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STATE OF WISCONSIN
BEFORE THE REAL ESTATE APPRAISERS BOARD

IN THE MATTER OF DISCIPLINARY	:	
PROCEEDINGS AGAINST	:	FINAL DECISION
	:	AND ORDER
JAMES A. BEGG and	:	LS0412061APP
JANE A. BRANDLEY,	:	
RESPONDENTS.	:	

Division of Enforcement Case No. 01APP034

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 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 18th day of October, 2006.

Mark P. Kowbel
Member of the Board
Real Estate Appraisers Board

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

IN THE MATTER OF THE DISCIPLINARY	:	
PROCEEDINGS AGAINST	:	
	:	
JAMES A. BEGG and	:	PROPOSED FINAL DECISION
JANE A. BRANDLEY	:	AND ORDER
	:	
RESPONDENTS.	:	LS #0412061APP

Division of Enforcement Case No. 01 APP 034

The parties to this action for the purposes of Wis. Stat. § 227.53 are:

James A. Begg
Post Office Box 375
Fontana, WI 53125

Jane A. Brandley
731 Milwaukee Street
Lake Geneva, WI 53147

Real Estate Appraisers Board
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708-8935

Wisconsin Department of Regulation and Licensing
Division of Enforcement
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708-8935

PROCEDURAL HISTORY

This proceeding was commenced by the filing of a Notice of Hearing and Complaint by the Department of Regulation and Licensing, Division of Enforcement, on December 6, 2004. An Amended Complaint was filed on April 22, 2005. A fact finding hearing was held on July 21, 22, and 27, 2005. Attorney Mark A. Herman appeared on behalf of the Complainant Department of Regulation and Licensing, Division of Enforcement. Attorney William A. Abbott, appeared on behalf of the Respondents, James A. Begg and Jane A. Brandley. A transcript of the proceedings was filed with the Administrative Law Judge on August 17, 2005. Thereafter, the parties timely served their arguments, proposed findings, conclusions and disciplinary recommendations. All post-hearing briefing was completed by October 5, 2006.

Based upon the evidence submitted at the hearing, the Administrative Law Judge recommends that the Real Estate Appraise Board adopt as its final decision and order the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. James A. Begg ("Respondent Begg"), date of birth September 17, 1950, is and was at all times relevant to the facts set forth herein, a licensed certified residential appraiser (#9-903). This license and certification was first granted to Respondent Begg on September 21, 1994.

2. The Respondent Begg's last address of record reported to the Department of Regulation and Licensing is 1017 South Shore Drive, Fontana, Wisconsin, 53125.
3. Jane A. Brandley ("Respondent Brandley"), date of birth March 19, 1935, is and was at all times relevant to the facts set forth herein, a licensed certified residential appraiser (#9-898). This license and certification was first to Respondent Brandley granted on September 9, 1994.
4. The Respondent Brandley's last address of record reported to the Department of Regulation and Licensing is 731 Milwaukee Street, Lake Geneva, Wisconsin, 53147.
5. On or about August 13, 1997, the Respondent Brandley conducted an appraisal for a mortgage refinance of real property located at W3812 Queen Road, Lake Geneva, Wisconsin ("subject property").
6. The lender guidelines for the subject appraisal required the use of comparables which were two bedroom homes that had sold within six months from the date of the appraisal.
7. The following properties were selected as comparable sales for the subject appraisal:
 - (a) W3906 South Shore, Town of Lake Geneva ("Comp.1"), a property with lake frontage on Lake Como;
 - (b) 654 Cedar Point Park, Williams Bay ("Comp.2"), a property with lake access rights to Lake Geneva;
 - (c) W4155 Lakeview, Lake Geneva ("Comp.3"), a property with access to Lake Geneva
9. Based upon her review of the comparables and the condition of the property, Respondent Brandley estimated the market value of the appraised property as \$124,000, as of the effective date of August 13, 1997.
10. Respondent Begg supervised Respondent Brandley in the preparation of the subject appraisal and signed the report as the supervisory appraiser.
11. On September 22, 2001, a residential field review appraisal was performed by Mr. James Paslawsky on behalf of the lender.
12. At the time of the Paslawsky review appraisal, the property had sustained some damage, had been in foreclosure proceedings, and resold for \$74,000.
13. Mr. Paslawsky estimated the market value of the property as of the effective date of the subject appraisal as \$75,000.00.
14. On or about December 11, 2001, the lender filed an informal complaint against the Respondents alleging that they had violated the USPAP in preparing the subject appraisal.
15. In June 2004, the property resold for \$155,000.

