

# WISCONSIN DEPARTMENT OF REGULATION & LICENSING



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STATE OF WISCONSIN  
BEFORE THE REAL ESTATE APPRAISERS BOARD

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IN THE MATTER OF DISCIPLINARY  
PROCEEDINGS AGAINST

PETER MELONE,  
RESPONDENT

FINAL DECISION AND ORDER  
LS9809081APP

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The State of Wisconsin, Real Estate Appraisers Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, makes the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Real Estate Appraisers Board.

The Division of Enforcement and Administrative Law Judge are hereby directed to file their affidavits of costs with the Department General Counsel within 15 days of this decision. The Department General Counsel shall mail a copy thereof to respondent or his or her representative.

The rights of a party aggrieved by this Decision to petition the department for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated this 23<sup>rd</sup> day of August, 2000.

Paul Vozar  
A Member of the Board

**STATE OF WISCONSIN**  
BEFORE THE REAL ESTATE APPRAISERS BOARD

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IN THE MATTER OF  
DISCIPLINARY PROCEEDINGS AGAINST

-----  
**SUMMARY**

This is a disciplinary action by the Real Estate Appraisers Board against Peter Melone. Mr. Melone was alleged to have violated rules regulating certified general appraisers in Wisconsin by failing to comply with USPAP in his preparation of an appraisal report. The board finds that Mr. Melone failed to comply with the Departure Provision of USPAP and issues a public reprimand.

**PARTIES**

The parties in this matter under section 227.44 of the Statutes and section RL 2.037 of the Wisconsin Administrative Code, and for purposes of review under sec. 227.53, Stats., are:

Complainant:

Division of Enforcement

Department of Regulation and Licensing

Madison, WI 53708-8935

Respondent:

Peter Melone

2665 Tower Rd.

McFarland, WI 53558

Disciplinary Authority:

Real Estate Appraisers Board

1400 East Washington Ave.

Madison, WI 53703

**PROCEDURAL HISTORY**

A. This case was initiated by the filing of a complaint (DOE case # 94 APP 025) with the Real Estate Appraisers Board on September 8, 1998. A disciplinary proceeding (hearing) was scheduled for November 10, 1998. Notice of Hearing was prepared by the Division of Enforcement of the Department of Regulation and Licensing and sent by certified mail on September 8th to Mr. Melone, who received it on September 9th or 10th, 1998. The complaint alleged that in preparing an appraisal report Mr. Melone violated USPAP standards 1-1(b), 1-2, 1-3, 1-4, 1-4(b), 1-5, and 2-1(b), thereby violating sections RL 86.01(2) and (5) [*sic*; actually subparagraph (6)], Wis. Admin. Code, and section 458.26(3)(c), Stats.

B. An answer was filed on September 28, 1998 on behalf of Mr. Melone by attorney William A. Abbott of Bell, Gierhart & Moore, S.C., 44 East Mifflin St., Madison, WI 53701-1807. The answer contained an affirmative defense that the USPAP standards in effect in 1993 were unconstitutionally vague.

C. A prehearing conference was held on October 1, 1998. Following the prehearing conference, Mr. Abbott determined that a witness would be unavailable on the scheduled hearing date, and the hearing was rescheduled to December 8, 1998.

D. Mr. Abbott filed a Motion to Dismiss on December 2, 1998 to be heard at the beginning of the hearing. This motion was based on discovery responses which indicated that the experts for the board based their opinions on

USPAP standards which were not in effect in 1993 when the appraisal which is the subject of this proceeding was prepared.

E. All time limits and notice and service requirements having been met, the disciplinary proceeding was held as scheduled on December 8, 1998. Mr. Melone appeared in person and represented by Mr. Abbott. The Real Estate Appraisers Board was represented by attorney Henry Sanders of the Department's Division of Enforcement. The hearing was recorded, and a transcript of the hearing was prepared and delivered on February 1, 1999. The testimony and exhibits entered into evidence at the hearing form the basis for this Proposed Decision.

## **APPLICABLE STATUTES AND RULES**

### **Statutes**

#### **458.26 Disciplinary proceedings and actions.**

...

(3) Disciplinary proceedings shall be conducted by the board according to the rules promulgated under s. 440.03 (1). The department may deny any certificate under this chapter, and the board may limit, suspend or revoke any certificate under this chapter or reprimand or impose additional continuing education requirements on the holder of a certificate under this chapter, if the department or board finds that the applicant for or holder of the certificate has done any of the following:

...

(c) Engaged in conduct while practicing as an appraiser which evidences a lack of knowledge or ability to apply professional principles or skills.

...

### **Wisconsin Administrative Code**

RL 86.01 Standards.

...

(2) All appraisals shall conform to the uniform standards of professional appraisal practice set forth in Appendix I.

...

(5) Certified and licensed appraisers shall not knowingly omit, understate, misrepresent or conceal material facts in their appraisals.

(6) A certified or licensed appraiser shall not offer to perform, nor perform, services which he or she is not competent to perform through education or experience.

