IN THE SUPERIOR COURT FOR THE STATE OF ALASKA AT KETCHIKAN

KIM M. WOLD,

Appellant,

vs.

STATE OF ALASKA, DEPARTMENT OF COMMERCE, COMMUNITY & ECONOMIC DEVELOPMENT, DIVISION OF CORPORATIONS, BUSINESS AND PROFESSIONAL LICENSING, and BOARD OF CERTIFIED REAL ESTATE APPRAISERS,

Appellee.

APPEAL CASE NO. 1KE-08-263CI

NOTICE RE COSTS AND ATTORNEY FEES ON APPEAL

To: Appellant and Appellee

Unless otherwise ordered by the court, the prevailing party seeking recovery of attorney fees and costs on appeal must submit a motion for attorney fees and an itemized and verified bill of costs within 10 days of the date shown in the clerk's certificate of distribution on the appeal decision. If the appeal decision was mailed, three additional calendar days are added to this deadline.

A request for any costs not allowed under Appellate Rule 508(d) must be made by separate motion.

Proof of service on the opposing party must be filed with the motion and bill of costs.

12/14/09
Date

Clerk

SEAL OF THE TRIAL COURTS OF THE STATE OF ALASKA FIRST JUDICIAL DISTRICT

I certify that on 12/14/09
A copy of this order was sent to:
Bruce Falconer, Robert Auth, Mark Davis, Steve MacSwain
Clerk: slh

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT KETCHIKAN



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| **KIM M. WOLD,** | ) |
| | ) |
| **Appellant,** | ) |
| | ) |
| **v.** | ) |
| | ) |
| **STATE OF ALASKA, DEPARTMENT OF COMMERCE, COMMUNITY & ECONOMIC DEVELOPMENT, DIVISION OF CORPORATIONS, BUSINESS AND PROFESSIONAL LICENSING, and BOARD OF CERTIFIED REAL ESTATE APPRAISERS,** | ) |
| | ) |
| **Appellees.** | ) |
| | ) **Case No. 1KE-08-263 CI** |

## DECISION

Mr. Wold appeals the February 20, 2008 Decision and Order of the Board of Certified Real Estate Appraisers (Board) in OAH Case Nos. 04-0275/0276-REA. Oral argument occurred on June 3, 2009. The parties were represented by their counsel of record. The court gave the Board two weeks within which to file additional briefing on a point raised during the oral argument and Mr. Wold a week thereafter within which to file a response. This briefing was completed by June 22, 2009. The Board is REVERSED in part and AFFIRMED in part.

## I. POINTS ON APPEAL

Mr. Wold's May 12, 2008 Statement of Points on Appeal sets forth the following claims:

1. The Division of Corporations, Business And Professional Licensing (Division) failed to prove by a preponderance of the evidence that he violated AS 08.87.200(1).

2. The Division failed to prove by a preponderance of the evidence that he violated AS 08.87.200(3).

3. The Board's findings that he violated the Uniform Standards of Professional Appraisal Practice (USPAP) Standards Rules (SR) 1-1(a) and 1-1(b) in the course of appraising the Entwit Float are not supported by substantial evidence, is against the weight of the evidence, and/or lacks a reasonable basis.

4. The Board's findings that he violated USPAP SR 1-1(a) and SR 1-1(b) in the course of appraising the Copper Road residence are not supported by substantial evidence, is against the weight of the evidence, and/or lacks a reasonable basis.

5. The Board's findings that he violated USPAP SR 1-1(a), SR 1-1(b), and SR 1-1(c) in the course of appraising the Ellis Island property are not supported by substantial evidence, is against the weight of the evidence, and/or lacks a reasonable basis.

6. 12 AAC 70.900 is invalid because neither it nor AS 08.87.200(3) adopt a particular version of USPAP, nor do they provide for applying and enforcing new versions as USPAP is updated. So he cannot be found to be in violation of USPAP standards contained in the 1995 and 2002 editions of USPAP.

7. Alaska Statute 08.87.200(3) is unconstitutional, on its face and as applied, because it does not adopt any particular edition of USPAP and thus does not provide adequate notice of what conduct is proscribed and has resulted in arbitrary and capricious enforcement action.

8. Alaska Statute 08.87.200(3) is unconstitutional, on its face and as applied, because it does not provide adequate notice of what conduct and, coupled with the Board's failure to define rules of professional conduct for certified appraisers as required by statute, invites and has resulted in arbitrary and capricious enforcement action.

9. He did not receive a fair hearing before the Board because: inadmissible evidence was admitted and considered; the hearing officer who heard this case did not issue the proposed decision and the (third) hearing officer who did issue the proposed decision was not present during the hearing before the Board and, apparently, did not review the first hearing officer's copious notes, and did not give weight to the conclusions stated on the record by the first hearing officer; the Board twice declined to adopt the third hearing officer's proposed decision and instead determined to decide the case itself; and, the Board members did not examine the evidence

presented during the hearing before deciding the matter, they engaged in improper *ex parte* communications, and they decided the matter on the basis of matters not in the record. The foregoing resulted in violations of his constitutional rights to due process and equal protection.

10. He is the victim of overzealous and arbitrary and capricious enforcement action by the Division and the Board in violation of his constitutional rights to equal protection and due process.

11. The Division's accusations concerning the Copper Road residence appraisal and the Entwit Float appraisal are barred by the doctrine of laches.

12. The hearing officer erred in denying his motion to sever the Ellis Island property appraisal from the Entwit Float and Copper Road residence appraisals.

13. The disciplinary sanction imposed by the Board was excessive and constituted an abuse of discretion.

14. The Board's decision to impose the five course requirements is without reasonable basis and an abuse of discretion.

15. The Board's decision to deny his reconsideration petition and refusal to allow him to take one or more of the required courses on line was without a reasonable basis and was an abuse of discretion.

Mr. Wold has briefed the following issues:

1. The court should grant a trial de novo on the record due to the facts and circumstances of the case;

2. The State has not adopted the USPAP editions the Board found that he violated;

3. The Copper Road appraisal and Entwit Marina appraisal cases are time-barred;

4. The Board's USPAP violation findings were not supported by substantial evidence;

5. The Board's negligence finding was not supported by substantial evidence; and

6. The penalties imposed were excessive.

Mr. Wold has waived the points on appeal not briefed.[1]

## II. JURISDICITION

This court has jurisdiction to review the Board's Decision and Order per Alaska Rule of Appellate Procedure 602(a)(2), AS 22.10.020(d), AS 44.62.330(a)(37), and AS 44.62.560.

## III. STANDARD OF REVIEW

Alaska Supreme Court has recognized that:

> In reviewing administrative decisions...[there] are at least four principal standards of review. "These are the 'substantial evidence test' for questions of fact; the 'reasonable basis test' for questions of law involving agency expertise; the 'substitution of judgment test' for questions of law where no expertise is involved; and the 'reasonable and not arbitrary test' for review of administrative regulations." We review an agency's interpretation of its own regulation under the reasonable basis standard, deferring to the agency unless the interpretation is 'plainly erroneous and inconsistent with the regulation.' We review questions of law and issues of constitutional interpretation de novo under the substitution of judgment standard.[2]

"Substantial evidence is evidence that a 'reasonable mind might accept as adequate to support a conclusion.'"[3] An appellate court does not "reweigh the evidence nor choose between competing factual inferences,"[4] and the court must uphold an administrative

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[1] ***See, State v. O'Neill Investigations, Inc.,*** 609 P.2d 520, 528 (Alaska 1980); ***Petersen v. Mutual Life Insurance Company of New York,*** 803 P.2d 406, 410 (Alaska 1990); ***Adamson v. University of Alaska,*** 819 P.2d 886, 889 n. 3 (Alaska 1991); ***Johnson v. Johnson,*** 836 P.2d 930, 936 (Alaska 1992).

[2] ***Simpson v. CFEC,*** 101 P.3d 605, 609 (Alaska 2004) (quoting ***Jager v. State,*** 537 P.2d 1100, 1107 n. 23 (Alaska 1975), ***See also, May v. CFEC,*** 175 P.3d 1211, 1215 (Alaska 2007), ***Lauth v. State,*** 12 P.3d 181, 184 (Alaska 2000) (quoting ***Bd. of Trade, Inc. v. State, Dep't of Labor, Wage & Hour Admin.,*** 968 P.2d 86, 89 (Alaska 1998)).

[3] ***May,*** 175 P.3d at 1216 (quoting ***Cleaver v. CFEC,*** 48 P.3d 464, 467 (Alaska 2002) (internal citation and quotations omitted)).

[4] ***State of Alaska, Division of Corporations, Business and Professional Licensing v. Platt,*** 169 P.3d 595, 601 (Alaska 2007) (quoting ***Doyon Universal Services v. Allen,*** 999 P.2d 764, 767 (Alaska 2000)).

agency's decision if it is support by substantial evidence "[e]ven though there are competing facts that might support a different conclusion."[5] An appellate court may reverse an agency's decision "only if we 'cannot conscientiously find the evidence supporting [the agency's decision] is substantial'."[6]

Alaska Statute 44.62.570(c) provides that: "The court may exercise its independent judgment on the evidence." Alaska Statute 44.62.570(d) provides that: "The court may . . . hold a hearing de novo."

Alaska Appellate Rule 609(b)(1) provides that the court has the discretion to "grant a trial de novo, in whole or in part. Alaska Appellate Rule 609(b)(2) provides that such a de novo trial would be based on the evidence in the record when the appeal was filed and "upon such evidence as may be produced in the superior court."

A trial de novo "is not a common procedure."[7] The Alaska Supreme Court has approved the use of de novo review only

> where certain issues are not within the expertise of the reviewing body; where the agency record is inadequate; where the agency's procedures are inadequate or do not otherwise afford due process; or where the agency was biased or excluded important evidence in its decision-making process.[8]

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[5] ***Platt,*** 169 P.3d at 601.

[6] ***Powercorp Alaska, LLC v. State, Alaska Industrial Development and Export Authority,*** 171 P.3d 159, 163(Alaska 2007) (quoting ***Leigh v. Seekins Ford,*** 136 P.3d 214, 216 (Alaska 2006) (citation omitted)).

[7] ***Kott v. City of Fairbanks,*** 661 P.2d 177, 180 n. 1 (Alaska 1983).

[8] ***South Anchorage Concerned Coalition, Inc. v. Municipality of Anchorage Board of Adjustment,*** 172 P.3d 768, 778 (Alaska 2007) (citations omitted); ***See also, Treacy v. Municipality of Anchorage,*** 91 P.3d 252, 270 (Alaska 2004); *See also* ***State v. Lundgren Pacific Construction Co.,*** 603 P.2d 889, 895, 896 n. 18 (majority opinion) and 898-99 (Matthews, J., concurring) (Alaska 1979); ***Southwest Marine, Inc. v. State,*** 941 P.2d 166, 179-80 (Alaska 1997).

## IV SUMMARY OF DECISION

The court declines to conduct a de novo review on the record.

The current edition of USPAP had been adopted in Alaska by statute per AS 08.87.200(3). If not, the current edition of USPAP sets the standard of care under AS 08.87.200(1).

The Division's action on Mr. Wold's Entwit marina and Copper Road appraisal reports were not time barred.

The Board's USPAP violation findings under AS 08.87.200(a)(3) were not supported by substantial evidence in the record with the exception of the finding that Mr. Wold violated SR 2-2(a)(xi) in the Ellis Island appraisal report.

The Board's findings that Mr. Wold violated AS 08.87.200(a)(1) were based on its findings under AS 08.87.2001(a)(3). So the court's decision with respect to the Board's USPAP violation findings under AS 08.87.200(a)(3) are dispositive with respect to its finding that he violated AS 08.87.200(a)(1).

The case must be remanded to the Board for re-assessment of its sanctions given the above. So it is not necessary for the court to address Mr. Wold's excessive penalty claim.

## V. RECORD

### a. USPAP

#### 1. 1997 Edition

The Preamble to the 1997 edition of the Uniform Standards of Professional Appraisal Practice (USPAP) included:

A. "STANDARDS 1 and 2 relate to the development and communication of a real property appraisal."[9]

B. The Standards include "Statements on Appraisal Standards issued by the Appraisal Standards Board for the purpose of clarification, interpretation, explanation, or elaboration of a Standard or Standards Rule."[10]

C. "To maintain a high level of professional practice, appraisers must observe these Standards."[11]

D. "Explanatory Comments are an integral part of the Uniform Standards and should be viewed as extensions of the Provisions, Definitions, and Standards Rules."

Standard 1 of the 1997 USPAP provided: "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."[12] The related Comment provided;

> 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 Rules 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 (SR) 1-1(a) provided: "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." The Comment to this SR provided:

> Departure from this binding requirement is not permitted.[13] This rule recognizes that the principle of change continues to affect the manner in which appraisers

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[9] Division's Excerpt of record (DER) at p. 289. (Hearing Exhibit F)
[10] DER at p. 289.
[11] DER at p. 289.
[12] DER at p. 296.
[13] All highlighting herein, whether by underling or bold print, has been added unless otherwise noted. The underling of such "Departure" sentences in the Comments is in the original. The underlying of "Comment" headings is in the original.

> perform appraisal services. . . 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. . . Each appraiser must continuously improve his or her skills to remain proficient in real property appraisal.[14]

Standards Rule 1-1(b) provides: "In developing a real property appraisal, an appraiser must: (b) not commit a substantial error of omission or commission that significantly affects an appraisal." The comment to this SR provides:

> 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 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.[15]

Standards Rule 1-1(c) provided: "In developing a real property appraisal, an appraiser must: (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." The comment to this SR provided:

> 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.[16]

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[14] DER at p. 296.
[15] DER at p. 296.
[16] DER at p. 296. The Division did not include a copy of SR 1-4 from the 1997 USPAP edition in its excerpt of record.

Standard 2 of the 1997 USPAP provided: "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."[17]

Standards Rule 2-1, and related Comments, provided:

> 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.
>
> (b) **contain sufficient information to enable the person(s) who are expected to receive or rely on the report to understand it properly**.
>
> Comment: Departure from this binding requirement is not permitted. The person(s) expected to receive or rely on a Self-Contained or Summary Appraisal Report are the client and intended users. Only the client is expected to receive or rely on the Restricted Appraisal Report.
>
> (c) clearly and accurately disclose any extraordinary assumption or limiting condition that directly affects the appraisal and indicates 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, a known but not yet quantified environmental issue, 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.[18]

Standards Rule 2-2 provided: "Each written real property appraisal report must be prepared under one of the following three options and prominently state which option is used:

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[17] DER at p. 297.
[18] DER at p. 297.

Self-Contained Appraisal Report, Summary Appraisal Report or Restricted Appraisal Report." [19]

The Comment to SR 2-2 provided:

> The essential difference among the three options is the use and application of the terms describe, summarize and state. Describe is used to connote a comprehensive level of detail in the presentation of information. **Summarize is used to connote a more concise presentation of information**. State is used to connote the minimal presentation of information.[20]

Standards Rule 2-2(a)[21] provided, in part, that The Self-Contained Appraisal Report must:

> (vi) state the extent of the process of collecting, confirming, and reporting data:
>
> Comment: This requirement is designed to inform the client and intended users whose expected reliance on the appraisal report may be affected by the extent of the appraiser's investigation; i.e. the process of collecting, confirming, and reporting data.
>
> Standards Rule 2-2(a)(vi) only requires that the extent of the process of collecting, confirming, and reporting data be stated, since the full extent of the process should be apparent to the reader in the contents of the report.
>
> (vii) state all assumptions and limiting conditions that affect the analyses, opinions, and conclusions;
>
> Comment: While typical or ordinary assumptions and limiting conditions may be grouped together in an identified section of the report, Standards Rule 2-1(c) requires that an extraordinary assumption or limiting condition must be disclosed in conjunction with statements of each opinion or conclusion that is affected.
>
> (viii) describe the information considered, the appraisal procedures followed, and the reasoning that supports the analyses, opinions, and conclusions;
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> Comment: This requirement calls for the appraiser to describe 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 and the intended

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[19] DER at p. 297.
[20] DER at p. 297.
[21] DER at pp. 298-99.

users of the report will understand it and will not be misled or confused. The substantive content of the report, not its size, determines compliance.

(ix) describe 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 the appraiser to describe 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 and the intended users of the report will understand it and will not be misled or confused. The substantive content of the report, not its size, determines its compliance.

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

(xi) describe any additional information that may be appropriate to show compliance with or clearly identify and explain permitted departures from the specific guidelines of STANDARD 1;

Comment: This requirement calls for a Self-Contained Appraisal Report to include 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.

When the DEPARTURE PROVISION is invoked, the assignment is deemed to be a Limited Appraisal. Use of the term Limited Appraisal makes it clear that the assignment involved something less than, or different from the work required by the specific guidelines. The report of a Limited Appraisal must contain a prominent section that clearly identifies the extent of the appraisal process performed and the departures taken.

The reliability of the results of a Complete Appraisal or Limited Appraisal developed under STANDARD 1 is not affected by the type of report prepared under STANDARD 2. The extent of the appraisal process performed under STANDARD 1 is the basis for the reliability of the value conclusion.

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.

Standards Rule 2-2(b)[22] provided, in part, that:

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[22] DER at pp. 300-02.

The summary Appraisal Report must:

Comment: **The essential difference between the Self-Contained Appraisal Report and the Summary Appraisal Report is the level of detail of presentation. As examples: a two-page narrative section with conclusion in a Self-Contained Appraisal Report might translate to a two paragraph section with the same conclusion in a Summary Appraisal Report; narrative presentation of data in a Self-Contained Appraisal Report might translate to tabular presentation of data in a Summary Appraisal Report. . .**

(vi) summarize the extent of the process of collecting, confirming, and reporting data;

Comment: This requirement is designed to inform the client and intended users whose expected 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.

Standards Rule 2-2(b)(vi) requires the extent of the process of collecting, confirming, and reporting data be summarized, since the full extent of the process may not be apparent to the reader in the contents of the report.

(vii) state all assumptions and limiting conditions that affect the analyses, opinions, and conclusions;

Comment: While typical or ordinary assumptions and limiting conditions may be grouped together in an identified section of the report, Standards Rule 2-1(c) requires that an extraordinary assumption or limiting condition must be disclosed in conjunction with the statements of each opinion or conclusion that is affected.

(viii) summarize 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 the summary is sufficient enough that the client and the intended users of the report will understand it and will not be misled or confused. The substantive content of the report, not its size, determines its compliance.**

(ix) summarize 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 report to contain 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 summarized in the depth and detail required by its significance to the appraisal.

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

(xi) summarize any additional information that may be appropriate to show compliance with, or clearly identify and explain permitted departure from the specific guidelines of STANDARD 1;

Comment: This requirement calls for a Summary Appraisal Report to include 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.

When the DEPARTURE PROVISION is invoked, the assignment is deemed to be a Limited Appraisal. Use of the term Limited Appraisal makes it clear that the assignment involved something less than, or different from the work required by the specific guidelines. The report of a Limited Appraisal must contain a prominent section that clearly identifies the extent of the appraisal process performed and the departures taken.

The reliability of the results of a Complete Appraisal or Limited Appraisal developed under STANDARD 1 is not affected by the type of report prepared under STANDARD 2. The extent of the appraisal process performed under STANDARD 1 is the basis for the reliability of the value conclusion.

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.

**2. 1998 Edition**

Standard 1 and the related Comment are the same as in the 1997 edition. Standards Rules 1-1(a),(b),(c) and the accompanying comments are that same as in the 1997 edition.

Standards Rule 1-3(a),(b) provided:

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 real estate, market area trends, and the highest and best use of the real estate;

Comment: This guideline sets forth a list of factors that affect use and value. An appraiser must avoid making an unsupported assumption or premise about market area trends, 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(a),(b) provided:

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.

The related comment provided: "This rule covers the three approaches to value. See Standards Rules 2-2(a)(x), 2-2(b)(x), and 2-2(c)(x) for corresponding reporting requirements."[23]

Standards Rules 2-1 and 2-2 are the same as in the 1997 edition.[24] The related Comments are also the same. Standards Rules 2-2(a) and 2-2(b), and the Comments for each, are not in the record.

**3. 2002 Edition**

Standard 1 of the 2002 USPAP provided: "In developing a real property appraisal, an appraiser must identify the problem to be solved and the scope of work necessary to solve the problem, and correctly complete research and analysis necessary to produce a credible result."[25] The related Comment provided:

> STANDARD 1 is directed toward the substantive aspects of developing a competent appraisal of real property. The requirements set forth in STANDARD 1 follow the appraisal development 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(a) and the related Comment are the same as in the 1997 edition.

Standards Rule 1-1(b) is the same as the 1997 edition. The related Comment provided:

> In performing real estate appraisal services, an appraiser must be certain that the gathering of factual information is conducted in a manner that is sufficiently diligent, given the scope of work as identified according to Standards Rule 1-2(f), to ensure that the data that would have a material or significant effect on the resulting opinions or conclusions are identified and, where necessary, analyzed.

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[23] DER at p. 332.
[24] The Division did not include a copy of SR 2-2(a)(ix) or the related commentary in its excerpt of record.
[25] DER at p. 334.

Further, an appraiser must use sufficient care in analyzing such data to avoid errors that would significantly affect his or her opinions and conclusions.[26]

Standards Rule 1-1(c) provided: "In developing a real property appraisal, an appraiser must: not render appraisal services in a careless or negligent manner, such as by making a series of errors that, although individually might not significantly affect the results of an appraisal, in the aggregate affect the credibility of those results."[27] The related Comment is the same as in the 1997 edition except that the last sentence has been deleted.[28]

Standards Rule 1-2 included:

(This Standards Rule contains binding requirements from which departure are not permitted.)[29]

In developing a real property appraisal, an appraiser must:

(a) identify the client and other intended users;

(b) identify the intended use of the appraiser's opinions and conclusions . . .

Comment: Identification of the intended use is necessary for the appraiser and the client to decide:

- the appropriate level of work to be completed, and
- the level of information to be provided in communicating the appraisal.

(c) identify the purpose of the assignment, including the type and definition of the value to be developed, and, if the value opinion to be developed is a market value, ascertain whether the value is to be the most probable price . . .

(d) identify the effective date of the appraiser's opinions and conclusions;

(e) identify the characteristics of the property that are relevant to the purpose and intended use of the appraisal, including:

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[26] DER at p. 334.
[27] DER at p. 334.
[28] The Division's excerpt of record does not contain all of SR 1-4. It does include SR 1-4(a), (b). Those provisions differ from the 1998 edition.
[29] Pleadings Vol. 11 at pp. 3185-87. Standards Rule 1-2 for the 1997 and 1998 editions of USPA are not in the record.

(i) its location and physical, legal, and economic attributes;

(ii) the real property interest to be valued;

(iii) any personal property, trade fixtures, or intangible items that are not real property but are included in the appraisal;

(iv) any known easements, restrictions, encumbrances, leases . . .

(v) whether the subject property is a fractional interest, physical segment, or partial holding;

Comment on (i) – (v): If the necessary subject property information is not available because of assignment conditions that limit research opportunities (such as conditions that preclude an onsite inspection **or** the gathering of information from **reliable third-party sources**), an appraiser must:[30]

- obtain the necessary information before proceeding, or
- where possible, in compliance with Standards Rule 1-2(g), use an extraordinary assumption about such information.

An appraiser may use any combination of property inspection and documents . . . the information used by an appraiser to identify the property characteristics must be from sources the appraiser **reasonably believes are reliable**.

An appraiser is not required to value the whole when the subject of the appraisal is a fractional interest . . .

(f) identify the scope of work necessary to complete the assignment;

Comment: The scope of work is acceptable when it is consistent with:

- the expectations of the participants in the market for the same or similar appraisal services; and

- what the appraiser's peers' actions would be in performing the same or a similar assignment in compliance with USPAP.

An appraiser must have sound reasons in support of the scope-of-work decision and must be prepared to support the decision to exclude any information or procedure that would appear to be relevant to the client, an intended user, or the appraiser's peers in the same or a similar assignment.

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[30] Standards Rule 1-2 from the 1997 and 1997 USPAP editions are not in the record.

An appraiser must not allow assignment condition or others to limit the extent of research or analysis to such a degree that the resulting opinions and conclusions developed in an assignment are not credible in the context of the intended use of the appraisal.

(g) identify any extraordinary assumptions necessary in the assignment; and

Comment: An extraordinary assumptions may be used in an assignment only if

- it is required to properly develop credible opinions and conclusions;
- the appraiser has a reasonable basis for the extraordinary assumption;
- use of the extraordinary assumption results in a credible analysis; and
- the appraiser complies with the disclosure requirements set forth in USPAP for extraordinary assumptions.

(h) identify any hypothetical conditions necessary to the assignment.

Comment: A hypothetical condition may be used in an assignment only if:

- use of the hypothetical condition is clearly required for legal purposes, for purposes of reasonable analysis, or for purposes of comparison;
- use of the hypothetical condition results in a credible analysis; and
- the appraiser complies with the disclosure requirements set forth in USPAP for hypothetical conditions.

Standards Rule 1-3 provided:

(This Standards Rule contains specific requirements from which departure is permitted. See the DEPARTURE RULE.)

When the value opinion to be developed is a market value, and given the scope of work identified in accordance with Standards Rule 1-2(f), an appraiser must:

(a) Identify and analyze the effect on use and value of existing land use regulations, reasonably probable modifications of such land use regulations, economic supply and demand, the physical adaptability of the real estate, and market area trends; and

Comment: An appraiser must avoid making an unsupported assumption or premise about market area trends, effective age, and remaining life.

(b) develop an opinion on the highest and best use of the real estate.

Comment: An appraiser must analyze the relevant legal, physical, and economic factors to the extent necessary to support the appraiser's highest and best use conclusion(s). The appraiser must 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.

Standards Rule 1-4(a), (b)[31] provided:

(This Standards Rule contains specific requirements form which departure is permitted. See the DEPARTURE RULE)

In developing a real property appraisal, an appraiser must collect, verify, and analyze all information applicable to the appraisal problem, given the scope of work identified in accordance with Standards 1-2(f).

(a) **When a sales comparison approach is applicable, an appraiser must analyze such comparable sales data as are available to indicate a value conclusion.**

(b) When a cost approach is applicable, an appraiser must:

(i) develop an opinion of site value by an appropriate appraisal method or technique;

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

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

Standard 2 is the same as in the 1997 edition.

Standards Rule 2-1(a) is the same as in the 1997 edition. Standards Rule 2-1(b) replaces "persons who are expected to receive or rely" with "the intended users" and concludes with "to understand the report properly." There is no Comment to SR 2-1(b). Standards Rule 2-

[31] Standards Rule 1-4 from the 1997 and 1998 USPAP editions are not in the record.

1(c) adds "hypothetical condition". The related Comment is substantially similar to the 1997 Comment.[32]

Standards Rule 2-2 is the same as in the 1997 edition. The related Comment[33] provided:

> When the intended users include parties other than the client, either a Self-Contained Appraisal Report or a Summary Appraisal Report must be provided. When the intended users do not include parties other than the client, a Restricted Use Appraisal Report may be provided.
>
> The essential difference among the three options is the content and level of information provided.
>
> An appraiser must use care when characterizing the type of work and level of information communicated upon completion of an assignment. An appraiser may use any other label in addition to, but not in place of, the label set forth in this Standard for the type of report provided.
>
> The report content and level of information requirements set forth in this Standard are minimums for each type of report. An appraiser must supplement a report form, when necessary, to ensure that any intended user of the appraisal is not misled and that the report complies with the applicable content requirements set forth in this Standards Rule.
>
> A party receiving a copy of a Self-Contained Appraisal Report, Summary Appraisal Report, or Restricted Use Appraisal Report in order to satisfy disclosure requirements does not become an intended user of the appraisal unless the client identifies such party as an intended user as part of the assignment.

Standards Rule 2-2(a)[34] provided, in part, that:

> The content of a Self-Contained Appraisal Report must be consistent with the intended use of the appraisal and, at a minimum . . .
>
> (vii) describe sufficient information to disclose to the client and any intended users of the appraisal the scope of work used to develop the appraisal;

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[32] DER at p. 338.
[33] Pleadings Vol. 11 at pp. 3188-89.
[34] Pleadings Vol. 11 at pp. 3189-91.

Comment: This requirement is to ensure that the client and intended users whose expected reliance on an appraisal may be affected by the extent of the appraiser's investigation are properly informed and are not misled as to the scope of work. The appraiser has the burden of proof to support the scope of work decision and the level of information included in a report.

When any portion of the work involves significant real property appraisal assistance, the appraiser must describe the extent of that assistance. The signing appraiser must also state the name(s) of those providing the significant real property appraisal assistance in the certification, in accordance with SR 2-3.

(viii) State all assumptions, hypothetical conditions, and limiting conditions that affected the analyses, opinions, and conclusions;

Comment: Typical or ordinary assumptions and limiting conditions may be grouped together in an identified section of the report. An extraordinary assumption of hypothetical condition must be disclosed in conjunction with statements of each opinion or conclusion that was affected.

(ix) describe the information analyzed, the appraisal procedures followed, and the reasoning that support the analyses, opinions, and conclusions;

Comment: The appraiser must be certain the information provided is sufficient for the client and intended users to adequately understand the rationale for the opinion and conclusions.

When the purpose of an assignment is to develop an opinion of market value, a summary of the results of analyzing the information required in Standards Rule 1-5 is required.[35] If such information was unobtainable, a statement on the efforts undertaken by the appraiser to obtain the information is required. If such information is irrelevant, a statement acknowledging the existence of the information and citing its lack of relevance is required.

(x) state the use of the real estate existing as of the date of value and the use of the real estate reflected in the appraisal; and, when the purpose of the assignment is market value, describe the support and rationale for the appraiser's opinion of the highest and best use of the real estate;

Comment: The report must contain 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, for example, as in insurance valuation or "value in use" appraisals. If the purpose of the assignment is a market value, the appraiser's support and rationale for the opinion of highest and best use is required. The appraiser's

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[35] Standards Rule 1-5 from the 2002 edition of USPAP is not in the record.

reasoning in support of the opinion must be provided in the depth and detail required by its significance to the appraisal.

(xi) **state and explain** any permitted departures from specific requirements of STANDARD 1 and the **reason for excluding** any of the usual valuation approaches; and

Comment: A Self-Contained Appraisal Report must include sufficient information to indicate that the appraiser complied with the requirements of STANDARD 1, including any permitted departures from the specific requirements. The amount of detail will **vary with the significance** of the information to the appraisal.

When the DEPARTURE RULE is invoked, the assignment is deemed to be a Limited Appraisal. Use of the term "Limited Appraisal" makes clear that the assignment involving something less than or different from the work that could have and would have been completed if departure had not been invoked. The report of a Limited Appraisal must contain a prominent section that clearly identifies the extent of the appraisal process performed and the departures taken.

The reliability of the results of a Complete Appraisal or a Limited Appraisal developed under STANDARD 1 is not affected by the type of report prepared under STANDARD 2. The extent of the appraisal process performed under STANDARD 1 is the basis for the reliability of the value conclusion.

**4. 2004 Edition**

The 2004 edition of USSPAP appears to be the same as, or substantially similar to, the those portions of the 2002 edition set forth and referenced above.[36]

**b. Mr. Wold's Appraisals**

**1. Copper Road Appraisal**

Mr. Wold submitted a summary appraisal report for the real property at 315 Copper Road in Ketchikan to Randall Ruaro of the Keene & Currall law firm on January 23, 1997.[37] The report consists of a cover letter, a completed Uniform Residential Appraisal Report

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[36] Pleadings Vol. 11 at pp. 3198-3213.

[37] Mr. Wold's excerpt of record (WER) at p. 1.

form, and addenda.[38] The Copper Road Property was owned by Leif Entwit. Mr. Wold concluded that the "as is" market value of the Copper Road property was $115,000 as of January 3, 1997. The purpose of the appraisal was identified as estimating the market value of the property in its "as is" condition.

Mr. Wold noted in the Summary of Salient Features that the condition of the residence was "average" and that it had 4 bathrooms.[39]

Mr. Wold noted in the Uniform Residential Appraisal Report form that:

A. "The market for single family homes in Ketchikan is deteriorating. The Timber Industry in Alaska is struggling due to lack of log supply . . . The Ketchikan Pulp Company has announced it will be closing on March 24, 1997."[40]

B. The water supply for the house is from a cistern. The street is gravel. There are 3 bedrooms and 3.5 bathrooms. [41]

C. Construction on the house on the Copper Road property was ongoing. It began in 1991. An addition was added in 1995. There is an unfinished shop area on the first level. An addendum is referenced.

D. Cost and depreciation data was obtained from the Marshall Swift Residential Cost Handbook. Physical depreciation was based on an effective age of 5 years. "Functional obsolescence was present in the lack of siding and interior trim. External obsolescence was due to market conditions."[42]

E. The value indicated by the cost approach is $122,636. He included deductions for physical depreciation, functional depreciation, and external depreciation.

F. The condition of the Copper Road house is "average." The quality of construction is "fair." The view is "restricted." It has 4 bathrooms. It has

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[38] WER at pp. 1-21. Mr. Wold noted in the cover letter that he inspected the property on January 3, 1997.
[39] WER at p. 4.
[40] WER at p. 5.
[41] WER at p. 5.
[42] WER at p. 6.

2,352 square feet of gross living area, of which 676 square feet is unfinished. Its functional utility is "poor." [43]

G. Four comparables are identified.[44] The blanks in the form are filled in. An attached addendum is referenced.

Comparable #1 (123 Christopher Road) had a sales price of $182,000 and an adjusted sales price of $131,580. Its location is "superior." Its view is "equal." Its design and appeal was "superior." Its quality of construction was "superior." Its condition was "equal." Its functional utility was "superior." It had 1,712 square feet. It had 4 bedrooms and 3 bathrooms. It is located 1 block north.

Comparable #2 (94 Bull Pine) had a sales price of $220,000 and an adjusted sales price of $118,840. Its location, design and appeal, functional utility, and qualify of construction were "superior." Its view was "equal." It had 2,920 square feet and had 4 bedrooms and 2 bathrooms. It was located 16 miles away.

Comparable #3 (114469 N. Tongass Hwy.) had a sales price of $190,000 and an adjusted sales price of $125,920. Its location, design and appeal, quality of construction, and functional utility were all "superior." Its view was "equal." It had 2,784 square feet, 6 bedrooms and 2 bathrooms. It was located .5 miles away.

Comparable #4 (296 Copper Road) had a sales price of $145,000 and an adjusted sales price of $112,280. Its design and appeal, qualify of construction, and functional utility were all "superior." Its location and view were "equal." It had 1,372 square feet, 3 bedrooms and 2 bathrooms. It was located across the street.

H. The appraisal is signed by Marna Cessnun as the appraiser and Mr. Wold as the supervisory appraiser. Both signed on January 22, 1997. Both certified that the appraisal was performed "in conformity with the Uniform Standards of Professional Appraisal Practice that were adopted and promulgated by the Appraisal Standards Board of the Appraisal Foundation and that were in place as of the effective date of this appraisal . . . ."[45]

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[43] WER at p. 6.
[44] WER at p. 6.
[45] WER at p. 9. ***See also,*** WER at p. 11.

Mr. Wold included: photographs of the subject property; photographs of the comparables; a floor plan of the subject property; a map of Southeast Alaska; a plat map for the subject property; and, a map of the Ketchikan area.[46]

The General Text Addendum included the following:

A. The appraisal considers the cost, income, and sales comparison approaches to value. The scope included a physical inspection of the subject property and surrounding neighborhood. Plats, zoning information, and assessment records were obtained. Area Realtors, assessment staff, lending institutions, title companies, and other persons with knowledge of the sale of residential land and property in the Ketchikan area were consulted. Reproduction costs from the Marshall Swift handbook is regularly checked against recent construction costs in the Ketchikan area. "The data obtained in the course of this appraisal was organized, analyzed, and incorporated in a summary appraisal report."[47]

B. The local economy is bad. As a result, the real estate market in Ketchikan is weak. Marketing time has increased. Downward price revisions has become more common. Residential listings are at a historical high.

C. The quality of construction is fair for the Ketchikan area. The house lacks exterior siding. Interior trim is not completed. Ceiling height in the living room is only 7 feet. One upstairs bathroom is not completely installed. Second level bedrooms lack closet doors. There is a partially installed kitchen area in the living room that the owner plans to remove. The interior stairway has no railing. There is evidence of moisture accumulation in the attic. There is a lack of adequate ventilation in the attic. "Functional obsolescence was present in the lack of siding, incomplete gutter system, and incomplete interior trim. External obsolescence was due to the market conditions." Water is provided by a "roof-catchment system."[48]

D. "The subject property would be expected to compete with similar properties in the Ketchikan marketplace with a similar marketing time estimated to be three to six months. **A thorough search for comparable sales was made in this small community. The number of comparable sales is limited. In order to locate comparable sales the following sources were used: lenders, brokers, title companies, and assessor's**

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[46] WER at pp. 12-19.
[47] WER at p. 20.
[48] WER at p. 20.

**records. Ketchikan does not have a comparable sales or multiple listing service.**

**There are relatively few sales in this small city. Attempts by the appraiser were made to find sales that bracket the subject in size and value. Due to the lack of sales it is often necessary to use sales which are located over one mile from the subject. As there is great disparity in size, value, and design of the comparables, single and gross adjustments for individual sales often exceed established appraisal guidelines. This is unavoidable given the limited sales data available.**

Four closed sales were utilized in the value estimate. The sales were physically inspected by the appraiser and confirmed with either principals or parties knowledgeable to the transactions. None of the sales were found to have any unusual seller concessions.

Adjustments to the comparables were made for significant factors which are inferior or superior which affect the value of the subject. Specific adjustments were derived using abstraction by paired sales technique, discussions with realtors, developers, buyers and/or cost data.

Sales #1, #2, and #3 were considered superior in location due to the subject's access off a gravel spur road and lack of homogenous surrounding properties. Site adjustments were made for significant value attributes such as size, topography, utility, landscaping etc.

Sales #1 and #3 were adjusted for superior site size and utility. The Ketchikan market highly values water views with lesser values attributed to mountain or territorial views.

Sale #3 was superior in view amenity. All of the comparables were considered superior in design/appeal due to the unfinished condition of the subject.

Sales #1, #2, and #4 were considered superior in overall quality of construction due to material used, workmanship, and amenities. Age adjustments were made at $1,500 per year of chronological or effective age differential.

The subject and comparables were considered similar in overall condition. Bathroom adjustments were made based upon $1,000 per fixture. Gross living area adjustments were made at $30.00 per square foot. The subject's unfinished area was adjusted at $5.00 per square foot. The subject was considered inferior to the comparables in functional utility due to incomplete state. Sales #1 and #2 were adjusted for electric heat due to the market's negative reaction to this higher operating cost. Car storage

adjustments were based on a market abstraction of $12,000 for a two-car garage. Special features were adjusted based on their contribution value. Major appliances were adjusted at $750 each.

The sales sold in the range of from $145,000 to $220,000. After adjustments a value range of $112,800 to $131,500 was indicated for the subject. Due to the deterioration of the market the subject's value was estimated to fall at the lower end of the range. Equal weight was given to the sales. The sales comparison value conclusion was $115,000."[49]

E. "FINAL RECONCILIATION

The cost, sales comparison, and income approaches were considered and/or utilized in the value estimate for the subject property. Emphasis will be given to the sales comparison approach which is typically regarded as the most reliable in the valuation of residential properties in the Ketchikan area. The cost approach typically reflects the upper limit of value. The income approach is rarely used as the basis for purchasing single family homes in Ketchikan. The sales comparison is felt to offer the most reliable support for the final value estimate and is given the greatest weight. The "as is" market value estimate of the subject property on January 3, 1997 is $115,000."[50]

Garnet Dima, Superintendent for Model Builders, Inc. sent a letter to Mr. Entwit dated February 11, 1998[51] in which he stated:

A. "The house in question is showing signs of sagging in the floor which is equal to one inch to inch and one eighth in six feet depending on the location."

B. His "solution" was to put a concrete beam at the back of the house and reframe part of the back wall. Then the footings would have to be adjusted to make the floor level.

C. He estimates that all of the above would cost approximately $25,000.

Mr. Wold sent an updated market value appraisal of the Copper Road property to Mr. Ruaro on April 11, 1998.[52] He stated therein that:

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[49] WER at pp. 20-21.
[50] WER at p. 21.
[51] WER at p. 22.

A. He had not observed any settlement of the residence on the property during his January 3, 1997 inspection.

B. Garnet Dima of Model Builders, Inc. had inspected the residence and issued an evaluation on February 11, 1998 of the cost to cure the settlement problem.

C. He has reviewed Mr. Dima's evaluation **and** spoken with Mr. Dima concerning the issues raised therein.[53] Mr. Dima's opinion is that the settling may have occurred over the short period of time after his (Mr. Wold's) inspection. The level of settlement is such that it would have been observed during Mr. Wold's inspection if it had been present.

D. Mr. Dima has recent experience curing similar settlement problems at 2 Ketchikan residences.

E. His opinion, based on Mr. Dima's information, is that the settling would result in a $25,000 diminution in value of the Copper Road property – an amount equal to Mr. Dima's estimated cost of cure. If the settling problem is not cured the house will not qualify for conventional financing and therefore have impaired marketability. He is adding an additional

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[52] WER at pp. 198-99.

[53] Mr. Wold's working file for this appraisal contain notes of an April 6, 1998 conversation between he and Mr. Dima. Pleadings Vol. 6 at pp. 1760-61. Mr. Wold therein states that:

> Discussed settlement w/Garnet Dima on 4/6/98. Dima stated that building pad was too small and residence was built too close to edge. It may not have settled long enough. The settlement may have occurred over a short period of time although stress may have accumulated over a longer period. Dima said bid was made in an attempt to secure work. Bid was based upon labor & material. Dima has completed two similar projects in the past year. Subject bid is consistent with bids for previous work. Size of the subject residence increases cost of repairs. Bid doesn't include potential increased costs for unforeseen conditions. Model Builders is a long time Ketchikan contractor with a good reputation. No indication that settlement is stable. Typical purchaser wouldn't purchase residence w/settlement. Financing through VA, AHFC or conventional lending programs not available because of settlement. Repairs would be required to make property marketable. Repair/stabilization cost is $25,000. Additional loss of value due to stigma, risk of cost overruns, entrepreneural profit/principle of substitution."

Mr. Wold's working file also contains a note which reads: "R & M video – Scott Menzies Numerous cracks – stress buildup out of plumb confirms Dima inspection." Pleadings Vol. 6 at p. 1762.

> $12,500 diminution to "compensate for risk associated with effecting the cure, such as cost overruns and the potential that additional problems may be found that would increase the cost to cure." "The typical purchaser of the subject property would require an entrepreneurial incentive as an inducement to purchase the property in its as is condition anticipating that the property could be brought up to a safe and habitable condition and a standard acceptable to mortgage lenders."

F. So his new market value estimate, reflecting the above, is $77,500. He has not re-inspected the property because that is outside the scope of his assignment. He has relied on the "expertise of Mr. Dima and his company, Model Builders, Inc." "This letter is considered an addendum to our prior appraisal report." "This appraisal was prepared for divorce settlement negotiations and/or legal proceedings."

**2. Entwit Marina Appraisal**

Mr. Wold submitted a Market Value Appraisal of A Partial Interest in Entwit's Float Ketchikan, Alaska as of April 1, 1998 on April 8, 1998.[54]

The Entwit Marina appraisal included an April 8, 1998 cover letter from Mr. Wold to Randall Ruaro of the Keene & Currall law firm in which Mr. Wold stated:

> The property appraised is an upland and tideland parcel that is improved with a pier and maritime floats. . . The purpose of this appraisal is to provide a supported estimate of the property's fair market value in its as is condition, as of the date of valuation. The intended use of this appraisal is for use in divorce settlement negotiations and/or legal proceedings. This appraisal is prepared for the use of our client, Randall P. Ruaro, and other third parties involved in the Entwit divorce matter. . . This appraisal is made in conformance with the Uniform Standards of Professional Appraisal Practice (USPAP)."[55]

The Entwit Marina appraisal included an Appraisal Report, which included the following information:

A. His analyses, opinions, conclusions, and his report conform to USPAP.[56]

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[54] WER at pp. 23-98.
[55] WER at p. 24.
[56] WER at p. 28.

B. His report assumes that "there will be capable management and responsible ownership of the subject property."[57]

C. The appraisal assumes a 6-month marketing time, which is typical for the market in Ketchikan for small commercial properties. "The most typical purchaser of the subject property would be an investor who would hold an interest in the property for its rental income and long-term value appreciation."[58]

D. The property rights being appraised is a partial (1/3) interest in the fee simple estate owned by John Entwit.

E. The property was inspected on February 16, 1998 and March 15, 1998. The effective date of the report is April 8, 1998.

F. Several photographs of the property were included.[59]

G. Mr. Wold investigated the current economic conditions and trends, focusing on the real estate market and the subject property. Sources of data included the Alaska Journal of Commerce, Alaska Business Monthly, the Ketchikan Daily News, and the U.S. Federal Reserve.

He inspected the site. He obtained plats, assessment records, and income and expense records. "The appraiser gathered and confirmed comparable land sales, construction costs, and investigated marina sales in Southeast Alaska."[60] Sources of this data are identified. "The assembled data was processed into the cost and income capitalization approaches to value. The sales comparison approach could not be used due to the lack of any current sales of marinas."[61]

He obtained important data from: Robert Norton (Ketchikan Title Agency), Andy Pekovich (DNR Director), Ed Entwit (Managing Owner), Jim Corack (appraiser with Horan Corack & Co.), and Tom Fabry (Farbry Construction).

"The factual data, analyses, and conclusions of value are incorporated into a **summary appraisal report**. The scope of this appraisal was considered

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[57] WER at p. 29.
[58] WER at p. 34.
[59] WER at pp. 38-42.
[60] WER at p. 43.
[61] WER at p. 43.

adequate for the purposes of the report and a sufficient basis for estimating the market value of the property interest under appraisement."[62]

H. The local economy destabilized with the closure of the pulp mill, and the area population and employment are in decline. Related data is provided over several pages.[63]

I. The upland parcel is 6,309 square feet. The tideland parcel is 64,033 square feet. The property has no direct platted access from the North Tongass Highway – access is provided by means of a prescriptive easement. The property has no water supply other than what could be provided by a roof catchment system. The site is zone general commercial. The site has inadequate parking in relation to the size of the marina. The current use is grandfathered. The property is subject to a sewer outfall easement, which has minimal adverse affect on its current use. It is possible that environmental hazards are present.[64]

J. The configuration of the marina is described. "The marina was originally constructed in the late 1960's with further additions in the 1970's. The typical economic life of marine improvements such as the subject, assuming normal maintenance, would not exceed 30 years for the piling and 10 to 15 years for the floats. Maintenance has been relatively sporadic. Deterioration was noted in the float decking. The general construction of the floats has substandard workmanship in that mixed diameter logs and materials have been used. Generally speaking, the piling are in poor condition and will require replacement in the near term. Several hazard areas were noted in the float decking. The main float was partially rebuilt in 1997 and is in superior condition to the remainder of the improvements.