APPLICABLE LAW

Uniform Standards of Professional Appraisal Practice, (USPAP) Rule 1-1(b) (1997 edition), provides that in developing a real property appraisal an appraiser must:

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 resulting opinions or conclusions are considered. Further, the appraiser must use sufficient care in analyzing the data to avoid errors that would significantly affect his or her opinions or conclusions.

USPAP Standards Rule 1-1(c) (1997 edition), provides that in developing a real property appraisal an appraiser must:

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, 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 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.

Per USPAP Standards Rule 1-4(f) (1997 edition), provides that an appraiser must:

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;

USPAP Standards Rule 2-1(a) (1997 edition), each written or oral property report must:

clearly and accurately set forth the appraisal in a manner that will not be misleading;

Comment: Departure from this binding requirement is not permitted.

USPAP Standards Rule 2-5 (1997 edition) provides that:

An appraiser who signs a real property appraisal report prepared by another in any capacity accepts full responsibility for the appraisal and the contents of the appraisal report.

Comment: Departure from this binding requirement is not permitted.

Wis. Stats. § 458.26(3) provides that 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 a certificate has done any of the following:

- (a) made a material misstatement in an application for the certificate or renewal of the certificate, or in any other information furnished to the board or department.
- (b) Engaged in unprofessional or unethical conduct in violation of the rules promulgated under s. 458.24.
- (c) Engaged in conduct while practicing as an appraiser which evidences a lack of knowledge or ability to apply professional principles or skills.
- (d) Subject to 111.321, 111.322 and 111.335 been arrested or convicted of an offense the circumstances of which substantially relate to the practice of an appraiser.
- (e) Advertised in a manner that is false, deceptive or misleading.
- (f) Advertised, practiced or attempted to practice as an appraiser under another's name.
- (g) Subject to 111.321 and 111.323 and 111.34, practiced as an appraiser while the individual's ability to practice was impaired by alcohol or other drugs.
- (h) Based the value of real estate in any appraisal report on the racial composition of the area in which the real estate is located.
- (i) Violated any rule promulgated under this chapter.

RL 86.01(2), Wis. Admin. Code, provides that all appraisals shall conform to the uniform standards of professional appraisal practice as set forth in Appendix I. No certified or licensed appraiser may sign any written appraisal report which was not prepared by the appraiser or under his or her supervision.

CONCLUSIONS OF LAW

1. The Wisconsin Real Estate Appraisers Board has jurisdiction to act in these matters pursuant to Wis. Stats., § 458.26.
2. The record does not establish that Respondent JANE A. BRANDLEY, by her conduct as set forth above, violated USPAP Standards Rule 1-1(b), 1-1(c), 1-4(f), 2-1(a); 2-5 (1997)
3. The record does not establish that Respondent JANE A. BRANDLEY, by her conduct as set forth above, violated Wis. Stats., § 458.26(3), or Wis. Admin. Code § RL 86.01(2).
4. The record does not establish that Respondent JAMES A. BEGG, by his conduct as set forth above, violated USPAP Standards Rule 1-1(b), 1-1(c), 1-4(f), 2-1(a); 2-5 (1997);
5. The record does not establish that Respondent JAMES A. BEGG, by his conduct as set forth above, violated Wis. Stats., § 458.26(3), or Wis. Admin. Code § RL 86.01(2).

ORDER

IT IS HEREBY ORDERED that the disciplinary action against the respondents be, and hereby, is DISMISSED.

OPINION

The allegations of unprofessional conduct in this matter involved whether the Respondents failed to select appropriate comparable sales data, and make sufficient and supportable adjustments between the comparables and the subject property, as well as disclose material conditions in accordance with the standards of the real estate appraisal profession. Additional allegations regarding the scope of work statement and the purpose of assignment in paragraph ten and eleven of the Amended Complaint was withdrawn prior to the hearing. The disposition of the factual and legal issues involved in this case turn on which of several conflicting expert opinions were more convincing and reliable. On all of the material issues, the opinions of the expert witnesses who testified on behalf of the Respondents were found to be more convincing than the opinions presented by the Complainant's expert. In a proceeding of this nature where the Complainant bears the burden of proof by a preponderance of evidence, and fails to meet its burden with sufficient evidence, the case must be dismissed.

The following evidence is a summary and analysis of the evidence presented at the hearing which supports this recommendation.

Linn Duesterbeck The Complainant's expert witness, Mr. Duesterbeck, testified that he conducted a review of the subject appraisal and of the subsequent review of that appraisal by Mr. Paslawsky. Mr. Duesterbeck is a full-time professional real estate appraiser with considerable experience appraising a variety of properties, including lake-front properties or properties with water-access. Mr. Duesterbeck testified that he is also a Wisconsin Certified General Appraiser, a Senior Residential Appraiser, former director of the Wisconsin Chapter of the Appraisal Institute, real estate broker and former Chairperson of the Wisconsin Real Estate Appraisers Board.