...

## **USPAP**

### **Chapter RL 87 APPENDIX I**

#### **UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE [in effect in 1993]**

##### **PREAMBLE**

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##### **DEPARTURE PROVISION**

This provision permits limited exceptions to sections of the Uniform Standards that are classified as specific guidelines rather than binding requirements. The burden of proof is on the appraiser to decide before accepting a limited assignment that the result will not confuse or mislead. The burden of disclosure is also on the appraiser to report any limitations.

An appraiser may enter into an agreement to perform an assignment that calls for something less than, or different from, the work that would otherwise be required by the specific guidelines, provided that prior to entering into such agreement:

1. the appraiser has determined that the assignment to be performed is not so limited in scope that the resulting appraisal, review, or analysis would tend to mislead or confuse the client, the users of the report, or the public; and
2. the appraiser has advised the client that the assignment calls for something less than, or different from, the work required by the specific guidelines and that the report will state the limited or differing scope of the appraisal, review or consulting service.

Exceptions to the following requirements are not permitted: Standards Rules 1-1, 1-5, 2-1, 2-2, 2-3, 2-5, 3-1, 3-2, 4-1, 5-1, 5-3, 6-1, 6-3, 6-6, 6-7, 6-8, 7-1, 8-1, 8-3, 9-1, 9-3, 9-5, 10-1, 10-3 and 10-5. This restriction on departure is reiterated throughout the document with the reminder comment: Departure from this binding requirement is not permitted.

Comment: Before making a decision to enter into an agreement for appraisal services calling for a departure from a specific appraisal guideline, an appraiser must use extreme care to determine whether the scope of the appraisal service to be performed is so limited that the resulting analysis, opinion or conclusion would tend to mislead or confuse the client, the users of the report, or the public. For the purpose of this provision, users of the report might include parties such as lenders, employees of government agencies, limited partners of a client, and a client's attorney and accountant. In this context, the purpose of the appraisal and the anticipated or possible use of the report are critical.

If an appraiser enters into an agreement to perform an appraisal service that calls for something less than, or different from, the work that would otherwise be required by the specific appraisal guidelines, Standards Rules 2-2 (k), 5-2 (i), 8-2 (h), and 10-2 (h) require that this fact be clearly and accurately set forth in the report.

The requirements of the departure provision may be satisfied by the technique of incorporating by reference.

For example, if an appraiser's complete file was introduced into evidence at a public hearing or public trial and the appraiser subsequently prepared a one-page report that (1) identified the property, (2) stated the value, and (3) stated that the value conclusion could not be properly understood without reference to his or her complete file and directed the reader to the complete file, the requirements of the departure provision would be satisfied if the appraiser's complete file contained, in coherent form, all the data and statements that are required by the Uniform Standards.

Another example would be an update report that expressly incorporated by reference all the background data, market conditions, assumptions, and limiting conditions that were contained in the original report prepared for the same client.

...

## **STANDARD 1**

In developing a real property appraisal, an appraiser must be aware of, understand, and correctly employ those recognized methods and techniques that are necessary to produce a credible appraisal.

Comment: Standard 1 is directed toward the substantive aspects of developing a competent appraisal. The requirements set forth in Standards Rule 1-1, the appraisal guidelines set forth in Standards Rule 1-2, 1-3, 1-4, and the requirements set forth in Standards Rule 1-5 mirror the appraisal process in the order of topics addressed and can be used by appraisers and the users of appraisal services as a convenient checklist.

### **Standards Rule 1-1**

In developing a real property appraisal, an appraiser must:

- (a) be aware of, understand, and correctly employ those recognized methods and techniques that are necessary to produce a credible appraisal;

Comment: Departure from this binding requirement is not permitted. 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 and changes in the legal framework in which real property rights and interests are created, conveyed, and mortgaged have resulted in corresponding changes in appraisal theory and practice. Social change has also had an effect on appraisal theory and practice. To keep abreast of these changes and developments, the appraisal profession is constantly reviewing and revising appraisal methods and techniques and devising new methods and techniques to meet new circumstances. For this reason it is not sufficient for appraisers to simply maintain the skills and the knowledge they possess when they become appraisers. Each appraiser must continuously improve his or her skills to remain proficient in real property appraisal.

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

Comment: Departure from this binding requirement is not permitted. In performing appraisal services an appraiser must be certain that the gathering of factual information is conducted in a manner that is sufficiently diligent to ensure that the data that would have a material or significant effect on the resulting analyses, opinions, or conclusions are considered. Further, an appraiser must use sufficient care in analyzing such data to avoid errors that would significantly affect his or her opinions and conclusions.

(c) not render appraisal services in a careless or negligent manner, such as a series of errors that, considered individually, may not significantly affect the results of an appraisal, but which, when considered in the aggregate, would be misleading.

Comment: Departure from this binding requirement is not permitted. 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 rule requires an appraiser to use due diligence and due care. The fact that the carelessness or negligence of an appraiser has not caused an error that significantly affects his or her opinions or conclusions and thereby seriously harms a client or a third party does not excuse such carelessness or negligence.