The uplands had a substantial amount of debris located at the southerly end of the property and clean up is advisable."[65]

K. A page long definition of "Highest And Best Use" from the *Real Estate Appraisal Terminology Handbook, Revised Edition* is stated.[66] The definition notes, in part, that the determination is based on the appraiser's judgment and analytical skills and is an opinion and not a fact.[67]

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[62] WER at pp. 43-44.
[63] WER at pp. 46-59.
[64] WER at pp. 61-63.
[65] WER at pp. 64-65.
[66] WER at p. 66.
[67] WER at p. 66.

"The highest and best use of the property, as vacant, would be for a marine oriented commercial use consistent with the constraints of the physical and legal limitations of the site. . .

The existing improvements conform to the zoning ordinance, however, the site is deficient in required parking relative to the size of the marina. The parking deficiency is permitted under the grandfather clause in the Ketchikan Gateway Borough zoning ordinance. The existing improvements contribute to the overall property value and constitute the highest and best use of the property, as improved."[68]

L. The cost approach, sales comparison approach, and income capitalization approaches are described. He noted that final estimate is based on the most applicable value indicators, "taking into consideration the purpose of the appraisal, the type of property being appraised, and the adequacy of the data process as it relates to the market."[69]

The cost and income capitalization approaches are used in the appraisal. "The sales comparison approach is not being used due to the lack of comparables sales."[70]

M. "The cost approach is based on the notion that a buyer will pay no more for property than the cost of producing similar property with the same utility. This approach is particularly applicable when the improvements being appraised are relatively new and represent the highest and best use of the land and/or when the improvements are relatively **specialized and** are located in an area where there are **limited comparable properties** on the market."[71]

Valuing the land involves a two step process – valuing the uplands and valuing the tidelands. The most effective valuation method often is to compare the property with recent sales of similar properties.

He has identified 5 such comparable sales of waterfront properties from the past 5 years based on discussions with the assessor's staff, a review of title company records, inquiry of local realtors and others with pertinent knowledge, and personal inspection. He was not able to identify comparable sales for the tidelands portion of the property.[72]

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[68] WER at p. 67.
[69] WER at p. 69.
[70] WER at p. 69.
[71] WER at p. 70.
[72] WER at pp. 70-71.

The 5 upland lot comparables are described and discussed. He valued the upland portion of the subject property at $8.00 per square foot based on comparison with the comparables.[73]

"Tidelands are typically valued as a percentage of the adjacent upland fee simple market value. The typical range falls in the 10 to 35 percent range and is dependent upon the size, location, and utility of the tidelands."[74] He estimates that the Entwit tidelands have a value ratio of 15%.

The result of the above is a value of $127,312 for the Entwit Float property ($50,772 for the upland and $76,840 for the tidelands).

N. The replacement cost estimate is based on data from local marine contractors and from Topper Floats of Seattle. Different costs were identified for the pier, ramp, floats, and aircraft float.

O. "Depreciation inherent to the improvements includes physical depreciation and functional obsolescence. The pier, ramp, and floats exhibit substantial physical deterioration. Only the main float could be considered in good overall condition. The piling are in very poor condition and require near-term replacement. Overall, the improvements have a remaining physical life of 10 years. Using an overall physical life of 30 years, a rounded depreciation rate of 65 percent is estimated for physical depreciation.

After deduction of physical depreciation, the depreciated value of the improvements is approximately $50,000 versus the previously estimated land value of $127,00. Typically, improvement values exceed land value. Where improvement values are substantially less than the land value, such improvements are deemed to represent a under improvement of the property and may be indicative of functional obsolescence. The high land value effectively shortens the remaining economic life of the improvements. Because of the imbalance of land and improvement values, a functional obsolescence of 50 percent is applied to the physically depreciated value of the improvements."[75]

The final value under the cost approach is estimated at $152,000.

P. The income capitalization approach is based on anticipated income from the property. First a rental value is determined, then expenses are deducted, and then the net income is discounted at a market rate. He reviewed the income and expense statements for the Entwit marina, which

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[73] WER at pp. 71-79.
[74] WER at p. 79.
[75] WER at p. 80.

did not include certain expenses. He surveyed the rates charged by other local marinas and floatplane facilities.

The Entwit marina charges $1.50 per linear foot per month for boat moorage and $100 per month for floatplanes. The marina records reflect that it had profits of $997.13 in 1995, $69.15 in 1996, and $570 through 3 quarters in 1997. The marina's financial records do not include management expenses, deprecation, or replacement reserves. The records do not take into consideration the owners' 5 vessels that are moored at the marina.

Other marinas charge $2.50 and $3.00 per linear foot per month. The City charges $1.60. He thinks the $3.00 amount is appropriate for this marina because the marina that charges that amount is nearby. The Ketchikan airport charges $100 per month for floatplanes. Another facility charges $75. He thinks the $100 figure is the market rate for the Entwit marina.

He estimates that the Entwit Marina could have gross annual income of $29,760.

The Entwit marina has a 40% vacancy rate. Other marinas have a much higher occupancy rate. "Giving consideration to the subject's vacancy factor and assuming that more intensive management could make a substantial reduction in the annual vacancy rate, a vacancy factor of 15 percent is estimated. Full occupancy is not a realistic expectation for the subject property, given the dilapidated condition of the floats and piling."[76] And the other marinas are superior in quality and charge the same or lesser rates. So there will be high turnover as tenants move to the other marinas as space becomes available.

He estimated the Entwit marina's operating expenses and income, and arrived at a net annual operating income of $16,380.

He concluded that an overall capitalization rate of 13% was appropriate. This resulted in an estimated value of $126,000.

Q. In reconciling the cost and income capitalization approaches, he is giving less weight to the latter. "This is due to the fact that the income capitalization approach value estimate closely approximates the value of the subject's land value estimate. The income capitalization approach indicates that the current income potential of the marina cannot support the land value estimate. Since the land is considered a constant and the floats, at a minimum, have value as salvage, the income capitalization

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[76] WER at p. 84.

approach value estimate would set the lower limit of value for the property. The cost approach is the superior approach is . .. superior . . . as far as what a prospective buyer would perceive as the value of the property. A prospective buyer would give a great deal of weight to the land value and, even if the intent . . . was for redevelopment, a salvage value closely approximating the depreciated value of the improvements could be achieved in the resale market. Therefore, weight is given to the cost approach, with the final fee simple market estimate, as of the date of valuation, of $150,000."[77]

R. With respect to Mr. Entwit's 1/3 minority interest in the property – a partial interest requires a marketplace discount as there is no formal secondary market for such interests and conventional financing would likely not be available. Comparable sales are "extremely scarce, no local data was available. Research of valuation literature was done. He considered the purchases whereby the current owners (all family members) acquired their interests. This includes Mr. Etnwit's purchase of his 1/3 interest in 1994 for $28,000. He estimated that a 35% discount rate would be appropriate under the circumstances. The result is an estimated market value of Mr. Entwit's 1/3 interest of $32,500.

### 3. Ellis Island Appraisal

Mr. Wold submitted an Appraisal of Ellis Island Ketchikan, Alaska as of February 1, 2002 on July 17, 2002.[78]

Mr. Wold's July 17, 2002 cover letter to Joel Kantor, Esq. included the following:

A. The "property consists of Ellis Island and an adjacent tideland parcel which are connected by a causeway and road easement to the North Tongass Highway. Improvements . . . include a single family residence, guest house, and pump house. The tidelands are improved with a boat house, marine float, ramp, and piling."[79]

B. "The purpose of this appraisal is to provide a supported estimate of the diminution of the property's market value resulting from the dispute relating to the access easement across the adjoining Brusich Marina property. This appraisal seeks to estimate the diminution of value from the temporary interference that occurred between February 1st and April 30th, 2002 due to construction activities. A second diminution value

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[77] WER at p. 89.
[78] WER at pp. 99-195.
[79] WER at p. 100.

estimate will be made due to the legal blight and stigma that encumber the Ellis Island property due to the historic and ongoing legal disputes relating to the access across Brusich Marina."[80]

C. "The report is prepared for the exclusive use of our client, Joel Michael Kantor, Esquire . . . The intended use of the report is for litigation in the matter of Robert Wayne Spears, trustee for Robert Wayne Spears family living trust, plaintiff, versus Alice Brusich and Stanely Oaksmith III and Bonnie L. Oaksmith, husband and wife, defendants."[81]

D. "The investigation of the real estate market and appraisal analyses conducted on the subject property result in the following estimates of value diminution as of February 1, 2002:

Temporary Interference - $40,000
Legal Blight & Stigma - $525,000"[82]

E. "This report is a complete appraisal analysis submitted in a self-contained report format. This report is intended to conform to the Uniform Standards of Professional Appraisal Practice (USPAP) and the regulations of the Appraisal Institute."[83]

The appraisal report included the following:

A. He has inspected the property.[84]

B. His analyses, opinions, conclusions, and report conform to USPAP.[85]

C. "The appraisal problem relates to the appurtenant easement crossing the Brusich Marina property which connects Ellis Island to the North Tongass Highway." Mr. Spears purchased the Ellis Island property with an appurtenant easement across the adjacent Brusich Marina property in 1996. Mr. Spears, the owner of the Brusich Marina property (Brusich) and the lessee (Oaksmith) of the property were involved in a lawsuit filed in 1998. The court entered a judgment in favor of Mr. Spears on November 4, 1999 which provided that the owner of Ellis Island had a fixed, permanent, and non-exclusive easement for free and unimpeded ingress and egress between Ellis Island and the North Tongass Highway

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[80] WER at p. 100.
[81] WER at p. 100.
[82] WER at p. 100.
[83] WER at p. 101.
[84] WER at p. 103.
[85] WER at p. 103.

and over the Bursich Marina property.[86] The easement runs with the Ellis Island property and is binding in perpetuity on the defendants and all owners and lessees of the subservient property. The width of the easement is at least the safe width of two automobiles. Mr. Spears was also granted a rent-free commercial use easement through April 30, 2009, and thereafter he would be required to pay reasonable rent. [87]

D. On February 1, 2002 the lessee of the subservient property began construction of a travel lift dock. The lessee's contractor was Charles Pool. "This construction The related activity impeded Mr. Spears' easement. He filed suit on February 8, 2002 against Alice Brusich, Stanley Oaksmith III and Bonnie L. Oaksmith.[88] A temporary restraining order (TRO) was issued against the defendants on February 14, 2002. The

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[86] Mr. Wold's work file contained a copy of the November 4, 1999 Judgment in Robert Wayne Spears as Trustee for the Robert Wayne Spears Living Trust v. Daniel A. Brusich, Alice Brusich, Stanley Oaksmith, III and Bonnie L. Oaksmith, 1KE-98-171 CI. The Judgment provides, in part, that:

> Plaintiff, as the owner of Ellis Island, has a fixed permanent and non-exclusive easement for free and unimpaired residential ingress and egress between Ellis Island and North Tongass Highway, or, over and across the fee simple and leasehold interests of the defendants Brusich, and the leasehold interests of defendants Oaksmith, in the real property commonly known at "Air Marine Harbor". . . The easement . . . . runs with the land in perpetuity and binds all defendants and all owners (except the State of Alaska) and lessees of Air Marine Harbor and each of their heirs, successors and assigns, and it inures to the benefit of plaintiff and all owners and lessees of Ellis Island and each of their heirs, successors and assigns and each of their invitees. . .
>
> Plaintiff has a fixed, non-exclusive easement for unimpeded commercial ingress and egress between Ellis Island and North Tongass Highway on, over and across the above-described Air Marine Harbor . . . located at and via the access easement as described . . . Plaintiff's Commercial Use Easement runs with the land and binds all owners (except the State of Alaska) and all lessees . . .

Pleadings Vol. 7 at pp. 1879-87. The file also contains a copy of the court's December 13, 1999 Order which basically provides that the easement is the existing road and where there is no road it is the width needed for two automobiles to pass safely – 20 feet. Pleadings Vol. 7 at pp. 2043-44.

[87] WER at pp. 107-08.

[88] Spears alleged in the Complaint that: "Defendants, either jointly or severally, without plaintiffs' permission or consent, have, and continue over plaintiff's objection, to_block and impede use of the fixed easement as described above and as shown in the attached exhibits." Pleadings Vol. 10 at p. 2932.

court found the defendants in contempt on May 6, 2002. A trial has been set to address Mr. Spears's request for permanent injunctive relief and damages.

E. "This is a complete appraisal analysis submitted in a self-contained report format."[89]

"The scope of this appraisal included an on-site inspection . . . In the **course of our investigation**, we talked to Realtors, buyers, sellers, and other knowledgeable people regarding real estate values in general and sales of specific properties referenced in this report. We obtained information from Ketchikan Title Agency. Assessment and zoning information was obtained . . . An investigation was conducted of economic conditions and trends . . . We searched public records and contacted parties knowledgeable of the real estate market in Ketchikan for comparable sales data. Comparable sales were also obtained from our office data base. Cost data was obtained from the Marshall Valuation Service. The comparable land sales and cost data were used to develop the cost approach to value."[90]

**"No sales of luxury residences located on islands were found in the Ketchikan marketplace. Therefore, the sales comparison approach was not used. Owner occupied luxury residences do not sell based upon their potential to generate income. Therefore, the income capitalization approach was not used."**[91]

"The appraiser researched sales data and conducted a survey of local Realtors regarding the diminution of value of the subject property."[92]

F. Access to Ellis Island is primarily over the easement. The only other alternative is by water. "This is a rudimentary, gravel surfaced roadway that is maintained by the owners and lessee of Air Marine Harbor. There are not street improvements such as curbs, sidewalks, gutters, street lighting, etc."[93]

G. "The subject property has a dominant easement across the adjacent Air Marine Harbor property. This easement extends through the Air Marine Harbor storage yard connecting to Brusich Road, which interesects with the North Tongass Highway. The easement was granted by court order as

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[89] WER at p. 122.
[90] WER at p. 122.
[91] WER at p. 122.
[92] WER at p. 122.
[93] WER at p. 147.

a fixed, permanent, and non-exclusive easement for free and unimpeded residential ingress and egress . . . runs with the land in perpetuity . . . In addition, a commercial use easement is granted through April 30, 2009. . . After April 30, 2009, the easement will be subject to rent at a rate to be negotiated . . .

The easement is necessary to allow vehicular access to the subject property."[94]

H. The improvements are described as including a "luxury residence" of "excellent quality construction" that was completed in 1999 and "is in very good condition." The improvements also include a large garage and guest house of similar quality. In addition there is a very large boat house on the property and a pier.[95]

I. "THE VALUATION PROCESS

In most appraisal studies, the appraiser applies what have become known as the three approaches to value: the Cost Approach, the Sales Approach, and the Income Capitalization Approach. These are briefly described as follows:

The Cost Approach[96] is generally defined as that procedure in appraisal analysis that is based on the proposition that the informed purchaser would pay no more than the cost of producing a substitute property with the same utility as the subject property. It is particularly applicable when the property being appraised involves relatively new improvements that represent the highest and best use of the land, or when relatively unique or specialized improvements are located on the site and for which there exist no comparable properties on the market.

The Sales Comparison Approach is typically defined as an appraisal procedure in which the market value estimate is predicated upon prices paid in actual market transactions and current listings, the former fixing the lower limit of value in a static or advancing market (price wise) and fixing the higher limit of value in a declining market; and the latter fixing the higher limit in any market. It is a process of analyzing sales of similar, recently sold properties to derive an indication of the most probable sales price of the property being appraised. The reliability of this technique is dependent upon a) the availability of comparable sales data; b) the verification of the sales data; c) the degree of comparability and extent of

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[94] WER at pp. 148-49.
[95] WER at pp. 151-52.
[96] The underlining of the names of the approaches to value in this section are in the original.

adjustment necessary for time differences, and d) the absence of non-typical conditions affecting the sale price. This approach is commonly referred to as the Market approach.

The Income Capitalization Approach involves an analysis of the property in terms of its ability to provide net annual income in dollars. The estimated net annual income is then capitalized or discounted at a rate commensurate with the relative certainty of continuance and the risk involved in ownership of the property. The Income Capitalization Approach is generally defined as that procedure in appraisal analysis that converts anticipated benefit (dollar income or amenities) to be derived from ownership of the property into a value estimate. This approach is widely applied in appraising income-producing property. Anticipated future income and/or reversions are discounted to a present worth or capitalized at an overall rate selected from the marketplace.

In essence, all approaches to value (particularly when the purpose of the appraisal is to estimate Market Value) are market data approaches, since the data inputs are presumably market derived.

At the conclusion of the three approaches, the most applicable value indicators will be correlated into a final estimate, with the appraiser taking into consideration the purpose of the appraisal, the type of property appraised, and the adequacy of the data process as it relates to the market."[97]

J. "COST APPROACH . . . The search for comparable land sales extended back to June of 1995. The search was focused on waterfront and island parcels that were sold in the North Tongass area. The sales involved discussions with Ketchikan Gateway Borough assessing staff, review of Ketchikan Title Agency files, research of Alaska State Recorders Office records, and inquiries made with local Realtors and other parties knowledgeable of the sale of waterfront and island properties in the Ketchikan marketplace."[98]

Five sales, and the Spears purchase of the Ellis Island Property, were "selected as representing the most recent and comparable sales available. The comparable sales were physically inspected by the appraiser and confirmed with parties knowledgeable of the transaction. The comparable sales are listed on the following sales chart and descriptive summaries."[99]

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[97] WER at pp. 155-56.
[98] WER at p. 157.
[99] WER at pp. 157-58.

The land sale comparables are described and discussed over eight pages.[100]

"The improvements were costed on a **replacement cost basis**. The cost estimates were obtained from the Marshall Evaluation Service *Residential Cost Manual*, which is a recognized cost data source commonly used in the appraisal and construction industries. The cost information was adjusted to the Ketchikan area."[101]

Mr. Wold applied a 1.41 multiplier to the costs derived from the Marshall Manual.

"Depreciation inherent to the improvements was limited to physical deterioration. Physical deterioration was estimated at 4% of replacement cost new, or $53,647. There was no functional or external obsolescence present."[102]

Mr. Wold cost approach resulted in a valuation of $2,087,517.[103]

K. Diminution in Value – Temporary Interference.

"It is the appraiser's opinion that the subject property suffered a temporary loss of value due to construction activities that occurred between February 1, 2002 and April 15, 2002 . . . in which the new travel lift dock was constructed. These construction activities caused the excavation of a portion of the easement right-of-way. Materials were stockpiled within the easement area and construction equipment was parked in this area. The construction activities impaired the access to the subject property without consent of Mr. Spears and with no compensation.

Impaired access due to construction activities is a detrimental condition that is considered temporary in nature. The loss of value is limited to the disruption caused by the temporary condition. The loss of value would be similar to the loss caused by condemnation of a temporary construction easement by a public authority. A temporary construction easement causes a loss of value that may be significant due to market resistance. . . In condemnation law, the most common measure of damages accepted by courts is the rental value for the easement area for the period of occupancy by the condemnor.[104]

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[100] WER at pp. 159-66.
[101] WER at p. 166.
[102] WER at p. 168.
[103] WER at p. 169.
[104] Mr. Wold cited *The Valuation in Litigation,* J.D. Eaton, MAI).

The property suffered a temporary loss of value between February 1 and April 15, 2002 due to the construction activities – which resulted in part of the easement area being excavated and construction equipment being parked in the area.

This loss was temporary. It did not have a lasting effect on the value of the Ellis Island property. It is akin to loss caused by a temporary construction easement by a public authority. In condemnation law, the most common measure of damages accepted by courts is the rental value for the easement area for the period of occupancy by the condemnor.[105]

While all access was not denied during the construction, there was disruption of use and a loss of quiet enjoyment of not only the easement but the entire subject property. Condemning authorities in these instances calculate the rental value on the whole property value."[106]

The Ellis Island Property would not normally be rented in the marketplace. "In these circumstances it is commonly accepted that the market loss can be calculated as a percentage of the market value."[107] The market value of this property is $2,100,000. "The percentage rate applied to the market value of the land will be based on an 8 percent land lease rate. This rate is found on recent State of Alaska and Southeast Alaska municipality land leases. The recapture rate is calculated using a 50-year economic life for the improvements, which indicates an annual depreciation rate of 2 percent."[108] He applied the 8% rate to the portion of the market value attributed to the real property and a 10% rate to the portion attributed to the improvements. The resulting annual rental rate (9.12%) was then divided by 12 (months) (.76%) That percent (.76%) was then multiplied by 2.5 months, which results in 1.9% - which was then multiplied by $2,100,000 for a rounded off result of $40,000. [109]

L. Intermediate to Long-Term Diminution of Value

"The appraiser reviewed the property ownership history and the origination of the easement. The easement was formalized by a judicial order that resolved the 1999 lawsuit, Case No. 1KE-98-171 CI. . . Subsequent to what was assumed to have been a resolution of the easement dispute, an encroachment by Oaksmiths/Brusich and their contractor, Charles Pool, occurred in February 2002. A new lawsuit was

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[105] WER at p. 170.
[106] WER at p. 170.
[107] WER at p. 171.
[108] WER at p. 171.
[109] WER at p.171.

filed to affirm Spear's non-exclusive but free and unimpeded access over the easement right-of-way. The parties had differing opinions as to each other's rights to the easement area and have found it necessary to have the court resolve this issue. Regardless of which party prevails, the subject property has had its marketability impaired due to the uncertainty regarding the use rights held by the dominant estate, legal blight, and stigma."[110]

Alaska Statute 34.70.010 et seq. requires that a seller of residential property disclose defects or other conditions in the property being sold. A seller is subject to sanctions for failing to comply – including treble damages for a willful failure. "The dispute regarding the appurtenant easement is one that would require disclosure under Alaska Statute."[111] The pertinent part of the disclosure form is on p. 4.[112]

"Implicit to estimating the market value of the subject property is the hypothetical sale of the property as of the date of valuation. The hypothetical sale would be subsequent to the seller's delivery of the required disclosures and the acceptance by the purchaser. Discussions with local Realtors indicate that disclosures concerning litigation and access rights would create a substantial hurdle to the property's marketability. Unwilling to become embroiled in potential litigation, the Realtors uniformly suggested that a potential purchaser consult an attorney before pursuing a purchase of an impaired property. The Realtors who the appraiser contacted include Bill Elberson, Bill Bolling, Roger Stone, Guy Mickel, Mary Rota, and Earl Mickel. More than one questioned why an individual would want to purchase a lawsuit.

The appraiser asked Bruce Falconer, an attorney familiar with real estate damage litigation, what advice he would give a party seeking to buy a property that was involved in litigation over the terms of an easement. His recommendation was that they might buy another property. He stated that even simple litigation tends to take six months for resolution and that one to three years is not unusual for typical or complex cases. He also cautioned that one could not be confident as to the outcome . . . that there is a risk of an unfavorable decision."[113]

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[110] WER at p. 172.

[111] WER at p. 172.

[112] A copy of the Residential Real Property Transfer Disclosure Statement form was in Mr. Wold's work file. Pleadings Vol. 7 at pp. 1994-2002. The portion of the form Mr. Wold references is under the "Title" section and reads: "Do you know of any existing, pending, or potential legal action(s) concerning the property?"

[113] WER at p. 173.

> "The key to value is the perception of the property in the marketplace. The Appraisal Institute offers a course entitled *Valuation of Detrimental Conditions in Real Estate.* This course lists 312 detrimental conditions which may impact a property's value. Specific conditions . . . include access diminution, imposed condition, ingress diminution, legal issues, and neighboring nuisances. These conditions tend to have an intermediate to long-term loss value that, while they may be curable, the property will have to overcome adverse public perception. Adverse public perceptions of a property can have lasting impacts on its value. The adverse perception may or may not be overcome in the foreseeable future. The loss of value would include the cost to cure the condition and any stigma and blight (negative market perception) that remain with the property."[114]

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[114] WER at pp. 173-74. The related publication, by Randall Bell, is in the record at Pleadings Vol. 8 at pp. 2236-2395. Mr. Bell identified detrimental conditions as including affects on market value caused by, among other things, "stigma". ***Id.*** at 2252. He noted that "estimating the impact on the value resulting from a detrimental condition can be a confusing, time-consuming effort. The effects . . . are difficult to quantify, and the difficulty is amplified by the fact that there are literally hundreds of variations and combinations of conditions." ***Id.*** He noted that "[m]any detrimental conditions can involve litigation or insurance claims." ***Id.*** He noted that the "practical issues of locating, collecting, and verifying the market data is extremely important." ***Id.*** He stressed that a detrimental condition had to be classified properly and that the impact of detrimental conditions cannot be generalized, but instead each is unique to the particular market. ***Id.*** at 2256. He identified 312 classifications of detrimental conditions, which included: "access diminution", "bankruptcy", "blight", "construction defect", "foreclosure", "obstruction", (there is a page missing in the exhibit – xxxviii – as a result the list jumps from #138 (Homestead) to #168 (Military base proximity). ***Id.*** at pp. 2268-76. He presents an analysis model which contains six elements (regardless of the detrimental condition) and which requires the application of one or more of the three traditional approaches to value. The elements are: determining the unimpaired value; determining what the detrimental condition is; and, then four stages – assessment stage, repair stage, on-going stage, and, market resistance. ***Id.*** at pp. 2289, 2361. He noted that, even after repairs (where appropriate) have been completed – market perceptions about the "fear of future related issues arising" can result in continued buyer resistance to purchasing the property. ***Id.*** at 2360. His discussion classified the various detrimental conditions into ten general categories. "Stigma" is discussed under Class IV (Detrimental Condition – Temporary Condition). He noted that it may take decades for the discounted value of the property to diminish. His case study involved a property where a homicide occurred. He noted that this type of detrimental condition did not involve physical issues with the property but rather "perception, perception, perception." ***Id.*** at pp. 2312-16. He identified a "neighboring nuisance" as an example of a Class V detrimental condition (Class V – Imposed Condition). He noted that such a condition may cause permanent market resistance and that it is "often measured through a paired-sale analysis which compares homes impacted by a situation with otherwise similar homes that are not." He also noted that luxury properties tend to be more impacted. His case study involved an airport next to a residential tract. ***Id.*** at pp. 2318-21.

> "Essential to returning the property to its before condition market value would be the successful resolution of the litigation, whereby the seller would no longer be required to made adverse statements in the seller's disclosure form. Since the use of this easement has been contentious, even the legal resolution of the lawsuit wouldn't necessarily preclude future disputes. A prospective seller would be damned if he did disclose, i.e., adversely affect the marketability of the property, and damned if he didn't disclose if a future dispute arose.
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> The seller . . . is an unenviable position . . . he must incur carrying costs associated with an extended marketing time, as well as litigation costs, and would likely have to accept a significant discount to entice a buyer to purchase the property in the near to intermediate future.
>
> Access diminution relates to the lack of free and unimpeded access to Ellis Island. The imposed condition is the detrimental effect imposed by adverse external factors, including undesirable acts or forced events by another person or entity that affects the value of a property. The construction project and necessity to seek judicial relief.
>
> The ingress and egress tend to fall within the considerations of the access diminution. Legal issues involve the pending litigation and the lack of

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The above article cited to a 1998 article Mr. Bell wrote entitled "The Impact of Detrimental Conditions on Property Values". Pleadings Vol. 8 at pp. 2393, 2396-2407. This article sets forth the same six elements. ***Id.*** at 2366-67. And the same 10 general classifications. ***Id.*** at 2399-2404. Under Class IV he noted that examples could include temporary construction easements and conditions caused by events – such as a crime. He noted that measuring such conditions often involves comparing the subject property to other properties with similar Class IV situations that are subsequently sold – and that the reduction in values can involve sudden drops with gradual increases over time as the market becomes more accepting of the situation. ***Id.*** at 2400. For Class V detrimental conditions – which includes acts or forced events by another person – the imposed condition "may be unclear and require special studies" and the loss in value can be permanent. ***Id.*** at 2401 (this was in the above-article too). He noted that several methodologies could be used to quantify the impact of a detrimental condition and that under the Market data analysis an appraiser studies the "effects of DCs on other properties. Although the unique characteristics of every DC makes direct comparison difficult, market data can help support the appraiser's conclusions." ***Id.*** at 2404. His concluding summary included: "Be cautious in using market data from one DC classification when attempting to quantify the diminution in value of another DC category. This is the basic concept of comparing apples to oranges. The common characteristics of each class of DCs are graphically distinct. Some DCs involve repairs and some do not; some involve permanent residual conditions while others diminish over time; some involving engineering studies and others do not, and so forth." ***Id.*** at 2405.

**DECISION**

finality over the dominant estate's use rights. Neighboring nuisance is the hostile condition between the parties arising from the easement dispute. Because one side to this litigation will receive less than a favorable outcome, there is a risk that the neighboring nuisance may continue even after resolution of the litigation.

The cost to cure the use rights . . . is very difficult to quantify. One would have to make an assumption as to who the prevailing party is . . . One would need to be clairvoyant to ascertain the costs, much less the outcome of this litigation. While costs cannot be quantified, the risk and uncertainty would be substantial. The cloud that would hang over the property for a period of time would cause stigma and blight on the property."[115]

He contacted two title agents (Mike Jusaro and Bob Norton) about title insurance for the property. Mr. Jusaro advised that pending litigation would be shown on a title report and the litigation would be excluded from the insurance coverage. Mr. Norton, who is familiar with the dispute at issue, advised his company would not issue a policy for a property involved in litigation.[116] The above shows that the seller would have to market the property for a longer period of time, until the litigation is resolved.[117]

"It is the appraiser's opinion that value of the subject property has been reduced by the easement dispute. Quantification of the value loss was conducted by two methods. The first was to analyze sales data to measure the value loss attributable to the curable conditions, legal blight, and stigma. No identical situations were found for which sales data was available to quantify the subjects' value loss. However, sales were identified which reflect buyer and seller interaction that establishes a range of probable value loss for the subject property."[118]

The first was the Ketchikan Pulp Company (KPC) sale to Gateway Forest Products (GFP). He described the property and improvements. Environmental litigation with the State and the EPA had concluded but the

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[115] WER at pp. 174-75.

[116] Mr. Wold's working file contained a copy of a Preliminary Commitment for title insurance for the Ellis Island property issued by Mr. Norton's company on January 27, 2000. The "Subject to" section includes references to 1999 Judgment and the fact that the exact width of the easement is not defined in the Judgment. Pleadings Vol. 7 at pp. 2025-28. This document was issued before the 2002 litigation. Mr. Norton sought legal counsel about the request to insure the easement. Pleadings Vol. 7 at p. 2031.

[117] WER at p. 175.

[118] WER at p. 175.

buyer was concerned about the risk of future environmental litigation, which it would assume after several years. KPC thought it would be the target of future suits. It was a motivated seller. The sale had elements of a "bulk sale discount". KPC sold the property to GFP for 10% of its assessed value. "The discount would be considered to mostly reflect the poor bargaining position of the seller and the risks of future litigation and potential for damages."[119]

The second "indicator of value loss" is the 2002 sale of a waterfront parcel by the Alaska Mental Health Trust Authority. The land was publicly owned. A road bisected the property. There was no related right-of-way. Neighbors used the road. The seller and the seller's appraiser recognized that blocking the road would likely result in litigation. The appraiser estimated that the value of the property as is was $92,700 and that it would have been at least $562,000 if the road problem did not exist. The property sold at auction for $106,058, with seller financing. Bill Pfifer, a neighbor, had been very interested in buying the property but had decided against bidding on it after doing "extensive due diligence" on the road situation. [120]

"An example of stigma loss is indicated in the Sea Level Condominium complex."[121] The stigma was the result of construction defects. The defects are discussed. The problems were remedied. But the units still are undervalued due to the reputation the complex has due to the past problems. Two specific recent unit sales at identified discounted prices are discussed. "There is a general fear of buying into a future problem. The stigma attached to the Sea Level Condominium complex correlates to the stigma regarding the pending and potential for litigation over the access to Ellis Island."[122]

The Harbormaster Condominium complex faces a stigma after 27 years due to unfounded rumors of construction defects and the developer having tendered the complex back to the financer due to slow initial unit sales. Two recent unit sales at below the depreciated values are discussed.[123]

The fourth example involves a waterfront house and a sale that had fallen through shortly before the report was prepared. The buyer made an offer on April 30, 2002. The seller disclosed that a planned future highway project may result in the taking of a portion of the property. The

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[119] WER at p. 176.
[120] WER at pp. 176-77.
[121] WER at p. 177.
[122] WER at p. 178.
[123] WER at pp. 178-79.

purchaser withdrew their offer based on this disclosure, even though the owner would be entitled to just compensation for a taking.

"This condition is commonly known as condemnation blight. It tends to be more of an issue now that seller foreclosures are required by state statute. A rational person would choose to avoid litigation, thus the marketability of properties clouded by legal uncertainty is significantly impaired."[124]

The seller has now rented the property. The rental rate is one-half of the owner's total opportunity cost. The owner believes it will be very difficult to market the property until the State's right-of-way plans are finalized. "In reality, the property may have impaired marketability until the highway project is complete, even if no property is taken. At this time, it appears that it might be as long as five years until this occurs." [125]

"Based on the preceding examples of value loss attributed to the uncertainty and stigma, we have estimated that the value loss for the subject property would fall in the range of 20 to 50 percent. To further refine the value loss estimate, we conducted a survey of several experienced Realtors in the Ketchikan market regarding purchaser perception and discounts related to legal uncertainty."[126]

Bill Elberson advised that: his agency would fully disclose the legal problems related to the Ellis Island property; he would want a legal opinion from the seller's attorney that states what legal rights are being sold; he would suggest a potential buyer consult their own counsel; and, he estimates that property involved in litigation over access would lose 25 to 50% of its value.

Bill Bolling advised that: full disclosure would be required; and, a buyer would have to have a 25 to 33% reduction in price as an incentive to make an offer and wait for the outcome of the litigation.

Mary Rota advised that there would be no market for the property until the litigation is resolved.

Roger Stone advised that full disclosure of the legal issues would be required and the marketability of the Ellis Island property would be questionable and a 25% discount would be necessary to attract a buyer.

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[124] WER at p. 179.
[125] WER at p. 179.
[126] WER at p. 180.

A final consideration is listed in the *Valuation of Detrimental Conditions in Real Estate* – luxury properties are impacted more by legal blight. The Ellis Island property is a luxury property. Buyers of such properties have more discretion in deciding whether to buy or not and are more likely to consult an attorney before buying and to avoid "properties that have pending litigation issues and the potential for further disputes."[127]

The estimated diminution in market value for the Ellis Island property "resulting from the legal blight and stigma is 25 percent." [128]

**c. Ms. Dineen's Complaint**

Julie Dineen is an appraiser in Colorado. She submitted a complaint to the Division on June 19, 1998 concerning Mr. Wold's Entwit Float appraisal. She enclosed her review of his appraisal report.[129] Her report included:

1. She reviewed Mr. Wold's report, inspected the property, conducted research at the DNR office in Juneau, analyzed her file data on marinas, tidelands, and upland property, inspected Mr. Wold's comparables, reviewed literature on highest and best use, interim use and partial interest valuations, spoke with three Ketchikan realtors and a Ketchikan appraiser, and spoke with the buyer of one of Mr. Wold's comparables.[130]

2. The people she spoke to were familiar with the property. They thought it was under-improved. They agreed it could generate income while the highest and best use was pursued. They noted that there was demand for boats 20 feet and over.[131]

3. Mr. Wold's highest and best use determination was flawed. It was not supported by his cost and income approaches. Highest and best use occurs when the value of the improvements exceeds the value of the land. If the land is worth more than the improvements then the current use cannot be the long-term highest and best use. A prudent investor would remove the improvements and develop or sell the land. She spoke with Brian Granville (MAI), an USPAP instructor, and he advised that Mr. Wold had

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[127] WER at p. 181.
[128] WER at p. 181.
[129] Pleadings Vol. 10 at pp. 2713-26.
[130] Pleadings Vol. 10 at pp. 2714-15.
[131] Pleadings Vol. 10 at p. 2715.

clearly violated SR 1-1(a), (b), (c) and SR 1-3(b) and possibly SR 2-2(ix).[132]

4. She noted that the uplands were **6,309** square feet and zoned **commercial**. She questioned Mr. Wold's comparables, and his related adjustments, and noted that he left out a possible comparable and had erred in stating the size of one of the comparables used.[133]

5. Mr. Wold's did not use available DNR data and nearby lease data in valuing the tidelands. He instead "applied the generally accepted range of 10% to 35% - it is known in S.E. Alaska that tideland values are 10% to 25% of their upland value." She thinks the tidelands are much more valuable because: the people she interviewed noted a scarcity of patented tidelands in Ketchikan, there is demand for moorage space for larger boats (over 20 feet); and the other data she referenced shows a higher value.[134]

Ms. Dineen testified on May 12, 1998 during the Entwit v. Entwit divorce trial.[135] Her testimony included:

1. She has been appraising properties in Southeast Alaska since 1983. About half of her work is done in Ketchikan. She has the MAI designation.[136]

2. She relied on a paragraph from the January 1994 edition of the Appraisal Journal on the evaluating "interim uses" for the proposition that if the value of the site as vacant exceeds the value as improved then additional analysis is necessary. Here Mr. Wold's income approach resulted in a $126,000 value which was less than his $127,000 vacant land value. Mr. Wold does note that this is indicative of functional obsolescence, but she thinks the results should have told him his highest and best use determination was wrong.[137]

3. She does not understand why Mr. Wold had a deduction for functional obsolescence in addition to the deduction for physical depreciation.[138]

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[132] Pleadings Vol. 10 at pp. 2716-17. Mr. Granville did not submit a related report. He did not testify in this or any related case. Ms. Dineen provided no further explanation of what she told Mr. Granville or what he said.

[133] Pleadings Vol. 10 at pp. 2717-18.

[134] Pleadings Vol. 10 at pp. 2718-19.

[135] Pleadings Vol. 10 at pp. 2827-65.

[136] Pleadings Vol. 10 at pp. 2829-30.

[137] Pleadings Vol. 10 at pp. 2839-41.

[138] Pleadings Vol. 10 at p. 2842.

4. She testified about her disagreements with Mr. Wold's upland comparables.[139]

5. She testified about her disagreements with Mr. Wold's tidelands valuation.[140]

6. She thinks a buyer would envision doing a "number of different things up in the uplands, including residential, or probably a **mix of residential and commercial** . . . I can basically put some money into the marina, enough to get it in . . . average condition . . . then collect the income for three, four, or five years, and then . . . pursue my development of that property to its highest and best use . . . there's plenty of demand for moorage space . . ."[141]

7. Mr. Wold should not have used the income capitalization approach.[142]

**d. Judge Jahnke's Decision**

Judge Jahnke issued his decision in Entwit v. Entwit on September 17, 1998.[143] The decision included:

1. Judge Jahnke's conclusion that Mr. Wold had assumed the role of advocate for Mr. Entwit's legal position.[144]

2. Judge Jahnke's conclusion that Mr. Wold erred in determining that use of the marina was the highest and best use of the property. He noted that the marina was in disrepair, had a 40% vacancy rate, and the difference between the value of the land and the value of the improvements.[145]

3. Judge Jahnke's conclusion that Mr. Wold had made a double deduction for the condition of the improvements. He noted that Mr. Wold had not explained his deduction for functional obsolescence.[146]

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[139] Pleadings Vol. 10 at pp. 2842-50.
[140] Pleadings Vol. 10 at pp. 2850-54.
[141] Pleadings Vol. 10 at p. 2855.
[142] Pleadings Vol. 10 at pp. 2858-59. This exhibit did not include cross-examination.
[143] Pleadings Vol. 10 at pp. 2866-90.
[144] Pleadings Vol. 10 at p. 2868.
[145] Pleadings Vol. 10 at p. 2869.
[146] Pleadings Vol. 10 at pp. 2870-72. Judge Jahnke speculated that Mr. Wold may have been referring to the lack of platted access to the property or the relatively small size of the upland property.

4. Judge Jahnke declined to include a deduction due to Mr. Entwit only owning a 1/3 interest because a sale of his interest was not being contemplated.[147]

5. Judge Jahnke concluded that, with respect to the Copper Road appraisal, there was an overlap in Mr. Wold's comparable adjustments for functional utility and design and appeal.[148]

6. Judge Jahnke noted that the only witness who testified about the settling situation was Scott Menzies, a civil engineer, who testified that settling was common and this settling was not serious and he did not agree with the deduction Mr. Wold made for the same.[149]

**e. Notice of Investigation**

The Division (Donald Faulkenburry) sent a Notice of Investigation and Request for Response to Mr. Wold on January 19, 1999.[150] The Division advised that an investigative file had been opened "concerning the appraisals identified in the enclosed Memorandum of Decision and Order . . . in case number 1KE-97-136 CI, Linda Lee Entwit v. John Leif Entwit. The judge's findings suggest that there may have been several violations of USPAP." Mr. Faulkenburry requested that Mr. Wold make available copies of the appraisals and his working files.

Mr. Wold forwarded the appraisals at issue and his related working files to the Division on April 14, 1999.[151]

**f. Mr. Wold's Deposition – Spears Case**

Mr. Wold was deposed with respect to the Spears v. Brusich et al., 1KE-02-63 CI case on July 18, 2002.[152] His testimony included:

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[147] Pleadings Vol. 10 at p. 2876.
[148] Pleadings Vol. 10 at p. 2877.
[149] Pleadings Vol. 10 at pp. 2878-80.
[150] Pleadings Vol. 2 at pp. 1538-41.
[151] Pleadings Vol. 6 at p. 1715.

1. He had a copy of the judgment from the 1999 litigation when he prepared his appraisal report.[153] He understood the judgment granted Mr. Spears and his successors free and unimpeded access to and from Ellis Island.[154] His investigation included: discussing the history of the property with Bob Norton (title agent) and Steve Seley; reviewing the transcript of the injunction hearing; reviewing the complaint; and, reviewing portions of Chuck Pool's deposition concerning Mr. Pool's construction activities at the site.[155]

2. He explained how he calculated the $40,000 damages for diminution in value based on the impeded access. He described the impediments to access. He assumed that there was a violation of the easement. There was construction work being done in the easement area and construction equipment on the easement area (a 30 foot corridor with a 20 foot right-of-way) during the relevant time periods. He did not assume that all access was blocked at all times during the pertinent time period.[156]

3. He does not have an opinion on whether cost approach would have yielded a larger value that reached through the sales comparison approach because "the sales comparison approach couldn't be developed."[157]

4. He explained how he arrived at the $525,000 diminution in value amount.[158]

**g. Mr. Coan's Complaint/Report**

Vince Coan submitted an appraisal review report on August 14, 2002 to Mr. Scott Maresh, a Bellingham attorney, regarding Mr. Wold's Ellis Island property appraisal.[159] His review included:

1. He had not inspected or appraised the subject property, or formed an opinion of value.

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[152] Pleadings Vol. 2 at pp. 536-602.
[153] Pleadings Vol. 2 at p. 558.
[154] Pleadings Vol. 2 at p. 560.
[155] Pleadings Vol. 2 at pp. 561-65.
[156] Pleadings Vol. 2 at pp. 568-75, 579-80.
[157] Pleadings Vol. 1 at p. 577.
[158] Pleadings Vol. 1 at pp. 580-88, 597-98.
[159] Pleadings Vol. 1 at pp. 202-208.

2. It had been reported to him that it was possible to access the Ellis Island property at all times. He assumes that to be the truth.

3. He intends that his appraisal review comply with the requirements of USPAP Standard 3.

4. Mr. Wold's appraisal report was not "complete and self-contained" because he did not utilize the sales comparison approach.

5. Mr. Wold's failure to use the sales comparison approach is the "most significant omission in the appraisal report." "It would be typical for appraisers to include developed high-end residential properties from Ketchikan and other areas in Southeast Alaska when estimating market value."[160] He inquired of other Southeast appraisers if such data was available and was told that it was. He is **personally aware** of the 2001 sale of an island residence in the Sitka area, which was then remodeled. This failure results in the opinion of value not being credible. This is a violation of USPAP Standard 1.

He noted that: "in this instance the sales comparison approach could be omitted; however, the appraisal is then a limited analysis, which requires a clear statement that departure has been invoked, and that the value estimate may be different were a complete appraisal process undertaken."[161]

2. Standards Rule 2-2(a)(xi) requires that an appraiser using the Self-Contained Appraisal Format must be consistent with the intended use of the appraisal, and, at a minimum, "state and explain any permitted departures from specific requirements of Standard 1 and the reason for excluding any of the usual valuation approaches." "The blanket statement that sales were not available is inadequate."[162]

3. There is inadequate data to support Mr. Wold's cost approach analysis.

4. With respect to "legal blight" – any such problem would not exist once the litigation is concluded and an assumption that there would be future litigation is an "extraordinary assumption" that must be disclosed.

5. The comparables Mr. Wold used in his "legal blight" analysis did not all involve litigation. And more comparable data was needed – i.e. data of the before and after sales price of properties involved in similar litigation.

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[160] Pleadings Vol. 1 at p. 203.
[161] Pleadings Vol. 1 at p. 204.
[162] Pleadings Vol. 1 at p. 204.

6. It is not clear that all access was impeded from reading Mr. Wold's report.

Mr. Coan forwarded his report to Margo Mandel with the Division. He noted in his transmittal memo that the Ellis Island case was scheduled for court in January 2003. He also noted that he is not sure how his being the complainant affected his role as a member of the Board.[163]

Mr. Coan was deposed in the Spears v. Brusich et al. case on August 28, 2002. His testimony included the following:

1. He did not include appraising single family residences on his resume because he does not like to do such appraisals and does not seek out such work. He has done them. But he typically hires another appraiser to when there is a residential component to the commercial property he is appraising.[164]

2. He contacted Jim Corak, an appraiser in Sitka, and Trish Hoover, an appraiser in Ketchikan. He did not specifically reference the Spears property. He asked Mr. Corak if he would be able to perform a sales comparison approach for a luxury island residence in Ketchikan. Mr. Corak said he could and mentioned some properties. Mr. Coan did not take notes. He is aware through his wife of an island property purchased in Sitka. He has not seen that property. He has not seen photographs of that property. He has not reviewed a description of that property. His only knowledge of it comes from his wife. The owners name is Fuller. It is only accessible by boat or plane.[165]

3. He agrees that Mr. Wold knows the Ketchikan residential market better then he does.[166]

4. He took a week long appraiser course ten years earlier that had included a section on USPAP. He has since complied with the minimum USPAP continuing education requirements. He has never taught USPAP standards or published anything on USPAP standards. He has no special training in the areas of USPAP standards other than the minimum required to obtain

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[163] Pleadings Vol. 1 at p. 201.
[164] Pleadings Volume 11 at p. 3067.
[165] Pleadings Volume 11 at pp. 3068, 3073.
[166] Pleadings Volume 11 at pp. 3068-69.

and maintain his licensing. He is no more qualified than Mr. Wold to express opinions on the USPAP standards. He has never been presented in court as an expert on the USPAP standards or on any appraisal related matter. He has testified twice as an expert in civil cases. He has never testified as an expert review appraiser. He has never been retained as an expert reviewer in a lawsuit.[167]

5. When he was retained he was not asked if he was capable of or qualified to review Mr. Wold's appraisal report. He thought he was because of his license and his experience. It was made clear to him at the start that he would not inspect the property or offer opinions on value. He told them he was too busy to appraise the property. He was not retained to express an opinion on whether there was a detrimental condition that affected the value of the Spears' property. [168]

6. He agrees that if an appraiser comes across information he believes is a relevant factor in valuing property he should consider it in formulating his appraisal. He had never heard of litigation blight or stigma before reading Mr. Wold's Ellis Island appraisal. The subject had never come up in any of the appraisal courses that he had taken. He has since reviewed the book on appraising detrimental conditions. He did not get the impression from the book that litigation blight was a listed detrimental condition. He understands that it was Mr. Wold's opinion that blight or stigma existed as the result of the universe of the dispute and related litigation. He does not believe that litigation blight or stigma is a detrimental condition - litigation does not have an effect on value once the litigation is over. But he does agree with Mr. Wold (p. 76 of his appraisal report) that the key to valuation is the perception of the property in the marketplace. He does agree that stigma can be a detrimental condition (i.e. a house in which murders occurred). He also agrees that at some level a running property dispute with neighbors could be a detrimental condition[169]

7. He has not reviewed the 1999 easement judgment. He was aware of the 2002 litigation. He did not know Mr. Spears was seeking a permanent injunction. If he were asked to appraise the property he would have to consider the ongoing dispute between the adjoining property owners but, in accordance with USPAP, he would have to make and define a related extraordinary assumption that there would or would not be access. He does not think a typical appraiser could make such an assumption with respect to future disputes. He is aware that the current litigation began after the prior judgment and that an injunction and contempt had issued.