In addition to reviewing the file materials that were provided to him by the Department, Mr. Duesterbeck testified that he conducted a physical inspection of the exterior of the comparables referenced in the subject appraisal. He also drafted a written certification, referred to as a "review appraisal report," and included a "paired-sales" analysis as an addendum to his report. [Transcript at pgs. 64, 67, Exs. 23, 24] The "paired-sales" analysis was presented for the first time at the hearing, although Mr. Duesterbeck testified that he had the material in his review file prior to the hearing. [Transcript at pgs. 70-71]. [\[1\]](#)

In both his written report and his testimony at the hearing, Mr. Duesterbeck contended that the Respondents' selection of comparables used in the appraisal was poor and the adjustments were inadequate. [Transcript at pg. 83] Mr. Duesterbeck testified that Comparable No. 1 was lake-front property with pier rights on the south side of Lake Como, whereas the subject property was lake-access located at least a half to three-quarters of a mile from the lake. [Transcript at pg. 84]. Mr. Duesterbeck testified that Comparable No. 2 was also lake-front on Lake Geneva which had higher value than Lake Como property. [Transcript at pgs. 88, 90]. In Mr. Duesterbeck's opinion, the Comparable No. 3 had a superior location and view on Lake Geneva. Mr. Duesterbeck concluded that, in his opinion, there is nearly a \$50,000 difference between lake-access property on Lake Como and lake-front property on Lake Geneva. [Transcript at pgs. 92, 93]

Mr. Duesterbeck further testified that he found ten sales that occurred within a two-year period of the effective date of the Respondents' appraised valuation which he thought should have been used in their appraisal report. [Transcript at pg. 93]. Those additional property sales were listed in Addendum C which was attached to his report. [Ex. 1] Mr. Duesterbeck testified that the failure of the Respondents to use these sales resulted in a misleading appraisal. [Transcript at pg. 94]. Mr. Duesterbeck testified that an appraiser is required pursuant to the ethics provision of USPAP to decline an appraisal assignment if the underwriter's guidelines do not allow the appraiser to use proper comparables. [Transcript at pgs. 94-95] Mr. Duesterbeck also identified a property located at N3325 Queen Road and set forth in Addendum B to his review appraisal that he felt supported his opinion that the Respondents had over-valued the subject property by at least 50%. [Ex. 1, pg. 3].

Although Mr. Duesterbeck's opinions were initially impressive, they were based on factual assumptions not supported by the

evidence as well as data that cannot be considered under the USPAP when performing a review appraisal. Mr. Duesterbeck testified that the road affronting the subject property was gravel and not paved asphalt, contrary to the finding in the subject appraisal in 1997 and the review appraisal by Mr. Paslawsky in 2001. When asked to explain the basis for his opinion, Mr. Duesterbeck testified that it was apparent to him from the photocopy of a snapshot of the subject property in 1997, which was attached to the appraisal report. Mr. Duesterbeck testified that the street in the photocopy was white and in his experience if the street was paved or blacktop, the photocopy would be much darker. [Transcript at pg. 96] Mr. Duesterbeck also testified that his opinion was based on discussions with maintenance employees and the sanitary district administrator.

However, the photostatic copies of the subject property that Mr. Duesterbeck relied on show the roof of the dwelling to be similar in color and appearance to the road in front of the dwelling. There was no claim that the roof was also gravel. In one of the photostatic copies of the street scene of the subject property, the portion of the road appearing on the bottom of the photo is quite dark. [Ex. 2] It is the view of this examiner that the difference in the shading of the road in the photocopies is more likely a result of the lighting when the pictures were taken and not because of the road material. Nor was any corroborating evidence to support the hearsay statements offered by Duesterbeck about his discussion with others about whether the street was paved or gravel. [Ex. 3]. The evidence submitted did not reliably or convincingly establish that the surface of the road was gravel.

Mr. Duesterbeck's opinion in this case was also premised upon another assumption of fact that was not supported by the evidence. This assumption involved whether a sanitary sewer project had been approved for the subject property and whether this should be disclosed in the subject appraisal. [Transcript at pg. 79] Mr. Duesterbeck testified that "everybody was well aware that the sewer was going in; that streets were going to be torn up and septic tanks filled in, but that everything would not be connected until 1999." [Transcript at pg. 83]. Yet, on cross-examination at the hearing, Mr. Duesterbeck admitted that he was not certain exactly when the construction of the sewer was approved and that it may have started the year after the appraisal. [Transcript at pg. 111]. When pressed further, Mr. Duesterbeck further admitted that he meant to say that he thought the process had begun, and that he did not actually know whether the Queen Road area had an approved sewer in 1997 or whether there was debate about whether one would be approved due to funding problems. Mr. Duesterbeck then testified that if those factors were true and the sewer had not been approved, it would affect his opinion as to whether it should have been included in the subject appraisal and whether there was a USPAP violation. [Transcript at pgs. 112, 113, 127].