### **Standards Rule 1-2**

In developing a real property appraisal, an appraiser must observe the following specific appraisal guidelines:

(a) adequately identify the real estate, identify the real property interest, consider the purpose and intended use of the appraisal, consider the extent of the data collection process, identify any special limiting conditions, and identify the effective date of the appraisal;

(b) define the value being considered; if the value to be estimated is market value, the appraiser must clearly indicate whether the estimate is the most probable price:

(i) in terms of cash; or

(ii) in terms of financial arrangements equivalent to cash; or

(iii) in such other terms as may be precisely defined; if an estimate of value is based on submarket financing or financing with unusual conditions or incentives, the terms of such financing must be clearly set forth, their contributions to or negative influence on value must be described and estimated, and the market data supporting the valuation estimate must be described and explained;

Comment: For certain types of appraisal assignments in which a legal definition of market value has been established and takes precedence, the Jurisdictional Exception may apply to this guideline.

When estimating market value, the appraiser should be specific as to the estimate of exposure time linked to the value estimate.

(c) consider easements, restrictions, encumbrances, leases, reservations, covenants, contracts, declarations, special assessments, ordinances, or other items of a similar nature;

(d) consider whether an appraised fractional interest, physical segment, or partial holding contributes pro rata to the value of the whole;

Comment: This guideline does not require an appraiser to value the whole when the subject of the appraisal is a fractional interest, a physical segment, or a partial holding. However, if the value of the whole is not considered, the appraisal must clearly reflect that the value of the property being appraised cannot be used to estimate the value of the whole by mathematical extension.

(e) identify and consider the effect on value of any personal property, fixtures or intangible items that are not real property but are included in the appraisal.

Comment: This guideline requires the appraiser to recognize the inclusion of items that are not real property in an overall value estimate. Additional expertise in personal property (See Standard 7) or business (See Standard 9) appraisal may be required to allocate the overall value to its various components. Separate valuation of such items is required when they are significant to the overall value.

### **Standards Rule 1-3**

In developing a real property appraisal, an appraiser must observe the following specific appraisal guidelines:

(a) consider the effect on use and value of the following factors: existing land use regulations, reasonably probable modifications of such land use regulations, economic demand, the

physical adaptability of the property, neighborhood trends, and the highest and best use of the property;

Comment: This guideline sets forth a list of factors that affect use and value. In considering neighborhood trends, an appraiser must avoid stereotyped or biased assumptions relating to race, age, color, religion, gender or national origin or an assumption that racial, ethnic, or religious homogeneity is necessary to maximize value in a neighborhood. Further, an appraiser must avoid making an assumption or unsupported premise about neighborhood decline, effective age, and remaining life. In considering highest and best use, an appraiser should develop the concept to the extent that is required for a proper solution of the appraisal problem being considered.

(b) recognize that land is appraised as though vacant and available for development to its highest and best use and that the appraisal of improvements is based on their actual contribution to the site.

Comment: This guideline may be modified to reflect the fact that, in various legal and practical situations, a site may have a contributory value that differs from the value as if vacant.

#### **Standards Rule 1-4**

In developing a real property appraisal, an appraiser must observe the following specific appraisal guidelines, when applicable:

(a) value the site by an appropriate appraisal method or technique;

(b) collect, verify, analyze, and reconcile:

(i) such comparable cost data as are available to estimate the cost new of the improvements (if any);

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

(iii) such comparable sales data, adequately identified and described, as are available to indicate a value conclusion;

(iv) such comparable rental data as are available to estimate the market rental of the property being appraised;

(v) such comparable operating expense data as are available to estimate the operating expenses of the property being appraised;

(vi) such comparable data as are available to estimate rates of capitalization and/or rates of discount.

Comment: This rule covers the three approaches to value. See Standards Rule 2-2(j) for corresponding reporting requirements.

(c) base projections of future rent and expenses on reasonable data and appropriate evidence;

Comment: This guideline requires an appraiser, in developing income and expense statements and cash flow projections, to weigh historical information and trends, current market factors

affecting such trends, and anticipated events such as competition from developments under construction.

(d) when estimating the value of a leased fee estate or a leasehold estate, consider and analyze the effect on value, if any, of the terms and conditions of the lease(s);

(e) consider and analyze the effect on value, if any, of the assemblage of the various estates or component parts of a property and refrain from estimating the value of the whole solely by adding together the individual values of the various estates or component parts;

Comment: Although the value of the whole may be equal to the sum of the separate estates or parts, it also may be greater than or less than the sum of such estates or parts. Therefore, the value of the whole must be tested by reference to appropriate market data and supported by an appropriate analysis of such data.

A similar procedure must be followed when the value of the whole has been established and the appraiser seeks to estimate the value of a part. The value of any such part must be tested by

reference to appropriate market data and supported by an appropriate analysis of such data.