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[167] Pleadings Volume 11 at pp. 3069-71.
[168] Pleadings Volume 11 at p. 3072.
[169] Pleadings Volume 11 at pp. 3074-76.

He does not know if legal blight exists or if it exists in this case. He has no opinion in that regard. He is not familiar with the concept. He is saying he has trouble with Mr. Wold's comparables because none involved litigation blight.[170]

8. An appraisal is subjective reasoning based on factual data. An appraisal is the appraiser's opinion and not a statement of fact. The opinion should be based on as many verifiable facts as the appraiser can locate. The opinion can be based on assumptions if there is some rational basis for the assumption. Generally, comparisons are made on the basis of homogenous data. But that is not possible in Alaska – so they make adjustments and use the grid analysis. "And **quite often** there are disputes not often on the direction of the adjustment, but on the degree of adjustment. And there's a **subjective nature in it**. . . We collect the best market data that in our opinion relates to the subject property and then we're required to adjust those properties.[171]

9. He agrees that if there is a valuation approach that is irrelevant it should not be used and that there are related USPAP standards.[172]

10. He is familiar with residential disclosure requirements. The general purpose is to require the seller to disclose to a buyer any conditions affecting the property which might be determined to be material by a buyer. He understands that a seller could incur treble damages for an inaccurate disclosure. The form requires the seller to disclose any existing, pending, or potential legal action concerning the property. A "yes" answer would be something material to an appraisal. Part of an appraiser's job is to anticipate how the market will perceive the property at issue.[173]

11. He disagrees with Mr. Wold's reliance on what he learned in a course in opining that luxury properties are more impacted by detrimental conditions than other properties. He thinks this can only be determined with market data.[174]

12. **He agrees that a comparable sales approach should not be undertaken if no comparable sales can be found**. He is critical of Mr. Wold for not making a related extraordinary assumption and not defining it. Mr. Wold was required to do more in a self-contained analysis than say he could not

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[170] Pleadings Volume 11 at pp. 3076-78, 3082.
[171] Pleadings Volume 11 at pp. 3078-79.
[172] Pleadings Volume 11 at p. 3079.
[173] Pleadings Volume 11 at pp. 3079-80.
[174] Pleadings Volume 11 at p. 3080.

find comparables so he is not using the sales comparison approach. He also thinks that was an inaccurate statement. Mr. Wold made the extraordinary assumption that the litigation would continue and failed to disclose it, and he should also have said that his conclusion would be different if the assumption turned out to not be true. USPAP requires this even if it is redundant.[175]

13. In a hypothetical situation where the dominant estate (luxury property) has a clearly defined legal easement but the owner of the servient estate states they will not recognize that right then "that would be a really tough appraisal assignment. I would make the extraordinary assumption and, obviously, that would impact my opinion of value of the property." He is not sure how he would measure it – he guesses he would look to an extended market period or narrow the market. The circumstance ("hostile access situation") would "definitely . . . impact my opinion of value."[176]

14. In order to comply with Standard 3 of USPAP he needs to do a more detailed report than his August 14, 2002 report, he told his client as much, and he is working on one.[177]

15. Mr. Wold's report is not a complete appraisal report because it does not include the sales comparison approach. **It was not enough for Mr. Wold to say that there were no comparables. When asked how to establish that there were no comparables he responded: "Well, you research your market, and then, if you don't find any comps, you say, there are no comps**." It is enough to say that you have searched the market, the market is correctly defined, and you have found no comparables within the market if it is true. To test this another appraiser would have to replicate the analysis – search the market. He is aware of at least one property that he believes should have "probably been included in his analysis." The only attribute necessary for a property to be a comparable to the Spears property was that it was a "high end" residence. He did not search the market to test Mr. Wold's assertion that he could not find comparables. The Sitka comparable is the only one he is "personally familiar" with. By this he only means he knows that a good quality single family home on an island was sold. There are no USPAP standards for how many comparables are required to do a sales comparison analysis. If you have one you should include it in your report. He understands the Fuller island is small. He does not know how big Ellis Island is. These types of things can be accounted for in adjustments. He understands the Spears property is truly a luxury residence. He does not know how large the Fuller house

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[175] Pleadings Volume 11 at p. 3081.
[176] Pleadings Vol. 11 at pp. 3082-83.
[177] Pleadings Vol. 11 at p. 3083.

is. Mr. Fuller had told him at a social gathering that he had bought the house and was doing extensive renovations. High end properties that would be comparables would consist of transactions involving the most expensive houses and the largest houses in Ketchikan. He would not include a 800 square foot cabin on an island. It is his understanding, from his conversation with Mr. Fuller at the cocktail party, that he has about 1.5 million into his property – including purchase price and renovations. **But he agrees that another appraiser could look at the Fuller property and determine it was not a comparable for the Ellis Island property and not be in violation of USPAP.**[178]

16. He still thinks that Mr. Wold's appraisal violated USPAP because he did not include a sales comparison analysis. Mr. Wold properly did not use the income approach. Mr. Wold's cost approach analysis did not violate USPAP.[179]

17. It appears to him that Mr. Wold's methodology, his calculations, for the temporary diminution in value was based on the Spears not being able to get to their property for 2 ½ months. If that is what happened then the methodology is okay. But Mr. Wold does not clearly describe the access impairment. Mr. Wold did not say in his report that all access was blocked for that period of time. He did say that Mr. Spears did not have all of his related property rights for that period of time. He does not think that such an impairment would support some sort of lost-rent damages as long as the owner could get to the property with minimal inconvenience. He then acknowledged that if access existed but was impaired there would be some damage but Mr. Wold's calculations lead him to understand there was no access for 2 ½ months.[180]

18. His subsequent Standard 3 compliant report does not add any new critiques of Mr. Wold's appraisal. With respect to legal blight, his ultimate conclusion is that there is insufficient information in Mr. Wold's report for him to determine whether Mr. Wold's conclusion is a good one.[181]

19. He does not know if the Spears property is worth 2.1 million or not, but there is insufficient information in Mr. Wold's report to rely on that value.[182]

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[178] Pleadings Vol. 11 at pp. 3084-86.
[179] Pleadings Vol. 11 at p. 3086.
[180] Pleadings Vol. 11 at pp. 3087-88, 3090-91.
[181] Pleadings Vol. 11 at pp. 3088-89.
[182] Pleadings Vol. 11 at p. 3089.

20. Any high end waterfront home would be a comparable to the Spears property. High end homes are bought and sold in Southeast Alaska, including high end waterfront homes. He thinks that the cost approach and the sales comparison approach should have been used for this property.

**h. Notice of Investigation**

The Division (Ms. Mandel) sent Mr. Wold a Notice of Investigation for Response on January 8, 2003.[183] The Division advised that the investigation involved the Ellis Island appraisal and requested copies of "all reports and supporting data" per AS 08.87.300.

**i. Response to Letter of Investigation**

Mr. Wold's counsel (Clay Keene) forwarded a Confidential Response to Ms. Mandel's January 8, 2003 Letter of Investigation on March 7, 2003.[184] Mr. Keene included copies of portions of Mr. Wold and Mr. Coan's deposition transcripts from the underlying civil case (1KE-02-63 CI). Mr. Keene stated:

1. Mr. Coan's "departure rule" analysis does not apply. The sales comparison approach could not be used due to the lack of market information. Mr. Coan's conclusion that there was such data is based on very limited and faulty information. He obtained "cocktail party" information from his wife and statements from Southeast Alaska appraisers about a luxury island residence in Sitka. He provides no information about the Sitka property.

2. Mr. Coan acknowledges he is inexperienced in appraising residential properties in general, and in Southeast Alaska in particular.

3. Mr. Wold agrees that if relevant market information had been available and he failed to use it then he would be in violation of Standards Rule 1-1. In this event the departure rule is invoked and the appraisal is deemed a Limited Appraisal. But here the market information was not available. So he did not violate Standards Rule 2-2(a)(xi). He noted that Stephanie Campbell, Director of Screening, Ethics and Counseling, Appraisal

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[183] Pleadings Vol. 8 at pp. 2174-75.
[184] Pleadings Vol. 1 at pp. 209-16.

Institute[185] had confirmed that if market sales data was not available for the Ellis Island property then the appraiser could correctly represent the appraisal report as being complete if disclosure of the omission is made.

4. Mr. Coan acknowledged during his deposition that if no market sales data was available the sales comparison approach could be omitted and the report represented as "complete".

5. Mr. Coan's information that there was market sales data was based on conversations with Trish Hoover, a Ketchikan appraiser, and with appraisers with a Sitka firm. He asked them whether there were luxury properties in Ketchikan and Sitka from which a sales approach could be made. He did not give them specific information about the Ellis Island property. He did not receive specific information from them concerning the properties they referenced. He in fact has no "personal" knowledge of the Sitka sale, contrary to the representation he made in his report. The only information he has about the Sitka property was provided by his wife's cocktail party talk.

   The Sitka property in fact was not a comparable. It was so inferior to the Ellis Island property that Mr. Wold would have had to make 200-300% adjustments. He considered this and recognized that such adjustments were unacceptable.

6. Mr. Coan acknowledges that the sole means of determining if there are comparable properties is to search the market. He acknowledges he did not do so.

7. Mr. Coan acknowledges that Mr. Wold knows the residential market in Southeast Alaska better than he does.

8. The attributes of the Ellis Island property are such that there are no comparables. The house is much bigger than the Sitka house, it has year round road access, it has electric and telephone service, it has deep water mortgage for the owners' 110' yacht, it has a covered boat house, and it has fresh water moorage.

9. If Mr. Wold had attempted a sales comparison approach then Mr. Coan would have complained that the required adjustments were so large that the resulting conclusion would be unreliable.

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[185] Ms. Campbell did not submit a report or testify. No further information about this conversation was provided.

10. It is evident that Mr. Coan was functioning as an advocate for a client involved in pending litigation.

11. Mr. Coan cited no authorities or treatises to support his conclusion that Mr. Wold could not consider the impact of litigation or legal stigma on the value of the Ellis Island property. Mr. Wold correctly analyzed the issues. He was obligated to consider the contentiousness nature of the neighbor's relationship. Mr. Coan's deposition testimony reflects that he is not familiar with the legal stigma concept.

**j. Mr. Ferrara's Reports**

Alfred J. Ferrara, Appraiser and Consultant with AVS, Inc. in Anchorage, submitted a report to Margo Mandel, Division Investigator, on April 28, 2003 concerning Mr. Wold's Ellis Island appraisal.[186] His report included:

1. She had requested that he review Mr. Wold's Ellis Island appraisal for compliance with USPAP "as well as standards of performance typical in Alaska for residential appraisals."

2. The complainant had raised two issues: the Ellis Island appraisal is self-described as being a complete appraisal in a self-contained format, which it is not, and it includes a substantial reduction in value due to litigation and related "stigma" which are not supported by like comparable sales data.

3. He is conducting a desk review. He has not inspected the Ellis Island property or any of the comparables. He is using the 2002 USPAP Standards. His review consisted of reading Mr. Wold's Ellis Island appraisal (with addenda) and comparing the methods, techniques, data, and analysis used in the "reports." He also reviewed documents from the case for which the Ellis Island appraisal was prepared consisting of: Mr. Wold's deposition transcript, the transcript of the deposition of the appraiser retained by the other side in the case, the review of Mr. Wold's Ellis Island appraisal prepared by the opposing party's appraiser, and the court's findings concerning the easement at issue in the case.

4. With respect to USPAP SR 2-1(a), it requires that "Each written . . . real property appraisal report must: clearly and accurately set forth the appraisal in a manner that will not be misleading." Mr. Wold's Ellis Island appraisal violated SR 2-1(a) because:

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[186] WER at pp. 200-208. Mr. Ferrara's CV is not in the record.

A. Mr. Wold describes it as a complete and self-contained report but "it clearly is not."

A complete and self-contained report would address all three valuation approaches or provide "adequate and valid reasons why they were not included." Mr. Wold did not include a market or income approach. The income approach is typically not used in residential appraisals, but he did not explain this in this appraisal. The major concern is the lack of market approach or statement of reasons why it was not included. He instead only used the cost approach. His use of this approach was flawed because he only included physical depreciation, which is unusual for $2,000,000 homes "even in Anchorage" and "certainly" in Ketchikan.

The data submitted to support the "legal blight & stigma value" is not complete – it is unsupported anecdotes from realtors.

B. Mr. Wold provided "very little" description of the improvements to the Ellis Island property, which is unusual for a property in this price range.

C. Mr. Wold included 21 pages of information about the Ketchikan economy which he did not reference or rely on it in his appraisal.

D. It would have been more useful for Mr. Wold to list other high end homes in the Ketchikan area that have sold over the past few years and state the length of time on the market to support his opinion that a two-year marketing period would be needed to sell the Ellis Island property – which opinion he based on comments from realtors. Such information may also have helped explain why he included no functional or external obsolescence.

E. The cost approach is typically used for such appraisals.

But Mr. Wold provided no explanation for his modification of the local cost multiplier (Marshall Valuation Service Residential Cost Manual) to better reflect Ketchikan construction costs and he provided no support for the same other than "from local builders relative to high end home construction."

Mr. Wold did not discuss the historical cost of construction. He should have done so since the improvements on the Ellis Island property were only three years old. The historical cost approach "may have been a better measure of the cost than a cost manual which is often not reliable on unusual properties."

The cost approach with a reasonable cost modifier "would be in conformity to standards" if historical cost data was not available. But "it is a well known fact that upper end properties in all cities in Alaska rarely sell for their cost of construction on the resale market and that external obsolescence is often present which is greater than the physical depreciation reported here." The fact that Mr. Wold did not use any upper end comparable sales in a market approach and had a relatively long two-year marketing period is indicative of some sort of obsolescence. But he simply states that "no functional or external obsolescence is present which is not credible and not supported in any manner."

F. Mr. Wold's "cost approach is not adequately completed and supported, and does not represent a complete and reliable indication of value." The result is that the appraisal is misleading as it is the only approach he used.

The initial cost and depreciation are not adequately supported (discussed above).

The next issue concerns his reported diminution in value. "The techniques used to estimate the diminution in value due to temporary interference are similar to that which would be correctly used in an appraisal." But the approach should apply only to the impacted area – the easement area – and not the entire property as the easement issue did not involve blocking access to the property. Mr. Wold did not explain why he found diminution in value for the improvements on the property. So his related conclusions are "not reasonably supported and misleading due to lack of rationale for such damage." And his market value diminution in value of $40,000 for 2.5 months of partial easement use "is not supported by the data presented in the report."

G. Mr. Wold's opinions concerning the intermediate and long-term diminution in value of the property due to past and anticipated future litigation over the easement and the other party's unwillingness to recognize the legal rights granted the owner of the Ellis Island property are not supported. The court had ruled in 1999 that there was a fixed, permanent, non-exclusive easement "for free and unimpeded residential and commercial ingress and egress over the fee simple interest of the fee owner Brusich and the leasehold interest of Brusich and Oaksmith." The owner of the Ellis Island property was able to obtain injunctive relief when the other party partially impaired the easement in February 2002. The court also found the other party in contempt of the 1999 ruling. So the court has ruled twice in favor of the owner of the Ellis Island

property and it is not likely there will be subsequent litigation as there would likely be "severe" "penalties" imposed if the other party again impaired the easement.

He questions Mr. Wold's conclusion that the owner of the Ellis Island property should disclose the history of litigation to a potential buyer. He agrees that the owner would have to disclose any pending litigation. But even if it were listed, it should not be of concern to a buyer in view of the title insurance and the court's prior rulings concerning the easement.

H. If Mr. Wold could include a diminution in value due to litigation stigma, he erred by not asking the title companies he contacted why they would not provide title insurance if there were pending litigation if the court had already ruled on the easement. He has communicated with title companies who have advised that insurance would be issued if the litigation "has been fully resolved with favorable court decisions". [He does not identify who he contacted]

The realtor's and attorney's anecdotal comments are not unreasonable – nobody would want to buy property with unresolved litigation. But here the court has already ruled on the easement. Mr. Wold's report does not reflect that he informed the realtors or attorney of this. Mr. Wold testified during his deposition in July 2002 that he would not change his valuation even though the court had resolved the matter in May 2002.

Mr. Wold's use of the Ketchikan Pulp Company sale as a comparable was not proper. That property was the subject of substantial known environmental concerns. That explains why it was sold for 10 cents on the dollar.

Mr. Wold's second comparable involved a "significantly different" situation. It involved a road bisecting a lot which isolated the waterfront portion of the lot, thereby substantially diminishing its value. Here the easement was located on another's property and existed for the benefit of the Ellis Island property.

Mr. Wold's third comparable did not involve a comparable situation as the stigma at issue there was the result of the building (condominiums) having a reputation for being built in a shoddy manner and was not the result of litigation.

Mr. Wold's fourth comparable is not really a comparable as the condominiums stigma was based on a foreclosure and purported construction defects and not litigation.

Even if the condominium comparables were valid comparables, Mr. Wold did not use paired sales to determine the diminution in value, he instead used a depreciated reproduction cost approach that is "an extremely weak measure in that you are using an estimate to estimate a second unknown."

Mr. Wold's fifth comparable does involve litigation as it is a parcel which fronts a highway and a portion of the parcel will be needed by the State for a right-of-way. This creates some uncertainty which does affect the marketability of the property. Mr. Wold's estimation of the diminution in value based on comparing the rental rate for the parcel with a 10% opportunity cost to arrive at a 20% reduction in value was improper. The correct approach would involve a different rental comparison. In any event, this parcel is not "comparable" to the Ellis Island property.

5. USPAP SR 1-1(b) states: "In developing a real property appraisal, an appraiser must: not commit a substantial error or omission or commission that significantly affects the appraisal. USPAP SR 1-1(c) provides that the appraiser shall 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."

   A. Mr. Wold "committed errors of omission which affected the appraisal, and rendered appraisal services in a careless and negligent manner resulting in a series of errors which produced a misleading appraisal."

6. Mr. Wold also violated USPAP SR 1-2(f),(g) which require that an appraiser identify the scope of their work.

   Mr. Wold identified his appraisal as being a complete appraisal but did not include the market approach and did not explain why the income approach was not used.

   SR 1-2(g) was violated because Mr. Wold made extraordinary assumptions that were not "spelled out specifically." "This may hinge somewhat on SR 1-2(h) which requires the appraiser to identify any hypothetical condition."

7. Mr. Wold also violated USPAP SR 1-2(a),(b),(c), which requires that "the report be presented in a manner that will not be misleading, that it must contain sufficient information for the report to be properly understood, and that any extraordinary assumptions or hypothetical condition be clearly stated."

8. Mr. Wold's failure to sufficiently explain the lack of market and income approaches and the appearance of extraordinary assumptions or hypothetical conditions also appears to violate USPAP SR 2-2(vii)(viii)(xi).

Mr. Ferrara submitted a report[187] to Ms. Mandel on May 6, 2003 concerning his review of Mr. Wold's Copper Road property and Entwit Float appraisals. Mr. Ferrara's report includes the following:

1. She had asked him to review these two appraisals for compliance with USPAP and the "standards of performance typical in Alaska for such properties."[188]

2. The complainant had raised two issues: the highest and best use of the Entwit dock was not used; and, the treatment of depreciation or obsolescence was incorrectly handled for the residential appraisal.

3. "My review consists of a desk review only as the subject and comparables were not inspected. . . The 1997 and 1998 USPAP standards were used for the purpose of the review."[189]

4. With regards to the Entwit Float appraisal:

   A The layout of Mr. Wold's report is typical. It "contains virtually all of the required sections however some of this discussion and data provided is limited, and the analysis lacks clarity."[190]

   B. Mr. Wold used the cost and income approaches. Use of the cost approach is unusual for such a property due to the depreciation and difficulty in estimating replacement costs.

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[187] WER at pp. 209-215.
[188] WER at p. 209.
[189] WER at p. 209.
[190] WER at p. 210.

C. More unusual is Mr. Wold's conclusion that the highest and best use is its current use as the income approach shows that the float does not generate any more value than the value of the land. "This clearly shows that the highest and best use of the property is incorrectly stated in the appraisal and is misleading."[191]

D. Mr. Wold's sale comparisons are not sufficiently inclusive as they do not include those in the opposing appraiser's findings, which Mr. Wold had. The sales Mr. Wold did use "appear to be analyzed in a manner which supports a lower end of possible value range for the subject property."[192]

E. The fact that the current use of the property is not its highest and best use is also evidenced by Mr. Wold's findings regarding the significant amount of physical depreciation and functional obsolescence. Note, the obsolescence is external and economic and not functional as the floats still function as such, despite their condition.

F. Mr. Wold's report violates USPAP SR 2-1(a) because it incorrectly states the highest and best use and the data used is not complete and "likely provides an incorrect indication of the land and site improvements."[193]

G. "It is believed that the cost approach is not adequately completed and supported and does not represent a complete and reliable indication of value."[194] So the appraisal is inaccurate and misleading.

H. "In conclusion, it is my opinion that the commercial appraisal completed by Wold of Entwit's Float has serious deficiencies which cause it to be in violation of Standards Rule 1-1(a)(b)(c) as well as Standards Rule 1-3(a)(b) and Standards Rule 2-1(a)(b)."

5. With regards to the Copper Road property appraisal:

A. The comparable sales were not proper as all were valued substantially higher than the property at issue. This is very unusual. This appraisal could not have been used for conventional financing purposes. "It is typical and virtually required in

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[191] WER at p. 211.
[192] WER at p. 211.
[193] WER at p. 211.
[194] WER at p. 211.

residential appraisal practice in Alaska and other states that the value of a property is bracketed with homes which have sold at prices both above and below the final concluded value. It is unreasonable to assume that no other sales in Ketchikan below $145,000 were available for comparison to the subject."[195] If that is the case then "it may be that residential properties do not normally sell for as low a price as $115,000 and the appraisal is misstated."[196]

B. The adjustments Mr. Wold used with respect to the comparisons are not explained in the report itself but are discussed in an addendum. The paired analysis is a reasonable and acceptable approach but "no such analysis was included in the appraisal."[197]

He questions the adjustments. For example, he wonders how a property a block away or half a mile away from the Copper Road property could have superior locations worth thousands of dollars more.

C. Mr. Wold incorrectly categorized the state of the house (lack of siding, lack of complete gutter system, incomplete trim) as an item of functional utility. These are physical deficiencies. He also stated that the condition of the house was equal to the comparables, which it was not.

D. Mr. Wold's adjustment of $3,380 for the unfinished basement is too precise. Such a level of accuracy is not used in residential appraisals and "is discouraged by most of the professional organizations."[198]

E. Mr. Wold notes in one place that the residence has 4 baths and elsewhere that it has 3.5 baths, and the reviewer cannot determine which is accurate.

F. The lack of proper comparables (other than #4) "results in an appraisal which does not appear to fairly represent the value of the property and which is misleading."[199]

G. Turning to the update to the appraisal report:

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[195] WER at p. 212.
[196] WER at p. 212.
[197] WER at p. 212.
[198] WER at p. 213.
[199] WER at p. 213.

1. He doubts the defect exists, at least not to the extent described by Mr. Wold, based on evidence from the court case – in particular the testimony of Scott Menzies (civil engineer) who testified that settling is common in Ketchikan and he did not view any settling in this house as being serious – he indicated it was barely perceptible and that the usual indications of settling (i.e. cracks) were not present. And the evidence that the pilings and subfloor were noted to be in good shape.

2. He thinks the property owner obtained a bid to fix a problem that ordinarily would not be addressed by owners of homes in this price range, and then attempted to use the bid to pressure the appraiser to lower the value of the property. "This is not uncommon at all . . . It is up to the appraiser to understand the nature of the claim and to make an independent assessment."[200]

   Based on Mr. Menzies' testimony, he believes that Mr. Wold overstated the decline in value and did so without adequate knowledge or sufficient investigation.

3. "It appears that he has been unduly influenced by the property owner in a volatile situation in which the appraiser is expected to see bias from all parties, but must be able to analyze these fairly to both sides."[201]

H. Mr. Wold violated USPAP SR 1-1(a),(b), and (c), and SR 2-1(a),(b).

Mr. Ferrara sent Ms. Mandel a letter on December 22, 2004 in which he advised that: Mr. Wold's Ellis Island property **did** contain an adequate explanation for why the income approach was not used; but with respect to Mr. Wold's treatment of the market approach:

> . . . the market approach is much more far reaching than his explanation that 'no luxury residences on islands' were found as a reason for excluding the approach. It is common knowledge among appraisers that extremely high end custom properties in Alaska typically suffer external obsolescence, and limiting the search for high end sales to those on island does not solve the primary concern of my comments which was to prove or disprove the presence of or lack of external

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[200] WER at p. 213.
[201] WER at p. 214.

obsolescence on high end homes in Ketchikan. Use of other high end homes would show if there is a market for such homes and if they sell near their cost of construction on the resale market. Therefore, while the scope of the report does indicate this reason for not using the approach, **I do not believe that it is a valid reason** as it so limited the scope of the data to be found that it does solve an important component of the valuation issue.[202]

**k. Accusation**

The Division filed an Accusation against Mr. Wold with the Board on July 14, 2004.[203] The Petitioner was the Director of the Division (Mr. Urion) who alleged:

1. Mr. Wold has been a certified general real estate appraiser in Alaska since 1991. (¶ 1)

2. Mr. Wold prepared the Copper Road property and Entwit float property appraisals for use with respect to John (Leif) Entwit's pending divorce case (1KE-97-136 CI). (¶ 2-4)

3. Ms. Entwit's attorney retained Julie Dineen to review Mr. Wold's appraisals. She concluded that the Entwit Float property appraisal was unreliable because: Mr. Wold's calculations did not support his finding that operating the property as a marina was its highest and best use; he failed to adequately discuss the differences between the subject property and the comparables that were used to value the land component of the property; and, he undervalued the tidelands by failing to consider comparable sale or lease data. She also concluded he violated USPAP SR 1-1(a)(b)(c) and 1-3(b). (¶ 5)

4. Judge Jahnke found (9/17/98 decision) in the Entwit divorce case that: Mr. Wold had taken on the role of advocate for Mr. Entwit's positions; a marina is not the highest and best use of the property in its current condition (physical and management); and Mr. Wold either undervalued the improvements, overvalued the land, or a marina is not the highest and best use, or a combination of the three exists. (¶ 6)

   Judge Jahnke also found that Mr. Wold made a double deduction for the poor condition of the marina – for physical deterioration and functional obsolescence. (¶ 7)

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[202] WER at pp. 227-28. It appears that a "not" was omitted between "does" and "solve" in the second to last line in the above-quoted portion of the letter.
[203] WER at pp. 216-25.

Judge Jahnke found that the marina property had a total value of $240,293 and rejected Mr. Wold's finding that partial interests command a lower value – finding that the value of Mr. Entwit's 1/3 interest was 1/3 of the estimated total value of the property. (¶ 8-9)

Judge Jahnke found that Mr. Wold had double counted certain deficiencies with respect to the Copper Road property and rejected Mr. Wold's conclusion that substantial settling had occurred. Judge Jahnke valued the property at $132,280. (¶ 9-10)

5. Ms. Dineen filed a complaint with the Division on June 19, 1998 regarding Mr. Wold's Entwit Float appraisal. The Division retained Mr. Ferrara to review Mr. Wold's Copper Road and Entwit Float appraisals. He found that Mr. Wold had committed USPAP violations with respect to the Entwit Float appraisal because: Mr. Wold's analysis did not support the conclusion that the present marina use was the highest and best use of the property; the cost approach analysis was not adequately completed or supported; and, the data relied on to value the land and site improvements was not complete and therefore likely to be incorrect. (¶ 11-14)

6. Mr. Wold's above-described conduct did not comply with USPAP and violated AS 08.87.200(a)(1) and AS 08.87.200(3), which is grounds for discipline per AS 09.87.210(1). (¶15)

7. Mr. Ferrara found that Mr. Wold had committed USPAP violations with respect to the Copper Road appraisal because: the comparables used were not appropriate; Mr. Wold's adjustments for the comparables were large and questionable; and, Mr. Wold improperly relied on an [Mr. Dima's] estimate that found sagging floors but did not state it was caused by settling, which resulted in his overstating a decline in value without adequate knowledge of the same or related investigation. (¶17-19)

8. Mr. Wold's above-described conduct did not comply with USPAP and violated AS 08.87.200(a)(1) and AS 08.87.200(3), which is grounds for discipline per AS 09.87.210(1). (¶ 20) (Count II)

9. Mr. Wold prepared the 2002 Ellis Island property appraisal for Mr. Spears' counsel for litigation purposes concerning the diminution in value of an easement in case number 1KE-02-63 CI. Litigation in 1999 had given Mr. Spears a fixed, permanent, non-exclusive easement for free and unimpeded residential and commercial ingress and egress. (¶ 22-24)

10. The opposing parties retained an appraiser, Vince Croan, to review Mr. Wold's appraisal. He concluded that: Mr. Wold's appraisal was not complete because he did not utilize the sales comparison approach for the property as improved; Mr. Wold's blanket statement that there were no

comparables was inadequate; Mr. Wold had actually done a limited scope appraisal in a self-contained format; the foregoing resulted in USPAP violations; he could not ascertain whether access was partially or totally denied and Mr. Wold should have differentiated between the two; and, Mr. Wold's assumption that there would be future related litigation was "extraordinary", and his comparables did not support the conclusion that litigation, in and of itself, created stigma/blight. (¶25-27)

11. The Division retained Mr. Ferrara to review Mr. Wold's Ellis Island property appraisal. Mr. Ferrara found that Mr. Wold had violated USPAP because: it was not a complete appraisal in a self-contained format as there was no market or income approach; the cost approach was not adequately completed and supported; the data in the report did not support Mr. Wold's estimate of the market diminution in value – Mr. Wold did not relate how the improvements or their use were affected by the encroachment; Mr. Wold made assumptions concerning the impact of potential litigation even though the legal issues had been finally determined and he did not fully discuss the related court actions and results; and, the comparable sales used involved significantly different situations. (¶ 28-31)

12. Mr. Wold's above-described conduct did not comply with USPAP and violated AS 08.87.200(a)(1) and AS 08.87.200(3), which is grounds for discipline per AS 09.87.210(1). (¶ 32) (Count III)

Mr. Wold filed a Notice of Defense on August 2, 2004. He requested an adjudication hearing.[204]

### l. Dr. Kilpatrick's Interim Memorandum

Mr. Wold 's counsel requested that Dr. John A. Kilpatrick review and comment on Mr. Wold's three appraisals, Mr. Coan's review of the Ellis Island property appraisal, and Mr. Ferrara's review of the three appraisals.[205]

Dr. Kilpatrick is the author or co-author of several articles published in professional appraisal publications.[206] He has served on the Publications Board of the Appraisal

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[204] WER at p. 226.

[205] WER at p. 229; Pleadings Vol. 1 at pp. 61; WER at pp. 230, 232. Dr. Kilpatrick's letter reflects that he has a doctorate and is a certified National USPAP Instructor.

Institute.[207] He is a nationally certified Appraisal Standards Instructor.[208] He has given several lectures and participated in several panel discussions on a variety of appraisal subjects.[209] He has provided expert testimony over forty five times.[210]

Dr. Kilpatrick submitted an interim memorandum to Mr. Wold's counsel on December 3, 2004.[211] His preliminary observations included:

1. Mr. Wold has been criticized for using the cost approach in the Entwit Float property appraisal. "This criticism is disingenuous."[212] USPAP does not require the use of any particular approach. Per USPAP Standards Rule 1-4, an appraiser is not required to use the sales comparison approach if it is not applicable. It is not applicable to special purpose property with few or no comparables. A complete appraisal of such a property would not need to include the sales comparison approach. Special purpose properties frequently have few comparables. The cost approach is frequently the preferred approach for such properties.[213] Of note, the cost approach encompasses a sales comparison analysis in estimating land value. It is not uncommon that the land value is the main source of value for the property. He "cannot find any technical fault with Mr. Wold's omission of the sales comparison approach or his reliance on the Cost Approach, and would take issue with criticisms based on this."[214]

2. Mr. Wold's highest and best use analysis did not violate USPAP. The court's valuation findings were not consistent with valuation theory or economics.

3. He is "mystified"[215] why Mr. Wold is being criticized for including both physical and functional depreciation in his cost analysis. USPAP does not

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[206] WER at pp. 247-48, Pleadings Vol. 1 at p. 63; Pleadings Vol. 9 at pp. 2674-77. Topics include: valuing impaired properties, stigma, and ***Daubert***,

[207] Pleadings Vol. 1 at p. 62.

[208] Pleadings Vol. 1 at p. 61.

[209] Pleadings Vol. 9 at pp. 2677-79.

[210] Pleadings Vol. 9 at pp. 2681-86.

[211] Pleadings Vol. 1 at pp. 61-64.

[212] Pleadings Vol. 1 at p. 61.

[213] Pleadings Vol. 1 at p. 62 (Citing *The Appraisal of Real Estate* (12th ed.) – "The cost approach is particularly important when a lack of market activity limits the usefulness of the sales comparison approach . . .").

[214] Pleadings Vol. 1 at p. 62.

[215] Pleadings Vol. 1 at p. 63.

address functional depreciation. *The Appraisal of Real Estate* (12th ed.) "is clear in its delineation that these are two completely separate components of depreciation ('external', sometimes called 'economic', is a third) and should be analyzed and reported separately. Indeed the example used in the text, on page 413, is of the functional form used in Mr. Wold's appraisal report. Not only can we not find fault with Mr. Wold's analysis and presentation, we would call into question any appraisal review which did criticize this presentation."[216]

4. Mr. Coan's criticism of Mr. Wold's intentional and disclosed omission of the sales approach is misplaced. Mr. Wold's approach is consistent with the two pertinent USPAP provisions – SR 1-4(a) and Statement 7.

5. The "litigation stigma" issue is not an USPAP issue. It is an admissibility issue under *Daubert.*[217] Further, Mr. Coan's related conclusions are wrong. Mr. Coan is not an expert in this area. Mr. Coan cited no supporting authority. Partners in his business have published many of the seminal articles in this area. "We can state, quite emphatically, that Mr. Coan is simply wrong in his analysis and his critique of Mr. Wold."[218]

6. Ms. Dineen's review report appears to be the source of the court's mistaken highest and best use finding. Her opinions are wrong. And, were she right, would show that she had a different opinion of highest and best use – which does not show an USPAP violation. She improperly relied on information from Brian Granville of the Appraisal Institute as support for opinions. Mr. Granville did not perform an appraisal review. She "then goes on to critique Mr. Wold's land sale comparables. She arrives at different value opinions, but fails to substantiate her opinions with adequate appraisal analysis. As such, she is, herself, in clear violation of Standards Rules 3-2(c) and 3-3."[219]

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[216] Pleadings Vol. 1 at p. 63. (emphasis in original)

[217] He is the co-author of a related article published in 1999 in *Real Estate Issues.* Pleadings Vol. 1 at p. 63.

[218] Pleadings Vol. 1 at p. 64.

[219] Pleadings Vol. 1 at p. 64.

**m. Notice of Hearing**

The Board issued a Notice advising that the hearing on the Division's Accusation would occur in Ketchikan before David Stebing, Administrative Hearing Officer (AHO), on February 8, 2005.[220]

**n. Pre-Hearing Motions**

Mr. Wold moved to bifurcate the proceeding so there would be separate hearings on each of the three appraisals at issue.[221] The Division opposed the motion.[222] AHO Stebing denied the motion.[223]

The parties stipulated to continue the hearing. AHO Stebing declined to adopt the stipulation.[224]

The parties filed a Notice of Settlement on January 26, 2005.[225] The Board rejected the proposed Memorandum of Agreement (MOA) on February 2, 2005.[226]

The hearing was rescheduled for March 2005. The parties filed a (second) Notice of Settlement on March 15, 2005. The hearing was continued. The Board discussed the MOA during meetings on April 7, 2005 and May 10, 2005. The Board rejected the MOA. Notice of the rejection was issued on May 24, 2005.[227]

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[220] Pleadings Vol. 1 at pp. 17-19.
[221] Pleadings Vol. 1 at pp. 30-36,49-52.
[222] Pleadings Vol. 1 at pp. 37-39.
[223] Pleadings Vol. 1 at pp. 53-54.
[224] Pleadings Vol. 1 at pp. 65-67.
[225] Pleadings Vol. 1 at p. 68.
[226] Pleadings Vol. 1 at pp. 72-73.
[227] Pleadings Vol. 1 at pp. 74-78.

**o. Second Notice of Hearing**

AHO Stebing issued a Second Notice of Hearing on July 7, 2005. He advised therein that the hearing had been scheduled for December 7, 2005 in Ketchikan.[228]

**p. Prehearing Motions**

The Division moved that its witnesses be permitted to testify via video link. Mr. Wold opposed the motion AHO Stebing granted the motion.[229]

Mr. Wold filed motions in limine to exclude Ms. Dineen's appraisal review and related testimony and to exclude evidence of Judge Jahnke's opinion in the Entwit v. Entwit divorce case (1KE-97-136 CI). The Division opposed the motions.[230]

Mr. Wold filed a motion for permission to testify by telephone and to have Tracy Heib testify by telephone.[231]

The Division filed a motion in limine – seeking admission of the 1998, 2002, and 2004 editions of Standards 1 and 2 of USPAP. Mr. Wold opposed the motion and filed a cross-motion to dismiss the USPAP violation allegations.[232] He argued that these editions had not been adopted by the Board or the legislature. He argued that no specific USPAP edition had been adopted. So, he argued, USPAP is not applicable.

AHO Stebing addressed the motions in limine in a November 28, 2005 Order.[233] He denied Mr. Wold's motions. With respect to USPAP, he found that the editions in effect during, before, and after the alleged violations are admissible under AS 44.62.460(d). He noted

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[228] Pleadings Vol. 1 at pp. 80-83.
[229] Pleadings Vol. 1 at pp. 103-14, 135-37; 154.
[230] Pleadings Vol. 1 at pp. 121-30; 145-50; 170-92.
[231] Pleadings Vol. 1 at pp. 138-39.
[232] Pleadings Vol. 1 at pp. 151-55; 217-232.
[233] Pleadings Vol. 1 at pp. 233-34.

that the "evidence at the hearing may address the extent, if any, that USPAP standards apply in this case."[234]

Mr. Wold filed a Motion for Reconsideration and Request for Continuance Pending Interlocutory appeal on November 29, 2005.[235] The motion addressed AHO Stebing's decisions on the motions in limine. The Division opposed the motion.[236] AHO Stebing issued an Order Denying Motion for Reconsideration and Continuance on December 5, 2005.[237] He ruled that: the administrative proceeding is not the proper place to raise legal issues concerning the applicability of USPAP; Ms. Dineen is not an expert witness and the provisions of Alaska Evidence Rules 702-03 do not apply per AS 44.62.460(d); and, her report can be considered at the hearing, even if she does not testify – noting that Mr. Wold had the opportunity to depose her and chose not to.

**q. Dr. Kilpatrick's Report**

Dr. Kilpatrick's October 24, 2005 report[238] included the following:

1. He inspected the properties at issue. He inspected the comparables. He reviewed the above-referenced reports. He reviewed the transcripts of Mr. Ferrara's and Mr. Coan's depositions. He reviewed documents from the underlying litigation. He met with Mr. Wold to discuss Mr. Wold's scope of work. He reviewed pertinent literature on methodology and USPAP. He reviewed the pertinent USPAP provisions on Appraisal Review.

2. He was tasked with discussing whether Mr. Wold's appraisals violated USPAP as alleged by Mr. Ferrara and Mr. Coan.

3. With regards to "misleading"

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[234] Pleadings Vol. 1 at pp. 234.
[235] Pleadings Vol. 1 at pp. 235-39.
[236] Pleadings Vol. 1 at pp. 241-44.
[237] Pleadings Vol. 1 at pp. 245-48.
[238] WER at pp. 229-48.

A. The word is not defined in USPAP, the *Dictionary of Real Estate Appraisal*, or *The Appraisal of Real Estate, 12th ed.*, and the word does not appear in the title of any articles over the preceding 10 years in *The Appraisal Journal*.

B. "Misleading" is used in two places in USPAP. Both concern the communication of assignment results and not the "actual analysis function."[239]

C. So only a report can be "misleading," not the analysis that results in the report. A faulty analysis can result in USPAP violations, but not for being "misleading."

D. Recent literature (Svelka (2004)) confirm that it is the reporting function that can be "misleading" and not the analytical function.

E. Mr. Ferrara frequently applies "misleading" to analytical functions. Such an approach is not supported in USPAP or by peer-reviewed literature. With respect to analytical functions – USPAP is "non-specific about methodological choices. The appraiser is granted a wide latitude to choose analytical methods, to apply weightings to approaches in the reconciliation, to make determinations as to applicability of approaches, and other find [sic] market-appropriate answers to other methodological questions. To quote Danny Wiley, former Chair of the Appraisal Standards Board, in his lectures at the USPAP Instructor's Course, 'As long as you thoroughly explain what you've done, it can't be misleading.'"[240]

4. With regards to the Copper Road property appraisal:

A. Mr. Ferrara correctly notes that the size of the adjustments Mr. Wold used exceed the USPAP norms for federal lending agencies. But the appraisal was not done for mortgage finance purposes so those standards do not apply.

B. Mr. Ferrara did not inspect the subject property, the neighborhood, or the comparables nor did he discuss Mr. Wold's scope of work with Mr. Wold.

C. If Mr. Ferrara had done so "he would have understood the comparable data challenge Wold faced."[241] The poor condition of

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[239] WER at p. 232.
[240] WER at p. 233. (emphasis added in report)
[241] WER at p. 234.

the residence required him to make several significant market driven adjustments. He does not disagree with the adjustments Mr. Wold made.

It is possible that Mr. Wold could have developed better comparables, but that would not have changed the end result of the appraisal. And the report could not be "misleading" as Mr. Ferrara does not disagree with Mr. Wold's opinion of the value of the property.

D. Mr. Wold's analysis of the situation presented in Mr. Dima's estimate is "consistent with the published appraisal literature and the lack of methodological citation is not uncommon in residential appraisals."[242] Mr. Wold did not cite the literature but he is not required to do so.

Mr. Ferrara's assertion concerning appraiser competency requirements is not supported by USPAP or the peer-reviewed literature, or in appraisal literature in general. Examples are given. "The meaning of this is quite clear - Wold's reliance on an outside expert for his construction defect estimate is valid and supported by USPAP and his peers in the industry. Ferrara's allegation is not only unsupported, it is counter to the guidance of the ASB."[243]

E. Mr. Ferrara's other critiques (i.e. the references to 3.5 and 4 baths) are minor and he has not shown that they have any "economically meaningful impact on the value estimate."[244]

F. It is not clear that the large adjustments Mr. Wold used made his approach inapplicable. His report would have been credible if he had left them out and explained why he was invoking the USPAP departure provision, and identified his analysis as being limited. "However, since Wold was forthcoming on his scope of work, explained what he did, and hid nothing about his analysis in his report, it is patently clear that an allegation of ***misleading*** with respect to this report is both patently false and mischaracterizes the use of the term in the appraisal profession."[245]

5. With regard to the Entwit Float property appraisal:

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[242] WER at p. 234.
[243] WER at p. 235.
[244] WER at p. 235.
[245] WER at p. 235. (emphasis in original)

A. Mr. Ferrara did not inspect the property.

B. The "pivotal characteristic"[246] of the property is the proportionately large section of submerged tidelands in comparison to the upland portion of the property. If Mr. Ferrara had inspected the property he also would have concluded the extensive tidelands – which are relatively unique to the property among comparable sites in Ketchikan – he would have arrived at the inexorable conclusion that the highest and best use of the site, if unimproved, is for a marina. However, the constraining feature of the site is the relative lack of upland land as well as ingress and egress."[247]

C. Mr. Wold's appraisal is not "misleading" in terms of the reporting function.

D. Mr. Ferrara's questions about the appraisal actually focus on the analytical function. He questions Mr. Wold's not using the sales comparison approach. The sales comparison approach was not required under the USPAP Departure Rule because of the unique factors and conditions of the property (evident from an inspection) and, with respect to marinas, the literature (which Mr. Ferrara did not address) states that the income capitalization approach is preferred for marinas (citing to Simpson (1998)) and the Appraisal Institute).[248] "Had appropriate data been available, Wold would have been correct to include a sales comparison approach but the use of the other two approaches in its place neither renders the appraisal less than credible nor renders the appraisal as limited under the Departure Provision. Either way, we can find nothing misleading about the way his analysis is presented."[249]

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[246] WER at p. 235.

[247] WER at p. 236.

[248] Dr. Kilpatrick, in his cover letter, also referenced J. Mark Stroud's A Practical Approach to Marina Valuation. Pleadings Vol. 9 at p. 2509. Mr. Stroud stated therein that: it is very important that the appraiser understand the site (i.e. size, shape, depth, site location, ingress/egress); analyzing existing improvements is important (the analysis should include a review from both the physical and functional perspective – he noted narrow boat slip size as an example of a functional inadequacy); the highest and best use of vacant waterfront land is often misleading (artificially high values); it is difficult to apply the cost approach, due in part to the difficulty in determining depreciation; and, it is difficult to use the sales comparison approach as no two marinas are alike. ***Id.*** at pp. 2538-53.

[249] WER at p. 237.

E. Mr. Ferrara faults Mr. Wold's application of the cost and income capitalization approaches. Mr. Ferrara fails to cite any salient marina related literature in his review. His (Mr. Kilpatrick's) review is based on the "current 'state of the art' in the appraisal profession" – "Simpson (1998), Dore (2001), and Shaw (2003). All of those are official, peer-reviewed publications of the Appraisal Institute, of which Ferrara is a member. We have reviewed Wold's work in light of Simpson, Dore, and Shaw and found nothing which would suggest that Wold's appraisal analysis is less than credible or was conducted in a manner different from what knowledgeable peers in the industry would have done. Hence, Ferrara's critique is without either basis or merit."[250]

F. Mr. Ferrara cites no authority for his conclusion that a marina cannot be the highest and best use of the property because the income is not sufficient to support the value of the land. "This is patently false and obviously false. Appraisers and the appraisal literature are replete with examples of highest and best use determinations which do not generate sufficient income to support the land. Agricultural, preservation/conservation, forestry, mining, recreational, and residential are all uses which do not generate income sufficient to support the value of the underlying land."[251] For example, Chapter 12 of The Appraisal of Real Estate, 12th edition – supports the conclusion that deferred maintenance needs to be considered and if curing deferred maintenance "results in a use which is maximally productive, then that use is the Highest and Best one, even if that used does not provide a positive return to the property under the current scenario."[252] The text also discusses situations in which the property is so unique that only one use is possible – in which case that one use is the highest and best use – and that is the situation here.