The Complainant submitted copies of the Lake Como Sanitary District Meeting minutes for 1996 and 1997, to corroborate the testimony of Mr. Duesterbeck about the sanitary sewer. [Exs. 68, 69, 70, 71, 72]. These documents showed that legislation had been introduced, and possibly passed, to secure state funding for the sewer project. but there was also some question as whether funding for the project would be in the Governor's budget. The meeting minutes do not indicate when the project was finalized, when the construction began or whether assessments had been established. [Exs. 68, 69, 70, 71] Mr. Schultz, the assessor for the Town of Geneva, testified he thought the sewer approval process took place in 1995 and construction was underway in 1997, but he could not testify as to the dates because he was not involved in the sewer construction process. [Transcript at pg. 31-32]

At best, the evidence presented shows that a sewer system was in the planning stages for some period at or around the time of the subject appraisal. The sewer project may have affected a portion of the Lake Como area including the subject property; however, the evidence was far from conclusive as the time frame and whether the failure to include this information in the subject appraisal was a violation of the USPAP.

Max Weber

Max Weber was retained by the Respondents as an expert witness. He testified that he was requested to determine whether or not the subject appraisal was misleading. Mr. Weber testified that he has been a City Assessor for a number of townships and cities in Wisconsin and that he has performed commercial re-evaluations. Mr. Weber has been a licensed appraiser since 1982. Mr. Weber testified that he has been a supervisory appraiser and holds a General Accredited Appraiser Designation and National Associate of Realtors. [Transcript at pgs. 176-178]. Mr. Weber admitted that his primary focus is commercial real estate and that he had not appraised any water-front or water-access properties recently. [Transcript at pg. 180]. A stipulation as to Mr. Weber's background and expertise was read into the record indicating that he did not handle appraisals

of residences located in Lake Como Beach subdivision; that he had only appraised condominium projects in the Lake Geneva area and that his last appraisal of a lake-front residence was two to three years ago. It was agreed by stipulation that appraising lake-front homes was less than 1 percent of Mr. Weber's appraisal his business.

Mr. Weber testified that in the course of his review, he read the subject appraisal by the Respondents and the review appraisal reports prepared by Mr. Paslawsky and Mr. Duesterbeck. Mr. Weber testified that he also reviewed written documents, depositions and the review appraisal report prepared by Mr. Coutts, another expert witness who testified at the hearing. [Transcript at pgs. 185-87].

Mr. Weber testified that in his opinion the subject appraisal was not misleading or incredible. [Transcript at pg. 187]. Mr. Weber testified that there were substantial flaws in Mr. Duesterbeck's review and that he failed to present a clear picture of what was being presented. [Transcript at pg. 194]. Mr. Weber testified that it is very difficult to do a paired-sales analysis in a situation where there are a limited number of sales that are comparable to a subject property and adjustments have to made for differences between the properties. [Transcript at pg. 189]. Mr. Weber testified that there is a degree of judgment to be made in most paired-sales analysis. [Transcript at pgs. 190-191]. Mr. Weber also testified that both of the review appraisals prepared by Mr. Duesterbeck contained numerous discrepancies, including differences in the condition of property at the time of the subject appraisal. [Transcript at pg. 195]. Mr. Weber explained that the subject appraisal which was done in 1997 described the property condition as "good," yet in the review appraisal by Mr. Paslawsky in 2001, the property condition is described as "average, substantial deferred maintenance" and the kitchen/ bath as "older-average." [Transcript at pg. 197, Exs.1, 29] Mr. Duesterbeck indicated in his report that he considered the condition of the property in 1997 to be "good." Yet, Mr. Duesterbeck did not contact Mr. Paslawsky to resolve the discrepancy between the condition as described in the subject appraisal and the review appraisal. [Transcript at pg. 199]. Mr. Weber testified that he would have to know whether Mr. Duesterbeck saw the properties and did the research to make a supporting claim that was contrary to Mr. Paslawsky's review. [Transcript at pg. 200].