(f) consider and analyze the effect on value, if any, of anticipated public or private improvements, located on or off the site, to the extent that market actions reflect such anticipated improvements as of the effective appraisal date;

Comment: In condemnation valuation assignments in certain jurisdictions, the Jurisdictional Exception may apply to this guideline.

(g) identify and consider the appropriate procedures and market information required to perform the appraisal, including all physical, functional, and external market factors as they may affect the appraisal;

Comment: The appraisal may require a complete market analysis (See Standards Rule 4-4).

(h) appraise proposed improvements only after examining and having available for future examination:

(i) plans, specifications, or other documentation sufficient to identify the scope and character of the proposed improvements;

(ii) evidence indicating the probable time of completion of the proposed improvements; and

(iii) reasonably clear and appropriate evidence supporting development costs, anticipated earnings, occupancy projections, and the anticipated competition at the time of completion.

Comment: The evidence required to be examined and maintained under this guideline may include such items as contractor's estimates relating to cost and the time required to complete construction, market, and feasibility studies; operating cost data; and the history of recently completed similar developments. The appraisal may require a complete feasibility analysis (See Standard Rule 4-6).

### **Standards Rule 1-5**

In developing a real property appraisal, an appraiser must:

(a) consider and analyze any current Agreement of Sale, option, or listing of the property being appraised, if such information is available to the appraiser in the normal course of business;

(b) consider and analyze any prior sales of the property being appraised that occurred within the following time periods:

(i) one year for one-to-four family residential property; and

(ii) three years for all other property types;

Comment: The intent of this requirement is to encourage the research and analysis of prior sales of the subject; the time frames are minimums.

(c) consider and reconcile the quality and quantity of data available and analyzed within the approaches used and the applicability or suitability of the approaches used.

Comment: Departure from binding requirements (a) through (c) is not permitted. See Standards Rule 2-2(k) Comment for corresponding reporting requirements.

### **STANDARD 2**

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.

Comment: Standard 2 governs the form and content of the report that communicates the results of an appraisal to a client and third parties.

### **Standards Rule 2-1**

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;

Comment: Departure from this binding requirement is not permitted. Since most reports are used and relied on by third parties, communications considered adequate by the appraiser's client may not be sufficient. An appraiser

must take extreme care to make certain that his or her reports will not be misleading in the marketplace or to the public.

(b) contain sufficient information to enable the person(s) who receives or relies on the report to understand it properly;

Comment: Departure from this binding requirement is not permitted. A failure to observe this rule could cause a client or other users of the report to make a serious error even though each analysis, opinion, and conclusion in the report is clearly and accurately stated. To avoid this problem and the dangers it presents to clients and other users of reports, 2-1(b) requires an appraiser to include in each report sufficient information to enable the reader to understand it properly. All reports, both written and oral, must clearly and accurately present the analyses, opinions, and conclusions of the appraiser in sufficient depth and detail to address adequately the significance of the specific appraisal problem.

(c) clearly and accurately disclose any extraordinary assumption or limiting condition that directly affects the appraisal and indicate its impact on value.

Comment: Departure from this binding requirement is not permitted. Examples of extraordinary assumptions or conditions might include items such as the execution of a pending lease agreement, atypical financing, or completion of onsite or offsite improvements. In a written report the disclosure would be required in conjunction with statements of each opinion or conclusion that is affected.

## **Standards Rule 2-2**

Each written real property appraisal report must:

(a) identify and describe the real estate being appraised;

(b) identify the real property interest being appraised;

Comment on (a) and (b): These two guidelines are essential elements in any report. Identifying the real estate can be accomplished by any combination of a legal description, address, map reference, copy of a survey or map, property sketch and/or photographs. A property sketch and photographs also provide some description of the real estate in addition to written comments about the physical attributes of the real estate. Identifying the real property rights being appraised requires a direct statement substantiated as needed by copies or summaries of legal descriptions or other documents setting forth any known encumbrances.

(c) state the purpose of the appraisal;

(d) define the value to be estimated;

(e) set forth the effective date of the appraisal and the date of the report;

Comment on (c), (d) and (e): These three requirements call for clear disclosure to the reader of a report the "why, what and when" surrounding the appraisal. The purpose of the appraisal is used generically to include both the task involved and rationale for the appraisal. Defining the value to be estimated requires both an appropriately referenced definition and any comments needed to clearly indicate to the reader how the definition is being applied [See Standards Rule 1-2 (b)]. The effective date of the appraisal establishes the context for the value estimate, while the date of the report indicates whether the perspective of the appraiser on the market conditions as of the effective date of the appraisal was prospective, current, or retrospective. Reiteration of the date of the report and the effective date of the appraisal at various stages of the report in tandem is important for the clear understanding of the reader whenever market conditions on the date of the report are different from market conditions on the effective date of the appraisal.

(f) describe the extent of the process of collecting, confirming, and reporting data;

Comment: This requirement is designed to protect third parties whose reliance on an appraisal report may be affected by the extent of the appraiser's investigation, i.e., the process of collecting, confirming and reporting data.