"Part of Ferrara's problem stems from his failure to inspect the site and part of it stems from his unfamiliarity with the salient literature on marina valuation, evidenced by his inability to cite, even in his deposition, any peer-reviewed literature on the subject."[253]

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[250] WER at p. 238. Dr. Kilpatrick also cited an article by Rudy Robinson and Scott Lucas entitled *Appraising Special-Purpose Industrial Facilities for Ad Valorem Purposes* in which the authors stated that the cost approach, though usually the least applicable approach for older properties of any type, could be used when appraising viable special-purpose industrial properties. Pleadings Vol. 9 at p. 2607.

[251] WER at p. 238.

[252] WER at p. 238.

[253] WER at p. 238.

G. Mr. Wold's analysis and report probably could be improved on, but the same could be said of every appraisal analysis and report. But the issue is whether it complies with USPAP. In his opinion it does.

6. With respect to the Ellis Island property appraisal:

A. Neither Mr. Coan nor Mr. Ferrara inspected the property. Neither appears to be very familiar with the property of this type of property.

B. He has concluded that the Ellis Island property is "trophy property" under the Appraisal Institute definition based on his inspection, his review of journal articles by Mundy in 2002 and 2003, and his discussions with Mundy.[254]

C. Mr. Wold did not use the sales comparison approach because he found no comparable sales data in the Ketchikan market. USPAP does not require that all three valuation approaches be used. Rather SR 1-4 states that all three are to be used if each is applicable. USPAP Statement 7 provides that if an approach is not applicable, "then the appraiser has *no* disclosure requirements, and the analysis is complete."[255]

D. Mr. Coan cites no authority for his conclusion that Mr. Wold's not using the sales comparison approach undermined the credibility of his appraisal analysis. The 2001 Sitka sale he mentioned as a comparable was not a comparable – something he would have realized if he had inspected the Ellis Island property.

E. USPAP Rule 2 does not require that a self-contained report include a sales comparison approach. The appraiser is only required to describe the scope of work. Mr. Wold could have determined that the sales comparison approach was applicable, and not used it, and the appraisal would still be "self-contained" and valid. Mr. Wold would have been required to invoke the Departure Rule [SR 1-4] and disclose that fact. "The Appraisal Standards Board has determined that the departure provision and the disclosure thereof

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[254] Bill Mundy, *Defining a Trophy Property*. Mr. Mundy wrote that the considerations are location (i.e. waterfront), quality, price and uniqueness. He also noted that such properties are frequently in high demand. Pleadings Vol. 9 at pp. 2599-601. Mr. Mundy also authored *Trophy Property Valuation: A Ranch Case Study*. Pleadings Vol. 9 at pp. 2618-2624.

[255] WER at p. 239. (emphasis added in report)

are confusing, and have dropped these requirements effective July 1, 2006."[256]

F. "Coan confuses Rule 1-1 and Rule 1-4. Only Rule 1-4 is specific to approaches to value. Coan's invocation of Rule 1-4 is highly disingenuous, given the specificity of Rule 1-4.

However, it is not apparent that these rules affected Wold's work or his report, since Wold determines that the sales comparison approach was not only 'not applicable' but would have been misleading and rendered the report less than credible. While Ferrara argues the contrary, we're not convinced by Ferrara's argument, and even less convinced as to the importance of the matter. In other words, even if Ferrara and Coan were right, all Wold would have had to do is disclose the departure provision and report his findings in the very same way he otherwise did."[257]

G. **He agrees with Mr. Coan that a blanket statement that sales were not available is inadequate.** But Mr. Wold's "determination was consistent both with Rule 1-4 and Statement 7. However, does Wold's lack of commentary render his analysis less than credible? Neither Coan nor Ferrara build a compelling case for that."[258]

Mr. Coan apparently concurred in his deposition with Mr. Wold's use of the cost approach.

Mr. Ferrara argued that Mr. Wold should not have used the cost approach because if there are no comparables the property must suffer from external depreciation for which the cost approach is inadequate. Mr. Ferrara provides no support. *The Appraisal of Real Estate* provides that this would occur only if the property had a diminution in value due to its proximity to lower-valued property. This situation is not apparent here and Mr. Wold did not contend it was.

H. Mr. Coan and Mr. Ferrara question whether property that is the subject of "contentious, long-term litigation over an easement, could suffer a stigma damage."[259] Mr. Wold properly cited applicable authority (i.e., Bell's (1999) text) and the Appraisal

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[256] WER at p. 240.
[257] WER at p. 240.
[258] WER at p. 240.
[259] WER at p. 240.

Institute course. "Notably, much of the seminal appraisal literature on stigma can be attributed to members of my firm, and the current thinking in the field is reflected in Kilpatrick, Troupe, Mundy and Spiess (2005). It is true that experts in the stigma arena do not always agree on these matters . . . However, neither Coan nor Ferrara are able to cite any peer-reviewed authors at all to support their contentions, while Bell's citation by Wold as well as my own work (not cited by Wold) would support both his litigation stigma contention as well as his methodology and findings."[260]

I. Mr. Coan's contention that it is not clear from Mr. Wold's report that all access was obstructed was then at the heart of the litigation between Mr. Coan's and Mr. Wold's clients. Mr. Wold's report was sufficient for the court to award the damages if it found that ingress/egress was inappropriately constrained.

J. Mr. Ferrara's contention that Mr. Wold violated USPAP SR 2-1(a)(b)(c) reflects that he is not familiar with the Rule. The focus of the Rule is on the "intended users". That is what is taught to all appraisers nationwide who take an USPAP course. Here the intended users were the court and the parties to the case. They would have had access to additional information. "In that situation, as Wold correctly anticipated, every aspect of his analysis would be presented and supplemented thoroughly as the case progressed. . . I am convinced that Wold's appraisal report fully complies with Standards Rule."[261]

7. There are several shortcomings in the work of Mr. Coan and Mr. Ferrara.

A. Mr. Ferrara was wrong when he stated that a self-contained report on the Ellis Island property would contain all three value approaches. There is no such thing as a "complete self-contained report." A "complete appraisal" is defined by the analytical content and not by the reporting content. Per USPAP SR 1-4, if an approach to value is not applicable it can be eliminated. Disclosure is required under USPAP 2-2 only if an applicable approach is omitted.

B. Mr. Ferrara's statement that it is well known that upper end properties in cities in Alaska rarely sell for the cost of construction and there is often external obsolescence that is greater than the physical depreciation reported by Mr. Wold demonstrates that he

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[260] WER at pp. 240-41.
[261] WER at p. 241.

crossed over the line into providing his own opinions on value. He was obligated to comply with USPAP SR 3-2(d) – which required that his report comply with the requirements for a Summary Appraisal Report. His report did not do so – it did not comply with the requirements of SR 2-2(b).

C. "Finally, we note that the contents of Ferrara's appraisal review certification violates the Certification Standards of Rules of the Appraisal Institute, specifically C.S.R. 1-1, 1-2, and 1-3.

D. Mr. Coan's criticizes Mr. Wold for using the actual sales price of the comparables. But Mr. Wold's approach is consistent with the literature (cited) on the subject.

E. Mr. Coan's statement that appraisers are required to form their own independent conclusions, based on market information is accurate, but properly applied methodology includes "both interviews or surveys of the market participants . . . and citations to authoritative sources. Coan's critique is not only without merit, it is extraordinarily disingenuous."[262]

**r. Mr. Bjorn-Roli's Report**

Per Bjorn-Roli, an Alaska certified appraiser and the Managing Director of Integrated Realty Resources, Inc. of Anchorage, submitted a Desk Review of Mr. Wold's Ellis Island property appraisal to Mr. Wold's attorney (Mr. Keene) on November 8, 2005.[263] Mr. Bjorn-Roli. The purpose of the assignment was to determine if Mr. Wold's appraisal complied with USPAP. The intended use was for Mr. Wold's disciplinary proceeding.

Mr. Bjorn-Roli found that:

1. Mr. Wold's appraisal complies with USPAP Standard I. But there are some items that merit comment. The improvements are relatively new, so depreciation is not a major factor, but Mr. Wold did not provide support for his depreciation finding. He also did not make a line item deduction for external depreciation, and he did not include an allowance for developer's margin. Discussions with Mr. Wold reveal that external depreciation was considered and is implicitly reflected in the artificially

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[262] WER at p. 243.
[263] WER at pp. 249-64.

low replacement cost estimate. For clarity purposes, this probably should have been made explicit. "Overall, while not performed in the technically correct manner, the methodology utilized resulted in an appropriate estimate of depreciation and appears to be in compliance with USPAP."[264]

2. Mr. Wold did not use the sales comparison approach, which is usually used for residential properties. USPAP allows this if the approach is not applicable. Lack of comparables is sufficient to find lack of applicability under USPAP. A lack of comparables is a frequent challenge for appraisers in Alaska. There likely have been high end waterfront homes that have sold in the Ketchikan area during the past few years. Whether they are comparable "is a very subjective question where the individual appraiser's judgment should be heavily relied on. Intuitively, it is my judgment that an island property similar to the subject would sell or rent for a premium and that large adjustments would be required to non-island transactions."[265] Such an "island adjustment" would "be very subjective and would not add to the credibility or reliability of the appraisal."[266] So if no island comparables exist, Mr. Wold complied with USPAP Standard I.

3. Mr. Wold did not make a definitive finding as to the degree of impaired access. He probably should have done so. For example, stating that he was making an extraordinary assumption of total impairment. The appraisal does imply that access was totally blocked. Mr. Wold's methodology is based upon 100% impaired access. If there was a total blockage of access then his "methodology is very appropriate, reasonable and well supported and complies with Standard I of USPAP."[267] If it was not, then "the methodology is inappropriate and even arguably misleading and does not comply with Standard I of USPAP."[268]

4. He agrees with Mr. Wold's detrimental condition and stigma approach to the litigation situation. This approach is "well supported by research and regularly performed within the appraisal community. The degree of economic damages is highly dependent on the type of ongoing litigation and the risk to a prospective buyer should an unfavorable outcome be obtained."[269]

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[264] WER at p. 251.
[265] WER at p. 252.
[266] WER at p. 252.
[267] WER at p. 252.
[268] WER at p. 252. ***See also,*** WER at pp. 253-54.
[269] WER at p. 253.

Appraisers could differ on whether the economic damages were the result of external depreciation or detrimental conditions/stigma. Either approach would comply with USPAP given the available data and the subjectivity of the analysis.

"Most appraisals come down to the judgment of the appraiser and it is my opinion it is entirely professional in conduct for an appraiser to analyze a subjective set of data and make a conclusion based on their own judgment and experience. Ultimately, it is in the public's interest that the opposing opinions be argued in front of a judge or jury and in this respect the appraiser served both the clients and publics interest."[270]

5. The report complies with USPAP Standard II. All of the sections contain sufficient data and analysis, noting the prior discussion about depreciation and degree of impaired access. And with respect to excluding the actual reproduction costs – Mr. Wold advised that he provided that information in a confidential manner to the owner to avoid having the information available to the assessor's office. This is an acceptable approach, though notation of the same should have been included in the appraisal.

6. "As a residential appraisal report being used for the purposes of litigation it is not surprising that the appraiser was brief in certain areas. To varying degrees this is typical of almost all appraisals that are written for prospective litigation. If this were a commercial property the scope of work performed would fall short of USPAP compliance. As a residential property, however, the scope of work performed is generally consistent with the quality and depth of work performed by other residential appraisers within Alaska. In certain areas the quality is superior while in others it is lower. While I disagree with certain aspects of the appraisal, assuming that impaired access constituted a total or near total loss of vehicular access, based on the scope of work performed in my review. I do not believe it is misleading, fraudulent or unprofessional. Furthermore, I believe that when viewed in whole the appraisal is USPAP compliant."[271]

### s. Mr. Coan's Deposition

Mr. Coan was deposed on November 22, 2005.[272] His testimony included:

1. It is his opinion that Mr. Wold's cost approach in the Ellis Island appraisal did not violate USPAP. He and Mr. Ferrara disagree about that.[273]

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[270] WER at p. 253.
[271] WER at p. 255.
[272] Pleadings Vol. 9 at pp. 2688-2709.

2. An appraiser performing an appraisal and an appraisal review is ethically obligated to maintain a related work file for five years.[274]

3. He is not familiar with "a lot of the material that's included in [Dr. Kilpatrick's] review." Dr. Kilpatrick's report is very well written and there is nothing in it that he strongly objects to (other than a personal reference to himself) – "It appears to me that our disagreements probably hinge around the actual problems in this case: Was access blocked or not?"[275]

4. He understood from his client that vehicular access was never blocked. He did nothing to verify what his client told him.[276] He did not have copies of the pertinent court documents (i.e. 1999 Judgment, 2002 preliminary injunction, transcript of the May 6, 2002 hearing, the pictures of the "road closed" sign).[277]

5. The methodology Mr. Wold used to determine loss of use was correct if the loss of use was a total impairment.[278] It was implicit in Mr. Wold's formula that he assumed a 100% diminution but he did not explicitly state as much.[279] Mr. Wold stated p. 71 of his appraisal that there may have been access at times but there was disruption of use and loss of quiet enjoyment – under that assumption Mr. Wold's methodology was correct. But "loss of quiet enjoyment" is a misleading generic term. He would have liked to have seen more explanation. He does not agree that an appraiser does not have to fully disclose in an appraisal what is already known by the intended user of the appraisal.[280]

6. He does not have the MAI designation. He has never been qualified or certified to be an USPAP standards instructor. He has never taught USPAP standards. This was the only appraisal he has ever done in a litigation-related matter. But he thinks that litigation appraisals are held to more stringent standards than other appraisals under Alaska's unwritten local practice. He did not apply such local standards in this case. He has never testified as an expert.[281]

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[273] Pleadings Vol. 9 at p. 2689.
[274] Pleadings Vol. 9 at pp. 2690-91.
[275] Pleadings Vol. 9 at p. 2691.
[276] Pleadings Vol. 9 at p. 2691.
[277] Pleadings Vol. 9 at pp. 2692-93.
[278] Pleadings Vol. 9 at pp. 2691-92.
[279] Pleadings Vol. 9 at p. 2693.
[280] Pleadings Vol. 9 at pp. 2694-
[281] Pleadings Vol. 9 at pp. 2694-95.

7. He is the sole appraiser in his business. He focuses on commercial properties and subdivision developments. He has been a appraiser in Alaska for 23 years. He used to be active in Southeast Alaska, but not since 2000. He had appraised three houses in Southeast Alaska over the past 10 years, two of which were for right-of-ways on Deermount Avenue in Ketchikan. Those home were of average quality.[282]

8. He has never done an appraisal that attempts to account for detrimental conditions such as stigma, litigation blight, neighborhood nuisance. He has appraised contaminated property but did so, with disclosure, as if no contamination was present.[283]

9. The detrimental condition methodology Mr. Wold used is "pretty standard in the industry." He objects to the comparable data Mr. Wold used – Mr. Wold's comparables suffered from different detrimental conditions.[284]

10. He spoke to Mr. Corak (Sitka) and Ms. Hoover (Ketchikan) and asked whether a sales comparison approach could be done if he was asked to appraise a deluxe waterfront residence in Southeast Alaska. They answered in the affirmative. He did not give them any information about the Ellis Island property. He did not tell them this was a luxury two million dollar property. He did not ask Mr. Corak the values of the properties in Sitka.[285]

11. **Appraisers frequently use comparable data that require large adjustments. There are no related published guidelines. A rule of thumb is that if the adjustment is over 50% you have a problem.**[286]

12. He learned about the Fuller house in Sitka from his wife. He knew it had been purchased and remodeled. He does not remember the sale price. It was a recent sale. He spoke with Mr. Fuller at a social setting and Mr. Fuller confirmed he had bought the property and was remodeling the improvements. He did not interview Mr. Fuller as an appraiser. He does not know whether or not the Fuller property would be relevant to the Ellis Island property.[287]

13. He agrees that Mr. Wold has more knowledge of and experience with residential properties in Southeast Alaska than he does. Mr. Wold has a

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[282] Pleadings Vol. 9 at pp. 2695-96.
[283] Pleadings Vol. 9 at p. 2696.
[284] Pleadings Vol. 9 at p. 2697.
[285] Pleadings Vol. 9 at pp. 2697-98.
[286] Pleadings Vol. 9 at p. 2698.
[287] Pleadings Vol. 9 at pp. 2698-99.

databank for residential properties. **He thinks that, if Mr. Wold looked and could not find comparables, Mr. Wold needed to provide more explanation of why there were no comparables than what was provided. But if the comparable data does not exist then Mr. Wold did not have to use the departure rule and the report is still a self-contained or complete report. Finding that there are no comparables does not violate USPAP.**[288]

14. He told his client that he had no prior experience appraising luxury homes in Southeast Alaska and that he had no prior experience with appraisals using the methodology Mr. Wold employed to determine the long-term diminution in value based on stigma and litigation blight. He did consult the book Mr. Wold had referenced in his appraisal. He did not take the related course. He did not do any additional research to familiarize himself with the concepts of stigma and litigation blight.[289]

**t. Division's Hearing Brief**

The Division filed its Hearing Brief on December 7, 2005.[290]

**u. Hearing Evidence**

The hearing occurred December 8 – 9, 2005.[291] The Division's first witness was Mr. Coan. His testimony included:

1. He has been an appraiser for 22 years. Most of his practice has been in the Mat-Su Valley. His office for the last 15 years has been in Wasilla. He has experience over the entire state. He has mostly appraised commercial industrial properties. He has appraised residential properties. "I quit appraising houses as a general matter about 15 years ago."[292] He has been certified in Alaska since it was required – 1992. He is an associate member of the Appraisal Institute. He served on the Board from 2000-03. He was the Chair.

2. He was hired by an attorney from Washington state to perform a technical or desk review of Mr. Wold's Ellis Island property appraisal. He was to determine if the results were supported and credible. His review consisted of reading Mr. Wold's appraisal from cover to cover. He does not think a

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[288] Pleadings Vol. 9 at pp. 2699-700.
[289] Pleadings Vol. 9 at p. 2700.
[290] Pleadings Vol. 1 at pp. 254-64.
[291] Pleadings Vol. 3 at pp. 742-964.
[292] Pleadings Vol. 3 at p. 753.

field review was necessary because he was not retained to form an opinion of value. He did not review any pleadings in the case. He may have seen Mr. Wold's deposition – he received a copy at some point.

3. He felt that Mr. Wold's appraisal violated USPAP and forwarded it, with a copy of his review, to the Division. USPAP is a "living or dynamic document . . . that's constantly changed."[293] Alaska requires that appraisers follow USPAP as a condition of their certification.

4. With regards to the Ellis Island easement, it had been reported to him that the court had defined an easement and that a pile of material had been stored on the easement for some period of time. He does not know how long.

5. "Yes, I felt - - I felt it was not complete enough explanation of why the sales comparison approach was not utilized through various means, it appeared to me that some sales of custom, or luxury residences in the area. They were not to the scope of value by which Mr. Wold's cost approach indicated. However, that is fairly common within the appraisal industry, particularly when your're dealing with unique properties, and I felt very strongly after doing cursory research, again I was not retained to appraise this property, that perhaps a sales comparison approach was possible to utilize, or at least should have been included as support for the cost approach."[294]

6. His cursory research consisted of contacting an appraiser in Southeast Alaska who he respects. He asked the appraiser to forward data to him on good quality waterfront residences in the area, if there were any. He did not tell the appraiser why he wanted the data and the appraiser did not ask.

   And, he stumbled upon "a comparable property, which may or may not have been right to use, that was an island residence in the Sitka area."[295]

7. Mr. Wold did not include any market research on luxury residences in Ketchikan. Mr. Coan was asked what Mr. Wold should have done. He responded that: "**You will find as many answers to this question as appraisers you query**."[296] He personally would have included data, even if it was not applicable and then take care of it in the reconciliation.

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[293] Pleadings Vol. 3 at p. 754.
[294] Pleadings Vol. 3 at p. 755.
[295] Pleadings Vol. 3 at p. 755.
[296] Pleadings Vol. 3 at p. 755.

8. Mr. Wold violated USPAP Standard 1 because: he did not provide a sufficient explanation of why he did not consider the sales comparison approach; his failure to include that approach was a substantial error; "and then its a domino effect, and that relates to careless and negligent manner . . ."[297]

The cost approach may have been appropriate and may have yielded the correct value. But the sales comparison approach was needed as a check. The approach may still be applicable even if there were no sales over $500,000. The ultimate sales price is not significant in his opinion or in his practice. He "would like to have seen some comparables."[298] He did not analyze the comparables that were sent to him. "Quite often, we have a large degree of adjustments in this state because the ideal comparable property rarely exists."[299] He does not think there would have been a violation if the market data of which he is aware was included in the report and then used as an explanation of why the sales comparison approach was not being used.

9. He believes Standards Rule 2-2 was also violated as part of the "domino effect" from SR 1-1.[300] The exclusion of the sales comparison approach was a departure which had to be disclosed. Standards Rule 2-2(a)(xi) was violated.

10. He did not understand from Mr. Wold's report whether total access was denied. The methodology implied that it was. But there was no explanation. "If in fact access was totally denied I have no problem with his methodology" in estimating the $40,000 value.[301] If access was not totally denied he should have stated that clearly and conspicuously and reported the appraisal was based on a hypothetical condition. Failure to do so would be an USPAP violation. He is not certain what Standards Rule would be violated. It is the requirement that extraordinary assumptions and hypothetical conditions have to be clearly explained.

11. He believes that Mr. Wold assumed there would be future litigation and that this was an extraordinary assumption. Litigation blight or stigma may exist. He cannot tell from Mr. Wold's comparables. The comparable properties suffered from various forms of stigma or blight but should not have been used as comparables because they involved different detriments – none had been impacted only by litigation. Mr. Wold probably did use

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[297] Pleadings Vol. 3 at p. 756.
[298] Pleadings Vol. 3 at p. 756.
[299] Pleadings Vol. 3 at p. 756.
[300] Pleadings Vol. 3 at p. 757.
[301] Pleadings Vol. 3 at p. 757.

the best set of market data from the area that was available to him. He is not certain that this a USPAP violation. If it is, the violation is of the competency provision of Standard 1 about not committing a series of errors that add up to a non-supported decision.

12. His testimony and report are based on the understanding that Mr. Wold had assumed that the litigation would continue.[302] He acknowledged that at p. 75 of the appraisal Mr. Wold had stated that legal resolution would not necessarily preclude future disputes since the easement had been contentious, and that the neighboring nuisance may continue after resolution of the litigation.

13. He has not taken any approved courses on impaired conditions. He had never done an appraisal that included an analysis dealing with detrimental conditions. He is aware that stigma is a detrimental condition that is separate from legal blight. Detrimental conditions are impacts on property perceived by buyers. He did obtain a copy of *The Valuation of Detrimental Conditions in Real Estate* by Bell after he reviewed Mr. Wold's appraisal. He agrees that a judicial decision does not necessarily avoid the stigma of future disputes. A contentious, abrasive, annoying neighbor can be detrimental to the value of a property. He agrees that buyers of trophy homes are sophisticated who would look at the neighborhood before buying and his offer to purchase would be impacted if he or she finds that the neighbor is a jerk who has to be corralled in occasionally by the court.

14. Mr. Wold did come up with some examples of how detrimental conditions in the Ketchikan area affected this property. Mr. Wold did not specifically refer to them as comparables. Mr. Wold, at p. 76 of his appraisal report, stated he could not find comparables. That is understandable. He agrees that different detrimental conditions (i.e. settling, contamination, zoning issues) could be used to show how detrimental conditions impact property. He is not certain Mr. Wold violated USPAP in this regard. Mr. Wold analyzed it fully and knew where he was going. He does have a problem with the way some of them were analyzed and anchored. Mr. Wold did cite to the Bell text at p. 44.

15. There are three approaches to valuing land under SR 1-4. They are to be employed when applicable. If an approach does not apply you don't use it. You still have a self-contained report and do not have to invoke the departure rule.

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[302] Pleadings Vol. 3 at p. 759. Mr. Coan is now being cross-examined.

16. Mr. Wold properly found comparable vacant land values for his cost approach. "There are very large adjustments but he was dealing with a hard property to appraise. I have no problems with that part of his analysis."[303] He does not have a problem with the way the cost approach was performed.

17. He thinks Mr. Wold should have used the sales comparison approach to the property as improved because he felt there were sales in Sitka that he should have known about and included. He received this sales information from Mr. Corak in Sitka. He did not tell Mr. Corak he was looking for comparables for a 2.1 million dollar home on an island in Ketchikan that had road access and public utilities. He did not tell Mr. Corak anything about the amenities. He just asked for information on luxury homes in Sitka, and elsewhere in Southeast. He also spoke with Trish Hoover, a Ketchikan appraiser. He learned at a cocktail party that a Mr. Fuller had purchased an island home in Sitka. When he did his report he had no documents on the Fuller house and he did not have definitive information on the purchase price. He received the information he requested from Corak after he had submitted his report. The information included the Fuller property. A $500,000 or $600,000 property probably could be used as a comparable for a $2,100,000 property if you focused on unit value that the improvements contributed to the transaction, and there may be a very large adjustment.

18. Mr. Wold would know the Sitka and Ketchikan market much better than he. He has never done the appraisal of a high end home in Ketchikan or Sitka. Mr. Wold could do comparable comparisons in his head and conclude that the comparables would not be reliable to provide an opinion of value.

19. When he did his review the case was scheduled for trial the following January. He did not inspect the Ellis Island property. He has no personal knowledge of the extent of any blockage. His client had told him that Mr. Spears had been deposed and testified that the access had not been totally denied. He did not reference this conversation in his review. He did not have the February 14, 2002 preliminary injunction when he did his report. He was not aware the judge had found that the road had been blocked and that road closed - detour signs had been posted on the access road. If he had known those things he would change his mind on this issue. He agrees that blockage 8 hours a day means the road is blocked. It does not have to be blocked 24/7.

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[303] Pleadings Vol. 3 at p. 762.

20. Mr. Wold does not state in his report that the road was blocked.[304] He does not state what market research he did regarding luxury residences. Mr. Wold "perhaps" should have considered the data he (Mr. Coan) found. There may be been other data. He believes Mr. Wold should have considered some data. He thinks Mr. Wold's report relates stigma and blight to there being future litigation.

21. He did **not** say in his report that Mr. Wold had to use the comparable he came up with or that he had to articulate why they were not applicable.[305]

The Division's next witness was Mr. Ferrara. His testimony included:

1. He has been an appraiser for over 40 years. His primary practice has been in Alaska. He has had his own firm in Anchorage since 1969. At one point there were 17 appraisers with his firm. He has done residential and commercial appraisals. He received certification #1 in Alaska. He was on the first Board. He served two terms. He was Chair from 1990-94. He is a designated member of the Appraisal Institute. He has the Senior Real Property Appraiser designation. He has the Member Appraisal Institute (MAI) designation since 1975. He was the National Chairman of the Communications Committee, subcommittees of which put out the 10th edition of *The Appraisal of Real Estate,* and other texts. He was an editor for several. *The Appraisal of Real Estate* is the definitive text on appraising. He taught residential and commercial appraiser classes at the University of Alaska (and its community college predecessor) for about 25 years, beginning in 1973 or 1974. The program was part of the Appraisal Institute's national program. He is a past member of the Appraisal Institute Executive Committee and as such reviewed appraisal reports as part of disciplinary proceedings. He has reviewed appraisals in other contexts too, though it has not been a major portion of his business.

2. He reviewed Mr. Wold's appraisal reports for USPAP compliance. He did not do a field review. Field reviews are not required. It is up to the client whether it is done or not. A field review may give you more insights about the property but would not give you any insights about the USPAP Standards. He was requested to the do the reviews by the Division. He was provided with copies of documents that included: the appraisals, Mr. Wold's appraisal files, Ms. Dineen's appraisal of the Entwit Float, a deposition from the Entwit divorce case, a court decision from that case, and the 1997 and 1998 USPAP Standards.

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[304] Pleadings Vol. 3 at p. 765. The Division is now on re-direct.
[305] Pleadings Vol. 3 at p. 766. Mr. Wold's re-cross examination.

3. **"[USPAP] Standards are put out every year. There are modifications, changes, sometimes minor. In some years, there were major ones."**[306]

4. The cost approach is usually used for relatively new properties with minor amounts of depreciation. It is not much use for a property where the improvements have virtually no value. It not of much value for older properties or properties with substantial amounts of depreciation. Lenders in Alaska for commercial loans do not require a cost approach because nobody believes it.

5. There are three types of depreciation: physical, functional, and external. A functional depreciation is something about the house that makes it so it does not function as a typical house or the way a typical buyer would want it to function. It is also called functional obsolescence. External obsolescence is something outside the property boundaries that affects its value.

6. It was proper for Mr. Wold to use the income approach to the Entwit Float property. There was nothing particularly wrong with his income approach methodology. This approach in this instance showed that the improvements had no value.

7. The current use cannot be the highest and best use if it produces less income than the value of the bare land. "Highest and best use is not as a marina for its highest and best use. It is an interim use as a marina unless something can be done to change that income stream."[307]

8. He does not believe the cost approach is a reliable method for valuing the marina property because of the type of marina and its age.

9. He felt that the depreciation was understated because the improvements were approaching the end of their economic lives. So he felt the use as a marina may be an interim use.

10. Mr. Wold violated SR 1-1(a) in his Entwit Marina appraisal because:

"Well, basically I don't believe that the treatment of the depreciation, the treatment of the highest and best use, all of those things are required by standards. They're very well, carefully laid out in both the text of the Institute and in any course that anyone has taken on it, and it just didn't appear that the techniques used here are sufficient. Use of a cost approach on a very substantially depreciated property of this type it would be very

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[306] Pleadings Vol. 3 at p. 769.
[307] Pleadings Vol. 3 at p. 772.

unusual. An income approach would be much more reliable. A market approach, at least to define some evidence of depreciation, would be beneficial on a property like that, though he indicated no sales were available. But again, it just didn't appear that there were sufficient methodology in here to produce a credible report used in his research."[308]

11. Mr. Wold violated SR 1-1(b) in his Entwit Marina appraisal because:

"Well, I believe that the techniques used and the conclusions, the description, the income approach, the treatment of the income stream, the lack or the representation of the depreciation is not as complete and as thorough as it should be, and its not convincing. Basically, when I finish reading this report, I can't tell you what the value of the property is. I just don't believe that its the value reported, but that's not important. It's just the fact that I don't believe these techniques have been used correctly to lead someone to a reasonable conclusion."[309]

12. Mr. Wold violated SR 1-1(c) in his Entwit Marina appraisal because:

"Yes. All of these are somewhat related in a way because I think the treatment of the use of the cost approach, the types of depreciation, the amount of depreciation, the land value and perhaps the treatment of the land, I think all of those and the income approach and the description of the highest and best use as being as improved rather than as an interim use for the property, knowing that the income is not supported, doesn't support the improvements at all, would indicate to me that the report is misleading . . . Well, misleading is that the reader or user of a report can be led to a conclusion other than what proof – what the intent, or the value or conclusion of the appraiser. And I think if when you look through a report, you've got to be able to follow through the step by step process, and you would normally reach the same conclusion, and if an appraiser delivers a report that does not lead someone on the step by step basis to a same conclusion, whether or not the value is correct or not, you can prepare a misleading report and have report which is not correct."[310]

13. Mr. Wold violated SR 1-3(a),(b) in his Entwit Marina appraisal because he did not correctly talk about what the property could be used for and he has not correctly identified the highest and best use. "The property obviously is not the highest and best use as improved for a marina if it cannot produce sufficient return to even give you the land value."[311]

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[308] Pleadings Vol. 3 at p. 774.
[309] Pleadings Vol. 3 at p. 774.
[310] Pleadings Vol. 3 at p. 774.
[311] Pleadings Vol. 3 at p. 775.

14. Mr. Wold violated SR 2-1(a),(b) in his Entwit Marina appraisal because "I think the report does not comply with those standards."[312]

15. The main question he had with the Copper Road property appraisal was that the comparable sales were all in a much higher price range, which resulted in Mr. Wold using large adjustments – 74%, 57%, 59%, and 78% gross and 27%, 45%, 33%, and 22% net. These homes were clearly superior but from the descriptions, some aspects of the Copper Road house were very similar to the comparables. Sometimes you have to make large adjustments if you are working with a very unusual property. The usual practice is to bracket the subject property using at least one comparable with a lower value. Lenders like Freddie Mac and Fannie Mae have certain standards and these adjustments would not be acceptable for most properties. A lender could possibly be convinced if these were the only comparables in town.

16. He said it was unreasonable to assume there were not sales in the Ketchikan market below $145,000. He did not do any market research. But he thinks it would be very unusual that this was the lowest priced property in town, and by such a margin.

17. Mr. Wold's adjustments are not adequately explained. He cannot understand how Mr. Wold can make adjustments of $10,000 for properties that are a block away or half a mile away "unless there is some particular detriment."[313] The adjustments may be reasonable. But he has not explained them sufficiently, particularly given the size of the adjustments. Mr. Wold used a typical adjustment page that is used in Alaska.

    You can have property in average condition that is poor quality and in average condition that is good quality.

    Design and appeal are fairly subjective adjustments. He questions why Mr. Wold had the same adjustment for the $220,000 and the $145,000 houses. These could be "perfectly reasonable" adjustments, they just aren't described. "It's just not a convincing presentation, or an explanation of the data, not whether its right or wrong or the value is correct or not, it just doesn't seem to be enough there to tell you whether this is reasonable or not."[314]

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[312] Pleadings Vol. 3 at p. 775.
[313] Pleadings Vol. 3 at p. 777.
[314] Pleadings Vol. 3 at p. 778.

18. The lack of siding is more a physical deficiency than functional obsolescence. The house is still functioning. "Not a big thing, but I think it's a category of discussion in the appraisal which is not – not correct in its analysis."[315] The siding and interior trim are physical items, not functional.

19. He thinks the $3,380 adjustment for the unfinished basement is too precise. Appraisal organizations teach that appraisers don't want to imply that they can value properties down to the smallest dollar. For example, the $80 should be rounded up to the nearest $100.

20. There is an adjustment discrepancy as there are references to 3 ½ and 4 bathrooms. "Again, that's not a standards violation."[316]

21. With respect to the contractor's letter, it just says sagging and not that settling has occurred. It is appropriate for an appraiser to adjust an appraisal when new information is learned. The process is the same as for the original appraisal – consider the change and determine its affect on market value.

His concern is that this appraisal was for a divorce case and in litigation parties provide appraisers with misleading information. It is up to the appraiser to sort out the biases.

"My thinking would be that if there were a $115,000 house that it would be unlikely that someone would really consider repairing a sagging floor unless it became a significant structural problem, which it didn't indicate that it was."[317] He is concerned that the new deduction was placed into the appraisal without sufficient information to see if that would be the market impact. Mr. Wold should have looked for comparables. Houses with sagging floors would be perfect but he could have looked at any houses with values below $100,000 to see if they had physical infirmities. He has had personal experiences with estimates in contractor's letters in litigation situations that turned out to be 2, 3, or 4 times too high. **He is not saying that this contractor was not reliable or that this estimate was not reasonable.**

22. Mr. Wold violated SR 1-1(a),(b),(c) in the Copper Road property appraisal because:

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[315] Pleadings Vol. 3 at p. 778.
[316] Pleadings Vol. 3 at p. 779.
[317] Pleadings Vol. 3 at p. 779.

"Well, basically, I believe that the – that the analysis of the property, the discussion was not complete enough about the various aspects of the property. I think that the physical attributes of the property were not **completely** outlined in this report. If they were as bad as was indicated in the adjustment process, they weren't outlined as completely as they should be. It's questionable whether the adjustments are warranted or not. I don't know, maybe they are. But the report is not complete enough for me to make that analysis. I believe that the data presented, being all upper-end comparables well above the subject property, is a very unusual process in typical appraisals done in the state. I think it could tend to be misleading, because all adjustments in one direction would tend to reduce results which are sometimes incorrect.

So therefore, I think the results in the report can be misleading. It just doesn't lead me to the conclusion that the appraiser has reached here in the property, so I think in some ways negligent. The updated letter deals with one adjustment or one bid from an individual on repairs, and it doesn't really get into showing comparable sales of properties which were impacted physically by various types of problems that may occur in a town like Ketchikan. And its just taking the old value and deducting this one estimate without any verification of the estimate, apparently, at the best I could tell."[318]

23. Mr. Wold violated SR 2-1(a) and (b) in his Copper Road property appraisal because:

"I believe that the informa - - the appraisal did not contain sufficient information to be properly understood and to determine if the value is correct or not. And so from that standpoint, if the data is not presented sufficiently in the report, the report can be misleading, and I believe it's a violation of standards to produce reports in that manner . . . Yes, both of them were in the same manner. I'm very concerned that no comparables were researched and no information, or if they were researched, they weren't discussed as to comparables below this."[319]

24. He reviewed Mr. Wold's Ellis Island property appraisal report, Mr. Coan's report, the court decision, exhibits relating to this property, the Complaint, the injunction, and Mr. Coan's deposition. He did a desk review of Mr. Wold's appraisal.

25. He is withdrawing his allegations regarding whether the appraisal is a complete and self-contained report because he had not had page 23 of the

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[318] Pleadings Vol. 3 at p. 780.
[319] Pleadings Vol. 3 at p. 780.

appraisal then, he has it now, and it contains Mr. Wold's explanation of why he did not use the sales comparison approach.

But he thinks Mr. Wold's explanation does not set forth a valid reason for deleting an approach. He does not think the property is technically an island since it is connected by a causeway. He thinks there are sales of luxury residences on waterfront properties in the areas of Ketchikan. He has seen many of them over the years. He knows they are there. He thinks Mr. Wold's focus on island properties is too narrow. Mr. Wold should have focused on competing properties. For example, a residence with extensive waterfront property would be very close – and then adjustments could be made. "But just saying that because no island luxury residences were found, I am deleting an approach seems a very weak method of deleting the primary approach to appraising residential properties."[320] He has never seen a residential property appraisal using just the cost approach before this one.

26. The lack of comparable sales data affects the cost approach because it is needed to determine depreciation. Mr. Wold could have looked at $500,000 to $800,000 homes for this purpose.

27. People in the market for homes are comparing what is available on the market. You can also do a cost approach if the home has more unusual aspects, custom features.

28. Mr. Wold made no deduction for functional obsolescence. The fact that he found no comparable sales and a two-year marketing period are indicative of the presence of some sort of obsolescence. It is a fact in Alaska that any upper-end house which is a few years old will sell for less than its cost of construction. People who can afford such houses can put in their own custom features. Mr. Wold provided no support for his statement that there was no functional obsolescence.

29. Mr. Wold's temporary interference evaluation is not supported by the data in the report. The report did not say that access was denied. If access was not denied then the adjustments for the loss are not supported by the data in the report. If the property was not able to be used then the adjustment is correct, but it is also misleading because it does not say the loss of use was for the time frame at issue.

30. He has significant disagreement with Mr. Wold's long-term diminution in value analysis. The court sided with the property owner. The owner instigated the litigation. He did not think it was reasonable to conclude

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[320] Pleadings Vol. 3 at p. 782.

there would be long-term blight or stigma. He has been involved in such litigation before and does not think the owner would have any problem getting title insurance given the judgments in the case. But it had been a problem for the owner while the litigation was ongoing. He thinks the other property situations Mr. Wold relied on were too dissimilar to be relevant. There was a basis for Mr. Wold to make a deduction on detrimental conditions causing stigma – based on the neighbors being difficult, litigious. But he would be surprised if the stigma would reach the level of the damages reported.

31. Mr. Wold violated SR 1-1(a),(b),(c) (2002 USPAP) in his Ellis Island property appraisal report because:

"Yeah, looking – let me clarify that, looking for luxury residences on islands as the only basis for comparable data, I think was an incorrect process, and by leaving out sales of other luxury residences on waterfront properties would – was an omission in that appraisal. I think that would lead to a misleading report. If there were no luxury residences on waterfront properties, that tells me that there is perhaps substantial depreciation on a property like this, if this is the only high-end property in Ketchikan.

So I believe that is gonna result in a misleading report, and I believe that the, are just omissions in discussing some of this and the other data that would have been present in that community."[321]

32. Mr. Wold did not violate SR 1-2(f).

33. Mr. Wold violated SR 1-2(g) (2002 USPAP) in his Ellis Island property appraisal report because:

"(g) is pretty much the same, extraordinary assumptions necessary, and I think in this particular case, there were some extraordinary assumptions made such as that the property would lose its utility and use over a period of time and that – I think that would be an extraordinary assumption based on the fact that there's no evidence submitted in the appraisal that in fact that occurred . . .

Well, it's [an extraordinary assumption] an assumption which is – relates to aspects of a property which is assumed to be the case, which may or may not be the case, but you're stating the property evaluation is based on something which has occurred or will occur. And he had made an assumption that this property had lost its use and utility for that period of

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[321] Pleadings Vol. 3 at pp. 785-86.

time and made an adjustment for that. And I think that's an extraordinary assumption considering that the comments about the easement did not indicate that the loss of use in that time frame had occurred. . .

The stigma issue was discussed pretty much at length in the report, so I don't believe that would be an extraordinary assumption because he did discuss that at length, and I think laid out the case for his making that adjustment."[322]

34. Mr. Wold violated SR 2-1(a),(b),(c) (2002 USPAP) in his Ellis Island property appraisal report because:

"It's gotta contain sufficient information to enable the intended users to understand the report properly and to clearly and accurately expose any extraordinary assumptions, hypothetical conditions, or limiting conditions that directly affects the property as impact on value. That's 2-1, 2-1(a),(b) & (c). . .

I believe all of those apply in this particular case. I don't believe the appraisal is clear. I think it is misleading, and its description of the property, I think, is misleading, and its application of some of the data that is not present and its analysis of the market, it's limiting the – limiting the analysis to only luxury residences on islands which would understandably be limited in number. And so therefore, not using a particular approach, the main approach in appraising residential properties, there's going to be something which is going to be certainly misleading and an omission which affects the property value and the extraordinary assumption, I think, relative to the loss of use of that property is one which is the easiest to identify, and that property was not described that way in the report as having lost its use entirely for that time frame, and yet, an adjustment was made for that particular total loss of use."[323]

35. Mr. Wold did not violate SR 2-2(a)(vii).

36. Mr. Wold did violate SR 2-2(a)(viii),(xi) (2002 USPAP) in his Ellis Island property appraisal report because:

"Q Now you've got – you're going to (viii) now, subsection . . .

A Subsection (viii), yep.

Q . . . where it says, State all assumptions . . .

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[322] Pleadings Vol. 3 at p. 786.
[323] Pleadings Vol. 3 at p. 786.

A Right

Q . . . hypothetical conditions, and limiting conditions that affect the analysis, opinions and conclusions.

A Right. And (xi), any departures from the specific requirements of Standard 1 are reason for excluding the usual evaluation approaches. I don't think anyone can deny that, on home appraisal in Alaska, a market approach is the usual approach, and by making an extraordinary assumption that because there were no luxury residences on islands, you're not gonna use a particular approach I think is a definite violation of something like that because that's not what you would normally do on a case like this. You would use other luxury residences and make appropriate adjustments."[324]

37. **The fact that Mr. Wold did not use the sales comparison approach and stated he was not going to do so was not an USPAP violation.**[325]

38. Mr. Wold knows the Ketchikan market better than he does. He was last in Ketchikan about 8-10 years ago for a review. He last did a residential appraisal in Ketchikan some 25 years ago.

39. The income approach is usually not relevant to residential appraisals. You can definitely have a self-contained report without including the income approach.

40. If there are no comparables you can still use the sales comparison approach.

41. **He did write in his report at p. 2 that Mr. Wold could have said that no two million dollar plus homes sell in Ketchikan, therefore the sales comparison approach was not used. That was before he had seen page 23 of Mr. Wold's appraisal where he explained why he was not using that approach. But Mr. Wold did not do that. He limited the scope to luxury homes on islands, which is different than saying no two million dollar homes in Ketchikan were found.** Any two million dollar home in Ketchikan would have been a comparable, whether on the water or not. Such homes would have the same buyers to some extent. If Mr. Wold had considered other luxury homes in Ketchikan and found that they were not comparable he should have said so. You would **not** use a $500,000 home as a comparable for a two million dollar home because of the large adjustments that would need to be made.

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[324] Pleadings Vol. 3 a p. 787.

[325] Pleadings Vol. 3 at p. 788. Mr. Ferrara is now being cross-examined.

Mr. Ferrara was asked what specific provision of USPAP Mr. Wold violated by stating that there were no two million dollar homes, luxury homes, on islands in Ketchikan. He responded:

"It says no omission will be put in an appraisal report that would be misleading, and by not searching the market for luxury homes, it's an omission, and it's misleading. If they're not present, he should have discussed specifically the sales and should have discussed an impact on value." They have to be discussed because "they have an effect on the depreciation of the property, and that would effect the cost approach . . ."[326]

Mr. Wold made a similar statement about no comparables in the Entwit Marina appraisal – but that is different, many more houses sell in Southeast Alaska each year than marinas. "Its common sense that when you work an appraisal, you know the properties which are unusual and specific like a marina is not going to have many sales. He indicated he searched, there were no sales, and he's not using the approach. . . That's not unusual. That's not unusual, and that's probably acceptable. On residences, it is not. Residences, the market approach is the primary approach."[327]

Mr. Wold may have been saying that there are no comparables in Ketchikan to a 2.1 million dollar trophy home but if that is the case then "that tells me this trophy home is going to sell at a substantial discount. They sell in a substantial discount in Anchorage . . . in Fairbanks, in Juneau, they sell in Kenai and Soldotna, at a substantial discount. Why wouldn't they sell at a substantial discount in Ketchikan? If they're not present, they sell at a discount."[328] He does not have to know the market to draw this conclusion.

42. His report reflects that **he did not use the 2002 USPAP edition** in reviewing the Ellis Island property appraisal – as the version of SR 1-1(c) he quoted is not in the 2002 edition. The 2002 version does not include "misleading."

43. He does not agree that under *The Appraisal of Real Estate* (12th ed.) the use of replacement rather than reproduction cost address functional obsolescence. It would eliminate some aspects of functional obsolescence. For example, if the residence had too many hallways or

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[326] Pleadings Vol. 3 at p. 790.
[327] Pleadings Vol. 3 at p. 790.
[328] Pleadings Vol. 3 at p. 791.

doorways or windows. But you are not eliminating the fact that this is an 8,000 square foot house with marble floors etc.