Mr. Weber testified further that the condition of a property is an important aspect of any appraisal and could mean tens of thousands of dollars of difference in an appraised value. [Transcript at pg. 200]. In addition, Mr. Weber disagreed with Mr. Duesterbeck's use of the comparables identified as Addendum C in his review report. Mr. Weber testified that it is was inappropriate for a review appraiser to present a list of sales as comparables without some supporting documenting the time adjustment, appreciation in value and adjustments for property condition. [Transcript at pgs.202-203] According to Mr. Weber, this misuse of data is misleading and does not provide enough information to draw any reliable conclusions. [Transcript pgs. 203-204]. Similarly, Mr. Weber testified that it is not acceptable to use a comparable that sold three years after the subject appraisal. [Transcript at pg. 205]. Any comparable should be corrected for time adjustment and appreciation. [Transcript at pg. 206]. In Mr. Weber's opinion, the failure of Mr. Duesterbeck to include a time adjustment in his paired-sales analysis results in a misleading review appraisal. [Transcript at pgs. 206-207]. Mr. Weber also testified Mr. Deusterbeck's paired-sales analysis data does not show or adjust for differences in amenities, such as garages, bathrooms, driveways, which should be done to avoid being misleading. [Transcript at pgs. 207-208].

Mr. Weber testified that Mr. Duesterbeck stated that he spoke to a realtor about the condition of the property when it was resold in 2001. Mr. Weber testified that reliance on the property condition at the time of a future sale was inappropriate and misleading. [Transcript at pg. 210]. Mr. Weber testified that a review appraiser is expected to review the original appraisal and all of the information that could be considered appropriate, including comparable sales, to determine whether or not those were the best sales that could have been used at the time of the original appraisal. [Transcript at pgs. 209-210]. Mr. Weber noted that it would be unusual for a review appraiser to make different findings as to property condition or other factors after the effective date of the original appraisal or review appraisal. Mr. Weber testified that a review appraiser would generally accept the findings in the original appraisal unless there was data to support other findings. Accordingly, Mr. Weber found it highly suspect that Mr. Duesterbeck would make findings as to the road and sewer which contradicted the original appraiser and the findings of the subsequent review appraiser. [Transcript at pg. 211]. Mr. Weber also found that the estimation of the linear foot of lake frontage of \$2,000 to \$5,000 as described by Mr. Duesterbeck for Comparable No. 1 to be incredible as it would greatly exceed the total value of the property. [Transcript at pg. 213]. Mr. Weber testified that if Mr. Duesterbeck was correct in his estimation, the property would have been worth \$270,000, although it actually sold for \$140,000. [Transcript at pg. 215].

Another significant problem with Mr. Duesterbeck's review appraisal and opinion, according to Mr. Weber, was actually

discovered during the course of Mr. Weber's testimony at the hearing. At the hearing, it became evident that Mr. Weber and Mr. Dueterbeck had different versions of the 2001 review appraisal by Mr. Paslawsky. Mr. Dueterbeck had reviewed a version of Mr. Paslawsky's report which had been marked and introduced as Exhibit 29. [Transcript at pgs. 216-217]. The version of the 2001 review appraisal provided to Mr. Weber, and marked and introduced as Exhibit 33, was not the same version that Mr. Dueterbeck had reviewed. Mr. Weber and the Respondent's legal counsel indicated at the hearing that the report which they relied upon and reviewed was provided to them by the Department. A comparison of the two versions of the report revealed a number of differences: the heading for single-family housing was blank; a different date appears under the line for expiration date of certification or license; the attachments listed for Exhibit 33 were not included; and the signatures on the two versions of the review appraisal reports were dissimilar. Respondent's counsel also found that there were differences between the two versions of Mr. Paslawsky's report appearing on page two, line 9. One version stated "adjustments for condition and basement appear relatively low versus subject" followed by a parentheses stating "non-lake front with no basement." [Transcripts at pg. 228]. The response on line 11 appearing on Exhibit 29 was different than the response on line 11 of Exhibit 33; one response included an explanation and the other version had no explanation with the response. [Transcript at pg. 229]. A difference also appeared between the two reports on line 12 regarding whether a summary appraisal was performed. [Transcript at pg. 229]. Finally, there was a discrepancy between the report marked as Exhibit 29, which listed the predominant value range of the property as "100 plus," and the value range in Exhibit 33 which stated the value at the time of the review appraisal as \$75,000, without any comment or explanation as to why the subject property was much lower. [Transcript at pgs. 231, 232].^[2] Upon discovery of these discrepancies in the copies of the two versions of the same review appraisals, the Respondent's counsel made a motion to dismiss on the grounds that the Complainant had not made a prima facie case. The Respondent's legal counsel argued that it was unclear whether Mr. Dueterbeck made his analysis based upon the correct facts or whether Mr. Paslawsky changed his opinion.