(g) set forth all assumptions and limiting conditions that affect the analyses, opinions, and conclusions;

Comment: It is suggested that assumptions and limiting conditions be grouped together in an identified section of the report.

(h) set forth the information considered, the appraisal procedures followed, and the reasoning that supports the analyses, opinions, and conclusions;

Comment: This requirement calls for the appraiser to summarize the data considered and the procedures that were followed. Each item must be addressed in the depth and detail required by its significance to the appraisal.

The appraiser must be certain that sufficient information is provided so that the client, the users of the report, and the public will understand it and will not be misled or confused. The substantive content of the report, not its size, determines its compliance with this specific reporting guideline.

(i) set forth the appraiser's opinion of the highest and best use of the real estate, when such an opinion is necessary and appropriate;

Comment: This requirement calls for a written report to contain a statement of the appraiser's opinion as to the highest and best use of the real estate, unless an opinion as to highest and best use is unnecessary, e.g. insurance valuation or value in use appraisals. If an opinion as to highest and best use is required, the reasoning in support of the opinion must also be included.

(j) explain and support the exclusion of any of the usual valuation approaches;

(k) set forth any additional information that may be appropriate to show compliance with, or clearly identify and explain permitted departures from, the specific requirements of Standard 1;

Comment: This requirement calls for a written appraisal report or other written communication concerning the results of an appraisal to contain sufficient information to indicate that the appraiser complied with the requirements of Standard 1, including the requirements governing any permitted departures from the appraisal guidelines. The amount of detail required will vary with the significance of the information to the appraisal.

Information considered and analyzed in compliance with Standards Rule 1-5 is significant information that deserves comment in any report. If such information is unobtainable, comment on the efforts undertaken by the appraiser to obtain the information is required.

(l) include a signed certification in accordance with Standards Rule 2-3.

Comment: Departure from binding requirements (a) through (l) above is not permitted.

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## **FINDINGS OF FACT**

1. The respondent, Peter Melone, is a Certified General Appraiser in the state of Wisconsin, under license number 11 issued July 17, 1991.
2. USPAP was developed in approximately 1987. USPAP was adopted as a standard in Wisconsin in 1991. USPAP has evolved since its promulgation. The addition of the Summary Appraisal Report and the Restricted Appraisal Report to S.R. 2-2 subsequent to 1993 was a major change; other changes made to USPAP between 1993 and the present were relatively minor.
3. Mr. Melone prepared an appraisal as of November 12, 1993 of an office building at 1219 Regent Street in Madison, Wisconsin [exhibit 3].
4. Mr. Melone's report did not incorporate all the elements required by USPAP. Mr. Melone's client, M&I Bank, had requested a "short appraisal or short narrative". Mr. Melone did not state explicitly in his appraisal report that he was departing from full compliance with USPAP.

## **CONCLUSIONS OF LAW**

- I. The Real Estate Appraisers Board has personal jurisdiction over the respondent, Peter Melone, based on his holding a credential issued by the board and based on notice under sec. 801.04 (2), Stats.
- II. The Real Estate Appraisers Board is the legal authority responsible for disciplinary actions against certified

general appraisers, under ch. 458, Stats., and it has jurisdiction over the subject-matter of a complaint alleging unprofessional conduct, under sec. 15.08(5)(c), Stats., sec. 458.26, Stats., and ch. RL 86, Wis. Admin. Code.

III. The violation in Finding of Fact 4 constitutes unprofessional conduct, under sec. RL 86.01(2), Wis. Admin. Code, and discipline is appropriate, under sec. 458.26(3), Stats.

### **ORDER**

THEREFORE, IT IS ORDERED that the respondent, Peter Melone, be reprimanded.

IT IS FURTHER ORDERED that Mr. Melone pay the costs of this proceeding, as authorized by sec. 440.22 (2), Stats., and sec. RL 2.18, Wis. Admin. Code, and if he fails to pay the costs within 60 days of the date of the cost order, his license will be summarily suspended, under sec. 440.22 (3), Stats.

### **ANALYSIS**

This is a disciplinary proceeding conducted under the authority of ch. 227, Stats., and ch. RL 2, Wis. Admin. Code. The Division of Enforcement in the Department of Regulation and Licensing filed a complaint with the Real Estate Appraisers Board alleging that the respondent, Peter Melone, violated rules regulating certified general appraisers in the State of Wisconsin. The burden of proof is on the Division of Enforcement to prove the allegations of the complaint by a preponderance of the evidence. I conclude that the division did not prove the numerous individual violations alleged to have been committed by Mr. Melone, but it did prove by a preponderance of the evidence that Mr. Melone failed to invoke the Departure Provision of USPAP in preparing an appraisal report which was "something less than, or different from, the work that would otherwise be required by the specific appraisal guidelines".