44. It looks like Mr. Wold did the cost approach correctly.

45. **He did not rely on and tried to ignore Judge Jahnke's decision in the Entwit divorce case.**

46. Mr. Wold's partial interest discount for the Entwit Marina appraisal appears to have been done in a manner consistent with USPAP.

47. The purpose of the Ellis Island appraisal was for use by the litigants in the then pending Spears v. Brusich case. The issues before the court included the Brusich's position that there was road access and Spears' position that it was being blocked. The February 14, 2002 preliminary injunction does contain findings that Brusich had erected road closed and detour signs and placed boulders and other obstructions on the access easement without Spears' consent. The parties, the intended users, were aware that these issues were present.

48. Mr. Wold's methodology to determine the impairment from the blockage was an accepted methodology. And, if a land owner is being denied use or access to their home **or** quiet enjoyment of their home the damage or impairment can go to the entire property.

Mr. Wold noted at p. 71 of his appraisal that he was relying on a damage methodology based on J.D. Eaton's book.

He (Mr. Ferrara) did not research the Eaton approach or any other source regarding damage to the easement as part of his review. He was familiar with the methodology from having done appraisals of temporary construction easements. He has since looked at Eaton. Eaton talks about there only being a partial loss to the property when portions of the property are being worked on.

"Quiet enjoyment" is not a term that is used often in the appraisal business. Short term impacts on quiet enjoyment are usually not addressed because they are too difficult to measure.

The injunction says access was impeded. His experience has been that when the Highway Department puts up detour signs that means detour for other than the folks who live in the impacted area. He does not know why the boulders were there. The court did not say all access was shut off.

He agrees that if the Spears were totally denied access for a substantial period of the day then that would allow damages to be calculated on the

basis of entire property. He agrees that if the blockage was total then Mr. Wold's methodology was reasonable and consistent.

49. It is his view that an appraisal report does not have to just be understandable to the intended user – **it must be understandable to anybody who reads it.**[329]

50. He does not agree that a permanent stigma would be present once the litigation has concluded. He did testify during his deposition that a cloud can remain over a property that a sophisticated buyer would perceive in determining value less than market value. He acknowledged that Mr. Wold's appraisal was as of February 1, 2002 and that the litigation was ongoing at that time and the focus in a buyer's views at that time. He thinks that if a buyer had come along then the sale would have been put off until the litigation concluded – the seller would not simply have agreed to taking one quarter off of the value of the property – especially given the prior court decision on the easement.

51. He has appraised properties with detrimental conditions. He has taken courses and seminars which deal with detrimental conditions. He did not review the Appraisal Institute's course study on valuation of detrimental conditions in real estate before performing his review.

52. He does agree that, even after litigation has ended, a sophisticated buyer would take into account that a neighbor is a jerk who is contentious and litigious. He did not get the impression that this was the case here. He agrees that it was reasonable for Mr. Wold to put in the appraisal that: "Because one side to this litigation will receive less than favorable outcome, there is a risk that the neighboring nuisance may continue after resolution of the litigation."

53. He has reviewed the specifics of the methodology that Mr. Wold wrote in his appraisal that he was using. He does not disagree that Mr. Wold used the correct process – one approved by the Appraisal Institute. Mr. Wold was entitled to apply the conditions he mentioned (access diminution, imposed condition, egress diminution, legal issues, and neighboring nuisance).

"My point in this, is not that the process was in violation. My point is, that the work in the report and the narrative related to me and information here does not lead me to the conclusion that the diminution in value would have been to the extent it is.

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[329] Pleadings Vol. 3 at p. 796.

The access was impaired obviously, but this was a valid legal easement that had been previously adjudicated, was recorded, and you've got a property owner that was doing something different on the property again, and they were resolving the issue by an injunction or applying for an injunction. It just didn't seem to rise to the same level as being the extent of loss in value. I didn't get that from the appraisal. That's what I am reviewing here, not his . . . process, but the fact that it didn't seem to me to be convincing to result in that kind . . .that kind of loss. . . .

No but again, I don't disagree with the process that was used. I disagree with the fact that the narrative related to me in this appraisal was not convincing to the extent of loss taken on the property . . .

That's what I am saying. I'm saying the process is not the question here. It is what is related does not seem to warrant the amount of the adjustment considering the fact that we had a joint-use easement, and my opinion of looking at this and reading the report that a joint-use easement would typically imply both parties would use it, and if that was an industrial or commercial user next door to it, there's bound to be some uses on that road that could be thought to be somewhat impeding and everything. This owner, or this easement joint user appeared to be much worse in that and was actually doing some impeding in the process, but it didn't seem to rise to the level of being this amount of loss. . .

Well, if he had said in fact that the next door neighbor would constantly do things in violation of court orders and a legal easement which are basically actionable, and this person would do this no matter what the cost to them, then perhaps that might have made a difference in my opinion as to his analysis, but that's not what was said in here. A neighboring nuisance, in my opinion, would be something from a property which is permanent or continuing, and it's not a property owner which is somewhat crazy in doing something. I think that's what's here. I don't interpret neighboring nuisance being the neighbor in his position, at least it wasn't related to me that way."[330]

54. With respect to the Entwit Marina – to truly compare the value of raw land with the value of the improvements where the land is not raw, but has improvements, you would have to factor in the cost of removing the improvements if they were a negative.

55. You can have differences of opinion on what is the highest and best use and you potentially could have more than one highest and best use. He agrees with Mr. Wold that the continuation of the marina was the only real

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[330] Pleadings Vol. 1 at pp. 798-99.

alternative, but he thinks this would only be on an interim basis. The optimum use of the property would be to replace the existing marina with a larger or improved marina – something that would increase the income.

He acknowledges that Mr. Wold identified reasons why the marina could not be expanded – parking and access. He does not recall Mr. Wold discussing deep water. He does not recall Mr. Wold discussing the financial impediments to improving the marina.

56. He does not agree that a marina is special purpose property. He thinks it is limited purpose property. **But he guesses that many people would consider a marina to be a special purpose property**. "Special purpose property" is a term of art. He does not recall the exact definition. He acknowledges that during his deposition he probably said that Mr. Wold could characterize it as a special purpose property.

He agrees that there are situations in which the income from a special purpose property under the income approach does not support the land.

"Well, I still don't quite understand what you're getting at here but my point would be that, no this property doesn't have but one use. I mean, the existing use is an interim use. It would likely be the long-term use provided something additional was done to this. I mean making this thing more rentable, improving it, changing it, doing something to this property consistent with the marina, and I could see the possibility of the marina being there permanently. But it wasn't explored whether the land can be subdivided into residential sites which are very valuable on water frontage and the marina removed. So there's some question here, in my mind that no, this, these improvements were not the permanent highest and best use of the property. There's something that would be done to this. Any buyer who would buy this property would be buying it not for the existing income stream in a permanent continuation, but a change in that income stream to make it more viable."[331]

57. Mr. Wold performed the income approach in a technically correct manner. Mr. Wold performed the cost approach in a technically correct manner.

58. He did his review from his home in Anchorage or Hawaii. He did not contact anybody with knowledge of the properties or the comparables. He has never been to the Entwit property. When doing a desk review he does not assume that the information provided by the appraiser is true. He did assume that Mr. Wold's information about things like the size of the

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[331] Pleadings Vol. 3 at p. 802.

marina, the size of the property, the parking was correct. He is not aware of any misstatement of fact.

59. He acknowledges that *The Appraisal of Real Estate* (12th ed.) provides that the cost approach can be used on older properties if there is sufficient data on depreciation and other characteristics.

Depreciation adjustments tend to be subjective at times. You may not have market evidence for an adjustment but you must have some basis for it.

**It was not an USPAP violation for Mr. Wold to use the cost approach.**

Under *The Appraisal of Real Estate* (12th ed.) "special purpose properties are often weighted heavily with the cost approach – by the cost approach."[332]

60. He put in his report that Mr. Wold had stated in his appraisal that the marina had a 40% vacancy rate due to the dilapidated condition of the floats and piling. Mr. Wold actually wrote in his appraisal that full occupancy was not a reasonable expectation due to the dilapidated condition but more intensive management could substantially reduce the vacancy rate to 15%. But this just shows its use was not its highest and best use since highest and best use assumes typical management and typical maintenance.

61. USPAP does not restrict using the cost approach under the circumstances of the Entwit Marina. His disagreement with Mr. Wold "was the conclusion of highest and best use and then, relating to the cost approach which is the weakest of any of the approaches on all of the properties and above income what an income, and what the land value was."[333]

He acknowledges that, under *The Appraisal of Real Estate* (12th ed.), the cost approach can be applied to, and is often the main approach for, special purpose property because the income approach doesn't support the raw land value. But special purpose properties are properties that have only one use – like a church. A marina is built and maintained for income. He acknowledges that it is Mr. Wold's analysis that the impediments to the property are such that with intense management to improve and reconfigure the marina, a marina is the only use for the property.

62. He has never done a marina appraisal. He has not seen many.

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[332] Pleadings Vol. 3 at p. 803.
[333] Pleadings Vol. 3 at pp. 804-05.

63. He agrees the Copper Road house was a difficult appraisal assignment given its unfinished condition. But appraisers often appraise homes with unfinished aspects. He acknowledges he testified during his deposition that this appraisal would have been a difficult task for even the most experienced appraiser.

64. Usually you do sales comparisons, bracketing, based on current sales data but sometimes you have to go beyond that for unique properties and look at older sales and make adjustments. And you could also look at listings of similar properties. He is not aware of any such listings in Ketchikan at the time this appraisal was done.

65. He agrees that the unfinished condition of the house was such that it would not have qualified for conventional financing. He agrees then that any sales of unfinished homes in Ketchikan would not involve financing. He agrees that in a community Ketchikan's size it may have been difficult to find data on sales of unfinished homes and that there might not have been such sales. But there may have been a sale of a smaller unfinished home for $80,000 - $90,000 which could have been used and adjustments made. He has no personal knowledge of such homes. It seems to him unreasonable to believe that there had been no sales of homes in the Ketchikan are for under $115,000. But he did not research the market.

66. This appraisal was done on a Fannie Mae Form 1004. It was a summary report. Narratives are typically not included. But such reports do need to provide whatever is necessary to explain the report and the data and information is summarized.

67. Mr. Wold did state in this appraisal that he did a thorough search for comparable sales in this small community – he contacted Realtors, lenders, brokers, title companies, and assessors – and he noted Ketchikan does not have a multiple listing service. He (Mr. Ferrara) did not contact any of those persons. Mr. Wold also stated in his report that there are a small number of sales in the Ketchikan area, he attempted to find sales to bracket the property in size and value and due to the lack of sales it is often necessary to look at properties over a mile from the subject property and he noted that there was a great disparity in the size, value, and design of the comparables he used causing gross adjustments which often exceed established appraisal guidelines.

Mr. Wold described the adjustments he made.

He has no idea whether Mr. Wold was lying about the adjustments he made or if he was intentionally fraudulent.

If Mr. Wold made a mistake putting the $25,000 adjustment in the functional depreciation box rather than the physical depreciation box that would not affect the value determination.

68. The Copper Road appraisal was not for financing, it was for litigation. So his comment that the adjustments exceeded what lenders would require has nothing to do with this appraisal.

69. **The technical problems he perceives with the Copper Road appraisal were not such that he would have filed a complaint with the Division.**

70. **Returning to Mr. Wold's comments in this appraisal about there being no comparables.[334] He made an appropriate comment if there were no comparables.** But he cannot conceive of there having been no comparable sales, but "If there were none, then he is perfectly right."[335] Then he should have used the three closest sales – sales around the $145,000 comparable he used. Not the $220,000 comparable, no matter how close it is to the property. The comparables he used were in different strata of the market, involving different potential buyers. He acknowledged that sometimes you have to use sales that are not competitive with the subject property and explain.

AHO Stebing stated at this point that:

"Let me just say in the interest of perhaps expediting the hearing or heading off some additional testimony or, even argument on the issue that with regard to this last issue that was discussed, whether your opinion that you find it inconceivable that there were not other comparables and that's diametrically opposed to Mr. Wold's conclusion as stated at the bottom of the page in this report which was addressed before the break. You know, to me it looks like a wash and the Division's got the burden of this case to prove by a preponderance of the evidence. And there was an opportunity to come up with that information before the hearing and we don't have it at the hearing, so I don't see that the burden has been met on that isolated issue. So let's just go ahead and go from there. Unless there's some other evidence that's coming into the hearing. Two diametrically opposed opinions and proponents of evidence applies. So let's move forward."[336]

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[334] Pleadings Vol. 3 at p. 809. Mr. Ferrara is now on re-direct.

[335] Pleadings Vol. 3 at p. 809.

[336] Pleadings Vol. 3 at p. 809. It appears that "proponents of the evidence applies" in the hearing transcript contains a typo. In context it appears that AHO Stebing said "preponderance of the evidence applies."

71. USPAP Standard 3 allows desk reviews. Whether a field review is done is up to the client.

"If they have concerns about perhaps some of the validity of some of the statements in a particular appraisal. Specific ones whether the comparables actually exist, or the subject is defined in the appraisal or perhaps, it's a specialty property which may be going into a portfolio of a certain type. They just may want additional verification just a due diligence type of thing. So some lenders, and some clients may request that. Most of the time the reviews that we do are desk reviews of the report. So the report stands on its own as to what's been presented and you got to see if it concludes – if you reach the same conclusion from the data presented, and the manner in which it is presented."[337]

72. If an appraiser thought that property was special purpose property, he expects that the appraiser would mention that in the appraisal. He questions whether the marina was a special purpose property because it was not like a school or a church or a particular public building that has no income history or likelihood of having an income history. He does not recall that Mr. Wold called the marina a special purpose property in the appraisal.

73. With respect to the intended users of the report, usually reports prepared for litigation are more complex, more thorough. In any event, every appraisal must comply with USPAP so the intended users always include the Division.

74. His conclusion that Mr. Wold violated SR 1-1(c) does not change even though he had been focusing on the **wrong** USPAP edition. He thinks the 2002 edition provides an even higher standard for the appraiser.

75. He is not authorized or certified to teach USPAP classes.[338]

The Division's third witness was Margot Mandel. Her testimony included:

1. She has been an Investigator with the Division since 2002. Mr. Coan was the Chair of the Board when he filed his 2002 complaint against Mr. Wold. It is not unusual for a member of the Board to file a complaint or for the Board to direct that investigations occur.

2. She sent a letter to Mr. Wold notifying him of the complaint and asking him to respond. He did so. Her supervisor told her to prepare this case for

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[337] Pleadings Vol. 1 at p. 809.

[338] Pleadings Vol. 3 at p. 810. Mr. Ferrara is again being cross-examined.

expert review. She was also instructed to do so on the 1998 complaint. The Division does not have a contract expert. Her supervisor told her to contact Mr. Ferrara, who they had used as an expert in the past. She did. He was interested. A contract was signed. She sent him the case files. She also had Mr. Wold's licensing file pulled, which is normal for cases heading towards litigation.

3. She is not a certified appraiser.[339] She previously was a probation officer.

4. No complaint was filed on the Copper Road appraisal. It was just included with the paperwork sent in on the Entwit marina appraisal. The Division's records show that the Division only opened an investigation file on the Copper Road appraisal because of Judge Jahnke's Memorandum of Decision.

5. She does not know why it took the Division from 1998 to 2004 to file an Accusation on the Entwit Marina complaint. She thinks it was the result of a lack of resources – there were a number of years when only medical cases were addressed.

6. Mr. Ferrara was asked to do his expert review about a year after the Division received Mr. Wold's response. The response was sent with the other materials to Mr. Ferrara. He was not asked to review it separately.

The Division's final witness was Donald Faulkenburry. His testimony included:

1. He has been an investigator with the Division since 1990. The Division has more Investigators now than it did in 1998-2000. The Division had 7 or 8 then and recently had 14. The Investigators also handle other cases, such as Medical Board cases. During the 1998-2000 time frame the Investigators concentrated on the Medical Board cases. It was very difficult to get a real estate appraiser case sent out for expert review during that time period.

2. The complaint filed by Ms. Dineen was assigned to him. He notified Mr. Wold and asked for a response and copies of Mr. Wold's file. His notice letter to Mr. Wold referenced a judgment from the Entwit divorce case. The judge did not reference USPAP but made statements that would suggest USPAP violations had occurred. Mr. Wold responded that the State could pay $.50 per page for his file to be copied and mailed. He discussed the case with his supervisor and prepared a subpoena for the files. He does not know whether it was served or not. The case was then turned over to a newer Investigator (Tom Stanley). Eventually some

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[339] Pleadings Vol. 3 at p. 813. Ms. Mandel is now being cross-examined.

records were received – they did not know whether the records were the appraiser's file or from the attorney's file from the divorce case. Mr. Stanley retired in 2002 or 2003.

Mr. Wold testified. His testimony included the following:

1. He has been an appraiser since 1975. He has focused on commercial and industrial properties since 1985. He has continued to do residential appraisals. By 1990 his work had expanded to points further north in Southeast Alaska. He moved to the Seattle area which made it easier for him to access the other communities. He has continued to do appraisals in the Ketchikan area. About 25% of his workload is now in Juneau. He has also done appraisals in places in Western Alaska. He does a lot of appraisal work for litigation and with respect to tax matters. He routinely does work for the local major banks and the national regional banks that do business in Alaska. He had probably done in excess of 20 marina appraisals prior to the Entwit Marina appraisal.

2. Marinas are special purpose properties. They have one use and one use only. There are factors of utility such as water depths, ingress/egress, and considerations of cost and the ability to produce income.

3. The Entwit Marina was a complex property to value – there were a number of physical, functional, and economic factors. It did not have a dedicated access route from the highway. The property had a unique configuration. There were zoning and parking issues.

4. His client for the Entwit Marina appraisal was Randall Ruaro, the attorney for Mr. Entwit in Mr. Entwit's divorce case. The appraisal was requested to help negotiate a property division. He was appraising Mr. Entwit's minority 1/3 interest.

5. Julie Dineen did a review appraisal of his Entwit Marina appraisal. He and she had been on opposite sides of a condemnation case prior to this case. Ms. Dineens' client received an unfavorable outcome in that case. There was quite a bit of animosity. They had previously had an amicable relationship. They are business competitors. Appraisers in Alaska often share information. She has not done so with him since the condemnation case.

6. His investigation of the market in Southeast Alaska and contacts with other appraisers revealed no sales of marinas. So be could not develop the sales comparison approach. He stated as much in his report.

7. With respect to his cost approach analysis – he contacted marine contractors and people who construct floats in order to develop a

replacement cost. He actually began the analysis by searching for comparables for the vacant land for the upland portion of the property. He then used a typical technique for valuing the tidelands. He cited the source of the technique. He has valued tidelands several times. The technique is accepted by the Department of Natural Resources. With respect to the comparables, he thinks Mr. Ferrara would have a different view if he had inspected the properties. Number 2 is particularly important as it is an adjacent lot and had been sold just 11 months earlier. The cost approach generally is not used for older buildings but it is used for special purpose properties because it is rare to find comparable sales and the income often does not support the value of the improvements. This is common for marinas and moorage facilities.

8. He developed both an income approach and a cost approach for the marina property. He then had to make a decision on highest and best use. He considered the physical suitability or adaptability of the property. He considered the legal restraints – what is permitted by zoning and under the deed and other factors such as the Army Corps. of Engineers regulations. You look first at what could be developed on the property from a physical standpoint. Then you look at what is legally permitted. Then you look at financial feasibility. He followed the procedure from *The Appraisal of Real Estate* (12th ed.) at p. 307. He addressed it in his narrative in his report. He determined that the current improvements contributed to the value of the property and that the current use was the highest and best use. There was no alternative use. The upland portion was a substandard lot - only 6,000 square feet. There was not enough room for improvements and parking. You have to consider the entire property – including the much larger tidelands. To make use of the tidelands you would have to dedicate the entire upland for marina or dock usage. It is zoned commercial. Over half the space would be needed for parking. There was limited ingress and egress. There is no dedicated right-of-way from the road to the marina. The marina could not be built out because it would then be a navigational obstruction. So about 25% of the tidelands could not be used for a marina. He did not think it would be financially feasible for a buyer to buy the property, take out the marina, and build something new there. What was financially feasible was to continue to use the marina, cure deferred maintenance, and make some modifications to cure functional obsolescence. The marina had a 40% vacancy rate. A limiting condition in appraisals is the assumption of competent management. He thought a buyer would do the maintenance, reconfigure some of the floats to accommodate larger boats and that would reduce the vacancy rate.

9. He disagrees with Mr. Ferrara's assertion that the cost approach is not used for commercial properties. He does work for lenders. He works in smaller communities. Often in such communities there is only enough data to use two approaches. One of those approaches is the cost approach

as it can always be developed. The appraiser then decides how much weight to give to each of the approaches. He gave more weight here to the cost approach because of his income projection and capitalization under competent management calculations. He valued the land at $127,000. He figured demolition costs would be in excess of $20,000, possibly up to $30,000. That reduces the value of the land by the same amount.

10. He did not identify the marina as special purpose property because it was obvious that is what it is.

11. His functional obsolescence determination was based on his assumption that competent management would reconfigure the floats. All of the vacancies in the marinas in Ketchikan are for smaller boats. There is unmet demand for moorage for larger boats. He figured competent management would remove the finger floats so larger boats could be berthed. The finger floats had value and could have been sold. The marina was not operating at optimal proficiency. He figured a buyer would have to exert entrepreneurial energy to take the steps discussed, which warranted a deduction.

12. He developed the comparables from his data base. He had intimate knowledge of each of the comparables.

13. With respect to the Copper Road appraisal – he was tasked with determining market value. This was 1997. The divorce litigation started in 1998.

14. Construction on the Copper Road house began in 1991. But it was unfinished when he appraised it. It lacked siding and gutters. The gutter situation was a concern because a roof rain catchment system is primary source of potable water in that area. A gutter system is typically part of the catchment system. Inside there was a large, 672 square foot, unfinished area on the first floor. There was a lack of interior trim. Some interior doors were missing, including for all of the operating bathrooms. One bathroom did not have a toilet. He used 3 ½ bathrooms in the property description but used 4 in the sales comparison approach because he figured a buyer would put in the toilet. There were problems with the floor plan. The house was owner built without architectural assistance. The ceilings were only 7 feet. One had to walk through one bedroom to access the upper level family room.

15. The house would not qualify for conventional financing due to its unfinished condition. He assumed a probable buyer would complete it. He estimated the cost to finish at $25,000. When done it would be a 2,000 square foot house. He did not have a target value, since no sale was

pending. He tried to bracket the house with sales in terms of size, bedroom counts and another criteria.

16. He and Ms. Cessnun, an appraiser employed by his firm, inspected the property. They discussed the property. They pulled what they believed were the most comparable sales. There were probably no more than a dozen sales at that time because of Ketchikan's sliding economic condition due to the pulp mill closure.

17. This was a typical summary report. An appraiser in a summary report simply summarizes and states what they did, their analysis. Much of the process is implicit in the form used. This was done on a Fannie Mae URAR Form 1004. This is a typical residential form for appraising a single family residence in the Ketchikan marketplace.

18. The lack of gutters on one side of the house was a functional deficiency as water from the roof is the source of water for the residence. The siding could be considered physical, but a home without siding lacks the insulation qualities of a home with siding. The lack of bathroom doors impaired the utility of the bathrooms.

19. The property was located on a small spur road. To get to a house a block over one had to go the highway, travel about a block, and enter another road. The property was in arguably the most deplorable area of Ketchikan. DEC has cited the area for having standing waste water in ditches. In the past there was a pig farm in the area, in violation of zoning requirements. The area was dominated by dilapidated residences, junked trailers and debris, and wrecked cars. The comparable a block away fronted the highway and you did not have to drive through the above to get to it. A related adjustment was warranted. Adjustments are left to the appraiser's discretion. Fannie Mae does publish a guidelines of what they consider to be reasonable adjustment limitations, but they have made allowances for the Ketchikan market so larger adjustments can be made if explained. This report was not subject to those limitations.

20. His adjustment explanations were similar to what he has done in every other residential appraisal, as well as what other appraisers in Southeast do.

21. He received a copy of the Model Builders letter to Mr. Entwit. Model Builders is a Ketchikan contractor that does commercial and residential work and complex remodeling and repair work. The owner, Mr. Dima, has an outstanding reputation as a reputable contractor who does quality work. He received Mr. Dima's letter 13 months after he had done his appraisal. He thinks the litigation had started by then but the trial had not yet occurred. Mr. Ruaro gave him the letter and a videotape of an

inspection Mr. Ruaro did with Scott Menzies. The video showed cracks in the drywall and that the walls were not plumb. He called Mr. Dima and discussed what Mr. Dima had found at the property. Mr. Dima told him there was sagging and settlement that was not stabilized. They discussed why Mr. Wold had not seen this during his earlier inspection. Mr. Dima explained how this could occur rapidly. Mr. Wold knew the property was in a muskeg area. His work file contains notes of his conversation with Mr. Dima. To his knowledge, Mr. Dima did not testify at the divorce trial. He felt that, under USPAP, he was able to rely on Mr. Dima's opinion. He is not an engineer or a contractor. Appraisers rely upon outside experts for guidance. He agrees with Mr. Ferrara that there should be some concern that this was a litigation ploy – so he thoroughly vetted Mr. Dima when he spoke with him – he challenged him to the point that Mr. Dima became indignant that Mr. Wold would question his integrity. He determined, based on all he knew, that the estimate was legitimate.

22. He treated Mr. Dima's estimate as a supplemental to his appraisal. He explained the $25,000 and $12,500 deductions. The latter would be needed to entice a buyer who would have to wait until the repairs were made before moving in and run the risk of cost overruns. The fix would have to be made before the property could qualify for financing, even if the rest of the house was not finished.

23. The intended user of the Ellis Island appraisal was Mr. Cantor and the parties in that litigation. When he got involved the lawsuit had been filed and the injunction issued. The injunction contained findings of fact. Depositions had occurred. He completed the report on July 17, 2002. The valuation date was February 1, 2002. The valuation date is the date of a hypothetical sale. He did two separate analysis as of that date – one for the temporary diminution of value related to the easement and the other with respect to intermediate to long-term diminution in value due to detrimental conditions and stigma. He has taken courses regarding valuation of easements and properties involved in right-of-way and construction valuation problems and he had taken the detrimental conditions in real estate course sponsored by the Appraisal Institute.

24. He attempted to find identical comparables. None could be found. The ones he used were the best he could find. He stated as much in the appraisal.

25. He had read all of the court findings, pleadings, and depositions and knew that the access had been blocked. These included the injunction[340] and the

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[340] The court issued a Preliminary Injunction in 1KE-02-63 CI on February 14, 2002. The court found that: the defendants had erected the "Road Closed" and "Detour" signs on the easement;

motion for order to show cause[341] and the finding of contempt. He had a transcript of the hearing. All of these were in his work file. All of the parties knew that the court had found that access had been blocked. He came in afterward. He was tasked with determining the resulting loss in value. The parties all understood what the dispute was about. They knew what "impeded" meant.[342]

26. He knew that the Brusiches and Oaksmiths had a history of fighting with each other, including a case that went to the Alaska Supreme Court. He knew Mr. Spears had to sue to get access to the easement in 1998 and 2002. He had a copy of the 1999 decision in the 1998 case. He had a copy of Katy French's February 8, 2002 affidavit, which included pictures of the easement area.[343] The pictures show the construction project and the road closed sign, and rocks piled in the right-of-way. The February

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and, their contractor "excavated and created holes in, and placed boulders and other obstructions upon" the easement. The court ordered that the defendants repair and restore the road. The court ordered that the defendants, directly or through their contractors/employees, were "enjoined from excavating, undermining, obstructing, blocking, or impeding, in any manner or fashion, the plaintiff's access easement. Except by moveable equipment incident to the ongoing construction project and as necessary but not overnite." The court also noted that: "the defendants have no right to block or excavate or obstruct the access easement" so plaintiff was not required to post a bond. Pleadings Vol. 8 at pp. 2126-27.

[341] Plaintiff applied for an Order to Show Cause on March 7, 2002. Pleadings Vol. 8 at pp. 2128-39.

[342] Mr. Spears argued in his Trial Brief in 1KE-02-63 CI that the issue was whether his right to absolute free and unimpeded access means the right to free from anything other than a de minimis interference or that his rights are subject to reasonable interference. Pleadings Vol. 8 at p. 2142. He argued that, under applicable caselaw, his easement meant that the defendants could not in any way interfere with or hinder his use of the easement. And that, in any event, the defendant's use of the easement was unreasonable as the excavation went 9 ½ feet into the 20 foot easement provided by the 1999 Judgment, the court found that the defendants had violated the preliminary injunction, and his expert has opined that the defendants did not need to interfere with the easement in order to do the work they wanted to do. He also argued that a permanent injunction was necessary to protect his rights given the defendants conduct. Pleadings Vol. 8 at pp. 2140-62.

[343] Ms. French averred that: she attempted to drive on the easement on February 7, 2002; a "Road Closed" sign was posted between the easement area and North Tongass Highway; she went down another road and encountered a "Detour Ahead" sign which partially blocked use of the access easement; the road towards the isthmus going to Spears [Ellis] Island was partially excavated and large boulders were placed around the hole, further diverting traffic from the customary lane; a large backhoe was excavating a substantial amount of material adjacent to the normal driving route and the operator told her that they were going down to minus five level and would then be backfilling for ramp for equipment and materials in the excavated area. She attached five pictures. Pleadings Vol. 8 at pp. 2115-2122.

14, 2002 injunction included the finding that the defendants had caused road closed and detour signs to be erected on Mr. Spear's easement, had excavated holes in the easement, and had placed boulders and other obstructions on the easement access. All done without Mr. Spears' consent. Mr. Spears moved for an order to show cause on March 7, 2002. Brusich/Oaksmith had continued to block the access road even after the injunction had been entered.[344]

27. The State of Alaska Residential Real Property Transfer Disclosure Statement requires sellers of residential properties in Alaska to disclose those conditions that a buyer would want to know in their ordinary due diligence in purchasing a property. The owner must answer truthfully or be subject to treble damages. A seller must disclose an ongoing dispute. Here the 2002 litigation had occurred despite the November 4, 1999 judgment establishing the location and terms of the easement.

28. J.D. Eaton is the authority with regards to valuing properties in litigation. He is the author of *The Real Estate Valuation in Litigation* book published by the Appraisal Institute. He cited Mr. Eaton as authority in this appraisal. He relied on p. 266 of the text in analyzing the easement. When there is an easement appurtenant to property and necessary for the quiet enjoyment of the property then the easement and the property are treated as one for valuation purposes. That is what he did.

It was not necessary that the road be blocked 24/7 each day of the period at issue. The same methodology would be used if the blockage was intermediate or dispersed throughout the day because the owner's quiet enjoyment of their property is diminished if they cannot come and go as they wish. In the construction project condemnation context, the government always pays 100% of the rental cost even though construction is only happening 8-10 hours a day 4 or 5 days a week. This is consistent

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[344] Mr. Spears applied for an Order to Show Cause in 1KE-02-63 CI on March 7, 2002. Pleadings Vol. 8 at pp. 2128-32. The Application was based upon the March 7, 2002 affidavit of Tim Long. He averred that: he is employed by an entity affiliated with Mr. Spears; his duties include functioning as caretaker for Ellis Island; the defendants' contractors "began digging at low tide near the travel lift and obstructed the access easement granted by the prior judgment . . . by placing high piles of fill rock on the easement. . . block[ing] approximately one-half the width of what I believed to be the easement"; Mr. Spears made arrangements for R & M Engineering to survey and stake the easement; R & M did so on March 1, 2002; later that day he "observed a large pile of rock fill on the easement, which obstructed at least half the west half of the road; defendants continued to dump fill rock on the easement on March 2, 2002 and their excavation looked as though it had gone into and undermined a portion of the easement; he took related photographs and measurements on March 3, 2002; and, it appeared to him that that "the excavation encroached into the basic twenty (20) foot wide." Pleadings Vol. 8 at pp. 2133-39.

with Mr. Eaton's book. The only difference is that here the Oaksmiths and Brusiches did not have imminent domain powers, they could not do what they did without Mr. Spears' permission. He considered that the Brusiches were in an inferior bargaining position as they would have had to get Mr. Spears' permission and he was not required to give it. He also considered that the construction involved the placement of a commercial travel lift that encroached into the easement area.

29. It was not necessary for him to make the extraordinary assumption that the litigation would continue. The focus is on the perception in the marketplace – would a buyer perceive they were assuming some risk of future litigation. Here the seller would disclose that there has been a history of litigation, there is an access easement over the neighbor's property, the title company won't insure or guarantee access, the risks are so overwhelming that a buyer will insist on a discount. Mr. Ferrara testified that the sale would just be put off pending conclusion of the litigation – but that delay constitutes value.

30. **He tried to find comparables by looking at his database, which included all residential properties. He obtained information from Ms. Cessnun. He obtained information from Mr. Corak in Sitka. He told Mr. Corak about the Spears property and Mr. Corak was familiar with it. He told Mr. Corak of his concerns about comparables and detrimental conditions. He asked Mr. Corak if he had an comparables and was told no. He contacted Jim Canary, an assessor in Juneau, who also told him he had no comparables.**

31. He did not refer to the Entwit Marina as "special purpose" property. He was not required to do so.[345]

32. Ms. Dinneen never worked for him. They dated once or twice while she was in the process of getting divorced. But the reason they do not talk is professional.

33. He spoke with the buyer and seller of comparable #2, the property adjacent to the Entwit Marina. He spoke to Mr. Lahmeyer, who he knew because he was a contractor. He also spoke with Les Hiatt and Mr. Green, the sellers. He did not speak with Mrs. Lahmeyer.

34. He did not specifically discuss the four factors for determining highest and best use as such, but he did lay it out in the description of the property and his conclusions. This was a summary appraisal. He has supporting information in his work file.

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[345] Pleadings Vol. 3 at p. 834. Mr. Wold is now being cross-examined.

35. He explained, with reference to the plat, why the marina could not be extended.

36. He made an explicit assumption in the report that competent management would run the marina. It is implicit that responsible management will cure the physical deterioration to avoid public safety hazards. That is capable management. He did not assume that a new owner would come in and promptly take care of the deferred maintenance over night. So there would be a 15% rate. He was "appraising a very complex and troubled property and . . . trying to do the best I possibly can with the information that I have."[346]

37. He did not state that the Copper Road property was in one of the worst neighborhoods in Ketchikan because he did not want to offend Mr. Entwit. But it was well known by all the persons involved and the local real estate professionals. He did note the adjustment for lack of surrounding homogenous surrounding properties. He made the adjustment and gave the reason. He did not feel the need to state that the house or the neighborhood was a pig sty, particularly since this was not being done for financing so there would be an end user for whom these considerations would be important.

38. He learned after the fact that Mr. Menzies had testified at the trial. Mr. Menzies is an environmental engineer. He has no education or experience in structural matters. He is not even sure he was asked about this when he was qualified as an expert. Mr. Menzies' trial testimony is not consistent with the video that he reviewed. When they did their inspection for the appraisal they had not noticed any settlement. But it is not uncommon in his experience for settling to occur years after a house is built. It happened to a house he had built in 1980 – the settling did not occur until 5 or 6 years later. He discussed this with Mr. Dima. Mr. Dima explained to him why/how this occurs. The video showed cracks in the dry wall and that the walls were not plumb (a plumb was held up next to the walls). At this time the house was involved in litigation and the other party was occupying it so he could not get back in – so he did not reexamine the property. An appraiser has to rely on outside experts on these matters. He did not speak to Mr. Menzies since he had the video. He did not get another estimate and was not required to do so. He did not address the soil condition in his original report because that was outside the scope of the report.

39. He did not note the prior Brusich litigation. It was common knowledge. It was in the court record in the pending litigation. All the parties and the

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[346] Pleadings Vol. 3 at p. 835.

court were aware of these things. He would have told Mr. Ferrara if he had called him. Mr. Ferrara is supposed to put himself in Mr. Wold's shoes and give him the benefit of the doubt for what he knew at the time. All of this information is in the public record.

40. He did state in the Ellis Island appraisal that access was not completely denied 24/7. But there was total blockage. He did not put that in there. That was the evidence in the case, the facts from the court record. That was the premise of the report. It looked like the excavation area was over half of the easement area. He did not include specific measurements because it is in the court record. His deposition answer about making any assumptions about the degree of encroachment should not be taken out of context. There were other factors, such as the stockpiling of materials, the judge's findings that blockage had occurred, the road closed signs.

41. With respect to the Eaton text, the situation with respect to the easement was akin to a temporary taking.

42. His work file contained a preliminary commitment for title insurance for the easement in the 1999 case, with 15 listed exceptions.

43. He obtained information from Mr. Corak on the $600,00 Fuller property in Sitka.

44. His work file contains information on a 1.1 million dollar house and $850,000 house. He did not use those as comparables. One of the sales occurred after his report. The other occurred back in 1995 in Sitka. That residence was not suitable for year-round occupancy. And it had no tidelands. He came across these properties after receiving Mr. Coan's report. He was trying to determine if he had missed a comparable.

45. Mr. Wold was asked about Mr. Bell's article *The Impact of Detrimental Conditions.* Mr. Wold testified that he identified the detrimental conditions but did not place them in any particular categories. Mr. Bell, in the article, stressed that each category had distinct traits and they should not be lumped together and that caution should be used when using market data for one classification in attempting to quantify a diminution in value from another category. Mr. Wold responded that he did not use the data as comparables. He did not use the word "comparable" in his report. The data he used is relevant because each of the properties experienced a decline in value because they had a detrimental condition.

Mr. Wold called Dr. Kilpatrick to testify. His testimony included:

1. He began appraising in 1984. He returned to college and obtained a doctorate in real estate. He held an administrative post at the University of

South Carolina. He has worked with Greenfield Advisors for the past 7 years. They are headquartered in Seattle. They have a nationwide practice. He is state certified in Alaska and several other states. He is a nationally certified appraisal instructor. He is a member of the faculty evaluation of the British Royal Institute, counselor to the United States Army and the United States General Services Administration on impaired property matters. He is an advisor to the Japan Real Estate Institute. He has testified as an expert in state and federal tribunals. He has authored 4 text books with a 5th coming. He has written numerous articles and made numerous presentations. His work has been featured in large newspapers. He is a consultant to Bloomberg Network News.

2. He has written and lectured extensively on areas at issue in this case. He has just been selected to author the Valuation of Impaired Property chapter for Matthew Bender's four volume attorney desk set and has been asked to co-author the updated chapter on valuation in the ADA's book. He has written a forthcoming text book on valuation.

3. He was retained in the fall of 2004. He was provided with a thick file that included the appraisal reports prepared by Mr. Wold and the other appraisers. He has a great deal of expertise with trophy properties and marinas. He collected and reviewed the appropriate literature. He then scheduled a field visit. Desk reviews are almost always only for simple financing appraisals. This is a much more serious matter. He does not see how a review could have been done without a field visit, or without talking to Mr. Wold. Mr. Ferrara was not allowed to do a field visit.

4. There are only a handful of nationally certified instructors for USPAP standards. Certification to instruct USPAP was not required until a few years ago. So USPAP was being taught rather sloppily. Becoming certified is an arduous process involving having a spotless record, being recommended, going through a background check, attending school, and passing an exam that has a 50% failure rate. He is certified so he can and has taught appraisers how to apply USPAP. He is not scheduled to do so currently.

5. As a certified instructor he is privy to the thought processes that go into the USPAP Standards.

6. He has reviewed the allegations against Mr. Wold point by point. It is his opinion that Mr. Wold did not violate USPAP with respect to the Entwit Marina. If he had been asked to appraise the marina he would have done it about the same way. It is his opinion that Mr. Wold did not violate USPAP in his Copper Road appraisal report or with respect to the Ellis Island appraisal.

7. He listened to Mr. Ferrara's testimony. The underlying theme was the word "misleading." That word means that the appraiser knew something that was different than what he was reporting – he reported something he knew to be false.

8. He does a lot of review appraisals in his practice. They involve major litigation. They involve some of the best appraisers in the country. Mr. Ferrara's review reports were not typical of what he has seen because: Mr. Ferrara did not do a field review; he is not current with the applicable literature – he did not cite any authorities, which is unusual; and, where he had issues with Mr. Wold's facts he did not independently verify the facts.

9. With respect to the Copper Road appraisal – Mr. Ferrara's major concern was with the comparables and that the adjustments would not pass muster with the federal financing regulatory agencies. But Mr. Wold stated this in his report. His task was to appraise an unfinished house. An acceptable way to do this would be to look at houses that the house as finished would look like and then make the appropriate adjustments for things that are not finished. He could come down either way on whether the depreciation was functional or physical but it does not matter in terms of the ultimate valuation. Mr. Wold's solution was USPAP compliant and would offer a good classroom case study.

The other concern was with how Mr. Wold handled the sagging. He followed the Appraisal Standards Board's recommendations pretty well. The recommendations are in Advisory Opinion No. 9, which was published in October 2002 but the underlying approach was well known before that time.[347] An appraiser is obligated to rely on the expertise from outside the appraisal field when deemed to be reliable. He finds no fault

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[347] Advisory Opinions do "not establish new standards or interpret existing standards. Advisory Opinions are issued to illustrate the applicability of appraisal standards in specific situations and to offer advice from the ASB for the resolution of appraisal issues and problems." Pleadings Vol. 9 a p. 2627. Advisory Opinion 9 dealt with the appraisal of real property that may be impacted by environmental contamination. SR 1-1(a) requires that an appraiser "have the requisite knowledge about appropriate methods, and be able to assemble the required information. An appraiser who lacks knowledge and experience in analyzing the impact of environmental contamination on the value of real property must take the steps necessary to complete the assignment competently, as required by the COMPETENCY RULE. However, an appraiser need not be an expert on the scientific aspects of environmental contamination, and in most situations the appraiser will utilize scientific and other technical data prepared by others, such as environmental engineers. In these situations, the appraiser should utilize an extraordinary assumption [see Standards Rule 1-2(g)] regarding the information obtained from other experts that is used in the appraisal. . . This is especially important when there is conflicting information about such information." ***Id.*** at 2628.

in the way Mr. Wold handled this. Mr. Ferrara has misconstrued the USPAP competency provision. Mr. Wold was not required to go out and become a structural engineer or home builder.

10. The competency rule does apply when an appraiser is asked to complete an assignment that deals with a problem they have no experience with. The appraiser must either decline the job or disclose the lack of experience in writing to the client.

11. Mr. Ferrara was not competent to review the Ellis Island appraisal report. He was not familiar with the work of the seminal authors in the area (i.e. Bell and Eaton).

12. USPAP Standard 1 governs the analytical portion of an appraisal. There are three main approaches to determining value. The sales comparison approach "takes data from recent, nearby, similar sales and compares the adjusted sales prices of those to the subject property at hand through a method that's most commonly called the sales adjustment grid. . . . You then have the cost approach which begins with a sales comparison approach of the land and then adds what we might call an engineering exercise on the improvements. And then we have the income approach, which is a discounting of the anticipated future earnings. None of those three approaches is mandatory. Appraisers are not required to use all three of them. And, in fact, USPAP is quite specific that if an appraiser deems that a particular approach is not relevant, for whatever reason, then the appraiser may choose not to use that and there's no need for the appraiser to discuss the rationale, yea or nay, for using it or not using it. It's simply not relevant. It's just not part of the process."[348]

13. USPAP does not require an appraiser to explain their choice of valuation approach. So Mr. Wold did more than he was required to do in the Ellis Island appraisal report when he stated he was not using the sales comparison approach and why not.

14. If Mr. Wold's cost and income approach methodologies in the Entwit Marina appraisal were consistent with USPAP, as Mr. Ferrara testified, then he could not have violated SR 1-1(a). Mr. Wold employed recognized methods and techniques. He produced a credible report.

15. When valuing land it is the value of the raw land, unimproved. When the land has improvements then the appraiser has to account for the cost of removing the improvements. Mr. Wold testified that, based on his considerable marina appraisal experience, it would cost $20,000 - $30,000

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[348] Pleadings Vol. 3 at p. 848.

to remove the marina improvements. That does not seem to be an unreasonable amount. Mr. Ferrara did not account for this in his review.

16. He has appraised a number of special purpose properties. He has never designated the property in the report as "special purpose" property. You do not need to do so. Anybody reading the report will understand what is going on, particularly in the litigation context. A reviewer would likewise understand. It is was apparent from Mr. Wold's report and would have been apparent to anybody doing a field visit. It would have been apparent that this was special purpose property and its only use was as a marina, that is the only solution to the highest and best use analysis. The real value to this property was the submerged tidelands. The upland portion was marginal at best. About only half of the uplands are flat, the rest is high slope. The ingress and egress is extremely poor. The visibility is extremely poor.

17. It was not inappropriate for Mr. Wold to use the cost approach on a weighted basis over the income approach for the Entwit Marina appraisal.

18. Under the principle of consistent use in *The Appraisal of Real Estate* (12th ed.), when you have a single unique use for a property you cannot parse between an interim use and a permanent use. This property could only be used as a marina. If the improvements were to burn down you would build a new marina there.

19. Mr. Wold properly did not value the property as having a brand new marina because the report was prepared in the context of litigation. Such a hypothetical condition would have added nothing to the intended use of the report.

20. Mr. Wold did not violate SR 1-1(b) in the Entwit Marina appraisal.

21. Mr. Wold did not violate SR 1-1(c). To the contrary, having spoken with him and reviewed his work file, checked his facts and seen what he saw, his thought processes were better than he has seen in a lot of appraisers.

22. Mr. Wold did not violate SR 1-3(a) in the Entwit Marina appraisal. He identified the physical adaptability of the property. It is important to remember that Standard 1 deals with his analysis – what research he did, how he gathered the data. It does not have to do with the report.

23. Mr. Wold did not violate SR 2-1(a). The word "misleading" is not defined in USPAP, *The Dictionary of Real Estate Appraisal*, or *The Appraisal of Real Estate*. Mr. Ferrara did not define it. Mr. Coan did not define it. He wanted to find a definition. He looked at two peer reviewed publications: an article in the Appraisal Journal from 2004 and the National USPAP

Instructor's Guide. That is where he got the definition in his report. He does not find that Mr. Wold was misleading anywhere in his reporting process.

24. Mr. Wold did not violate SR 2-1(b). This Rule focuses on what would be understood by the intended users. Mr. Wold understood that the users were already intimately familiar with the property.

25. A summary report prepared for litigation is usually much shorter than if prepared in a non-litigation setting. You meet the minimum USPAP requirements and that is basically it.

26. He cannot find fault with Mr. Wold's methodology in valuing the damage to the easement in the Ellis Island appraisal. Mr. Wold consulted authoritative literature (Bell).

There are two authoritative peer reviewed papers on the valuation of trophy properties published within the last 5 years in the Appraisal Journal – both were published by members of his firm. The Spears property is not analogous to the road widening situation Mr. Ferrara referenced. It is a trophy home. He has inspected it. He has inspected the boat house. "[I]f you're the kind of person who could write a check for that house, and you come up and you find out, well, these people have a history of bad blood, they've got a history of litigation, and, by the way, they're blocking the road during, you know, what few daylight hours we have, am I going to touch this with a 10 foot pole? The marketability of that property, until that matter is properly settled, has fallen to zero. And if we want to parse, was the road half blocked, a quarter blocked, three quarter blocked, was it blocked eight hours a day, 12 hours a day, six hours a day, that – these issues of how many angels are dancing on the head of a pin are irrelevant. When we're dealing with trophy property and the kinds of people who'd buy trophy property, and remember, we've done exhaustive research in this field at my firm, this sort of situation, which was the cause of this appraisal report, would simply slam the door on the marketability of this property."[349]

The methodology Mr. Wold used in valuing the two month easement encumbrance was very much within USPAP standards.