In addition to the discrepancies in the two versions of report, Mr. Weber testified that there was no indication of the type of research that was done by Mr. Paslawsky to validate the quantitative analysis of the original appraisal. [Transcript at pg. 232]. Mr. Weber testified that there was a difference in the square footage of the property and the condition of the property, as described in the original appraisal and the review appraisal. [Transcript at pg. 234]. Mr. Weber testified that the discrepancies in the adjustments used by Mr. Paslawsky in his review appraisal that should have been recognized and considered by Mr. Dueterbeck in his review. [Transcript at pgs. 240-243].

Mr. Weber explained that it is difficult for any reviewer to review an appraisal eight years after-the-fact because the appraiser cannot see the property in the condition when it was originally appraised. As a result, a review appraiser should give a greater margin of acceptability to the original appraiser, particularly if that appraiser was experienced in the area and if the subject property varied considerably in the eight years between the time it was originally appraised. [Transcript at pgs. 250-251]. Mr. Weber concluded that based upon his review of the subject appraisal, he did not find anything to suggest that the appraisal report prepared by the Respondents in 1997 was not credible or that it violated the requirements of USPAP. [Transcript at pg. 260]

JAMES COUTS

James Coutts testified as an expert witness for the Respondents. Mr. Coutts is an experienced real estate appraiser and educator who has been licensed and practiced in south central Wisconsin and North Central Illinois since 1984. Mr. Coutts is a board certified instructor in the USPAP who teaches pre-licensing courses and continuing education courses for Blackhawk Technical College, Waukesha County Technical College and the Appraisal Institute. [Transcript at pg. 340]. Mr. Coutts also performs residential and commercial property appraisals in the same area as Mr. Dueterbeck. Mr. Coutts acknowledged that he and Mr. Dueterbeck are competitors and they have been on the opposite sides in various court cases and hearings, including a complaint to the Department filed against him by Dueterbeck. Mr. Coutts testified that all of the alleged violations against him in that case were dismissed by the Administrative Law Judge. [Transcript at pgs. 344-45]^[3] Mr. Coutts incurred litigation fees in defending himself against the allegations. [Ex. 56]

Mr. Coutts acknowledged that in the past he and his deceased brother-in-law shared data with Mr. Begg on other appraisals of high-priced properties in Lake Geneva. [Transcript at pg. 429]. Mr. Coutts testified that he did not consider himself to have a bias in this proceeding because he was not co-appraiser of the property, has no current ongoing business relationship with any parties, is not related to any parties, and does not have a shared interest in the property. Mr. Coutts also prepared and signed a certificate which is attached to his review report attesting to his lack of any interest or bias. [Ex. 3] The

information presented at the hearing showed that Mr. Coutts had professional contacts with at least one of the parties and one of the expert witnesses. This is sometimes unavoidable among those who work in the same field or compete in the same geographic area. However, it was not sufficiently demonstrated to this examiner that these previous contacts or circumstances rose to the level of a bias or conflict of interest that would disqualify or render the opinion of Mr. Coutts unreliable. Nor did appear to this examiner that the expertise of Mr. Coutts was inherently untrustworthy simply because he had past dealings with some of the parties or witnesses.

Mr. Coutts testified that he prepared a review report in response to the topics raised in this complaint, the subject appraisal and the review appraisal by Mr. Dueterbeck. [Transcript at pg. 323, Ex. 5]. Mr. Coutts sat through the hearing and heard the testimony of Mr. Dueterbeck and Mr. Weber. Mr. Coutts indicated in his written report that he had not only read and analyzed all of the appraisal reports, but independently verified the data contained in the multiple listing services and register of deeds for the property. He testified that he personally inspected the subject property and the comparables from the exterior. [Transcript at pg. 364-365]

Mr. Coutts identified several problems with the review appraisal prepared by Mr. Paslawsky. Mr. Coutts testified that it was poorly prepared and that had it been better-supported and properly conducted in compliance with USPAP, it is likely that the complaint would not have been filed against the Respondents. [Transcript at pg. 349]. Mr. Coutts testified that Fannie Mae had been taking a lot of losses and they look at the appraisal and if they feel a review is needed based on the sale price versus the loan they will have a filed review done. [Transcript at pg. 347, 349]. According to Mr. Coutts, the most significant problem with the Paslawsky report was that it used comparable sales that were 15 and 27 months prior to the effective date of the original appraisal. [Transcript at pg. 368]. Mr. Coutts testified that the 2001 version of the USPAP standard applicable at the time of Paslawsky review restricts the use of sales data that was not available to the appraiser. [Transcript at pgs. 368-369].