As a preliminary matter, the Motion to Dismiss filed on December 2, 1998 was withdrawn at the close of hearing, as Mr. Abbott accepted Mr. Scott's unchallenged testimony that he had based his review and testimony on the version of USPAP in effect in 1993. I also find that although Mr. Duesterbeck based his review and testimony on a printed version of USPAP which contained some variances from the exact text of USPAP as it existed in 1993, the variances in most cases were minor and his expert testimony was still of value.

Testimony was offered by Linn Duesterbeck, who was a previous member and chair of the Real Estate Appraisers Board. Mr. Duesterbeck was the Board Advisor who originally reviewed the complaint against Mr. Melone. Mr. Duesterbeck stated that he has conducted a few appraisals in the Madison area in which Mr. Melone does most of his work, but he does not consider himself to be a competitor of Mr. Melone. Mr. Duesterbeck is an M.A.I. (Member of the Appraisal Institute); the designation is evidence of having met additional requirements and is considered to be an exclusive and prestigious designation, but an M.A.I. follows the same rules (USPAP) in preparing an appraisal as non-members. Mr. Duesterbeck testified that he reviewed Mr. Melone's appraisal using the version of USPAP that was in effect in 1993 [exhibit 5]. A comparison of exhibit 5 with exhibit 38 shows that exhibit 5 contains some differences from what appears to have been the actual text of USPAP at that time, but for the most part, and except for S.R. 2-2(f), the variances are minor and do not affect the validity of Mr. Duesterbeck's testimony.

According to Mr. Duesterbeck's testimony, Mr. Melone did not comply with all required USPAP standards and did not state that he was intentionally not complying, as required by the departure provision [transcript, p. 41]. Specifically, Mr. Duesterbeck testified that in his expert opinion,

- Mr. Melone's appraisal report violated Standards Rule 2-2 because the report was misleading and not clearly understandable [transcript, p. 42].
- the written appraisal contained no scope of the report, no function of the report, no conclusion as to market value, and no adequate site description, since it did not adequately describe a parking area [transcript, p. 43].
- the report contained no site sizes on a table of comparable sales [transcript, p. 44] although there are building sizes [transcript, p. 67].
- the report contained no rationale for the appraiser's opinion that the market value is \$60 per square foot [transcript, pp. 44-45, 68-70].
- the report contained an insufficient basis for the income approach, especially non market-derived capitalization rates for comparable sites [transcript, pp. 45-47].
- Mr. Melone did not include the anticipated sale price in his three-year sales history, which would be a violation

of standard 1-5(a) [transcript, p. 47], and even if he discussed this sale with the client, it still should have been mentioned in the report [transcript, pp. 78-79].

Garth Scott was retained as a second expert witness for the board. Mr. Scott does perform appraisals in the Madison area. Mr. Scott is also an M.A.I. and he testified that the rules relating to the preparation of appraisals are the same for M.A.I. appraisers and non-M.A.I. appraisers. Mr. Scott has taken coursework on USPAP "four or five times" [transcript, p. 102]. Mr. Scott testified, by reference to his letter of May 1, 1998 [exhibit 13] that Mr. Melone's report contained a number of areas in which he failed to follow USPAP standards as required. Mr. Scott acknowledged that if Mr. Melone had used the Departure Provision of USPAP and explained that he was preparing something other than a full or complete appraisal, the report might well have satisfied USPAP. Mr. Scott however expressed the opinion that the inadequacies of the report should not be reduced to a single violation, i.e. a failure to invoke the departure provision, because that would "place USPAP as too low a standard of practice. Such an excuse would allow an appraiser to simply default to the one single violation pertaining to a failure to note the departure intended in the report, when in fact a much wider, pervasive violation of standard 2-1(b), as well as others, are embodied in this report." [exhibit 13, p. 3]. Specifically, Mr. Scott testified that

- Mr. Melone's appraisal report did not clearly state the function of the report or the scope of data collection.
- based on Mr. Scott's own experience in the Madison area, Mr. Melone's reference to outside income from on-site parking would be a zoning violation and it is not adequately dealt with in the report.
- Mr. Melone made an unsupported analysis of market area trends when he stated "property values are increasing".
- Mr. Melone's descriptions of comparable sales, rental, operating expense and capitalization data are inadequate.
- Mr. Melone failed to mention the pending sale, a violation of S.R. 1-5.
- the report did not adequately show how the appraiser used his lists of raw data to arrive at various conclusions, including the property value, specifically:
  1. no explanation of how the land value of \$10/sf was arrived at.
  2. the deferred maintenance value of \$24,000 is not described in sufficient detail to inform the client.
  3. the report does not contain an adequate explanation of the derivation of the market rent of \$8/sf triple net from rental comparables on a tax-included basis, nor does it contain an adequate explanation of the estimated income from parking rental.
  4. the report has no support for the management and reserve deduction.
  5. the report has no support for the capitalization rate.
  6. the report does not contain an adequate explanation for the comparison of comparable sales to the subject property or the adjustments made.