27. He has applied a detrimental conditions analysis in his practice. He has analyzed stigma "using methodology not far different from what Mr. Wold did."[350] Mr. Wold used methodology recognized in the profession. He does not read Mr. Wold's report as Mr. Wold basing his analysis on

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[349] Pleadings Vol. 3 at p. 853.
[350] Pleadings Vol. 3 at pp. 853-54.

the litigation continuing. So this was not an extraordinary assumption he was required to identify. The issue of litigation stigma deals with the history of litigation between the dominant and servient estates. A potential buyer of trophy property would be dissuaded by this.

28. Sometimes an appraiser cannot find comparables. In that case the appraiser can seek out other reasonable methods. USPAP does not define what methods can be used. USPAP instructors are adamant in telling students that USPAP is silent on the choice of methodology. The anecdotal information Mr. Wold used was appropriate.

29. Mr. Wold's cost approach in the Ellis Island appraisal was appropriate.

30. He does not agree with Mr. Ferrara's assertion that newer trophy homes do not sell for the cost of their construction. Contractors often build spec trophy houses with the intent to sell them and make a profit. This is happening in Seattle and all over the world. If there was any functional obsolescence, Mr. Wold's use of replacement rather than reproduction costs would account for it. Reproduction costs refers to replacing exactly what is there. Replacement costs refer to the costs of replacing the utility of what is there. In the chapter on the cost approach in *The Appraisal of Real Estate* (12th ed.) there is a "very convoluted and not very well written discussion of this."[351] He is on the board that publishes the text. The chapters are written by a committee. This chapter is not very well done and needs to be addressed. It was appropriate for Mr. Wold to put 0 under functional obsolescence.[352]

31. Mr. Wold wrote his Ellis Island report for litigation purposes. His explanation of the level of impairment of the easement was more than adequate. He was asked to come up with an appraisal based on the detrimental condition. The factual dispute is decided in court.

32. Mr. Wold did not violate SR 1-1(b), (c) in the Ellis Island appraisal. "The heart of the matter is errors of omission or - - which lead to a careless and misleading analysis. And again, when you go through Mr. Wold's work file, you see what he did to gather data, you see the amount of due

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[351] Pleadings Vol. 3 at p. 855.

[352] Pleadings Vol. 3 at p. 855-56. Dr. Kilpatrick quoted the following from p. 358 of *The Appraisal of Real Estate* (12th ed.) – "Estimating replacement cost generally simplifies the procedure when measuring depreciation in components of super adequate construction." A few lines above that the text provides: "A replacement structure typically does not suffer functional obsolescence resulting from superadequacies."

diligence that he's exercised here, this does not come even close to falling under the threshold of a USPAP violation."[353]

33. Mr. Wold did not violate SR 1-2(f) or (g) in his Ellis Island appraisal. He made the appropriate scope of work decisions right up front, it is in his work file. A different appraiser may have chosen a different scope. Appraisers rarely agree on such things. That does not mean there was an USPAP violation.

34. Mr. Wold did not violate SR 2-1(a),(b), or (c) in his Ellis Island appraisal. Mr. Wold was up front in disclosing all of the limiting conditions, extraordinary assumptions, and there were no hypothetical conditions. This is true for all of the appraisals.

35. Mr. Wold did not violate SR 2-2(a)(vii) – he developed the scope of work in all three of the appraisals and sufficiently reported on what that scope of work was.

36. Mr. Wold did not violate SR 2-2(a)(viii) – this rule is redundant to SR 2-1 and is going to be removed in 2006.

37. Mr. Wold did not violate SR 2-2(a)(ix). He had no need to state and explain any departures from specified requirements. This rule is also being done away with in 2006 (departure rule). It is only required when there is an applicable approach to value which he chose not to use. Where he did find an approach not applicable he did disclose it, even though he was not required to do so. If an appraiser finds that an approach is not relevant no disclosure language is needed.

38. Advisory Opinion #9 is not a binding part of USPAP. But if you want to deviate from an Advisory Opinion you need to have darn good reason.

39. He holds a courtesy license in Alaska.[354] It is a temporary license. He holds a courtesy license as a general real estate appraiser in Alaska for a specified time. "Exactly what the legal terminology of that is, I'll leave that up to you lawyers."[355] If the lawyer says it expires next week he believes him.

40. He was certified in Washington in 1999. He has never personally appraised property in Alaska. He is an associate member of MAI.

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[353] Pleadings Vol. 3 at p. 856.
[354] Pleadings Vol. 3 at p. 859. Dr. Kilpatrick is now being cross-examined.
[355] Pleadings Vol. 3 at p. 859.

41. Mr. Wold complied with Advisory Opinion #9. It includes but is not limited to environmental contamination. Mr. Wold relied on information prepared by another and he disclosed that as an extraordinary assumption. That is what his supplemental is. He would cite what Mr. Wold did as an example of stating an extraordinary assumption in teaching his students. USPAP does not require that he provide an "extraordinary assumption" label.

42. Income capitalization is the preferred approach for a marina. He relied on the Robinson and Lucas article in stating that the cost approach could be used. That article deals with, but is not limited to, special purpose industrial properties. The point of the article is that for special purpose properties the cost approach is the best approach. He disagrees with those authors to the extent they state that such properties are not subject to the income approach. He cited as an example an appraisal of a petroleum refinery he is presently working on. The question here is USPAP compliance – does Mr. Wold's use of the cost approach for a special purpose property have support in the peer-reviewed literature. It does.

43. **He would have said more than Mr. Wold did in the Ellis Island appraisal about why he did not use the sales comparison approach. But what Mr. Wold said was USPAP compliant. Mr. Wold's statement does not support the conclusion that his appraisal is misleading or less than credible.**

44. Mr. Wold did not have to include external depreciation due to proximity to lower valued real estate – it is built into the replacement cost portion of the cost approach.

45. In the article *A Practical Approach to Marina Evaluation* it does say that the cost approach is particularly difficult for marinas and care should be given when using this approach to value older marinas. He agrees care should be given. That does not mean the cost approach cannot be used. He agrees the article does say that the income approach is the preferred approach. But that does not mean that use of the cost approach is an USPAP violation.

46. The article he cited in his stigma comments does not use the term "litigation stigma" but it addresses the underlying concept and he has cited it as authority for such in an arbitration proceeding and it was accepted as such. The house in that matter still suffers from litigation stigma and has not sold.

47. The Valuation of Trophy Properties article did not use the cost approach but it addressed vacant land and Mr. Wold used the same approach in valuing the land in his cost approach analysis. If there had been

improvements on the properties in the article then they would have been valued similarly to what Mr. Wold did.

48. He made a mistake in an article he wrote that will be corrected in subsequent issues – that USPAP requires appraisers to use all 3 value approaches unless one can be shown to be inappropriate. It should read that USPAP "provides", not that USPAP "requires". USPAP clearly does not require that an appraiser use all 3 approaches.

49. He agrees with that portion of his article that says that the sales comparison approach is usually the most reliable for single family residences and that for special purpose, non-income producing properties, the cost approach may be the only approach.

50. He acknowledged that in Mr. Wold's Entwit marina highest and best use analysis he did not discuss the cost of demolition in his report. But he did account for it in his analysis. He knew this report was for litigation . Such reports are streamlined. He could have put it in his report but he was not required to.

51. Mr. Wold's use of Mr. Dima's letter was entirely appropriate. He was not an expert. He relied on an expert. That is what Advisory Opinion #9 addresses. He did not offer his own expert information – he relied on such information from an expert. This is what appraisers dealing with detrimental conditions do. This is what Mr. Bell does. This is what he does.

52. Mr. Bell's text *Valuation of Detrimental Conditions in Real Estate* is not something he relied on. Mr. Bell did write in the text that evaluating loss due to neighborhood nuisance is often measured through a paired sales analysis. That does not mean that is the only way. This is an area of disagreement between he and Mr. Bell – he prefers the survey research method. But he does not find Mr. Bell's approach to be outside of USPAP and he does not think Mr. Bell would find his approach to be outside of USPAP. Mr. Bell does criticize appraisers who try to lump different detrimental conditions together and he criticizes those who try to chop them up into little categories. He thinks Mr. Bell misses the point that various types of detrimental conditions often end up with the same impact. He and Mr. Bell do agree that there is a body of knowledge out there about the impact of detrimental conditions on the value of property. Mr. Wold sought it out. This case is about USPAP. It is not about whether a different appraiser would have done things differently.

53. When asked if he was defending Mr. Wold he replied that he was testifying on his behalf.

54. Whether the easement was totally blocked is a matter to be determined by the court.

55. *The Appraisal of Real Estate* (12th ed) is the textbook used in nearly every appraisal principles course in the country. **If you comply with it you comply with USPAP**. It provides (at p. 354) that special purpose property, by definition, has only one or a very limited use. It provides that the cost approach can be used to value special purpose properties. A marina is a special purpose property.[356]

Mr. Wold's final witness was Mr. Bjorn-Roli. His testimony included:

1. He is an owner of Integrated Realty Resources. He is a certified general real estate appraiser in Alaska. He is a member of MAI. He began appraising in 1996. He grew up in Anchorage. He returned there from Seattle in 2003. He has done a number of appraisals of specialized properties such as the Space Needle, the Puget Sound Naval Shipyard, malls, high rise office buildings – complex properties requiring specialized analysis. He has done the same type of appraisal work since returning to Alaska. He works for large national lenders. He has appraised the new wing of Providence Hospital, the Fifth Avenue Plaza, Alaska Pacific University, seafood processing plants, and other properties in Southeast Alaska.

2. He was asked to review Mr. Wold's Ellis Island appraisal. He did a standard desk review. When you do a desk review you assume that the statements in the appraisal are accurate. You do not go out and verify them. A review can be done for a number of purposes, his was to check on USPAP compliance. He found no USPAP violations in Mr. Wold's appraisal report.

3. He has been appraising properties in Alaska since 1996 or 1997. He was in Seattle from 1999 to 2003.[357]

4. He thinks doing a desk review for USPAP compliance is appropriate.

5. Depreciation was not a major factor in Mr. Wold's report but his depreciation estimate is stated without any support or analysis. That is a business problem. It is not an USPAP violation. This was a new property.

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[356] Pleadings Vol. 3 at p. 870. Dr. Kilpatrick is now subject to re-direct. Page 354 includes the following: "The cost approach is used to develop an opinion of market value . . . of . . . special purpose . . . properties, and other properties that are not frequently exchanged in the market. . ."

[357] Pleadings Vol. 3 at p. 872. Mr. Bjorn-Roli is now being cross-examined.

Depreciation was a minor matter. It is not unusual for an appraiser not to provide a significant amount of information.

6. He thinks it would have been better for Mr. Wold to use reproduction costs with explicit deductions for depreciation in his cost analysis rather than replacement costs. That is a business choice. It is not an USPAP matter. The approach Mr. Wold used was perfectly acceptable.

7. Mr. Wold performed the cost approach analysis in a technically correct manner.

8. His gut tells him that there have been sales of high end waterfront homes in the greater Ketchikan area during the last several years. Such sales could have been comparable. It is very subjective.

"I think what I was trying to say was that this argument that Mr. Ferrara is making has serious implications for all appraisers in the state because, if it's true that Mr. Wold committed a violation of USPAP, then a lot of appraisers have issues, because Alaska has a unique geography. We have a lot of rural communities, and there is not always comps or good comps. And, it is very common practice in this state to exclude the sale comparison approach when it is not applicable. That's a very common practice. Now there has been subjectivity there and Mr. Ferrara has concluded, without providing any comps, apparently. I haven't read his review, but he hasn't provided any sales, comparable sales, **but he's concluded, in his subjective opinion, that there must be comps and therefore, there's a violation of USPAP. Now I, as a professional, am not going to indict a peer based on something that I haven't even investigated and researched**. I've been in this position before when I had to appraise a property in Dutch Harbor and there's no comps. Every leading appraiser in this state has been in the same position. If this was a condominium in Independence Park, we'd have a violation of USPAP because there's 50 comps and I wouldn't be here today. But it's not. It's a unique property in a fairly small market. . . so the answer is yes, you should include the sales comparison approach sometimes and no, it's perfectly acceptable and common practice to not include it at other points in time. It's perfectly acceptable. It's done every single day. . . I think it's actually a little bit scary that there's an argument that there's a violation of USPAP because of the implication for the rest of the appraisers in the state."[358]

9. Mr. Wold did not clearly state the degree of impaired easement access. The methodology he used is correct if there was a 100% loss of easement

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[358] Pleadings Vol. 3 at pp. 873-74.

utility. But such large economic damages would not have been appropriate if vehicle access over the easement was still obtainable. Whether Mr. Wold should have stated the degree of blockage is a scope of work issue. The focus there is on the intended user. Here the intended users were the parties to litigation and the judge. Here the degree of impairment is a finding of fact, it is not known with certainty and was the subject of dispute in the litigation. The easement did not have to be 100% blocked. The focus is on loss of functional utility. He thinks Mr. Wold made the implicit assumption that the easement was totally blocked. He did put in his report that Mr. Wold should have made this clear or utilized an extraordinary assumption. The court will ultimately determine the degree of access impairment. If the court found, for example, that the easement was blocked only 30 days that would not mean Mr. Wold violated USPAP as he had clearly stated he was using the longer time period in his appraisal.

10. With respect to Mr. Wold's use of replacement costs rather than reproduction costs, as discussed in his [witness] report – Mr. Wold did not want to use reproduction costs because then that information would be public and result in increased property tax assessments. An appraiser in this situation generally notes that they considered the reproduction approach and are not using it but he or she cannot state why. This is a business matter. It is not an USPAP matter.

### v. Notice of Intent to Call Rebuttal Witnesses

The Division filed a Notice on December 14, 2005 that it intended to call two rebuttal witnesses (Ms. Cori Hodolero and Mr. Coan). Ms. Hodolero would authenticate Division documents showing that Dr. Kilpatrick had been issued a temporary courtesy license which expired on December 12, 2005 and that Mr. Bjorn-Roli's Alaska certification lapsed from 2001-03. Mr. Coan would rebut Mr. Wold's hearing testimony concerning the extent of the blockage of the Ellis Island property and authenticate his work file which included information on comparables for the Ellis Island property.[359]

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[359] Pleadings Vol. 1 at pp. 262-64.

The Division filed a related Second Amended Exhibit List on December 14, 2005.[360] The Division filed therewith: documents related to Mr. Bjorn-Roli's Alaska certification; Dr. Kilpatrick's Alaska certification; and, appraisal documents for four island properties. Two of the appraisals were done in 1998, one in 2001, and one in April 2002. The older two involved water front properties. The latter two apparently involved island properties. All of the properties are in Sitka. The conditions of the properties (quality of construction, condition) ranged from average to good. The appraised values ranged from $444,958 to $619,833.

Mr. Wold opposed the Division's Notice.[361] He argued that Ms. Hondolero's proposed evidence was not rebuttal evidence because: Dr. Kilpatick had testified during the hearing that he had a courtesy license that was about to expire and he testified truthfully that all times during his review appraisal and testimony he was licensed in Alaska; and, Mr. Bjorn-Roli had testified that he had been working in Seattle and had returned to Anchorage in 2003, and his resume shows the same. He argued that Mr. Coan cannot be a rebuttal witness about the road blockage because: he has no related personal knowledge; he stated in his appraisal review that he assumed only partial blockage; and, he testified that he had not reviewed any of the pleadings in the underlying case and no copies of the same are in his work file. He argued that Mr. Coan cannot provide rebuttal testimony concerning the comparables information in his work file because: he did not receive the same until about one month after he had submitted his appraisal review report; Mr. Coan testified that said "comparables" could not be used in a sales

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[360] Pleadings Vol. 1 at pp. 266-398.
[361] Pleadings Vol. 2 at pp. 402-535.

comparison because of the difference in values between those properties and the Ellis Island property; and, the Division had the opportunity during the hearing to present this evidence.

AHO Stebing granted the Division's motion on December 19, 2005. The next day he scheduled the remainder of the hearing for January 27, 2006. On December 23, 2005 he reset the remainder of the hearing for February 27, 2006.[362]

**w. February 26, 2006 Hearing**

The hearing resumed on February 26, 2006.[363] The Division called Mr. Coan as a rebuttal witness. His testimony included:

1. He received the faxed information from Sitka regarding comparables after he prepared his appraisal review. But he knew about the data before he did so. He had either been told by Mr. Corak over the telephone or received and then misplaced the faxed documents.

2. The Brusich's attorney that he worked with had told him that there was always easement access. So he made the assumption in his appraisal review that there was access at all times. He did not make that assumption based on any review of the record in the court case. He has since reviewed some of the pleadings – affidavits of Katy French and Mr. Spears, the preliminary injunction, the application for the order to show cause, the affidavit of Tim Long, the plaintiff's trial brief introduction, and Appendix A to the trial brief. Having reviewed those documents he does not question his assumption. There is nothing in those pleadings that contradicts his assumption.

3. His work file does **not** show that he received the information from Mr. Corak prior to preparing his appraisal review.[364]

4. He testified during his September 28, 2002 deposition in the underlying litigation that he did not search the market specifically to test Mr. Wold's assertion that he could not find any comparables. He was also asked if the Sitka comp was the only one he came up with and he said that was the only one he was personally familiar with. That is the Rockefeller Island information he received from his wife at a cocktail party. He now agrees

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[362] Pleadings Vol. 2 at pp. 603-05.
[363] Pleadings Vol. 3 at pp. 965-1002.
[364] Pleadings Vol. 3 at p. 975. Mr. Coan is now being cross-examined.

that he did **not** have the other comp information when he prepared his appraisal review.

5. He did not revise his report once he received the faxed documents.

6. He does not know why the Brusich's attorney did not provide him with copies of the pleadings. He would have liked to have had the pertinent information. He acknowledged that the injunction uses the word "blocked". The affidavits say there was material within the easement but do not say that there was ever a time you could not drive to the property. He agrees that is a question of fact that was being litigated. He agrees that if the easement was totally blocked for extended periods of time then Mr. Wold used the appropriate methodology.

The Division's second rebuttal witness was Cori Hondolero. Her testimony included:

1. She is a licensing and record supervisor for the Division. She authenticated documents in the licensing files for Dr. Kilpatrick and Mr. Bjorn-Roli.

2. Mr. Bjorn-Roli's Alaska license lapsed between July 1, 2001 and July 27, 2003. He had a courtesy license from June 6, 2003 to December 2, 2003.

3. Per 12 AAC 70.920, a courtesy license is valid for only one appraisal. The maximum term is 180 days. It can be extended one time for 30 days. Only two courtesy licenses can be issued to an appraiser during a 12 month time period. Once the assignment is completed the appraiser must send the Division a copy of the appraisal within 30 days.

4. Mr. Bjorn-Roli did not comply with the requirement that he submit a copy of his appraisal, even though the Division has sent him a reminder letter.

5. Dr. Kilpatrick has, to her knowledge, never held a general real estate appraiser license in Alaska. He did receive two courtesy licenses. The first was valid from June 16, 2005 to December 12, 2005.

### x. Written Closing Arguments

The Division filed its Written Closing Argument on May 1, 2006.[365] The Division's arguments included:

1. Mr. Wold is now relying on theories that were not stated in his appraisals – he relied on the cost approach because the marina is a "special purpose" property, he made the adjustments he did to the Copper Road property because it was in the most deplorable part of Ketchikan, and his easement loss estimate was based on his review of the pleadings which showed that the parties knew that access was blocked.

2. USPAP compliance is required by FIRREA and AS 08.87.200(3).

3. With respect to the Entwit Float property appraisal:

   A. Ms. Dineen and Judge Jahnke found that the present use was not the highest and best use because the cost approach value was basically the same as the value of the land itself due to the poor condition of the improvements and underutilization of the marina.

   B. Judge Jahnke found a double deduction – for physical depreciation and for functional obsolescence.

   C. Ms. Dineen filed a complaint with the Division on June 19, 1998. The Division hired Mr. Ferrara to review the matter, and he prepared a report on May 5, 2003. He found that the appraisal is misleading due to Mr. Wold's highest and best use finding. He testified that Mr. Wold's reliance on the cost approach was unusual given the age of the improvements. Dr. Kilpatrick agreed that the income capitalization approach is the preferred approach.[366] Mr. Ferrara found that the deductions for physical depreciation and for functional obsolescence indicated that use as a marina was an interim use and not the highest and best use.

      "Based on Wold's own appraisal, Julie Dineen's appraisal review, Judge Jahnke's decision, and Fred Ferrara's appraisal review and

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[365] Pleadings Vol. 2 at pp. 609-668.

[366] Pleadings Vol. 2 at p. 617. The Division cites *The Appraisal of Real Estate* at p. 339 for a proposition that is not stated there. The Division also cited ***In re Ambos,*** 1994 WL 16005180 (Br. S.D. Ga. 1994) and ***Norwest Marine, Inc. v. Town of Stonington,*** 199 WL 391105 (Conn. Super. 1999).

testimony, Wold's conduct violated USPAP (and AS 08.87.200(3) and AS 08.87.200(1)."

4. With respect to the Copper Road property appraisal:

A. Mr. Ferrara found that this appraisal was misleading as the comparables used were not true comparables – not sales that would be used by most appraisers in valuing the property and were not indicative of the value of the property due to the large and questionable adjustments.

B. Dr. Kilpatrick agreed that Mr. Wold's choice of comparables would be problematic if this was an appraisal for a federally insured financing transaction.

C. Mr. Wold did not bracket the comparables, as is typically done.[367]

D. Mr. Ferrara testified Mr. Wold did not adequately explain the large adjustments. For example, he made a $25,000 adjustment for each sale because the house lacked siding, a complete gutter system, and completed interior trim. These are physical deficiencies not functional deficiencies. The failure to properly account for comparable properties violates USPAP Standards Rules 1-1 and 2-1.[368] Misinformation about comparable properties is a violation of USPAP Standards Rules 1-1(b), 1-1(c) and 2-1(a).[369]

E. Mr. Ferrara faults Mr. Wold because: he relied on Mr. Dima's estimate; Mr. Dima found sagging but did not say the house had been settling; so Mr. Wold overstated the decline in value; and, he relied on Mr. Dima without adequate knowledge and sufficient investigation.

F. Based on Judge Jahnke's decision, Mr. Wold's appraisal, and Mr. Ferrara's review and testimony – Mr. Wold violated USPAP Standards Rules 1-1(a),(b),(c) and 2-1(a),(b), and AS 08.87.200(1) and AS 08.87.200(3).

5. With respect to the Ellis Island property appraisal:

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[367] Pleadings Vol. 2 at p. 621. The Division cited ***Snowbank Enterprises, Inc. v. United States,*** 6 Cl. Ct. 476, 485 (Cl. Ct. 1984).

[368] Pleadings Vol. 2 at p. 622. The Division cited ***Edison v. State, Department of Licensing,*** 32 P.3d 1039, 1048-50 (Wash. Ct. App. 2001).

[369] Pleadings Vol. 2 at p. 622. The Division cited ***Riffe v. Ohio Real Estate Appraisal Board,*** 719 N.E.2d 587, 591 (Ohio Ct. App. 1998).

A. Courts have generally not allowed recovery for diminution due to stigma in the absence of accompanying physical harm.[370]

B. Mr. Coan concluded that Mr. Wold's blanket statement that comparable sales were not available was inadequate – so his appraisal was actually a limited scope appraisal in a self-contained format. Dr. Kilpatrick agreed with Mr. Coan's analysis.

C. Per Mr. Coan, omission of the sales comparison approach for the improved property violated USPAP Standards Rules 1-1 and 2-2(a)(xi).[371]

D. Mr. Coan could not ascertain whether easement access had been totally disrupted. Mr. Bjorn-Roli agreed, and further stated that if the impairment was not total then the large economic damages probably would not have been incurred and Mr. Wold's methodology was inappropriate and arguably misleading.

E. Mr. Coan concluded that Mr. Wold's future litigation assumption was "extraordinary" and needed to be disclosed as an "extraordinary assumption" in the report.

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[370] Pleadings Vol. 2 at p. 624. The Division cites ***Berry v. Armstrong Rubber Co.,*** 989 F.2d 822, 829 (5th Cir. 1993).

[371] Pleadings Vol. 2 at pp. 624-25. The Division quotes *The Appraisal of Real Estate* (12th ed.) at p. 421 ("the sales comparison approach is a significant and essential part of the valuation process, even when its reliability is limited"). The quoted text is from a section that is headed "Applicability and Limitations", and which, at p. 419, begins by stating:

> The sales comparison approach is applicable to all types of real property interests when there are sufficient recent, reliable transactions to indicate value patterns or trends in the market. . . When data is available, this is the most straight-forward and simple way to explain and support a value opinion.
>
> When the market is weak and few market transactions are available, the applicability of the sales comparison approach may be limited. For example, the sales comparison approach is usually not applied to **special-purpose** properties because few similar properties may be sold in a given market, even one that is geographically broad. To value **special-purpose properties, the cost approach** may be more appropriate and reliable. Nevertheless, sales and offers for properties in the same general category may be analyzed to establish broad limits for the value of property being appraised, which may help support the findings of the other value approaches applied.

F. Mr. Coan concluded that the comparable properties Mr. Wold used for his litigation blight analysis did not experience blight or stigma based solely on litigation so his related findings were not supported.

G. Per Mr. Coan's report – Mr. Wold's use of the cost approach was not adequately completed and supported. For example, he did not find any functional or external obsolescence – buyers of luxury homes are unwilling to pay the full construction cost because they have the means to build their own dream home and are thus less likely to pay such value for somebody else's.[372] Mr. Ferrara's report and testimony supported this conclusion.

H. Mr. Ferrara stated that the external obsolescence – indicated by Mr. Wold's lack of upper end sales comparisons and two year marketing period – is often greater than the physical depreciation. He also reported and testified that Mr. Wold's statement that no sales of luxury residences located on islands were found in the Ketchikan marketplace was not sufficient for not using the sales comparison approach.[373]

I. Mr. Ferrara stated that there was not sufficient data in Mr. Wold's appraisal report to support Mr. Wold's market diminution value of $40,000. He did not show how the improvements were affected by the partial easement encroachment. Mr. Bjorn-Roli agreed with Mr. Ferrara in this regard.

J. Mr. Ferrara concluded that Mr. Wold had made assumptions concerning the impact of potential litigation even though there was no doubt about the validity of the easement. Mr. Wold did not completely discuss the court actions and results. And Mr. Ferrara concluded that Mr. Wold's comparables were too different to be used for comparison purposes.

K. Mr. Ferrara concluded that Mr. Wold had violated:

1. SR 1-1(b), (c) because he committed errors of omission that affected the appraisal, and rendered appraisal services in a

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[372] Pleadings Vol. 2 at p. 626. The Division cited ***Lewis v. Country of Hennepin,*** 623 N.W.2d 258, 263 (Minn. 2001).

[373] Pleadings Vol. 2 at pp. 626-27. The Division cited *The Appraisal of Real Estate* (12th ed. 2001) at p. 421 for the proposition that data to determine depreciation estimates for the cost approach are obtained through the sales comparison process.

careless and negligent manner resulting in a series of errors which produced a misleading appraisal.

2. SR 1-2(g) because he had used only the cost approach and a significant deduction in value was taken for an extraordinary assumption that had to be specifically spelled out.

3. SR 2-1(a),(b),(c) because the report contained a valuation approach which would rarely be relied upon, it did not contain sufficient information, and it incorrectly stated there was no functional or external obsolescence.

4. SR 2-2(a)(viii) – for failing to state all assumptions, hypothetical conditions, and limiting conditions.

5. SR 2-2(a)(xi) - for failing to explain permitted departures from specific requirements. Mr. Wold made assumptions about the impact of future litigation when there was no doubt about the validity of the easement, access was never completely denied, the effect of future litigation was overstated (especially since Mr. Spears instigated the litigation).

L. Mr. Wold violated AS 08.87.200(1) (USPAP) and AS 08.87.200(3) based on his appraisal, Mr. Coan's appraisal review and testimony, and Mr. Ferrara's appraisal review and testimony.

6. With respect to the credibility of the experts:

A. Mr. Ferrara is the most knowledgeable and experienced appraiser in Alaska. He has over 40 years of experience. He served two terms as chair of the Board of Real Estate Appraisers. He is a member of the Appraisal Institute. He helped prepare the 10th edition of *The Appraisal of Real Estate*. He taught residential and commercial appraiser classes for 25 years through the Appraisal Institute. He has performed appraisal reviews, including reviews through the Appraisal Institute. The Alaska Supreme Court chose him to be part of an arbitration panel for a condemnation in Valdez (***See, City of Valdez v. 18.99 Acres,*** 686 P.2d 682, 685, 692 (Alaska 1984)). He testified as an expert in Mr. Wendte's appraiser disciplinary proceeding (***See, Wendte v. State, Board of Real Estate Appraisers,*** 70 P.3d 1089 (Alaska 2003)).

B. Dr. Kilpatrick has never appraised property in Alaska. He has held only a limited, temporary courtesy license in Alaska. It expired on

December 12, 2005 and he cannot get another one. But in his report he described himself as being a certified Alaska general real estate appraiser and he so testified. He was not and could not have been a certified general real estate appraiser in Alaska. A person reading his report would not know the limited scope of his licensing in Alaska.

Dr. Kilpatrick was not objective. He admitted he was defending Mr. Wold. He directed gratuitous insults at Mr. Ferrara. For example, he ridiculed Mr. Ferrara for referring to the sales comparison approach as the "market approach" but Mr. Wold did the same in two of the appraisals at issue. And the sales comparison approach was referred to as the market approach in an article he relied upon in reaching his conclusions. This calls his competence into question too.

Dr. Kilpatrick's competence was also called into question because he admitted that an article he authored contained a blatant error – stating that USPAP "requires" appraisers to use all of the valuation approaches unless one or more is shown to be inappropriate, when it should have said "provides" that appraisers use, etc. He intentionally included this misstatement in a book so the Board cannot rely on his conclusions in this case.

C. Mr. Bjorn-Roli did not become certified as a general appraiser in Alaska until 1991 and he let his license lapse 2001-03. He obtained a courtesy license on June 6, 2003 and his certification was reinstated on July 28, 2003. He did not comply with the requirements of his courtesy license because he did not submit within 30 days of completion of his assignment a copy of the report the license authorized him to prepare. He did not mention the license lapse in his testimony. He instead testified that he had appraised properties in Alaska during the lapse time period.

7. Desk reviews are an appropriate means of reviewing another appraiser's work under *The Appraisal of Real Estate* (12th ed. 2001), USPAP Standard 3, and caselaw. Mr. Bjorn-Roli's so testified.

8. Use of cost approach to the Entwit Marina property:

A. Mr. Ferrara testified the cost approach is usually applicable to new properties and is not of much value for older properties or properties with substantial depreciation. His view is supported by numerous appraisal authorities.

B. Mr. Wold's justifications for using the cost approach "border on the frivolous."[374]

1. Dr. Kilpatrick testified that the income approach was the preferred approach for a marina. But he cited an article which he claimed supported Mr. Wold's use of the cost approach. However, the study in the article was limited to large scale manufacturing facilities, landfills, and incinerators. The reasons why the income approach would not work for such properties do not apply to a marina. Nonetheless, Dr. Kilpatrick would not acknowledge that he was taking the article out of context. To the contrary, he extrapolated its reach to include all special purpose properties.

2. Dr. Kilpatrick acknowledges that Mr. Wold did not refer to the marina as a special purpose property in his appraisal. Mr. Ferrara testified that if Mr. Wold thought it was a such he should have said so.

3. And, not only did Mr. Wold not identify the property as a special purpose property, he emphasized its income potential, not its use, as his primary consideration. And he identified the property's highest and best use as being a marine oriented commercial center.

9. Mr. Wold's analysis of the depreciation of the marina violated USPAP:

A. The cost approach is not appropriate for older properties because it is often difficult to determine depreciation.

B. Mr. Wold's treatment of depreciation proves this point. He provided a confusing and contradictory depreciation analysis. He deducted 65% ($91,253) from the value of the improvements for physical depreciation. He then noted that the improvements represent an under-improvement of the land because the value of the improvements, as depreciated, was substantially less than the value of the land. So he then took another 50% off for functional obsolescence. Judge Jahnke concluded this was a double deduction, and he found that Mr. Wold had provided no justification for the functional obsolescence deduction. Ms. Dineen testified that there was no functional obsolescence – the marina was old and not well-maintained but that was not a

[374] Pleadings Vol. 2 at p. 635.

functional problem. Mr. Ferrara noted that what Mr. Wold termed functional obsolescence was actually external obsolescence and economic, not a functional problem. And, if the improvements had the functional problems Mr. Wold found, then under the income approach, the depreciation was understated.

10. Mr. Wold's highest and best use analysis violated USPAP.

A. The fact that his income approach value was less than the value of the land proves this. The fact that the cost approach provided a higher value was not reliable because of the age of the property and deteriorated nature of the improvements. Mr. Ferrara concluded the highest and best use would be the marina as an interim use. The article that Dr. Kilpatrick relied on provided that the highest and best use of a marina may be a different use, especially when the value of the land as vacant is greater than the value of the existing marina business.

B. Mr. Wold's position is that the land can only be used for a marina so use as a marina, whatever the condition, is its highest and best use. But the highest and best use is that which maximizes the investment property's value. The focus is on the use of the property that should be made given its existing improvements. The existing improvements are compared with the ideal improvements.[375]

Mr. Wold tried to avoid the value of the land as vacant exceeding the value as improved rule by arguing that the cost of demolition to make the land vacant must be considered. But he did not mention this in his appraisal.

Dr. Kilpatrick takes the same simplistic approach.

C. Per Mr. Ferrara, this portion of the appraisal violates SR 1-1(a),(b),(c); 1-3(a); and 2-1(a).

11. Mr. Wold's selection of the comparables for the Copper Road property violated USPAP:

A. Per Mr. Ferrara, bracketing the subject property is the usual practice.

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[375] Pleadings Vol. 2 at p. 640. The Division cites *The Appraisal of Real Estate* (11th ed.) at p. 301.

B. Even if there were no lower sales (below $145,000), Mr. Wold had other options (using older sales, listed properties that did not sell, houses in similar unfinished condition).

C. Per Mr. Ferrara, the $220,000 house should not have been used because buyers for such a house are not in the market for a $115,000 house.

D. Mr. Wold's adjustments were exceedingly large and were not adequately explained. For example, he does not explain how properties a block or ½ a mile away could have values $10,000 higher.

E. And his $25,000 deduction for functional utility were for the lack of siding and interior trim, but these are physical deficiencies as the house apparently functioned.

F. Mr. Ferrara relied on the 1997 USPAP (year the appraisal was done) and the 1998 USPAP (year of a adjustment after Mr. Dima's report). Standards Rule 1-1 is the same both years. He testified Mr. Wold violated SR 1-1(a),(b),(c), and SR 2-1(a),(b). SR 2-1 did not change from 1997 to 1998.

G. Mr. Wold provided additional information during his testimony in an effort to justify the large adjustments. But he did not provide this information in his appraisal. He was required to note the presence of detrimental neighborhood conditions.[376]

H. Dr. Kilpatrick did not address these issues other than to state that Mr. Wold had properly accounted for the large adjustments.

12. Mr. Wold's sagging adjustment for the Copper Road property violated USPAP:

A. Mr. Dima stated that there was sagging. Mr. Wold's report described this as settlement.

B. Per Mr. Ferrara, an appraiser should have considered what effect this physical change would have on a buyer. A buyer of a $115,000 house would be unlikely to fix such a problem

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[376] Pleadings Vol. 2 at p. 647. The Division cites *The Appraisal of Real Estate* (11th ed.) at p. 528. There is **no** discussion of this topic at page 528 of the cited text.

C. Per Mr. Ferrara, Mr. Wold made his downward adjustment without sufficient information to determine if there would be a market impact resulting from the sagging. He needed to look at lower value houses to see what kind of physical infirmities they had and make related comparisons. The issue is not whether Mr. Dima was right. The issue is the impact on the marketability of the house.

D. Per Mr. Ferrara, Mr. Wold violated SR 1-1(a),(b),(c) and 2-1(a),(b) because he based his adjustment on only one bid and did not research comparables.

E. Mr. Wold and Dr. Kilpatrick focus on the reasonableness of Mr. Wold's reliance on Mr. Dima's information. They do not address the main problem identified by Mr. Ferrara – that Mr. Wold did not provide support for his conclusion that the value of a house appraised in this price range would be reduced to the extent he found. And Dr. Kilpatrick's reliance on Advisory Opinion No. 9 is misplaced as it address property impacted by environmental contamination and, in any event, requires that the appraiser utilize an extraordinary assumption concerning the information he/she obtained from an expert, and Mr. Wold did not specifically identify Mr. Dima's information as such.

13. Mr. Wold's reliance on the cost approach in the Ellis Island property appraisal violated USPAP:

A. Mr. Ferrara's initial comments in his report that Mr. Wold had not made any comments about the lack of sales approach are no longer valid because he did not have a copy of p. 23 of Mr. Wold's appraisal report and Mr. Wold therein stated that he found no sales of luxury residences on islands in the Ketchikan marketplace.

B. But Mr. Ferrara is nonetheless of the opinion that Mr. Wold's above-statement is not valid as the property is not really an island property (it is connected by a causeway) so he should have looked to sales of competing residences, such as luxury residences on waterfront properties.

C. Mr. Coan (22 years of Alaska appraisal experience and former chair of the Board) also testified that Mr. Wold's no comparables statement was not sufficiently complete as it appeared that there were some sales of custom or luxury homes in the area. He testified he believed that it would be typical for appraisers to have included high-end residential properties in Ketchikan and other areas of Southeast Alaska. Mr. Wold's appraisal does not contain any market research regarding luxury residences in Ketchikan.

D. Mr. Coan and Mr. Ferrara testified that Mr. Wold should have used the sales comparison approach as support for his cost approach analysis. Per Mr. Ferrara, sales comparison data provides depreciation information which the appraiser can then use to adjust for functional or external deficiencies.[377]

E. Mr. Ferrara faulted Mr. Wold for not making any deduction for functional or external obsolescence under the depreciation category. He testified that newer upper end homes typically do sell for less than the cost of construction as buyers in this market want to put in their own custom features. If there were no upper end sales at all, that would mean that some depreciation was present. Mr. Wold did not support his conclusion that there was no functional or external obsolescence. The fact that he used no comparables and found a 2-year marketing period both indicated that some form of obsolescence was present, particularly for a two million dollar property.

F. Mr. Ferrara concluded that Mr. Wold violated SR 1-1(b),(c) and 2-2(a)(viii) and 2-2(a)(xi). He withdrew his allegations that Mr. Wold had also violated SR 1-2(f) and SR 2-2(a)(vii) – having seen the missing p. 23.

G. Mr. Coan concluded that Mr. Wold violated SR 1-1(a),(b),(c) because: Mr. Wold's one sentence no comparable statement was not adequate; his failure to include a sales comparison approach was a substantial omission; and, he rendered appraisal services in a careless and negligent manner that in the aggregate affected the credibility of his results.

H. Mr. Coan also testified that Mr. Wold violated SR 2-2(a)(xi) "because the exclusion of the sales comparison approach was an appropriate departure if disclosed but the blanket statement that sales are not available was inadequate."[378]

I. Dr. Kilpatrick, in his report and testimony, agreed that Mr. Wold's blanket statement was inadequate. He agreed that Mr. Wold should have made a greater effort to describe why the sales comparison approach was inapplicable. He also acknowledged

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[377] Pleadings Vol. 2 at p. 651. The Division cites *The Appraisal of Real Estate* (12th ed.) at p. 421 for the proposition that the sales comparison approach often provides data needed for the other approaches – such as depreciation data for the cost approach.

[378] Pleadings Vol. 2 at p. 655.

that for the property to suffer external obsolescence it would have to have a diminution in value due to proximity to lower valued property and that an appraiser cannot determine whether there is such external obsolescence unless there is some supporting market data. This supports Mr. Ferrara's opinion that for Mr. Wold to determine there was no external obsolescence he would have needed market data showing the sale of high end homes at or near the cost of their construction. Mr. Bjorn-Roli also admitted that Mr. Wold's depreciation estimate was made without any support or analysis.

Dr. Kilpatrick attempts to justify Mr. Wold's approach by arguing that Mr. Wold's use of replacement cost rather than reproduction cost accounted for his lack of discussion of obsolescence or depreciation. Replacement cost can eliminate the need to measure many forms of functional obsolescence but not all forms.[379]

14. Mr. Wold's temporary access encumbrance damage analysis violated USPAP:

A. Mr. Ferrara testified that Mr. Wold's evaluation was not supported by the data in his appraisal report. Mr. Wold did not state that all access was denied. If in fact all access was denied then his adjustment would be correct but the report would be misleading because he did not state as much. Mr. Coan had the same problem – he could not determine the extent of the obstruction from Mr. Wold's report.

B. Mr. Bjorn-Roli agreed with Mr. Ferrara and Mr. Coan.

C. The pleadings from the underlying case show that access was never totally impeded – there was always room for one vehicle to pass.

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[379] Pleadings Vol. 2 at p. 656. The Division cites *The Appraisal of Real Estate* (12th ed.) at p. 357. The treatise there states that reproduction costs are the costs to construct an exact duplicate of the building, and replacement costs are the costs to construct "a building with utility equivalent to the building being appraised . . . When this cost basis is used some existing obsolescence is presumed to be cured." "The use of replacement costs can eliminate the need to measure many, but not all, forms of functional obsolescence. . . A replacement structure typically does not suffer functional obsolescence resulting from superadequacies. However, if functional problems persist in the hypothetical replacement structure, an amount must be deducted from the replacement cost." *Id.* at 357-58.

D. Mr. Wold noted in his appraisal that "all access was not denied during the construction . . ." But at the hearing he testified that all parties knew the court had found that the access had been blocked. He never used the word "blocked" in his appraisal report. He had no related personal observations. He improperly relied on Eaton, *Real Estate Valuation in Litigation* (p. 266), which addressed the destruction of an easement. He also testified that he spoke with a person who said their access had been impeded, but he testified during his earlier deposition that he had spoken to no such persons. And he testified during his deposition that he had not made any assumptions about the degree of encroachment.

Dr. Kilpatrick took the position that it did not matter if the road was completely blocked, one-half open, or three-quarters open or if the blockage occurred only part of each day.

E. Mr. Wold's errors violated SR 1-1(b),(c). Mr. Ferrara also testified that he violated SR 2-1(a),(b),(c) (USPAP 2002) because he did not describe the property as having lost its entire use for the time frame at issue yet his calculations were based on there having been an entire loss. Mr. Ferrara also testified that Mr. Wold violated SR 1-2(g) by failing to identify the extraordinary assumption that the property had lost its total use and utility for the time period at issue since the evidence reflects that a total loss of the easement had not occurred.

15. Mr. Wold's litigation stigma damages analysis violated USPAP:

A. Mr. Ferrara testified that it was not reasonable to conclude that there would be a blight or stigma on a long-term basis. The court's decisions would be recorded and known by potential buyers. And it would not be a problem getting title insurance once the litigation had concluded.

B. Mr. Wold's other sales were too dissimilar to be comparables. The KPC sale involved unresolved contamination issues. In the second sale the easement would not have, for the most part, been usable by the property owner. The third sale involved a reputation for construction defects. The fourth sale involved a reputation for construction defects and the lender foreclosing on the developer. The fifth sale involved a State right-of-way. A possible sale had fallen through because of the State's plans with respect to the right-of-way. But the owner had not marketed it again. He had instead decided to wait until the right-of-way work was done because he did not think it would sell. None involved lawsuits

between adjoining landowners, the enforcement of a pre-existing easement, or nuisance litigation.

C. Mr. Ferrara concluded that Mr. Wold could not have made such very substantial adjustments for permanent stigma when the property owner's rights had been adjudicated by the court. Mr. Coan agreed. He testified that Mr. Wold would have had to compare data from properties with similar detriments.

D. Mr. Wold's errors violated SR 1-1(b),(c). Mr. Ferrara also testified that he violated SR 2-2(a)(viii),(xi) because he made assumptions based on the impact of potential litigation when there was no dispute about the validity of the easement due to the court actions - the effect of future litigation was overstated, especially since it was Mr. Spears (the property owner) who instigated the most recent litigation.

E. Mr. Wold testified that he relied on materials from the Appraisal Institute sponsored course – Valuation of Detrimental Conditions in Real Estate. But those materials indicate how difficult it is to quantify the effects of detrimental conditions due to the hundreds of variations and stress that, since many of such claims involve litigation or insurance claims, it is important that the appraiser's analysis be presented in an understandable way to their client and judges/juries. And the materials do not mention litigation blight. No other appraisal authority mentions litigation blight as a detrimental condition. The author notes that the failure to research and apply relevant market data is the most common flaw in detrimental condition analysis. He notes that each detrimental condition has its own traits and warns against using one classification when attempting to quantify diminution based on another. Mr. Wold did not know or did not care that he was supposed to be making these distinctions. Dr. Kilpatrick also testified, without any support, that any detriment could be used to prove diminution in value caused by another detrimental condition. Mr. Wold's errors in his analysis of detrimental conditions violated SR 1-1(b),(c).

Mr. Wold filed his written closing argument on May 6, 2006.[380] His arguments included:

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[380] Pleadings Vol. 3 at pp. 669-741.

1. His expert, Dr. Kilpatrick, focused on Mr. Ferrara's use of the term "misleading."

2. Mr. Ferrara did not provide any supporting authority for the broad conclusions he stated in his appraisal review report or in his testimony.

3. The Division served Notices of Investigation with respect to the Entwit Float property appraisal and the Ellis Island property appraisal. The Division did not serve a Notice of Investigation with respect to the Copper Road property appraisal. Mr. Ferrara testified he did not think a complaint on that appraisal was warranted. He also testified he gave no weight to Judge Jahnke's decision in the Entwit v. Entwit divorce case.

   The Division's investigations were the result of complaints filed by appraisers retained by the party opposing the party who had retained Mr. Wold.

4. The Division retained Mr. Ferrara to review Mr. Wold's three appraisals. The Division relied almost exclusively on his testimony and that of Mr. Coan. Mr. Coan was the chair of the Board at the time he filed his complaint concerning Mr. Wold's Ellis Island property appraisal.

   Mr. Wold's expert, Dr. Kilpatrick, was certified to teach USPAP standards when he did his appraisal review of Mr. Wold's appraisals and when he testified. Mr. Ferrara and Mr. Coan were not. Mr. Coan had only taken the minimum USPAP coursework to be certified. He had never taught an USPAP standards class. He had no special training in appraisal standards. He had never been qualified as an expert in appraisal standards prior to his participation in the Spears v. Brusich litigation.