Mr. Coutts also found a number of problems with Mr. Dueterbeck's review appraisal. [Ex. 3]. For example, Mr. Dueterbeck relied on the sale of a property in the year 2000 to support his opinion the subject appraisal had over-valued the property. According to Mr. Coutts the use of subsequent sale was specifically disallowed under the USPAP and the comments to USPAP Standard 3 which states that the appraisal review must be in the context of the market conditions as of the effective date of the review. Mr. Coutts also testified that Standard 3 also disallows information that could not have been available to the appraiser as of the date of opinion and must not be used by the reviewer in the development of an opinion as to the quality of the work under review." [Transcript at pgs. 369-370]. Mr. Coutts explained that a review appraiser might use subsequent sales to develop their own opinion of value or to show a market trend; however, the review appraiser may not use such information as a basis to discredit the original appraiser's opinion of value. [Transcript at pgs. 370-371]

According to Mr. Coutts, by using sales that occurred after 1997 to discredit the original appraisal, both Mr. Dueterbeck and Mr. Paslawsky violated a binding USPAP requirement. [Transcript at 372] Mr. Coutts testified that he spent a considerable time researching the sales records and could find only one comparable sale of Lake Como access within the six month time frame as required by the underwriter guidelines. [Transcript at pgs. 354-355]. Mr. Coutts testified that it was an inferior two-bedroom property that might not have been found during a normal search because it had no linkage to Lake Como. [Transcript at 356]

Mr. Coutts explained that it was important to recognize the distinction between the limited scope of the subject appraisal and the scope of a review appraisal which tends to be more in depth. The subject appraisal was for a refinance on a fairly modest property, with underwriter guidelines for two-bedroom comparables in a limited time frame. Mr. Coutts testified that an appraiser is required to follow the underwriter guidelines if they can produce a credible report which satisfies the USPAP. [Transcript at pg. 357]. There was no evidence offered to show that the lender guidelines were *per se* unreasonable for the subject appraisal.

Mr. Coutts further testified that if a review appraiser has a disagreement with a finding in an original appraisal, such as whether a road surface is gravel or paved, the reviewer should rely upon the original appraiser unless there is overwhelming evidence that the original appraisal is incorrect. [Transcript at pg. 359]. Mr. Coutts testified that the road surface would have been clear in the original photographs; if different than described in the appraisal report, the underwriter would not have accepted it, and there would have been a red flag on that aspect of the appraisal. [Transcript at pg. 358]. There was no indication in Mr. Paslawsky's report that the road surface was other than paved asphalt. Mr. Coutts also tried to find photos of the street from

other sales to determine whether the street was paved or gravel at the time of the subject appraisal. He could not locate any, so he found it reasonable to accept the information reported in the subject appraisal. [Transcript at pgs. 359-360]

With respect to the sanitary sewer issue, Mr. Coutts testified that under Standard 2 of the USPAP, an appraiser is only required to consider and analyze the effect on value of any anticipated public or private improvements to the extent that market actions reflect such anticipated improvements as of the effective date of the report. [Transcript at pg. 361] From all of the information that was available, Mr. Coutts concluded that the sewer had a neutral-positive impact that would have favored an increase in value; therefore, the USPAP would not require it to be included in the appraisal. [Transcript at pg. 364]. If the cost of the sewer was public knowledge in the marketplace, the appraiser would have put that information in the appraisal. [Transcript at pg. 364]. Mr. Coutts testified that the Respondents may have considered the possible impact and concluded that it did not create a major adverse financial impact. If so, the Respondents were not required to include the sanitary sewer information in the appraisal. [Transcript at pg. 363]

Mr. Coutts testified that Mr. Duesterbeck's certification of his review violated the jurisdictional exception of the USPAP. Mr. Coutts testified that the jurisdictional exception that if any parts of the USPAP standards are contrary to law or public policy of any jurisdiction, only that part shall be void and of no force or effect in that jurisdiction. [Transcript at pg. 374]. Mr. Coutts testified that exception states: "[T]he purpose of the jurisdictional exception rule is strictly limited to providing a severability clause intended to preserve the valance of the USPAPA if one or more of its parts are determined to be contrary to law or public policy of the jurisdiction." Mr. Coutts explained that when a reviewer uses the jurisdictional exception they must state by what authority they are doing so and what parts of the USPAP they are discarding. [Transcript at pg. 375].