Craig Hungerford, a Certified General Appraiser working in the Madison area, was called as an expert witness by the respondent. Mr. Hungerford stated that he had taken coursework on USPAP one time in 1991 [transcript, p. 114]. Mr. Hungerford confirmed that USPAP standards apply equally to M.A.I. and non-M.A.I. appraisers. Mr. Hungerford testified that the USPAP standards in 1993 were "a collection of what I believe to be somewhat vague and ambiguous language at times, making them difficult to understand and therefore apply" [transcript, p. 114]. Mr. Hungerford disagreed with Mr. Duesterbeck's critique of the appraisal over an issue of file memoranda. Mr. Hungerford stated that the standards in section 1 of USPAP are related to the conduct of the appraisal, but not to the appraisal report itself. Mr. Hungerford also pointed out that Mr. Duesterbeck's review of the appraisal may not itself have complied with section 3 of USPAP. Mr. Hungerford went on to characterize the type of appraisal conducted by Mr. Melone as a Summary Appraisal, which was formally recognized by USPAP in the revision which took effect on January 1, 1995, but which, according to Mr. Hungerford, was utilized by appraisers well before that time. Mr. Hungerford said that Mr. Duesterbeck seemed to be looking at Mr. Melone's appraisal as if it were what is now known as a Self-Contained Appraisal Report. Mr. Hungerford also provided an explanation for Mr. Melone's inclusion of outside income from on-site parking which would not be a zoning violation – i.e. that the building occupants would pay for parking spaces – and therefore concluded that the discussion of the issue in the appraisal report was adequate [transcript, p. 123]. Despite his testimony that Mr. Melone's report most closely resembled a Summary Appraisal, Mr. Hungerford testified that the report did not depart from the USPAP requirements in effect in 1993, and that no statement under the Departure Provision was necessary if an appraiser arranged with a client to produce something other than a Self Contained Report [transcript, pp. 134-146].

Although the testimony of an M.A.I. appraiser would not automatically carry more weight than the testimony of a non-M.A.I. appraiser, I find that a relevant factor in balancing conflicting expert testimony may be a witness's

familiarity with USPAP as evidenced by such facts as the number of courses taken (four or five for Mr. Scott versus one for Mr. Hungerford). Mr. Scott's testimony is accepted as somewhat more convincing than Mr. Hungerford's.

James Coutts also testified as an expert witness for the respondent. Mr. Coutts is a certified general appraiser and, as of the date of the hearing, a candidate for M.A.I. designation. Mr. Coutts is an instructor who teaches at least one course per year on USPAP. Mr. Coutts exhibited a commendable concern for his responsibilities under section 3 of USPAP (the version in effect today) as he was reviewing Mr. Melone's appraisal report against sections 1 and 2 (the version in effect in 1993). Mr. Coutts also placed the M.A.I. versus non-M.A.I. issue into a useful perspective by saying that "Mr. Duesterbeck and Mr. Scott got into quite detailed analysis, and they were looking for that. And that would be required, you know, if I was providing an appraisal for review, for experience review to the Institute, they'd be looking for that." Mr. Coutts testified that although he identified some areas of Mr. Melone's report which could have been improved – and in fact, he expressed the opinion that a more constructive approach in this case would have been a review and some suggestions to Mr. Melone for improvement [transcript, pp. 262-263] – he considered the appraisal report to have been adequate for its purpose [transcript, p. 267]. Mr. Coutts addressed the Departure Provision in a somewhat ambiguous way by saying "there was a lot of time spent talking about a departure provision that wasn't invoked. So we should be analyzing this report, not based on the departure provision standards, but on what was appropriate and adequate to meet Standards 1 and 2 at that time. And so, as far as I'm concerned that's just a waste of time to discuss the departure provision because the appraiser admittedly didn't use it. It's nowhere in his report. So let's analyze it without the departure provision." [transcript, p. 263].

The respondent, Peter Melone, is a certified general appraiser. Mr. Melone testified that his client, M&I Bank, asked him for "a short appraisal, a short narrative", and that "a short narrative today would be similar to either a restricted use report or a summarized report" [transcript, p. 153]. Mr. Melone stated that he considered the pending sale and discussed it with his client although he did not include it in the report [transcript, p. 157]. Mr. Melone offered an explanation, based on the uniqueness of the site, for why, in his discussion of comparable sites, he did not base his site adjustments on the square footage of the site [transcript, pp. 159-160]. The explanation about the uniqueness of the site was plausible, but it is exactly the sort of explanation which probably should have been in a full appraisal report since, as he said, 99 per cent of appraisal reports would have included the square footage. Mr. Melone testified that he stated in his report that the highest and best use of the property was "as is", that "I did consider all the requirements necessary to analyze the highest and best use, but I did not consider it to be of significant importance to this appraisal to have a discussion on it. It's in a commercial building. It's in a commercial district. It's a no-brainer. It's obvious." Mr. Melone stated that using current terminology, his report would have been considered a "complete" report in that it employed all three approaches to value, but that it would have been either a "restricted" or "summary" report rather than "self-contained" [transcript, p. 162]. Mr. Melone presented professional publications, which described USPAP as unclear and confusing.

