal). While showing that the Appraisal could have been done differently, and, arguably, better, the general appraiser's report does not invalidate Respondent's work.

27. The general appraiser opined that Respondent made three primary errors in the Appraisal: 1) Not disclosing the commercial property located near the Subject Property; 2) Identifying the Subject Property as "lake front" when it was actually on the canal connecting the lake; and 3) Not appropriately adjusting the values in the comparative properties used to appraise the Subject Property.

28. As to the commercial property, Respondent testified that at the time of the Appraisal, the commercial building was hidden by the trees along the back of the Subject Property. The pictures in the Appraisal do not show a view of the canal, so there is no way to confirm what foliage existed at that time.

29. As to the identification of the property as lake front, the MLS listing used by real estate agents lists the property as "waterfront," with the waterfront type as "canal-fresh lake." As far as water is concerned, the description is a matter of opinion by the appraiser or real estate agent. There is no definitive guideline as to what constitutes waterfront.

30. As to the adjustments made by Respondent to the comparable sales properties, it is clear the general appraiser made significantly larger adjustments than those made by Respondent. However, the reasons set forth for the general appraiser's adjustments are not convincing. Respondent's adjustments are equally valid to those made by the general appraiser.

31. There is no evidence of collusion by Respondent with anyone associated with the sale of the Subject Property. There is no evidence that Respondent's client, the seller or the buyer believed the Appraisal was improper or incorrect. There is no evidence that the amount determined by Respondent for valuation of the Subject Property was wrong.

CONCLUSIONS OF LAW

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

proceeding pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes (2009).

33. The burden of proof is on Petitioner to show, by clear and convincing evidence, that Respondent committed the acts alleged in the Administrative Complaint. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). The clear and convincing evidence standard is used in the instant case because the action is a penal licensure proceeding. Munch v. Department of Professional Regulation, 592 So. 2d 1136 (Fla. 1st DCA 1992).

34. Clear and convincing evidence is an intermediate standard of proof which is more than the "preponderance of the evidence" standard used in most civil cases, but less than the "beyond a reasonable doubt" standard used in criminal cases. See State v. Graham, 240 So. 2d 486 (Fla. 2nd DCA 1970). Clear and convincing evidence has been defined as evidence which:

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

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)

(citations omitted).

35. The Division is given the right to discipline an appraiser's license for certain violations. Section 475.624, Florida Statutes (2006), states in pertinent part:

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

* * *

(2) Has been guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest conduct, culpable negligence, or breach of trust in any business transaction in this state or any other state, nation, or territory; has violated a duty imposed upon her or him by law or by the terms of a contract, whether written, oral, express, or implied, in an appraisal assignment; has aided, assisted, or conspired with any other person engaged in any such misconduct and in furtherance thereof; or has formed an intent, design, or scheme to engage in such misconduct and committed an overt act in furtherance of such intent, design, or scheme. It is immaterial to the guilt of the registered trainee, licensee, or certificateholder that the victim or intended victim of the misconduct has sustained no damage or loss; that the damage or loss has been settled and paid after discovery of the misconduct; or that such victim or intended victim was a customer or

a person in confidential relation with the registered trainee, licensee, or certificateholder, or was an identified member of the general public.

* * *

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

36. Disciplinary actions, such as contemplated in the above referenced statute, may be based only upon those offenses specifically alleged in the Administrative Complaint. See Cottrill v. Department of Insurance, 685 So. 2d 1371 (Fla. 1st DCA 1996); Kinney v. Department of State, 501 So. 2d 129, 133 (Fla. 5th DCA 1987); and Hunter v. Department of Professional Regulation, 458 So. 2d 842, 844 (Fla. 2d DCA 1984). A statute imposing a penalty is never to be construed in a manner that expands the statute. Hotel and Restaurant Commission v. Sunny Seas No. One, 104 So. 2d 570, 571 (Fla. 1958).

37. Count I alleges Respondent is guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest conduct, culpable negligence or breach of trust in a business transaction. See § 475.624(2), Fla. Stat. (2006). The evidence presented by the Division fails to establish, by clear and convincing evidence, that Respondent is guilty of any of those actions. The evidence presented at final hearing addressed only whether Respondent's appraisal techniques were

reasonable (under the nebulous authority of Uniform Standards of Professional Appraisal Practice, or USPAP).⁴ Nonetheless, even if the 2005 USPAP standards did apply, the evidence is insufficient to prove that Respondent was in violation. There is no evidence of fraud, nor evidence of misrepresentation, concealment, false promises, false pretenses, dishonest conduct, culpable negligence or breach of trust by Respondent in the business transaction.

38. Count II alleges failure by Respondent to exercise reasonable diligence in developing the Appraisal. See § 475.624(15), Fla. Stat. (2006). The evidence to that effect falls well short of clear and convincing. Rather, the Division proved only that Respondent could have prepared the Appraisal differently and, arguably, better, using other comparables from the area.

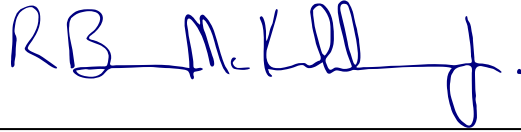
39. The Division did not meet its burden of proof in this matter.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by Petitioner, Department of Business and Professional Regulation, Division of Real Estate, dismissing the Administrative Complaint against Respondent, Peter Joseph Esposito.

DONE AND ENTERED this 28th day of May, 2010, in
Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of May, 2010.

ENDNOTES

^{1/} The complainant was not identified during final hearing. There was no evidence presented that any party to the transaction complained about the Appraisal or believed it to be erroneous in any fashion.

^{2/} The Division did not contact the lender as part of its investigation, even though the lender was the entity that relied upon the Appraisal.

^{3/} Adjustments can be made to properties used, as comparables, based on the home's effective age. However, there is no industry standard for such adjustments, and the adjustments are a judgment call made by the individual appraiser based upon their own observation of the property. As stated by the Division's expert witness, "Well, I estimated it differently, but that would be an opinion, a matter of opinion."

^{4/} The USPAP standards have not been properly promulgated into Florida Rules since 1991. The 1991 version of USPAP is clearly not relevant to the instant matter, but the 2005 standards, which would have been applicable to the time frame in question in this matter, have not been incorporated by statute. Thus, it

is not possible to legally apply the standards to the instant action.

COPIES FURNISHED:

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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.