In the opinion of Mr. Coutts, it was inappropriate for Mr. Duesterbeck to claim use of the exception without providing a basis for its use and without stating what standards he was not following. He testified that if Mr. Duesterbeck thought he was under a Department requirement that prohibited him from following the USPAP, he should have stated the authority and described what he did not apply. [Transcript at 376] Mr. Duesterbeck testified that he believed that the standard applied because he prepared a review appraisal for a governmental entity. Mr. Coutts testified that Mr. Duesterbeck, a general certified appraiser, who served on the Real Estate Appraisers Board, should have a better understanding of the USPAP jurisdictional exception. [Transcript at pg. 373]

Mr. Coutts also found that Mr. Duesterbeck violated several USPAP requirements in Standard 3 regarding the use of comparables. When asked whether Mr. Duesterbeck Addendum C which listed ten paired-sales was appropriate, Mr. Coutts testified as follows:

A: To me, that means nothing other than there's some sales in the area and question that question that claim. To my mind, if I understand it, he is reviewing and he is analyzing this appraisal, why didn't he pick the three best comparables out of those, stick them in the grid to support his contention of value, if different? Instead he went to 2000, got a sale, and apparently put some weight on Paslawsky's appraisal or review and instead of using the sales that were available during that time, whether – they were apparently not two bedrooms. Why didn't he stick those in the sales grid and support his opinion of value? It's meaningless to list them. He has the same ability based on his comments that he's familiar with the market and does business in that area. Even though he not a competitor apparently to Begg and Brandley, why couldn't he put that into a grid and support his opinions of value? That would have much more meaningful than what he did. [Transcript at pgs. 383-384]

Mr. Coutts testified that the adjustments made by the Respondents in the subject appraisal were conservative and not misleading. Mr. Coutts indicated that it did not appear that the Respondents were trying to favor a higher price. [Transcript at pg. 401]. Mr. Coutts testified that he might have made some adjustments that would have increased the value more, such as bathrooms, square footage and other amenities; however, since he did not an analysis of the submarkets, he could only confirm that the magnitude and direction of the adjustments in the subject appraisal appeared reasonable. [Transcript at pg. 419]. Mr. Coutts testified that although his opinion of value differed from the subject appraisal, he still thought the subject appraisal was credible. [Transcript at pgs. 422, 439].

CONCLUSION

Based upon the entire record presented, this Administrative Law Judge does not find that the Complainant has presented

sufficient evidence to establish the alleged USPAP violations. The burden of proof is on the Complainant to prove the allegations in the complaint by a preponderance of the evidence. The evidentiary problems in this case reflect the difficulty inherent in prosecuting a case which is dependent upon expert testimony and appraisal reviews conducted years after the original appraisal. The condition of the subject property and comparables were considerably different at the time of the original appraisal and the review appraisals. Likewise, witnesses who may have been able to provide reliable information on the issue were not available. This was a challenging case made more difficult by the passage of time and the lack of sufficient evidence on key issues. In weighing the evidence that was presented, it did not reach the requisite level of certainty to establish that the subject appraisal was misleading or that standards in the profession were violated.

For these reasons, it is, therefore, recommended that the Real Estate Appraisers Board adopt as its final decision in this matter the proposed Findings of Fact, Conclusions of Law and Order and dismiss this case.

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

Dated this _____ day of June, 2006

Colleen M. Baird
Administrative Law Judge

[1] Strenuous objections were made by the Respondents' counsel that neither he nor his experts had an opportunity to review Mr. Dueterbeck's paired-sales information prior to the seeing it for the first time at the hearing. The document was admitted over counsel's objection and the parties were advised that the weight given the evidence may be diminished based by the lateness of the offer and prejudice to the objecting party.

[2] Counsel for the Division of Enforcement did not know which version of Mr. Paslawsky's review appraisal report was forwarded to Fannie Mae and which version of the report Mr. Dueterbeck reviewed in rendering his review appraisal. It was suggested that Ex. 33 was received by the Department as part of the complaint and that Ex. 29 was received in response to a letter from the Division's investigator, but multiple attorneys and investigators may have worked on the case. [Transcript at pg. 220-221]

[3] *In the Matter of Disciplinary Proceedings Against James E. Coutts, Final Decision and Order*, LS990311APP. The ALJ found that the complainant in this proceeding, Linn Dueterbeck, was not objective in his complaint, both because he was intimately familiar with the property in question and because he had performed an appraisal of the identical property approximately two years earlier for the opposing side in a lawsuit, reaching an estimate of value more than twice as high as Mr. Coutts. Most of Mr. Dueterbeck's charges were factual disagreements over Mr. Coutts' choice of comparable sales and his inclusion or exclusion of various details which Mr. Dueterbeck considered important. The ALJ noted that it almost appeared as if Mr. Dueterbeck deliberately misinterpreted anything which could possibly be misinterpreted in Mr. Coutts' report.