I accept Mr. Melone's testimony that he was performing a "short" appraisal for M&I Bank, that "a short narrative today would be similar to either a restricted use report or a summarized report", and that this was what the client requested and expected. All of the experts agreed that even prior to the explicit creation of the Summary Appraisal Report and the Restricted Appraisal Report in the 1994 revisions to USPAP, such reports were both common and acceptable. However, the interpretation of Mr. Duesterbeck, Mr. Scott and, I believe, Mr. Coutts, was that these types of reports required the use of the Departure Provision, and I agree. It is my interpretation, as informed by all of the expert testimony in the hearing, that the purpose of the Departure Provision of USPAP in effect in 1993 was to require Mr. Melone to set forth "clearly and accurately" the fact that his appraisal report was "something less than, or different from, the work that would otherwise be required by the specific appraisal guidelines" [USPAP, Comment on Departure Provision, paragraph 2]. In other words, he was required to state somewhere in his report that by agreement with his client, he was not presenting all of the data and analyses which would normally be required by USPAP in a full appraisal report. It seems clear that Mr. Melone's client was not misled by the "short" report, but the Departure Provision requires such a statement to avoid any misunderstanding by "the client, the users of the report, or the public". Furthermore, "the burden of disclosure is also on the appraiser to report any limitations." [USPAP, Departure Provision, paragraph 1]. Consequently, Mr. Melone did not violate USPAP in all of the ways described by the board's expert witnesses, and any omissions were not caused by negligence or incompetence or inability to interpret USPAP but by agreement with the client, but he nevertheless committed a single violation of USPAP by not clearly and accurately setting forth in his report his departure from compliance with all of the provisions of USPAP.

As a final matter, Mr. Abbott included an affirmative defense in the respondent's answer to the complaint, which alleged that this disciplinary proceeding should be dismissed because the USPAP standards in effect in 1993 were unconstitutionally vague. This is an issue, which cannot be litigated in this forum, as neither this ALJ nor the Real Estate Appraisers Board may find a statute to be unconstitutional. Kmiec v. Town of Spider Lake, 60 Wis.2d 640, 646, 211 N.W.2d 471 (1973). However, the respondent did raise the issue at the earliest opportunity, a record was developed on the issue, including exhibits 21 through 25 as well as testimony, and the respondent may pursue it on appeal to circuit court. Omernick v. Department of Natural Resources, 100 Wis.2d 234, 248, 301 N.W.2d 437 (1981).

### Discipline.

The purposes of professional discipline have been set forth in Wisconsin Supreme Court Rule SCR 21.03(5), which states: "Discipline for misconduct is not intended as punishment for wrongdoing, but is for the protection of the public, the courts and the legal profession." The Wisconsin Supreme Court has extended this in various attorney discipline cases, including Disciplinary Proc. Against Kelsay, 155 Wis.2d 480, 455 N.W.2d 871 (1990), by saying that the protection is "from further misconduct by the offending attorney, to deter other attorneys from engaging in similar misconduct and to foster the attorney's rehabilitation." That reasoning has been extended by regulatory agencies, including the Department of Regulation and Licensing, to disciplinary proceedings for other professions.

Mr. Melone conveyed an impression of generally being a very competent appraiser. In addition, he testified that his reports since 1993 have become more detailed [transcript, pp. 152-153] and he stated that he would be taking a four-hour course on USPAP in 1999. The process of this proceeding itself is almost certainly sufficient to "rehabilitate" Mr. Melone, i.e. to ensure that he follows USPAP, especially the Departure Provision, more rigorously in the future. Aside from his testimony that he apparently considers USPAP even in its present form to be somewhat unclear and confusing, the undersigned was not left with any impression that the public and the profession need to be protected from Mr. Melone.

However, public discipline in this case may well be of value in deterring other professionals from similar errors. Even though the recent revisions to USPAP have explicitly authorized Restricted Reports and Summary Reports, the evidence heard in this case indicates that other members of the profession may yet labor under misconceptions about the importance of the departure provision. Consequently, public discipline in the form of a reprimand is recommended.

### Costs.

The assessment of costs against a disciplined professional is authorized by sec. 440.22(2), Wis. Stats. and sec. RL 2.18, Wis. Admin. Code, but neither the statute nor the rule clearly indicates the circumstances in which costs are to be imposed. The board has the discretion to impose all, some, or none of the costs of the proceeding. One approach is routinely to impose the costs of investigating and prosecuting unprofessional conduct on the disciplined individual rather than on the profession as a whole. I am aware that the Supreme Court does so in attorney discipline cases, and I am aware that the majority of boards in this department, including the Real Estate Board, have historically imposed costs. A recommendation that Mr. Melone pay the costs of this proceeding is included.

Dated and signed: May 24, 1999

John N. Schweitzer

Administrative Law Judge

Department of Regulation and Licensing