5. USPAP SR 3 required that an appraiser performing an appraisal review must have knowledge of the methods and techniques required in the appraisal under review and "geographic competency when the review appraiser is not familiar with the nuances of the local market, costs, sales and comparable properties."[381] Mr. Ferrara lacked both. He had never done a marina appraisal. He had never seen a marina appraisal. Mr. Wold, on the other hand, had done over 20 marina appraisals, was familiar with the rates and level of marina improvement depreciation, and had contacted reliable persons with replacement cost information. Neither Mr. Coan nor Mr. Ferrara had experience with the Southeast real estate market. Mr. Coan had little or no experience with marina appraisals. These shortcomings were compounded by the fact that they did not inspect the properties. Dr. Kilpatrick testified that a field review would be

[381] Pleadings Vol. 3 at p. 676 (citing the Comment to the USPAP SR 3 Competency Rule).

necessary given what was at stake (i.e. Mr. Wold's licensure). Mr. Ferrara testified that a field review is preferable to a desk review.

Mr. Coan and Mr. Ferrara's lack of experience with the real estate market in Ketchikan is evident from their opinions.

A. Mr. Ferrara criticized Mr. Wold for not bracketing the Copper Road property. He speculated that there had to be more representative properties in Ketchikan. Yet he identified none. AHO Stebing found that the Division had not shown that there were any. Mr. Wold clearly explained in his appraisal report that he could find none.

B. Mr. Ferrara criticized Mr. Wold for not including the sale of luxury waterfront residences as comparables to the Ellis Island property. But he identified none. He acknowledged that Mr. Wold knew the Ketchikan market better than he did. He acknowledged he had not been to Ketchikan to do a residential appraisal in 25 years.

C. Mr. Coan testified that he had no information concerning comparables at the time he performed his appraisal review of Mr. Wold's Ellis Island property appraisal report other than one property in Sitka. He had only vague and uncertain information about that property. He was nonetheless "confident" comparable sales data existed. Though he admitted during his deposition that he had never researched the market for comparables. He admitted he heard about the Sitka property during a cocktail party, and did not obtain any relevant information about the property. He did not obtain any specific information from appraisers. Yet he represented in his report that he asked Southeast appraisers about the availability of market data and his personal knowledge of the Sitka property. He did obtain some information from a Sitka appraiser about Sitka properties, but this happened after he had submitted his appraisal review. And that information shows that his representations concerning comparables was untrue as those properties were not comparables – having values in the $400,000 - $600,000 range. He had an obligation to correct his report once he had this information. He did not do so. Mr. Wold assumes he did not do so because that would have undermined the credibility of his review and the case was then heading to trial.

Neither Mr. Coan nor Mr. Ferrara were competent to render opinions on Mr. Wold's "Intermediate to Long Term Diminution in Value analysis.

A. Neither was familiar with or understood the methodology Mr. Wold used from the *Valuation of Detrimental Conditions in Real Property* by Randall Bell.

B. Neither put forth the effort to learn about the analysis. They were obligated to do so in order to be competent to render their opinions.

C. Mr. Coan testified during his deposition that he could not say that legal blight does not exist.

D. Neither carefully read Mr. Wold's appraisal. Their opinions are based on Mr. Wold assuming that the Spears/Brusich-Oaksmith litigation had to continue into the future. But Mr. Wold clearly stated several times in his appraisal that his detrimental condition analysis did not rely on the continuation of litigation between those parties. The detrimental condition was not the litigation but the buyer's perception as of the February 1, 2002 valuation date. Mr. Wold's analysis was borrowed from Mr. Bell's recognized teachings.

E. Both complain that the "comparables" used by Mr. Wold did not involve the same detrimental condition. But Mr. Wold stated in his appraisal report that no identical situations were found. But he was able to identify sales that would reflect buyer and seller interaction that establishes a range of probable loss for the subject property. Both Mr. Wold and Dr. Kilpatrick testified that finding such a range was appropriate under the circumstances.

F. The Division provided no competent testimony or definitive authority that showed that Mr. Wold's methodology was not consistent with Mr. Bell's teachings.

G. Neither Mr. Coan nor Mr. Ferrara offer any authority for their allegations that Mr. Wold's methods and analysis violated USPAP.

1. A difference of opinion between appraisers as to methodology is not an USPAP violation. Per the reports and testimony of Mr. Bjorn-Roli and Dr. Kilpatrick – a difference of professional opinion, supported by accepted and recognized authority, is not an USPAP violation.

2. The Division has failed to produce any recognized accepted authority that supports the claim that Mr. Wold's analysis was contrary to accepted and recognized appraisal practices and procedures.

6. Entwit Marina property Appraisal:

A. The Division focuses on two things: Mr. Wold's highest and best use finding; and, his reliance on the cost approach to this older property. The Division relies on Mr. Ferrara's comments, Ms. Dineen's comments, and Judge Jahnke's findings.

1. But Mr. Ferrara agrees with Dr. Kilpatrick that the marina is a "special purpose" property and that, per *The Appraisal of Real Estate* (12th ed.), the cost approach should be used for such property.

2. And Mr. Ferrara agrees that Mr. Wold's application of the cost and income approaches for the marina property was done correctly.

3. Judge Jahnke was not deciding USPAP issues.

4. Ms. Dineen's appraisal review report mirrors that of Mr. Ferrara. She did not perform a market value analysis. She did not make her self available to be deposed with respect to Mr. Wold's proceeding. She prepared her report for use by a party opposing Mr. Wold's client. She did not have the required objectivity. Mr. Wold's testimony shows that he and Ms. Dineen have once shared a personal relationship and have since been involved in several contentious condemnation proceedings on opposite sides. He testified she has bad feelings and animosity towards him.

B. Highest and Best Use:

1. Mr. Ferrara and Ms. Dineen rely on the general rule that if the income from the improvements do not support the unimproved land then the best use of the property is not its current use.

2. But Mr. Wold was very clear that the present use as a marina was the highest and best use because of the unique characteristics and disamenities of the property. Unique property with only one use is referred to as "special purpose property." Special purpose properties are an

exception to the above-general rule per *The Appraisal of Real Property* (12th ed.) at pp. 319, 326.[382]

3. Mr. Ferrara agrees that the marina property was a special purpose property but suggests that use as a marina would continue as an "interim use", not a special purpose property use. But he offered no information on what the alternate use would be once the interim use ended.

4. There is no alternative future use. Dr. Kilpatrick and Mr. Wold explained the property's impairments – such as lack of upland areas, parking restrictions, access impediments, and zoning issues. These circumstances would have been apparent to any appraiser visiting the property. Mr. Ferrara did not visit the property.

C. Cost approach:

1. *The Appraisal of Real Estate* (12th ed.) provides that the cost approach can be used on older properties if there is adequate data to measure depreciation and that the cost approach can be used to value special-purpose properties that are not frequently exchanged in the market.[383]

2. Ms. Dineen and Mr. Ferrara correctly note that the use of the cost approach for older property is very unusual. But they do not consider that the Entwit Marina is a special-purpose property. They both characterize the use as a marina as an interim use. But they do not identify an

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[382] Pleadings Vol. 3 at p. 687. The cited treatise provides at p. 319 that in "identifying and testing highest and best use, special considerations are required for . . . Special-purpose uses." The cited treatise provides at p. 326 that: "The highest and best use of special-purpose property as improved is probably the continuation of its current use if that use remains viable . . . If the current use of special purpose property is physically, functionally, or economically obsolete and no alternative uses are feasible, the highest and best use of the land may be realized by demolishing the structure and selling the remains for their scrap or salvage value."

[383] Mr. Wold cited to p. 354. The treatise provides at that page that:

> The cost approach can also be applied to older properties given adequate data to measure depreciation.
>
> The cost approach is also used to develop an opinion of market value . . . of . . . special-purpose or specialty properties, **and** other properties not frequently exchanged in the market.

alternative future use. And they agree with Mr. Wold and Dr. Kilpatrick that in 1998 the property was going to be continued to be used as a marina.

3. The Division and Mr. Ferrara are wrong when they complain that Mr. Wold improperly characterized a portion of the depreciation as being functional. Mr. Wold sufficiently explained this finding. He explained that the marina depended to too much on smaller boat slips. He concluded that good management would reconfigure the marina to accommodate larger boats, for which there is greater demand. Neither the Division nor Mr. Ferrara have offered any contrary evidence.

D. Other considerations:

1. Mr. Ferrara testified that: Mr. Wold performed both the cost and income approaches properly and that there were no misstatements of fact in this appraisal.

2. Mr. Ferrara misread Mr. Wold's report when he said that Mr. Wold had attributed the 40% vacancy rate to the dilapidated condition of the floats and pilings. He acknowledged this during his testimony. Mr. Wold actually had written that "more intensive management could make a substantial reduction in the vacancy rate" though full occupancy was not a realistic expectation given the condition of the pilings and floats.

3. Mr. Ferrara did not tell the Division of his lack of marina appraisal experience.

4. Mr. Ferrara's comments that Mr. Wold skewed the comparable sales data to achieve a lower value. But he offers no support for this claim.

5. Mr. Ferrara criticizes Mr. Wold's depreciation (physical and functional) determinations. This is an academic debate and does not involve USPAP considerations. Mr. Wold explained that the functional obsolescence was due to the excess amount of small boat moorage. He concluded that more competent management could remedy this. Mr. Ferrara offers no facts or methodology to support his comments regarding physical and functional depreciation. He simply states that depreciation may be substantially higher than was indicated in the appraisal. He does not

explain how Mr. Wold's erred. In fact, he acknowledged that Mr. Wold correctly applied the cost approach.

6. Mr. Wold's work file shows that he exercised due diligence to collect the required information for submitting this appraisal in a "summary" format. Mr. Ferrara, by contrast, did not have a work file for any of his appraisal reviews for the Division. That is a violation of the USPAP ethics rules.

E. Alleged USPAP violations:

1. Mr. Ferrara's appraisal review analysis is disjointed. He does not connect his objections to specific USPAP Standards Rules. He provides no analysis. He simply provides broad-stroke generalities.

2. SR 1-1(a) – an appraiser must be aware of and correctly employ those recognized methods and techniques that are necessary to produce a credible appraisal.

a. Mr. Wold applied the proper approaches (income and cost) to value for a special-purpose property.

b. Mr. Ferrara acknowledges the approaches were done properly.

c. Mr. Wold had the discretion to give weight to the cost approach. His doing so was consistent with recognized appraisal authority.

e. Mr. Wold had the knowledge and marina appraisal experience to appropriately determine the depreciated life of the improvements using standard cost approach techniques.

f. Mr. Ferrara did not cite any recognized authority that shows Mr. Wold was unaware of or misunderstood what methods or techniques were necessary to produce a credible appraisal.

g. SR 1-1(a) did not prevent Mr. Wold from using the cost approach over the income approach. He was aware of and understood the recognized valuation methods. He chose the one that he thought was justified under the circumstances and applied it correctly.

3. SR 1-1(b) – an appraiser may not commit a substantial error of omission or commission that significantly affects an appraisal.

   a. The Comment reflects that the focus is on the appraiser exercising due diligence to collect the data needed to render a reliable conclusion of value.

   b. Mr. Wold gathered data specific to comparable properties, the physical and legal disamenities of the property, improvement replacement costs, property characteristics, and tideland valuation. Neither the Division nor Mr. Ferrara claim that the information he gathered was incorrect or that he failed to exercise due diligence.

   c. The Division has not identified any misinformation in the appraisal that significantly affects Wold's opinions and conclusions. Mr. Ferrara testified he was not aware of any. He simply is of the view that an appraiser violates SR 1-1(b) if he/she does not use the approach he thinks is appropriate.

   d. The Division has not identified any relevant information that was available to Mr. Wold that he did not gather.

4. SR 1-1(c) – an appraiser must not render an appraisal 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.

   a. "Misleading" refers to the misstatement of facts and not to the analytical function of the appraiser's analysis.

   b. Neither Mr. Ferrara nor the Division have alleged specific acts of carelessness or negligence that caused errors within the appraisal that results in it being misleading.

   c. Neither has identified a material fact in the appraisal that resulted from Mr. Wold's carelessness or negligence that had a substantial affect on the results of the appraisal.

d. Neither has identified a series of errors which, taken together, affect the appraisal result.

5. SR 1-3(a) – in developing an appraisal, an appraiser must consider the effect on use and value of the following factors: existing land use regulations, reasonable probable modifications of such land use regulations, economic demand, the physical adaptability of the real estate, market trends, and the highest and best use of the real estate.

a. Mr. Wold's appraisal is a summary report but it still provides a detailed narrative statement that addresses these factors.

b. Mr. Ferrara's criticisms have nothing to do with SR 1-3(a). He does not fault Mr. Wold for not considering the factors required by SR 1-3(a).

6. SR 1-3(b) – an appraiser must recognize that land 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.

a. Mr. Wold met these requirements. The marina is a special-purpose property. Mr. Wold clearly disclosed his finding that the income potential of the property could not support the land value. He properly concluded that use as a marina would continue indefinitely. All of this is consistent with the authorities cited and Dr. Kikpatrick's expert opinions.

7. SR 2-1(a) - the appraisal report must clearly and accurately set forth the appraisal in a manner that will not be misleading.

a. Mr. Wold complied with these requirements.

b. Mr. Ferrara has not discussed in any meaningful way how Mr. Wold violated this provision.

c. Mr. Ferrara agrees that the technical aspects of Mr. Wold's use of the cost and income approaches were proper. He simply thinks a different approach should be taken. That does not mean that the appraisal is "misleading". Particularly since Mr.

Ferrara has now acknowledged that the cost approach can be applied to older properties and that the marina was a special purpose property.

8. SR 2-1(b) – an appraisal must contain sufficient information to enable the intended user to understand the report properly.

a. Neither the Division nor Mr. Ferrara have presented evidence that this appraisal did not comply with this requirement.

b. Mr. Ferrara and Ms. Dineen's complaints focus on Mr. Wold's methodology and not on the information conveyed. They did not complain they could not understand the report because of a lack of sufficient information therein.

c. The Division has not identified what information was lacking.

7. Copper Road property appraisal:

A. This was a summary report prepared for divorce litigation.

B. The hearing officer found the Division did not meet its burden of proof on the allegation that Mr. Wold had failed to bracket the property with comparables.

1. Mr. Ferrara speculated that there were such comparables but cited none.

C. It is noteworthy that Mr. Ferrara opined that this appraisal did not merit the filing of a complaint against Mr. Wold.

D. Adjustments:

1. Mr. Ferrara acknowledges that the condition of the property provided for a challenging assessment and that the adjustments would have been difficult, even for the most experienced appraiser.

2. Mr. Ferrara testified that Mr. Wold did not explain why large adjustments were made. But Mr. Wold clearly did so in his summary report.

3. Mr. Ferrara complains about the absence of explanation for some of the adjustments, such as for "design and appeal". But neither he nor the Division offer any authority that specifies the extent of the description and explanation the appraiser is required to provide on a printed Fannie Mae Form URAR 1004, such as Mr. Wold used for this appraisal. In the absence of such authority an USPAP violation cannot be found.

4. Neither the Division's investigator nor Mr. Ferrara inspected the comparable properties. The Division did not retain a local appraiser to do so.

5. Mr. Ferrara's claim that the unfinished parts of the residence should have been described as physical deficiencies rather than functional deficiencies does not allege an USPAP violation. It is a matter of discretion for the appraiser and does not affect the value finding. In any event, Mr. Wold explained his decision to treat these deficiencies as functional rather than physical as each of the deficiencies had a functional character. For example, water for the residence was supplied by a roof catchment system. Mr. Ferrara acknowledged during his testimony that whether the lack of siding or gutters were functional or physical deficiencies was left to the discretion of the appraiser. Neither Mr. Ferrara nor the Division have provided any authority that holds that such deficiencies must be identified as physical or that USPAP is violated if they are identified as functional.

6. It must be remembered that this was a summary appraisal prepared on a Fannie Mae Form and to be used for divorce litigation purposes only. So it does not matter whether the adjustments would have been accepted for purposes of securing conventional financing. The owners of the property were parties to the divorce – they were aware of the condition of the property.

7. Mr. Wold explained the adjustments in narrative form in a General Text Addendum. Mr. Ferrara does not allege that any of the information he recited is not true.

8. Neither the Division nor Mr. Ferrara explain how Mr. Wold's report violated USPAP. They just claim his narrative is unconvincing. Mr. Ferrara has not pointed to any USPAP provision that requires a specific level of

explanation and discussion of an appraiser in a summary report prepared on the Fannie Mae Form. The Division did not offer any evidence that Fannie Mae or commercial lenders require any more information than Mr. Wold provided.

E. Settlement

1. Neither the Division nor Mr. Ferrara explain what USPAP provision Mr. Wold violated by reducing the market value of the Copper Road property by a contractor's estimated cost to cure settlement.

2. Mr. Wold amended this appraisal 13 months after it was prepared after receiving Mr. Dima's estimate letter and questioning Mr. Dima extensively about his cost to cure estimate. Mr. Wold found Mr. Dima's estimate reasonable. He knew Mr. Dima to be a reputable contractor. He felt confidant he could rely on Mr. Dima's estimate. He concluded that repairs would eventually have to be made for the property to qualify for conventional financing, and that the property would have impaired marketability without such repairs.

3. The Division alleges Mr. Wold overstated the decline in value and improperly relied on Mr. Dima's report without adequate knowledge and sufficient investigation.

   a. Mr. Ferrara did not question Mr. Dima. The Division did not question Mr. Dima. No evidence was presented that Mr. Dima's estimate was not reasonable.

   b. Mr. Ferrara claims that Mr. Wold violated the USPAP competency provisions because he relied on Mr. Dima's report without seeking independent verification, even though he knew that Mr. Dima had been retained by a biased party. He contends Mr. Wold was obligated to gain the necessary knowledge to be able to determine if settlement was present. Said provisions do not require that an appraiser have or obtain knowledge and experience outside of the appraisal field. Mr. Ferrara cites to no specific provision in the rule or in USPAP or to any other recognized authority. Dr. Kilpatrick is of the opinion that no such obligation is imposed by

USPAP. He cites to USPAP Advisory Opinion No. 9.

F. Alleged USPAP violations:

1. The Division makes only general allegations, and relies on Mr. Ferrara's opinions. He in turn only makes general, conclusory allegations. He fails to connect the shortcomings he finds in the appraisal with the specific language of any USPAP provision.

2. SR 1-1(a)

a. The Division has not shown that Mr. Wold was unaware or, misunderstood, or incorrectly employed recognized methods and techniques necessary to render a credible report. He used both the cost and sales approaches.

b. Most of Mr. Ferrara's objections focus on the adjustments in the sales comparison approach. But AHO Stebing found that the Division had not met its burden of proof on its claim that Mr. Wold should have used better and more relevant comparables. The Division has not shown that his adjustments were not consistent with the facts on the ground. Neither the Division nor Mr. Ferrara investigated the facts on the ground.

c. Mr. Ferrara complains about how Mr. Wold explained some of the adjustments or how he characterized them – i.e. whether as physical or functional deficiencies. But he testified that none of these things affected the final value determination. He also acknowledged that adjustments are subjective, Mr. Wold described each of his adjustments in his appraisal report, and that placing an adjustment in one category on the Form as opposed to another is not a technical USPAP violation.

d. Mr. Wold employed the accepted method for doing residential appraisals. The Division has not shown that he should have used a different approach.

3. SR 1-1(b)

a. Mr. Ferrara complains about the large adjustments Mr. Wold made. But the evidence shows that the same were necessary due to the absence of sales to bracket the property. And the Division has not shown how the large adjustments significantly affected the appraisal.

b. Mr. Ferrara acknowledged that placing some adjustments in categories different than what he would have done are not USPAP violations.

c. The Division has not shown that Mr. Wold referencing 3.5 bathrooms on one place and 4 in another significantly affected the appraisal.

d. Mr. Wold's use of Mr. Dima's estimate was appropriate for reasons discussed above. And the Division has failed to show that such reliance significantly affected the appraisal.

e. Neither Mr. Ferrara nor the Division did a market value appraisal to compare to Mr. Wold's appraisal in order to determine if there were any differences that could be attributed to Mr. Wold's alleged omissions and commission. Mr. Wold is not even sure what specific error of omission or commission he committed.

4. SR 1-1(c)

a. The Division had not identified the specific error or errors Mr. Wold is alleged to have committed in a careless or negligent manner.

b. Only an error of fact, not of analytical function, violates SR 1-1(c) – as previously explained. The Division has not identified any misstated facts.

c. With respect to Mr. Dima's information – Mr. Wold did not fabricate or negligently or carelessly state the cost of cure. His decision to include the cost of the cure was an analytical function.

5. SR 2-1(a)

a. Neither the Division nor Mr. Ferrara identify what aspect of this summary report is misleading.

b. The Division has not offered any proof that anything material in this summary report was false, or was known by Mr. Wold to be false. To the contrary, Mr. Ferrara testified that he assumed all of the factual information in the summary report was correct.

6. SR 2-1(b)

a. The Division has not shown what additional information Mr. Wold should have included in his summary report.

b. Mr. Ferrara assumed the information provided was true. That is consistent with the role of a desk review.

c. The information provided was sufficient to enable the reader to understand the report. The same is true for Mr. Wold's supplement.

d. With regards to Mr. Ferrara's adjustment complaints – he has not specifically described what additional information Mr. Wold should have included that Mr. Ferrara knew was available and relevant and was omitted.

8. Ellis Island property appraisal:

A. Dr. Kilpatrick and Mr. Wold inspected the property. Mr. Coan and Mr. Ferrara did not.

Mr. Coan contacted other appraisers but provided them with little, if any, pertinent information and misrepresented his findings in his report regarding comparables.

Neither Mr. Coan nor Mr. Ferrara have working knowledge of or experience with the luxury residential real estate market in Southeast Alaska in general or in Ketchikan in particular.

Neither Mr. Coan nor Mr. Ferrara have working knowledge of or experience with the methodology of detrimental conditions used by Mr. Wold and based on the course study of Mr. Bell.

B. Mr. Wold offered the expert testimony of and reviews of Dr. Kilpatrick and Mr. Bjorn-Roli. Both testified that there were aspects of Mr. Wold's report that they would have done differently but that Mr. Wold had not violated USPAP. Both testified that Mr. Wold's statement that: "No sales of luxury residences located on islands were found in the Ketchikan marketplace. Therefore, the sales comparison approach to value was not used" was sufficient. Both opined that the exclusion language Mr. Wold used in his decision not to use the sales comparison approach was consistent with USPAP.

Mr. Ferrara is confused when he states that a self contained report must contain all three approaches to value. USPAP Standards Rules 1 and 2 do not contain such a requirement. Standards Rule 1-4 only requires that all 3 approaches be used if each is applicable. USPAP Statement 7 provides that if an approach is not applicable then the appraiser has no departure disclosure requirement. USPAP is clear that a lack of comparable data is sufficient grounds for an approach that normally would be used to be not applicable.

C. Mr. Wold's decision that the sales comparison approach was not applicable was proper.

1. SR 1-4(a) requires that an appraiser collect, verify, and analyze all information applicable to the appraisal problem, given the scope of work identified per SR 1-2(f), and that when a sales comparison approach is applicable, the appraiser must analyze the comparable sales data as are available to indicate a value conclusion.

   The Comment to SR 1-2(f) provides that an appraiser must have sound reasons in support of his or her scope of work decision and "be prepared to support the decision to exclude any information or procedure that would appear to be relevant to the client, an intended user, or the appraiser's peers in the same or a similar assignment."

2. Mr. Wold was not required to provide a detailed narrative for his decision to exclude the sales comparison approach. He is only required to have sound reasons supporting the decision. He provided sound reasons in his testimony. He was not required to recite the same in his report.

He determined from his search of the real estate markets in Ketchikan, Juneau, and Sitka in 2002 that there were no comparables. He stated his decision in the "Scope of Appraisal" section of his report. He made a similar statement in the Entwit Float property appraisal. Mr. Ferrara agrees that this statement in that appraisal was sufficient. Yet he argues that a similar statement here violates USPAP. He has failed to provide any evidence of any comparable luxury property that Mr. Wold should have considered and used.

3. Mr. Coan and Mr. Ferrara agree that if there were no comparables Mr. Wold did not violate USPAP by leaving out the sales comparison approach.

Neither the Division nor Mr. Ferrara have offered evidence of any comparable properties in Ketchikan or Southeast Alaska. All Mr. Ferrara can do is speculate that there must have been such sales data in Ketchikan.

Mr. Coan admits he had no comparable information sufficient for an appraiser to be able to use the sales comparison approach - despite what he put in his review report about comparables and his claim that Mr. Wold was required to invoke the departure rule. Mr. Coan's report is more problematic for him than for Mr. Wold due to his gross exaggerations and misrepresentations. And the after-the-report information he did obtain showed that there were no comparables.

D. Mr. Ferrara and the Division claim the appraisal was misleading because Mr. Wold failed to include a component for functional depreciation.

1. Mr. Ferrara's opinions are based on his personal experience in Anchorage. No evidence was presented that his experience is consistent with the Ketchikan market. Dr. Kilpatrick testified his experience is not consistent with the market in the rest of the world.

2. Functional depreciation, or functional obsolescence, is a component of the cost approach. Mr. Ferrara testified Mr. Wold properly performed the cost approach.

3. Mr. Coan testified, in his deposition and at the hearing, that Mr. Wold's cost approach complied with USPAP.

4. Mr. Wold and Dr. Kilpatrick testified that use of replacement costs and not reproduction costs accounts for functional obsolescence. Both relied on *The Appraisal of Real Estate* (12th ed.).

E. Temporary loss of easement:

1. Mr. Ferrara acknowledged that Mr. Wold's methodology was acceptable.

2. The issue is whether it was acceptable for Mr. Wold to conclude the Spears were entitled to 100% of the rental value for the two months of construction activity. Mr. Wold properly relied on *The Valuation in Litigation* by J.D. Eaton at p. 71.

3. Mr. Coan and Mr. Ferrara also fault Mr. Wold for applying the rental rate to the entire property rather than the easement areas because the loss of access was not total. Neither offers any supporting authority. Mr. Wold relied on *The Valuation of Litigation* at p. 266.

4. Mr. Ferrara did acknowledge that if the homeowner is being denied access to, and the quiet enjoyment of their home then Mr. Wold's method would apply to the entire property. Mr. Coan acknowledged that if the encumbrance was only 8 hours, Mr. Wold's methodology was sufficient.

5. Per Dr. Kilpatrick, it does not matter whether the blockage was 8 hours a day or all day – the focus is on whether Mr. Wold's methodology was correct. Mr. Coan and Mr. Ferrara agree that it was.

6. Mr. Wold's analysis is not based on 100% blockage.

7. Mr. Wold's approach finds support in reported decisions which hold that substantial, but not total interference, is sufficient for the full rental value of the property to be assessed.[384]

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[384] Mr. Wold cited: ***Jackson Hole Mountain Resort Corporation v. Alphenhof Lodge Association,*** 109 P.3d 555, 561 (Wyo. 2005); ***M.H. Seigfried Real Estate, Inc. v. Renfrow,*** 633 S.W.2d 272 (Mo. 1982); ***Mondelli v. Saline Sewer Co.,*** 628 S.W.2d 697 (Mo. 1982); ***Anderson v. Hayes,*** 136 S.W. 558 (Ky. 1940).

8. Mr. Wold was entitled to calculate damages based on the belief that the interference was substantial because Mr. Spears had the right to free and unimpeded residential ingress and egress under the 1999 judgment. There was ample evidence available to him to support this belief.

9. In any event, the degree of interference and the amount of damages were matters to be determined by the court.

F. Detrimental Conditions

1. Mr. Wold's methodology was recognized and approved by the Appraisal Institute.

2. Neither Mr. Ferrara nor Mr. Coan had experience with or even knowledge of the methodology.

3. Both contend that Mr. Wold made the extraordinary assumption that the litigation would continue. But Mr. Wold stated in his appraisal report that his analysis was not dependent on the litigation continuing.

4. Both complain that the "comparables" Mr. Wold used in his damage analysis did not sufficiently represent the Ellis Island situation. But Mr. Wold clearly stated in his appraisal report that no identical situations were found but he did find situations which evidence buyer and seller interaction and which establish a range of probable value loss for Ellis Island.

Per Dr. Kilpatrick, USPAP is silent on the appraiser's choice of methodology in such circumstances.

The Division offered no proof that Mr. Wold's "range of probable values" was not an acceptable method under Bell's methodology as set forth in *Valuation of Detrimental Conditions in Real Estate.*

G. Alleged USPAP violations:

1. "The parties are in agreement that the 2002 USPAP applies to the Wold Ellis Island Appraisal."[385] The 2002 edition

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[385] Pleadings Vol. 3 at p. 730.

does not include the term "misleading." Mr. Ferrara apparently was not aware of this.

2. Neither the Division nor Mr. Ferrara have specifically explained how Mr. Wold violated specific USPAP prohibitions.

3. SR 1-1(b)

   a. Mr. Ferrara claims Mr. Wold erred by not considering luxury waterfront houses in his market analysis and that, if there are none, then there is "perhaps" substantial depreciation – in either event the result is going to be misleading. Mr. Ferrara expresses the belief that other data would have been available in the community.

   b. Mr. Wold was entitled to leave out the sales comparison approach if he determined that there were no sales comparables. His simply stating that this is what he did and why is sufficient. The Division has not shown that he was required to state more.

   c. Neither Mr. Coan nor Mr. Ferrara offered any information as to any specific comparables Mr. Wold should have considered.

   d. Mr. Ferrara's "substantial depreciation" comment makes little sense. Mr. Wold accounted for functional obsolescence by using replacement rather than reproduction costs. And there is no evidence in the record to support Mr. Ferrara's view.

4. SR 1-1(c)

   a. Mr. Ferrara's analysis under SR 1-1(c) is based on the term "misleading". That term is not in SR 1-1(c). It is not in the 2002 edition of USPAP.

   b. Neither the Division nor Mr. Ferrara presented any supporting evidence. No testimony was presented that Mr. Wold was "careless" or "negligent". The Division has not offered any definitions of those terms.

5. SR 1-2(g)

a. Mr. Coan and Mr. Ferrara complain that Mr. Wold failed to state two extraordinary assumptions: there was no possibility of access; and the litigation would continue.

b. But Mr. Wold's report did not assume either circumstance.

6. SR 2-1(a)

a. The Division's allegations focus on Mr. Wold's decision not to use the sales comparison approach, to apply 100% of the rental value for the loss of use of the easement, and the extraordinary assumption regarding the easement.

b. Mr. Ferrara's related testimony is jumbled and does not address the issue of what is not clearly and accurately described in the report.

c. Mr. Wold found no comparable sales. He stated as much. He was not required to use the sales comparison approach. He stated he was not using it. His decision is supported by USPAP.

d. Mr. Ferrara did not show that the entire use of the easement must be blocked in order for there to be a loss of 100% of the rental value during the period of encumbrance. Neither he nor the Division offered any evidence that the diminution in value must be proportionate to encumbered use. Spears was entitled to free and unimpeded access under the judgment. If access is impeded the focus is then on whether it was substantial, not whether it was total. The information before Mr. Wold (i.e. preliminary injunction) was sufficient for him to conclude it was substantial. So he was not required to make the extraordinary assumption that the easement was totally blocked. The Division has provided no authority which precludes Mr. Wold's approach.

7. SR 2-1(b)

a. The Division has not met its burden of proof. It has not shown that the information in the appraisal was inaccurate or not sufficient to enable the intended user to understand the process and analysis used by Mr. Wold.

8. SR 2-1(c)

a. There was no extraordinary assumption to report. Mr. Wold did not assume total blockage. He did not assume that the litigation would continue.

b. Neither Mr. Coan nor Mr. Ferrara had any experience with or knowledge of the process Mr. Wold used. They did not take the time to learn about it.

c. Mr. Bjorn-Roli and Dr. Kilpatrick agree that Mr. Wold's methodology is accepted in the profession.

9. SR 2-2(a)(vii)

a. Mr. Ferrara testified that, having received the missing p. 23, he has withdrawn this allegation.

10. SR 2-2(a)(viii)

a. Mr. Wold made no assumptions that required disclosure.

11. SR 2-2(a)(xi)

a. The departure rule does not apply for the reasons discussed in Dr. Kilpatrick's report.

b. Mr. Ferrara and the Division did not discuss the departure rule.

c. Mr. Coan alleges Mr. Wold violated the departure rule by not using the sales comparison approach because there were comparables. But there were no comparables. So the departure rule did not apply.

d. The Comment to this SR provides that not all specific requirements are applicable to every

appraisal. If a specific requirement is not applicable then it is irrelevant and no departure is needed.

### y. Notice of Reassignment

On November 7, 2006, Notice was provided that AHO Stebing had resigned and that the case was being reassigned to Administrative Law Judge James T. Stanley.[386]

### z. Proposed Decision

Administrative Law Judge (ALJ) James Stanley submitted a proposed Decision and Order on May 24, 2007.[387] The proposed Decision and Order included:

1. The Division accuses Mr. Wold of violating AS 08.87.200(1) by "acting negligently or failing without good cause to exercise reasonable diligence in developing three appraisal reports, preparing appraisal reports, or communicating appraisal reports."[388]

   The Division also accuses Mr. Wold of violating AS 08.87.200(3) with respect to the three appraisal reports by failing to comply with USPAP.

2. The Division bears the burden of proving the alleged violations by a preponderance of the evidence. The Division has met its burden with respect to some, but not all, of the alleged violations.

3. The case has been "intense and protracted."[389] Mr. Wold's 3 appraisals total 192 pages. The hearing transcript is nearly 600 pages. The pleadings total approximately 1,300 pages. The exhibits total approximately 1,450 pages. The written closing arguments total 133 pages.[390]

4. Mr. Wold has been a certified general real estate appraiser in Alaska since 1991. He began working in the field in 1975. His appraisal work has been more industrial and commercial than residential since 1985. He still performs residential appraisal reviews for subordinates. His appraisal work had expanded beyond the Ketchikan area by 1990. He moved to the Seattle area in the mid-1990s so he could have better access to the other

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[386] Pleadings Vol. 4 at p. 1003.
[387] DER at pp. 371-390.
[388] DER at p. 372.
[389] DER at p. 373.
[390] This does not include Mr. Wold's hearing exhibit AB, which is *The Appraisal of Real Estate*, (12th ed.). DER at p. 373.

areas of Alaska where he performed appraisal services. He states that he has appraised more than 20 marinas, docks, and moorage facilities.

5. Mr. Wold was commissioned by Mr. Entwit to perform the Copper Road property summary appraisal report for use in his divorce case. The effective date of his appraisal report is January 3, 1997. Mr. Wold described the improvements (house) as being unfinished. He did not describe the house as being in poor condition. He noted the quality of construction was fair. He did describe its functional utility as "poor." He noted it was located in "the most deplorable area of Ketchikan."

Mr. Wold estimated the value at $115,000. He cited 4 comparables. He described all as superior in design and appeal to the subject. He used significant downward adjustments in value for each.

Mr. Entwit had Mr. Dima, superintendent of a Ketchikan contractor, inspect the house in February 1998. Mr. Dima wrote in his report that the floor showed signs of sagging – equal to 1 inch and 1 1/8 inch in 6 feet depending on location. He estimated it would cost $25,000 to fix. Mr. Wold obtained a copy of Mr. Dima's letter. Mr. Wold wrote to Mr. Entwit's lawyer (Mr. Ruaro) on April 11, 2009 that he was modifying his prior valuation – reducing it by $25,000 to cure the sagging floor and by an additional $12,500 to cover risks associated with effecting the cure, such as cost overruns and the discovery of additional problems. He adjusted his estimate of the market value of the property to $77,500 as of January 23, 1997.

6. Mr. Ruaro commissioned Mr. Wold's second appraisal – of Mr. Entwit's 1/3 interest in the Entwit's Float. The intended use was for Mr. Entwit's divorce. The property consisted of a small upland parcel and a larger tideland tract. The tideland portion was improved with a marina built in the 1960's and in poor condition.

Mr. Wold used the cost and income capitalization approaches. His cost approach analysis resulted in a $152,000 valuation. The components were: $140,390 for the improvements replacement; $115,822 deducted for physical and functional depreciation; $24,568 depreciation on the value of the improvements; and, $127,00 for the value of the land.

His income capitalization approach resulted in a $126,000 valuation. He gave less weight to the income capitalization approach because the resulting value closely approximated the value of the land.

He used 5 comparables to determine the value of the land. Each comparable was a sale within the preceding 3 years. The values of the comparables ranged from $6.09 to $11.73 per square foot. He explained

the differences between the comparables. He selected a value of $8.00 per square foot for the upland portion of the property. The tideland portion of the property is more than 10 times larger. He used a percentage of the value of the upland portion to reach the opinion that the tideland portion was worth $1.20 per square foot.

Counsel for the opposing party in the divorce action retained appraiser Julie Dineen to review this appraisal report. She alleged in her May 10, 1998 review letter that: Mr. Wold's appraisal was unreliable; his highest and best use finding for the marina was not supported by his calculations; and, he did not make proper adjustments or adequately discuss differences in the comparables; he undervalued the tidelands because he did not rely on other available data or lease data. She opined that he violated USPAP Standards Rules 1-1(a),(b),(c) and 1-3(b). Her review letter was forwarded to the Division in June 1998.

7. The Entwit divorce case proceeded to trial. The trial judge did not adopt Mr. Wold's estimated values. The court found that the Copper Road property had a value of $132,280 and that the Entwit Marina property had a value of $240,293.

8. The Division retained Mr. Ferrara to review Mr. Wold's Copper Road property and Entwit Float property appraisal reports. He submitted his review report on May 5, 2003. He alleged that Mr. Wold had violated USPAP Standards Rules 1-1(b), 1-1(c), 1-3(a), 1-3(b), 2-1(a), and 2-1(b). Mr. Ferrara did not visit the properties. He had not prepared an appraisal of Ketchikan residential property for 25 years as of the time of the 2005 hearing.

9. Mr. Wold's third appraisal was his July 17, 2002 appraisal of the Ellis Island property – "consisting of a luxury single family residence, guest house, pump house, boat house, marine float, ramp, and piling."[391] The appraisal was commissioned by counsel for the owner (Mr. Spears) for use in pending litigation against his neighbors. The stated purpose of the appraisal was to determine the diminution in value from temporary access interference between February 1, 2002 and April 30, 2002, and to "determine the diminution in value of the property resulting from the historic and ongoing legal disputes related to access."[392]

The pending 2002 litigation was related to 1998 litigation which resulted in a 1999 judgment giving the owner of Ellis Island (and successors in interest) a fixed, permanent, non-exclusive easement over the neighboring

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[391] DER at p. 377.
[392] DER at p. 377.

property to the North Tongass Highway for ingress/egress. The 2002 litigation was based on allegations of non-compliance with the 1999 judgment.

The appraisal problem was not routine. The appraisal report was self-described as being in a self-contained format.

The real property and improvements were assessed for property tax purposes at $1,183,100. "The improvements and amenities are deluxe in every respect. The large main house and guest house are roofed in copper. The boat house is 172 feet long, 55 feet wide, and 60 feet to the peak of the roof."[393]

Mr. Wold considered five comparables. The comparables had a value range of $4.99 and $9.45 per square foot. He distinguished and explained the comparables. He settled on a $7.00 per square foot value for the upland portion of the property and $2.00 per square foot for the tidelands. His land value totaled $800,000. He valued the improvements on a replacement cost basis, adjusted to the Ketchikan area. He used the cost approach to reach a rounded value of $2,100,000 for the improvements.

Mr. Wold calculated that the Ellis Island property suffered a temporary loss of value in the rounded amount of $40,000.

Mr. Wold calculated that the Ellis Island property had suffered a diminution in value of $525,000 "from the 'legal blight and stigma' fostered by the access issues and history."[394] He found at the outset that the situation would come within Alaska's mandatory disclosure law, based on the law, his related discussions with five Ketchikan Realtors, with an attorney, and with two title company representatives, and on his own insight. He next determined that a 25% to 50% discount would be required to attract a buyer based on his consultation with four local Realtors.

Opposing counsel retained appraiser Vince Coan to review Mr. Wold's appraisal report. Mr. Coan concluded that: Mr. Wold's appraisal was sufficiently incomplete that it should have been titled a "limited scope appraisal in a self-contained format"; Mr. Wold violated USPAP Standards Rules 1-1 and 2-2(a)(xi); Mr. Wold erred with respect to the amount of time access was impaired; assuming future litigation was an "extraordinary assumption" requiring disclosure; Mr. Wold's comparables

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[393] DER at p. 378.
[394] DER at p. 379.

were not appropriate as they did not involve litigation; and, he questioned whether litigation by itself could create legal blight and stigma.

10. The Division sent its file materials on the Ellis Island property appraisal to Mr. Ferrara for his expert review on April 28, 2003. He submitted a report on April 28, 2003 in which he alleged that: Mr. Wold's report was not a complete appraisal in a self-contained format; the appraisal was misleading because Mr. Wold's cost approach was not adequately completed and supported; Mr. Wold's damages finding for easement encroachment lacked support; Mr. Wold's discussion of the court actions and the court decisions was inadequate; and, Mr. Wold violated USPAP Standards Rules 1-1(b), 1-1(c), 1-2(f), 1-2(g), 2-1(a),(b),(c), 2-2(a)(vii) and 2-2(a)(xi).

11. Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) mandated that regulated financial institutions use state licensed appraisers for certain federally regulated transactions. All states now regulate the licensing of real estate appraisers. FIRREA also mandates that the states adopt USPAP. Alaska has done so. USPAP and AS 08.87.020 both seek to maintain high standards for the appraisal profession.

12. AS 08.01.075 permits the Board to: revoke or suspend a license; impose limits or conditions on the person's practice; impose remedial education; impose probation; and, impose a civil fine of up to $5,000. The purpose of any discipline imposed is to protect the public, not punish the licensee. General and individual deterrence are legitimate goals.

When considering what discipline to impose, he is mindful that depriving a person of their profession "should not be lightly undertaken."[395]

13. He applied USPAP SR 1-1 and SR 2-1 from the 1995 edition of USPAP and the USPAP Standards Rules 1-1, SR 1-2 and SR 2-2 from the 2002 edition of USPAP.

14. Both parties presented the expert testimony of two experts. The principal experts were Mr. Ferrara for the Division and Dr. Kilpatrick for Mr. Wold. "There can be no dispute that each of the appraisal experts has deep knowledge of the appraisal profession; each of the principal experts has testified as an expert numerous times in a variety of court and administrative proceedings. There is no dispute that the real-life experience of each of the experts is different."[396]

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[395] DER at p. 381.
[396] DER at p. 383.

15. All appraisers are bound by USPAP's "broadly worded" mandates.[397] USPAP "tells the appraiser what steps he or she must follow when producing an appraisal, but USPAP does not indicate the quantitative result. The broadly worded standards of USPAP require . . . the appraiser be careful, explain everything, keep in mind who is reading the work product."[398] Two good appraisers appraising the same property can reach different conclusions yet each appraisal can have the necessary credibility. Appraisers have numerous opportunities under USPAP to make judgment calls. But an appraiser must follow the steps required in the USPAP standards.

16. "There is room for a legitimate difference of opinion between the appraisers testifying as experts and Mr. Wold. For example . . . rest assured that there is room for different opinions as to what is *careless*, what is *negligent*. . . reviewers of the appraisal product in question will have different opinions of what is *misleading* and what is not *misleading*."[399] But "a retained expert will not be testifying if their opinion does not in general support the position taken by their client."[400] So it is not surprising that the experts have different opinions about Mr. Wold's appraisals.

17. "Mr. Wold has violated a number of USPAP standards. This conclusion is based upon consideration of the experts' testimony, an objective review of the appraisals themselves, and a review of the entire record in this case. By no means is each of the three appraisals completely deficient; however, appraisers are professionals and the law requires that they adhere to high standards of competence in a specialized field. The law in Alaska also mandates that Mr. Wold meet the standards of USPAP in every appraisal report that he produces."[401]

18. With respect to the Entwit Float property appraisal:

    a. Mr. Wold found that the property's current use as a marina was its highest and best use even though:

        1. He found it was in poor condition and the improvements were an "underimprovement of the property."

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[397] DER at p. 383.
[398] DER at p. 383.
[399] DER at p. 384.
[400] DER at p. 384.
[401] DER at pp. 383-84. (Citing AS 08.87.200(3))

2. He found that full occupancy was unlikely.

3. He valued the property under the income approach at $126,000 but he valued the land alone at $127,000.

b. Once the value of the land exceeds the value of the improved property the highest and best use ordinarily becomes the land as vacant.[402]

c. "Using the cost approach on older properties is difficult because of the high depreciation and the difficulty in calculating the replacement of old improvements."[403]

d. Mr. Wold deducted $91,253 for the poor condition of the marina in his cost approach and an additional $24,569 for "functional obsolescence", which is a double deduction for the same characteristic.

e. Mr. Wold used a formula for valuing the tidelands but did not include any independent sales or leasing data.

f. Given the above, he finds:

1. Mr. Wold violated SR 1-1(a) by not using "recognized methods and techniques to produce a credible appraisal of the marina (which affected the valuation of Entwit's one-third interest)."[404] He did not adequately explain why he used the cost method. The cost approach is usually used when appraising new or relatively new construction.[405]

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[402] DER at p. 385 (citing *The Appraisal of Real Estate* (12th ed.) at pp. 306, 309).
[403] DER at p. 385 (citing *The Appraisal of Real Estate* (12th ed.) at p. 354).
[404] DER at p. 385.
[405] DER at p. 385 (citing *The Appraisal of Real Estate* (12th ed.) at p. 354). *The Appraisal of Real Estate* (12th ed.) at pp. 353-55, includes:

> In any market, the value of a building can be related to its cost. The cost approach is particularly important when a lack of market activity limits the usefulness of the sales comparison approach and when the properties to be appraised – e.g. single family residences – are not amenable to valuation by the income capitalization approach. Because cost and market value are usually more closely related when properties are new, the cost approach is important in estimating the market value of new or relatively new construction. . . The cost approach can also be applied to older properties given adequate data to measure depreciation.

The marina was not new or relatively new. "To apply the cost approach to older properties, it is mandatory that adequate data be available to measure depreciation, and that the data be fully explained."[406]

B. Mr. Wold's double deduction violates SR 1-1(b) "because it is a substantial error which affects the appraisal."[407]

C. Mr. Wold did not violate SR 1-1(c) by producing a misleading report for careless or negligent reasons given for whom the report was prepared and the reasons for the report. The fact that the court and the opposing appraiser had different views "does not necessarily distill to a finding of misleading."[408]

D. Mr. Wold did not violate SR 1-3(a) when he concluded that the highest and best use of the land was a marina. His

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The cost approach is also used to develop an opinion of market value . . . of proposed construction, special-purpose or specialty properties, **and** other properties that are not frequently exchanged on the market. Buyers of these properties often measure the price they will pay for an existing building against the cost to build minus depreciation or the cost to purchase an existing structure and make necessary modifications. If comparable sales are not available, they cannot be analyzed to develop an opinion of the market value of such properties. Therefore, current market indications of depreciated cost or the costs to acquire and refurbish . . . are the best reflections of market thinking and, thus, of market value (or use value).

When the physical characteristics of comparable properties differ significantly, the relative values of these characteristics can sometimes be identified more precisely with the cost approach than with sales comparison. . .

When improvements are considerably older or do not represent the highest and best use of the land as though vacant the physical deterioration, functional obsolescence, and external obsolescence of the structure are more difficult to estimate. Furthermore, relevant comparable data may be lacking or the data available may be too diverse to indicate an appropriate estimate of entrepreneurial profit (i.e. the profit actually earned from an investment project.

[406] DER at p. 385 (no citation to authority is provided).
[407] DER at p. 385.
[408] DER at p. 385.

conclusion is debatable but does not rise to the level of a violation of SR 1-3(a).

E. Mr. Wold did not violate SR 1-3(b). He did consider the pertinent factors.

F. Mr. Wold did not violate SR 2-1(a). "The report reasonably set forth the appraisal in a manner that would not be misleading to its readers."[409]

G. Mr. Wold did not violate SR 2-1(b). His report was "well understood by the client and the intended users and readers . . ."[410]

19. With respect to the Copper Road property appraisal:

a. Mr. Ferrara "takes issue"[411] with: Mr. Wold's selection of comparables, and the adjustments he made to the same to make them comparables; Mr. Wold's "perceived inability to bracket the property"[412]; and, Mr. Wold's characterization of deficiencies in the property as physical or functional.

b. The evidence supports findings that:

1. Mr. Wold did not violate SR 1-1(a). He used the sales comparison approach and common valuation techniques.

2. Mr. Wold violated SR 1-1(b) by using comparables that required "unreasonably high adjustments."[413] All four comparables were more valuable and required downward adjustments of between 23% and 46%. "Inability to bracket a property is a substantial defect in an appraiser's reliance on the sales comparison approach."[414] "It may be true that better comparables were unavailable, if true, this fact would need to be explained and justified in the report."[415]

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[409] DER at p. 386.
[410] DER at p. 386.
[411] DER at p. 386.
[412] DER at p. 386.
[413] DER at p. 387.
[414] DER at p. 387 (Citing ***Snowbank Enterprises, Inc. v. United States,*** 6 Cl. Ct. 476, 485 (Cl. Ct. 1984)).
[415] DER at p. 387.

3. "Mr. Wold violated SR 1-1(c) when he blithely relied on a contractor's very short letter to further reduce the estimated value of the residence from $115,000 to $77,500. Given that the $115,000 was derived using larger than normal adjustments, a further reduction of 23% in estimated value requires more than a belief that the contractor's reputation in the community was good."[416]

4. Mr. Wold did not violate SR 2-1(a) or (b). The summary appraisal was not misleading, especially in view of the intended users. "Again, the fact that appraisers and experts differ over matters of opinion does not support a violation of SR 2-1(a) or (b) in this case."[417]

20. With respect to the Ellis Island property appraisal:

a. Mr. Ferrara opines that Mr. Wold violated USPAP Standards Rules 1-1(b), 1-1(c), 1-2(g), 2-1(a), 2-1(b), 2-2(a)(viii), and 2-2(a)(xi).

b. The evidence supports the following findings:

1. Mr. Wold violated SR 1-1(a) because he used only the cost approach, which was not reasonable under the facts of this case. "There is no dispute among experts and in the literature that correct use of the sales comparison approach will produce the most accurate results."[418] Mr. Wold unreasonably limited his search for comparables to high-end island properties in the Ketchikan area. "This is unreasonable given that higher priced, non island properties in the Ketchikan area and in nearby Southeast Alaska communities could be used."[419] USPAP requires that an appraiser must produce a credible appraisal by using the best recognized method and by providing strong justification if it is not used. "Absent a much greater demonstration of due diligence, use of the cost approach method is inadequate to produce a credible result."[420]

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[416] DER at p. 387.
[417] DER at p. 387.
[418] DER at p. 388. No citations to authorities is provided.
[419] DER at p. 388.
[420] DER at p. 388.

2. Mr. Wold violated SR 1-1(b) by not exercising reasonable due diligence, which would have "included all high-end residential properties in Southeast Alaska."[421]

3. Mr. Wold violated SR 1-1(c) "because he failed to reasonably exhaust his search for the sale of comparable properties which in turn pushed him to use the cost approach in a residential setting."[422] The prohibition against careless or negligent services is strict. "Departure from this binding requirement is not permitted."[423] The Board did not find intentional misconduct.

4. Mr. Wold did not violate SR 2-1(a). The report is "readable and explanatory."[424] There was no attempt to mislead.

5. Mr. Wold did not violate SR 2-1(b). The report contains sufficient information to be understood by the intended readers. They may disagree with his conclusions, but "a difference of opinion does not support a violation of SR 2-1(b)."[425]

6. Mr. Wold did not violate SR 2-1(c) (2002 version). The report sufficiently describes the various assumptions and the methodology he used. The report satisfied the "extraordinary assumptions" disclosure requirement.

7. Mr. Wold did not violate SR 2-2(a)(viii) (2002 version). All assumptions, hypothetical conditions, and limiting conditions which affected his analysis and conclusions were adequately stated.

8. Mr. Wold violated SR 2-2(a)(xi) because he failed to adequately explain his rejection of the sales comparison approach.

21. ALJ Stanley found, based on the above, that Mr. Wold had violated **both** AS 08.87.200(1) and AS 08.87.200(3).[426]

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[421] DER at p. 388. (Citing Commentary to SR 1-1(b)).
[422] DER at p. 388.
[423] DER at p. 388 (Quoting Commentary to SR 1-1(c)).
[424] DER at p. 389.
[425] DER at p. 389.
[426] DER at p. 389.

22. "**Disciplinary Sanctions** Mr. Wold's three appraisals fell below the applicable standards in several instances, but in more instances than not, he has reasonably met the demanding USPAP standards. Even though the record is extensive, the reader is not certain of the time constraints that may have been in place when the appraisals were being prepared. Mr. Wold is a very experienced appraiser, but experienced appraisers occasionally make mistakes and inadvertently violate the applicable professional rules. Looking at the record as a whole nothing suggests that Mr. Wold is incompetent or unqualified to hold an appraiser's license. I find no intent on the part of Mr. Wold to breach or 'skirt' the high standards of competence imposed by the USPAP."[427]

23. ALJ Stanley recommended: a formal reprimand; successful completion of a 15 hour USPAP course; fined $2,500 with $1,500 waived if Mr. Wold successfully completes the USPAP course within 12 months; and, that Mr. Wold's license be suspended for 30 days if he does not successfully complete the USPAP course within the 12 months.

**aa. Board's June 14, 2007 Meeting**

The Board met by teleconference on June 14, 2007.[428] The Board took up ALJ Stanley's proposed Decision and Order. One Board member (Mr. Olmstead) recused himself. Ms. Horetski, an Assistant Attorney General, advised that the Board had three options. The third option was to reject the proposed Decision and Order per AS 44.62.500(c) and to remand the case for the receipt of additional evidence. The Board selected the third option. The Board remanded the case for the submission of additional evidence on the issues of: the prior disciplinary sanctions imposed by the Board, including MOA's; and, the correct interpretation of the fine provision in AS 08.01.075(8) – whether fines are imposed per violation, per count, or in the aggregate.[429]

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[427] DER at p. 390.
[428] DER at p. 391.
[429] DER at p. 394.

### bb. Additional Briefing

ALJ Stanley issued an order on June 28, 2007 in which he discussed the Board's June 14, 2007 decision and set a deadline for the parties to file responsive pleadings.[430]

The Division filed its additional briefing on July 10, 2007.[431] It argued that: MOA's should not be considered under AS 08.01.75(f) and AS 08.01.075(a)(8); the Board should considered reported USPAP decisions from outside Alaska; and, that AS 08.01.075(a)(8) authorizes the Board to impose fines of up to $5,000 for each USPAP violation.

Mr. Wold filed his additional briefing in July 11, 2007.[432] He argued that: the Board has imposed sanctions in only one prior case[433]; MOA's are not "prior decisions" and should not be considered; the proposed sanctions in this case are appropriate for the violations found by the ALJ; and, the maximum fine is $5,000, regardless of the number of USPAP violations.

The Division provided Mr. Wold with MOA-related discovery.[434]

Mr. Wold filed Supplemental Briefing on August 10, 2007.[435] He argued that the proposed sanctions in this case are more severe than prior sanctions imposed per MOA's for more egregious violations.

### cc. Revised Proposed Decision and Order

ALJ Stanley submitted a Revised Decision and Order on October 3, 2007.[436] The revised Decision and Order mirrors his proposed Decision and Order except that he also

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[430] DER at pp. 395-96.
[431] Pleadings Vol. 4 at p. 1044-50.
[432] Pleadings Vol. 4 at pp. 1052-66.
[433] ***Wendte v. State of Alaska, Board of Real Estate Appraisers,*** 70 P.3d 1089 (Alaska 2003).
[434] Pleadings Vol. 4 at pp. 1067-1182.
[435] Pleadings Vol. 4 at pp. 1183-94.

discusses: the Board's June 14, 2007 action and his June 28, 2007 Order;[437] the consistency requirement of AS 08.01.075(f);[438] and, the construction of the fine provision in AS 08.01.075(a)(8).[439]

**dd. Board's October 5, 2007 Meeting**

The Board met on October 5, 2007 in Anchorage.[440] Four of the five members were present. Mr. Olmstead again recused himself. The Board discussed ALJ Stanley's new proposed decision.[441] The Board decided to postpone making a decision pending a later teleconference discussion, which would allow all of the Board members to attend and provide them with time to review the proposed decision.

**ee. Board's November 29, 2007 Meeting**

The Board met via teleconference on November 29, 2007 to address ALJ Stanley's new proposed decision.[442] Four members were present. Mr. Olmstead was not present. Robert Auth, Assistant Attorney General, noted that: the case had been scheduled for a hearing in 2005 but the retirement of a hearing officer had caused a year delay; and, this was the first case involving USPAP violations that had gone to hearing. The Board voted to discuss the new proposed decision in executive session. The Board met in executive session for 65 minutes. When the Board returned to public session, it voted to reject the new proposed decision per AS 44.62.500(c) and ordered that: the entire record be prepared for Board review; and, that written

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[436] DER at pp. 397-422.
[437] DER at pp. 399-400. He noted that MOA's are not "prior decisions" for purposes of AS 08.01.075(f).
[438] DER at pp. 408-411.
[439] DER at pp. 411-13. He concluded that the Board could not impose a fine against Mr. Wold of greater than $5,000 in the aggregate.
[440] DER at pp. 423-33.
[441] DER at p. 431

arguments be scheduled prior to the Board's final consideration of the decision in the case. The Board then decided that it would discuss the case during its January 10-11, 2008 meeting and that the written arguments would be due November 29, 2007. The Board "resolved" to "review any materials and exhibits regarding the case before the January 10-11, 2008 meeting."[443] Ms. Mandel advised that she could set up a room at the Office of Administrative Hearing so that Anchorage members could review the records there in person. Board member Gene Shafer (Fairbanks) requested that a copy be mailed as it would take some time to review the records.[444]

**ff. Division E-Mails**

Ms. Mandel sent an e-mail to the Board members on November 30, 2007 in which she advised that the Division was scanning the Wold case onto a CD, which would be made available to them for their review if they chose not to come to the Division's office to review the case file. She also advised that *The Appraisal of Real Property* (12th ed) was an exhibit and that it was too lengthy to scan and so would be available to review at the Division's office and at local libraries. She noted that the appraiser members probably already had their own copy of the book.[445]

Board member Moore e-mailed Ms. Mandel on December 3, 2007 to request a copy of the CD and copies of the pages from *The Appraisal of Real Property* (12th ed.) that were used as exhibits (so she did not have to read the entire book). Ms. Moore responded by e-mail that date and advised that she hoped to have the CD's by the end of that week and would mail

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[442] DER at pp. 434-38.
[443] DER at p. 435.
[444] DER at p. 435.
[445] Pleadings Vol. 11 at p. 3244.

one to Ms. Moore and that: "In regards to the book, the pages referenced will be cited by the attorneys and/or expert witnesses."[446]

Ms. Mandel sent an e-mail to the Board members on December 4, 2007 advising that the CD "should be ready" by December 10, 2007 and that she would deliver copies to the two Anchorage members and deliver copies to the other members via DHL overnight delivery (she asked for their physical addresses). Ms. Moore responded by e-mail on December 4, 2007 – providing her Trapper Creek address and advising that she did not think DHL delivered there. She noted that UPS delivered there once a week and the USPS every day but Sunday. Mr. Shafer provided his address in a December 4, 2007 e-mail. Ms. Mandel sent him an e-mail on December 10, 2007 advising that the CD was being sent to him via DHL that day. She also sent Ms. Moore an e-mail that advising that the CD was being mailed to her that day via USPS express. Ms. Moore advised Mr. Mandel in a December 14, 2007 e-mail that she had received the CD on December 12, 2007.[447]

Ms. Mandel sent an e-mail to the Board members on December 27, 2007 in which she advised that the Chairperson (Mr. MacSwain) had asked that she resend the contact information in case members wanted to review the exhibits in person – she noted that all of the exhibits were on the CD that they all had received.[448]

Ms. Mandel sent an e-mail to the Board members on January 9, 2008 in which she advised that more motions had been filed in the case and that she would be scanning them and

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[446] Pleadings Vol. 11 at p. 3245.
[447] Pleadings Vol. 11 at pp. 3247-51.
[448] Pleadings Vol. 11 at p. 3253.

then e-mailing copies to the Board members. She asked them to contact her if they do not receive the same.[449]

**gg. Mr. Wold's Motion to Establish Agency Action**

Mr. Wold filed a Motion to Establish Final Agency Action on December 12, 2007.[450] He argued that: the Board does not have the authority to decide the case; the authority to do so was delegated to the Office of Administrative Hearings per AS 44.62.340(a); the ALJ's revised Decision and Order became effective 30 days after it was delivered per AS 44.62.520(a); the Board did not seek reconsideration or review per AS 44.62.540(a); so, the ALJ's Decision and Order became effective on November 3, 2007. And he argued that the Board failed to appeal the Decision and the deadline for doing so has passed.

The Division opposed the motion.[451] The Division argued that: ALJ Stanley does not have jurisdiction to decide the motion so it has been sent to the Board; the Division recommends the motion be denied; the Board exercised its authority under AS 44.62.500(c) to reject the proposed decision in its entirety, and chose to decide the case itself upon the record; the Board had not previously delegated its authority to decide the case, it only appointed a hearing officer to preside over the hearing and to prepare a proposed decision per AS 44.62.450 and AS 44.62.500(b); the ALJ's proposed Decision was not a final agency action so there was nothing to appeal; the Board did not just partially reject the ALJ's proposed decision, it rejected the proposed decision as evidenced by it June 14, 2007 Order and the ALJ's June 28, 2007 Order, and the language of AS 44.62.500(c); and, the Board had all of the same available options when it rejected the revised proposed Decision.

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[449] Pleadings Vol. 11 at p. 3254.
[450] Pleadings Vol. 4 at pp. 1224-26.

Mr. Wold responded that the record does not support the claim that the Board only delegated the authority to conduct the hearing and issue a proposed decision. He noted that he had received no notice of such a partial delegation and that the ALJ had done far more than conduct the hearing – having, for example, decided numerous pre-hearing motions.[452]

**hh. Mr. Wold's Motion to Limit Agency Action**

Mr. Wold filed a Motion to Limit Agency Action on December 12, 2007. He argued: the Board partially rejected the ALJ's proposed decision and requested additional briefing concerning the possible sanctions; by specifying those particular issues the Board has exhausted its authority under AS 44.62.500(c) and any further Board action is limited by AS 44.62.500(b) to either accepting the ALJ's revised Decision and Order or reducing the proposed sanctions and accepting the remainder of the Decision; and, in the alternative, any further Board action or review is limited to the issues identified by the Board during the June 14, 2007 meeting.

The Division opposed the motion for the reasons stated above. [453]

Mr. Wold responded that: the Board has exhausted its authority under AS 44.62.500(c) and its further action is limited by AS 44.62.500(b);[454] the Board may have had the option on June 14, 2007 to decide the case itself or refer it to the ALJ for additional evidence, it elected the latter and it could not later elect the latter after the ALJ receives the additional evidence and issues a revised proposed Decision; and, it is the ALJ, not the Board, who should decide his motions.

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[451] Pleadings Vol. 4 at pp. 1272-75.
[452] Pleadings Vol. 4 at pp. 1268-70.
[453] Pleadings Vol. 4 at pp. 1272-75. The Division filed one opposition to both motions.
[454] Pleadings Vol. 4 at pp. 1265-67.

### ii. Division's Written Argument

The Division (Mr. Auth) filed a Written Argument with the Board on December 28, 2007.[455] Mr. Auth noted that the ALJ had found 8 USPAP violations and that the Board may want to consider whether Mr. Wold had committed more violations. Mr. Auth noted that the entire record had been provided on the CD and noted where the appraisals, Mr. Coan's report, and Mr. Ferrara's reports could be found in the record. Mr. Auth requested that the Board members review the hearing transcript and the parties extensive and detailed written closing arguments. Mr. Auth advised that if the Board agrees with the ALJ's analysis of the USPAP violations, they could adopt by reference those portions of the ALJ's proposed decision and rewrite the disciplinary sanctions. Mr. Auth also discussed the factors the Board should consider in imposing sanctions.

### jj. Mr. Wold's Written Closing Argument

Mr. Wold filed his written closing argument to the Board on December 31, 2007. His arguments were basically the same as set forth in his prior written Closing Argument. He did present certain themes, which were present in the prior Closing, and which he repeated or referred to at various times during this new Closing. The themes were:

1. The Board must: base its decision on the evidence in the record; the Members must be objective and unbiased; the Board cannot consider any new evidence, including that suggested or offered by a Member; and the Board must keep in mind that the Division bears the burden of proof, it must show how a specific act of omission or commission violated a particular USPAP provision.

2. None of the Division's witnesses supported their opinions with citations to any authorities. Mr. Ferrara only conducted a desk review. None of the State's witnesses talked to anybody with pertinent personal knowledge or information with respect to any of the appraisals. Mr. Ferrara and Mr.

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[455] This document was added to the record during the oral argument.

Coan had no experience in the Ketchikan or Southeast residential markets. They had no experience with marinas. They had no experience with the methods Mr. Wold used. Mr. Ferrara did not understand how the term "misleading" is used in USPAP and this contributed to his poor overall USPAP analysis. Neither Mr. Coan nor Mr. Ferrara had any special competence in USPAP.

3. Mr. Coan committed ethics and competency violations in his complaint as: he was Chair of the Board; it contains gross misrepresentations; and, the underlying litigation was still ongoing.

4. Mr. Coan and Mr. Ferrara violated the competency requirements of USPAP in performing their desk reviews of Mr. Wold's appraisals because they lacked both the requisite knowledge of the techniques at issue and the geographic competency required by the USPAP Competency Rule.

5. The Division did not permit Mr. Ferrara to do site reviews. This limited the reliability of his reports and related testimony and prejudiced Mr. Wold's right to a fair hearing.

6. The Division's witness offered only broad conclusions. They failed to tie specific facts to specific USPAP provisions.

7. The Division is acting in bad faith. For example, pursuing the Copper Road appraisal claims even though Mr. Ferrara, it's own expert, testified that the appraisal did not warrant a complaint and AHO Stebing found that the Division had not met its burden of proof on the bracketing issue – the Division had not presented any evidence of any other comparables. The failure to present evidence also appears with respect to whether there were Ellis Island comparables and whether Mr. Dima's estimate was reasonable or whether he was reliable. The Division did not investigate the comparables Mr. Wold used for the Copper Road property or the adjustments he made.

7. Mr. Wold's expert (Dr. Kilpatrick), by contrast, cited to pertinent authorities and conducted site reviews. He tied the evidence to the USPAP provisions. He is a certified USPAP standards instructor. Mr. Bjorn-Roli is the President of the Alaska Chapter of the Appraisal Institute. Neither found any USPAP violations.

8. Mr. Wold had far more experience than Mr. Coan and Mr. Ferrara in the Ketchikan and Southeastern residential market. He was familiar with the various techniques he used and related literature. They were not. He was far more experienced than both with respect to marina appraisals. Mr.

Wold's appraisals were consistent with the authoritative literature, in particular *The Appraisal of Real Estate* (12th ed).

Mr. Wold attached copies of Dr. Kilpatrick's October 24, 2005 report, Mr. Bjorn-Roli's November 8, 2005 report, and the decision in ***Missouri Real Estate Appraiser's Commission v. George Greenwood***.[456]

**kk.. ALJ's Position**

The Office of Administrative Hearings took the position that ALJ Stanley could not decide the pending motions and had no further role to play in the case.[457]

**ll.. Board's January 10-11, 2008 Meeting**

The Board held a meeting on January 10-11, 2008.[458] All five members were present. Mr. Wold's case was addressed on January 11, 2008.[459] Mr. Olmstead again recused himself. Ms. Horetski stated that the Board had decided on November 27, 2007 to decide the matter without taking additional evidence. It was noted that the hearing exhibits were present. Ms. Horetski stated that the Board first had to address two legal issues: deciding Mr. Wold's pending motions to establish final agency action and to limit agency action, and interpreting the statutory fine provisions. The Board discussed the motions. The Board denied both motions. The Board decided to deliberate on Mr. Wold's case in executive session. The Board was in executive session from 9:25 a.m. to 4:07 p.m. The Board took a two hour lunch break during that time period. The Board, through Ms. Horetski, announced its decision after returning to the public session. She stated that the Board had made some changes to pages 2 and 19 of ALJ Stanley's original proposed decision. She stated that the Board had found violations of USPAP

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[456] 2000 Mo. Tax LEXIS 226 (November 16, 2000).
[457] Pleadings Vol. 5 at pp. 1451-54.
[458] DER at pp. 439-46.

Standards Rules 1-1(a), 1-1(b), 1-1(c) and 2-2(a)(xi), and read the sanctions being imposed. She advised that she would have a final order for the Board's review by January 31, 2008.

**mm.. Board's February 15, 2008 Meeting**

The Board met via teleconference on February 15, 2008.[460] Four members were present. Mr. Olmstead was not present. The Board retired into executive session to discuss the draft Proposed Decision submitted by Ms. Horetski. The executive session lasted 55 minutes. The Board approved the proposed Decision with minor changes after returning to the public session.

**nn. Board's Decision and Order**

The Board issued its Decision and Order on February 20, 2008.[461] The Decision and Order is word for word the same as ALJ Stanley's proposed Decision and Order except for the following:

1. The Hearing Officer who presided over the hearing was David Stebing. He resigned before issuing a proposed decision. James Stanley, an administrative law judge (ALJ), was assigned the case. He reviewed the hearing testimony and exhibits and issued a proposed decision on May 24, 2007. He found therein that Mr. Wold had violated USPAP in several instances and recommended completion of a 15 hour USPAP course within one year and a fine of $2,500 with $1,500 suspended.[462]

2. The Board considered the proposed decision on June 14, 2007. The Board deliberated and then voted to reject the proposed decision per AS 44.62.500(c). The Board remanded the case to the hearing officer for the admission of additional evidence with respect to: the disciplinary sanctions imposed by the Board in other cases, including settled cases; and, the interpretation of AS 08.01.075(a)(8), the statute setting the maximum fine the Board could impose.[463]

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[459] DER at pp. 444-45.
[460] DER at pp. 447-48.
[461] WER at pp. 265-288.
[462] WER at p. 266.
[463] WER at pp. 266-67.

3. The parties submitted additional briefing. ALJ Stanley issued a second proposed decision in which he addressed the legal issues raised by the Board and recommended the Board impose the sanctions he had recommended in his first proposed decision.[464]

4. The Board met on November 27, 2007. The Board voted to reject ALJ Stanley's second proposed decision and to decide the case themselves per AS 44.62.500(c). Board deliberations were scheduled for January 11, 2008. Copies of the entire case record were distributed to the members of the Board prior to the meeting. Arrangements were also made to allow Board members to view the same at the Office of Administrative Hearings in Anchorage. The record consists of the accusation, the three appraisal reports, the hearing transcript (nearly 600 pages), the pleadings (totaling approximately 1,300 pages), exhibits (totaling approximately 1,450 pages), and the parties' written closing arguments (totaling 133 pages).[465]

5. Mr. Wold's two motions were delivered to the Division on December 13, 2007: a Motion to Establish Final Agency Action and a Motion to Limit Agency Action. ALJ Stanley took the position that he could not decide the motions. Deputy Chief ALJ Christopher Kennedy supported ALJ Stanley's position.[466]

6. The Board met on January 11, 2008. The Board, before deliberating, sought legal advice on procedural matters from the Office of the Attorney General. The Board reviewed Mr. Wold's motions. Both are premised on ALJ Stanley's second proposed decision being the final decision in the case. The Board voted to deny both motions because the Board had voted to reject both of ALJ Stanley's proposed decisions. The Board voted to conduct its deliberations in executive session. The Board reached a unanimous decision in which they agreed with ALJ Stanley's findings concerning the facts and USPAP violations but imposed different sanctions to reflect their view of the seriousness of the violations and of the re-training they believed necessary.[467]

7. The Board interprets AS 08.01.075(a)(8), in the context of this case, as establishing a maximum fine of $5,000 for each the three appraisals, regardless of the number USPAP violations found with respect to each

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[464] WER at p. 267.
[465] WER at p. 267.
[466] WER at pp. 267-68.
[467] WER at p. 268.

appraisal and regardless of the fact that the claims were brought in one charging document.[468]

8. The Board is obligated by AS 08.01.075(f) to seek consistency in imposing discipline. "The Board carefully reviewed and considered the prior real estate appraiser disciplinary cases summarized at pages 11-14 of the second proposed decision issued by ALJ Stanley on October 3, 2007."[469] The Board agrees with him that cases settled under a MOA are not "prior decisions" under AS 08.10.075(f). The facts of the one reported prior case (Wendte) are not similar to this case.

9. The fine provision under AS 08.01.075(a)(8) could be read to apply on a per accusation basis, regardless of the number of violations, or on a per count basis. The Board interprets the provision, in the context of this case, as providing for fines of up to $5,000 per appraisal, regardless of the number of violations found with respect to an appraisal.[470]

10. "**Disciplinary Sanctions** Mr. Wold's three appraisals fell below the applicable standards in several instances. The Board finds that these violations are serious, and the disciplinary sanctions to be imposed must reflect the seriousness of the violations. The sanctions must also deter Mr. Wold and other licensed real estate appraisers from engaging in similar conduct in the future. Although serious, Mr. Wold's offenses do not justify the imposition of the maximum possible sanctions. For the reasons stated, and based upon the entire record in the case, the Board unanimously decides to impose the following sanctions:

1. Licensee Kim Wold is formally reprimanded for failing to adhere to USPAP Rules 1-1(a), 1-1(b), 1-1(c), and 2-2(a)(xi) as set forth above.

2. Licensee Kim Wold is ordered to pay a civil fine in the amount of $1,500 each for the Copper Road appraisal, the Marina appraisal, and the Ellis Island appraisal . . .

3. The violations show a lack of application of basic concepts of appraisal practice, therefore the following training is required. The licensee must successfully complete the five courses listed below, offered through the Appraisal Institute, Chicago, Ill. All classes must be taken through classroom attendance, and evidence successful completion of and passage of the examination for each course must be provided to the Board within

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[468] WER at p. 268.
[469] WER at p. 277.
[470] WER at pp. 278-79.

18 months after this order becomes final. The required Appraisal Institute courses are:

A. Business Practices and Ethics (8 hours);

B. General Market Analysis and Highest and Best Use (30 hours);

C. Advanced Sales Comparison and Cost Approaches (40 hours);

D. Litigation Appraising; Specialized Topics and Applications (16 hours); and

E. National Uniform Standards of Professional Appraisal Practice (USPAP) (15 hours).

These course requirements are imposed concurrently for each of the three appraisals.

4. If the licensee fails to meet the requirements set out above, his certification as a real estate appraiser in Alaska will be suspended until proof of compliance with this order is received by the Board.[471]

**oo. Mr. Wold's Motion for Reconsideration**

Mr. Wold, through new counsel, filed a Petition for Reconsideration on March 7, 2008.[472] He asked that the Board reconsider requiring "classroom attendance" for the ordered education programs. He noted that some of the ordered courses were offered online.

**pp Board's March 27, 2008 Meeting**

The Board met via teleconference on March 27, 2008.[473] Four members were present. Mr. Olmstead was not present. The Board considered Mr. Wold's petition for reconsideration. The Board discussed the motion in executive session for 24 minutes. The Board denied the motion after returning to the public session.

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[471] WER at pp. 287-88.
[472] Pleadings Vol. 5 at pp. 1485-87.

## VI. DECISION

### a. Review

Whether the court should conduct a de novo review pursuant to AS 44.62.570 and/or Appellate Rule 609 is debatable. The factors that possibly could support de novo review include:

1. The Division sent a Notice of Investigation and Request for Response on January 19, 1999 concerning Ms. Dineen's Entwit Marina complaint and then took no further action until it requested that Mr. Ferrara review that appraisal report, and the Copper Road appraisal, in 2003.

2. The Copper Road appraisal report had not been the subject of a complaint.

3. The Division's action in 2003 came after Mr. Coan had filed his Complaint on the Ellis Island appraisal report. He was the Chair of the Board when he filed his Complaint. He was also the appraiser retained by the opposing party in litigation concerning access to Ellis Island.

4. The Division's choice of expert appraiser to review Mr. Wold's three appraisal reports. Mr. Ferrara is an experienced and apparently well-regarded appraiser. But he did not have extensive or recent experience with the Ketchikan market or the market in southeast Alaska. He did not have any particular USPAP expertise. He had never appraised a marina. He was not familiar with the detrimental condition analysis used by Mr. Wold in the Ellis Island appraisal or with the related literature.

5. The Division limited Mr. Ferrara's role to performing a desk review. USPAP provides for desk reviews. But USPAP does not specifically address desk reviews in the context of performing a review for purposes of determining USPAP compliance for possible use in a disciplinary proceeding. The use of a desk review in the context of this case is potentially problematic because of: the seriousness of the situation – Mr. Wold's professional reputation and livelihood were at stake; the desk reviewer necessarily must place themselves in the position of the intended reader of an appraiser and such a person would have personal knowledge of the property and other related circumstances; two of the appraisals were summary reports, which necessarily place greater reliance on the knowledge of the intended reader as less information is provided in such

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[473] DER at pp. 449-50.

appraisals; and, Mr. Ferrara had no familiarity with any of the properties, the comparables, or the local market.

6. Mr. Coan was presented as an expert witness by the Division even though: he was a complainant; he had been the appraiser retained by the adverse party in the Ellis Island litigation; he had no particular USPAP expertise; he did not inspect the Ellis Island property; he has no experience or familiarity with the detrimental condition analyses Mr. Wold used or the related literature; his practice focuses on commercial real estate appraisals, he does not like to do residential appraisals and hires others to do such appraisal work when there is a residential aspect to a commercial real estate appraisal; and, he was not particularly familiar with the Ketchikan or Southeast Alaska markets.

7. Mr. Coan's August 14, 2002 review of Mr. Wold's Ellis Island appraisal was the basis of the Complaint he submitted to the Division. He identified Mr. Wold's failure to use the sales comparison approach at the "most significant" omission in the appraisal report. He stated that he had made inquiries about comparables and was "personally aware" of a 2001 sale of an island residence in Sitka. In fact his inquires were extremely limited and did not include reference to the Ellis Island property and his knowledge of the Sitka sale, at that time, was based on a comment from his wife and conversation at a social event.

8. Mr. Ferrara and Mr. Coan may have violated USPAP Standard 3.[474]

9. The record is extensive. The record was available for Board members to review beginning in early December 2007. One member did not receive it until December 12, 2007. The Board made its decision on January 11, 2008.

10. The Board twice voted to reject settlement agreements between Mr. Wold and the Division though it appears that the Board had not been provided the record to review before making either decision.

11. The ALJ permitted the Division to present evidence on rebuttal that was not truly rebuttal evidence.

12. The hearing officer who presided over the hearing retired and did not submit the proposed decision.

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[474] The only version of Standard 3 in the record is from the 1997 USPAP (DER at pp. 305-307). Related evidence is found in Mr. Coan and Mr. Ferrara's reports, their testimony, and Dr. Kilpatrick's reports and testimony. ***See also***, *The Appraisal of Real Property* (12th ed.) at pp. 633-38.

13. The Board twice rejected ALJ Stanley's proposed decisions, even though the Board members had not been provided with the record to review before making either decision.

14. The Board adopted ALJ Stanley's new proposed decision with only a few changes to reflect the procedural status of the case and then imposed sanctions substantially greater than what he had recommended for the same USPAP violations.

15. The Board applied the 1995 edition of USPAP to the Copper Road and Entwit Marina appraisal report though it was not the USPAP edition in effect when either of these appraisals were performed.

16. The Board insisted that Mr. Wold take the ordered appraisal courses in person. The Board did not explain why this requirement is necessary. It appears that such courses are offered online and that the Division accepts on line course work as satisfactory for up to one-quarter of continuing education requirements.[475]

The court, however, declines to conduct a de novo review on the record for the following reasons:

1. There are no issues concerning whether the Board possessed any required expertise.

2. The record is adequate.

3. "Administrative proceedings must comply with due process."[476] "Due process does not have a precise definition, nor can it be reduced to a mathematical formula."[477] It requires adequate notice and the opportunity to be heard[478] and an impartial decision-maker.[479] "Administrative agency personnel are presumed to be honest and impartial until a party shows actual bias or prejudgment. To show hearing officer bias, a party must show that the hearing officer had a predisposition to find against a party or that the hearing officer interfered with the orderly presentation of

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[475] ***See,*** 12 AAC 70.220(d).

[476] ***State, Department of Natural Resources v. Greenpeace, Inc.,*** 96 P.3d 1056, 1064 (Alaska 2004) (citation omitted).

[477] ***Id.*** at 1063 (citation omitted).

[478] ***Id.*** at 1064.

[479] ***Lundgren Pacific,*** 603 P.2d at 889; ***see also, Matter of Dobson,*** 575 P.2d 771, 774 (Alaska 1978).

evidence."[480] There is a presumption or regularity which attaches to administrative agency decision-making.[481] This presumption: "protects them against inquiry into how they reach their decisions based on mere suspicion. . . However, that presumption may be overcome by a 'strong showing of bad faith or improper behavior' that will allow such an inquiry."[482]

Mr. Wold was afforded due process in the sense that he had notice of the Division's claims and a sufficient opportunity to be heard. The facts and circumstances of this case are not sufficient to overcome the presumption that the hearing officers and Board members were unbiased. The court can not find that the Board members could not have adequately reviewed the record prior to the January 11, 2008 hearing.

The court will consider certain of the above-stated circumstances which favored de novo review in determining whether there was substantial evidence to support the Board's USPAP violation findings.

**b. USPAP Applicability**

The USPAP versions in effect as of the date of the appraisals are those that apply under AS 08.87.200(3) for the following reasons.

1. Alaska Statute 44.62.245(a) provides that: "In adopting a regulation that incorporates a document or other material by reference, a state agency may incorporate future amended versions of the document or other material if the adopted regulation identifies or refers to the document or other material followed by the phrase 'as may be amended,' the phrase 'as amended from time to time,' or a similar provision and the (1) document

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[480] ***AT&T Alascom v. Orchitt,*** 161 P.3d 1232, 1246 (Alaska 2007) (fact that a hearing officer was also an elected officer with the Alaska Chapter of the AFL-CIO did not show bias); ***see also, Bruner v. Petersen,*** 944 P.2d 43, 49 (Alaska 1997) (actual bias is required, and is not shown merely because the decision-maker had 'a close and supportive working relationship' with the persons making who made the initial decision that was the subject of the "hearing").

[481] ***See, Martin Marietta Materials, Inc. v. Dallas County,*** 675 N.W.2d 544, 554 (Iowa 2004); ***Snyder v. Jefferson County School District R-1,*** 821 P.2d 840, 842 (Colo. App. 1991), aff'd 842 P.2d 624; ***Brown v. Board of Education, Unified School District No. 333, Cloud County,*** 928 P.2d 57, 69 (Kan. 1996); ***West v. Oklahoma Resources Board,*** 820 P.2d 454, 457 (Okla. App. 1991).

[482] ***Martin Marietta,*** 675 N.W.2d at 554 (quoting ***Citizens to Preserve Overton Park, Inc. v. Volpe,*** 401 U.S. 402, 420 (1971)) (other citations omitted).

consists of a regulation of another agency of the state; or (2) incorporation of a future amended version of the document or other material is explicitly authorized by a statute."[483] So the only statute on point on this issue expressly references regulations and does not specifically impose the same requirement on statutes.

USPAP compliance is required by statute. Alaska Statute 08.87.200(3) provides that: "a certified appraiser may not . . . fail to comply with the Uniform Standards of Professional Appraisal Practice adopted the Appraisal Standards Board of the Appraisal Foundation."

There is a related regulation but it leads back to a statute. Alaska Statute 08.87.020(2),(3) provide that the Board "shall . . . adopt rules of professional conduct to establish and maintain a high standard of integrity in the real estate profession; and (3) adopt regulations necessary to carry out the purposes of this chapter, including regulations necessary to comply with the requirements of 12 U.S.C. 3331-3351 . . . the regulations . . . may not be more stringent than the corresponding minimum requirements for receiving approval of the state's program of certification of real estate appraisers under 12 U.S.C. 3331-3351 or other federal law." 12 U.S.C. 3339 and 12 CFR § 34.44 require that all appraisals for federally related transactions conform to generally accepted appraisal standards as evidenced by the Uniform Standards of Professional Appraisal Practice adopted by the Appraisal Standards Board of the Appraisal Foundation. 12 AAC 70.900 provides that: "The standards of practice for certified real estate appraisers in this state are those specified in AS 08.87.200(3)."

The issue then is whether AS 44.62.245(a) is applicable to "statutes" and whether the reference to USPAP in AS 08.87.200(3) is to USPAP as amended annually.

The Alaska Supreme Court[484] has noted that: "The guiding principle of statutory construction is to ascertain and implement the intent of the legislature or agency that promulgated the statute or regulation".[485] Alaska courts apply a sliding scale approach to statutory interpretation: to determine the meaning of a statute we look to its legislative history, even if its language is plain on its face.[486] But "the plainer the meaning of the language in the statute, the more convincing any contrary legislative

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[483] The Administrative Procedures Act (AS 44.62) generally applies to regulations adopted under AS 08. There are exceptions that are not pertinent herein. ***See,*** AS 08.01.090.

[484] ***Beasley v. State,*** 56 P.3d 1082, 1084 (Alaska 2002).

[485] ***Id.*** quoting ***Millman v. State,*** 841 P.2d 190, 194 (Alaska App. 1992).

[486] ***Id.*** citing ***Progressive Ins. Co. v. Simmons,*** 953 P.2d 510, 516 (Alaska 1998).

history must be."[487] When a statute's meaning appears clear and unambiguous, the party urging another meaning "bears a correspondingly heavy burden of demonstrating contrary legislative intent."[488]

Alaska Statute 44.62.245(a) does not apply to statutes. The legislature did not use the word "statute." The court is not aware of any legislative history that reflects that the legislature intended that statutes be included within the scope of this statute.

Alaska Statute 08.87.200(3) does include the USPAP edition in effect at the time of the appraisal report at issue. It is evident that the legislature intended that the USPAP requirements mirror those required by federal statute and regulation. The federal statute and regulation also simply reference USPAP, without specifying whether the reference is to the edition in effect as of the date of the statute or regulation was promulgated or the reference is to the USPAP edition in effect at the time of the matter at issue. It is clear that Congress and the Alaska legislature intended that appraisers comply with the current edition of USPAP given the underlying purpose of the certification and USPAP requirements – to assure that appraisers are competent and that appraisals meet USPAP standards - and the fact that USPAP is revised annually.[489]

2. The Alaska Supreme Court has not ruled on the legality of a statute which adopts future versions of codes written by private groups. The Court has noted that there could be related serious due process problems because of the lack of notice of the amendments and the opportunity to comment on or criticize the amendments.[490] Those concerns do not appear to be present in the USPAP context for the following reasons:

   A. The record reflects that appraisers in Alaska understand that they must comply with the USPAP edition then in effect.

   B. 12 AAC 70.115 mandates that an applicant for an appraisal license in Alaska must take 15 hour USPAP course taught by a certified instructor. 12 AAC 70..220(e) provides that a licensed appraiser must complete a 7 hour USPAP course provided by a certified instructor in order to have their license renewed.

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[487] ***Id.*** quoting ***Progressive Ins. Co.,*** 953 P.2d at 516 (citing ***State v. Alex,*** 646 P.2d 203, 208-209 n. 4 (Alaska 1982)).

[488] ***Id.*** quoting ***University of Alaska v. Geistauts,*** 666 P.2d 424, 428 n. 5 (Alaska 1983).

[489] ***See,*** AS 08.87.020, AS 08.87.110, AS 08.87.120.

[490] ***See, Northern Lights Motel, Inc. v. Sweaney,*** 561 P.2d 1176, 1180-82 (Alaska 1977).

C. Appraisers certify USPAP compliance in their appraisals. Mr. Wold did so in each of the 3 appraisal reports at issue herein.

D. Appraisers are familiar with USPAP – the provisions of USPAP, the entity which issues USPAP, that new versions are issued each year, and where copies of USPAP can be obtained.

3. Given the above, the court finds that Mr. Wold could be found to have violated AS 08.87.200(3) if he violated a provision of the USPAP edition in effect at the time of the appraisal report at issue.

The court also notes that a finding that AS 08.87.200(3) does not reference USPAP as amended after the date AS 08.87.200(3) was enacted does not mean that the USPAP editions in effect at the time of the appraisal reports herein are not pertinent for the following reasons:

1. Alaska Statute 08.87.200(1) provides that: "A certified real estate appraiser may not act negligently or incompetently or fail without good cause to exercise reasonable diligence in developing an appraisal, preparing an appraisal report, or communicating an appraisal."

2. The Board found that Mr. Wold had violated both AS 08.87.200(1) and AS 08.87.200(3) as result of the USPAP violations that were found.[491]

3. Even if a violation of AS 08.87.200(3) could not be found because of the requirements of AS 44.62.245(a) and/or the due process concerns identified in ***Sweaney***, a violation of the requirements of the USPAP edition in effect at the time of Mr. Wold's appraisal reports can nonetheless be considered as a basis for a finding of negligence under AS 08.87.200(1) because USPAP sets performance standards for appraisers and appraisers, including Mr. Wold, know that.

**c. <u>Time Bar</u>**

Mr. Wold has not shown that the Board actions on the Copper Road and Entwit marina appraisal reports were time-barred for the following reasons.

1. There is no applicable statute of limitations. The limitations periods set forth in AS 09.10 do not apply as: AS 09.10.010 provides that the same

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[491] WER at p. 286.

only apply to a "civil action"; there is no provision in AS 09.10 that addresses administrative professional license actions; and, Mr. Wold has not cited legal authority that supports his position.

2. It appears that the doctrine of laches could apply to the extent that the Division's delay in proceeding on these two appraisals was "prosecutorial."[492] But Mr. Wold has not shown that he has been materially prejudiced by any such delay so laches does not bar the actions.

3. It is conceivable that due process considerations could arise, independent of the applicability of laches, if there is a significant delay between the time of an event giving rise to possible sanctions and the filing of a related action and/or final adjudication of the action. But, as noted above, Mr. Wold has not shown that he had been materially prejudiced by the delay in this case.

**d. Substantial Evidence**

**1. Entwit Marina Appraisal Report**

**A. SR 1-1(a)**

The Board found that Mr. Wold violated SR 1-1(a) because: he did not use recognized methods and techniques to produce a credible appraisal; he did not adequately explain why he used the cost method; and (apparently) the cost method was not appropriate under the circumstances.

The Board's finding was not supported by such evidence that a reasonable mind might accept it as adequate to support the Board's conclusions for the following reasons:

1. The Board applied the 1995 USPAP. The 1995 USPAP is not in the record. The Division did not show that the 1995 USPAP contained the same pertinent language as the 1998 version in effect at the time of this appraisal.[493] The court cannot presume that such is the case given the fact that new additions are published annually and the evidence in the record demonstrates that there can be substantial changes made from edition to

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[492] ***See, State, Division of Insurance v. Schnell,*** 8 P.3d 351, 359 (Alaska 2000).

[493] Standards Rule 1-1(a) in the 1998 USPAP edition provided that: "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 result."

edition. This reason is dispositive in and of itself. To the extent that it is not, the court's conclusion is supported by the following considerations.

2. The cost approach is a recognized valuation method. The cost approach is one of the three valuation approaches referenced in USPAP. All of the appraiser witnesses recognized as much. The same is recognized in *The Appraisal of Real Estate* (12th ed.).

3. The Board relied primarily on Mr. Ferrara's opinions. As previously noted: he has no particular USPAP expertise; he has never appraised a marina; he has no extensive or recent experience in the Ketchikan or Southeast Alaska markets; he only performed a desk review; and, he did not cite any supporting authorities.

4. Use of the cost approach:

   a. Ms. Dineen did not fault Mr. Wold's use of the cost approach. She instead focused on his highest and best use determination.[494] The Board found that Mr. Wold did not violate USPAP in that regard.

   b. Mr. Ferrara focused primarily on Mr. Wold's highest and best use determination. He did fault Mr. Wold in his report and hearing testimony for using the cost approach.[495] He did so in a conclusory manner. He simply stated that use of the cost method on substantially depreciated property was unusual and that he did not think that Mr. Wold used sufficient methodology. But he also testified that Mr. Wold did not violate USPAP by using the cost approach. The court again notes that he has no particular USPAP expertise and no expertise with respect to marina appraisals.

   c. The marina could reasonably be classified as a special purpose property.[496] Mr. Ferrara acknowledged as much during his

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[494] Mr. Ferrara focused on the same issue. But both he and Ms. Dineen identified marina use as the appropriate use of the property on an interim basis and both made claims about other possible uses of the property that were simply not supported by the facts. For example, they opined that the uplands could be developed for other uses, including being subdivided for residential uses, even though it is a very small (6,309 square feet) non-conforming lot that is zoned commercial with access concerns.

[495] He testified that Mr. Wold should have just used the income approach. Ms. Dineen faulted Mr. Wold for using the income approach in his analysis.

[496] *The Appraisal of Real Estate* (12th ed.) identifies "special purpose" properties as being those properties for which extra expense and design expertise would be needed if they were converted to other uses (p. 262) and those for which only use or a very limited number of uses are appropriate (p. 326).

deposition and hearing testimony. He faulted Mr. Wold for not stating that it was special purpose property but: it has not been shown that USPAP requires the use of such terminology; Mr. Wold's description and discussion of the property in his appraisal report show that he considered it to be such; and, he did describe the property as being relatively specialized.

1. *The Appraisal of Real Estate* (12th ed.) is the authoritative appraisal text. The experts recognized that compliance with it is compliance with USPAP. It provides that the cost approach is particularly important when the sales comparison approach has limited usefulness and that the cost approach can be used to value special purpose properties.

2. Mr. Ferrara acknowledged during the hearing that ***The Appraisal of Real Estate*** (12th ed.) provides that the cost approach can be used for special purpose properties.

5. Credible result:

a. The Board did not discuss what constitutes or does not constitute a "credible" appraisal. The Board did not cite any related literature.

b. The Board did not identify why the appraisal was not credible, except perhaps that Mr. Wold used the cost approach. He was permitted to do so for the reasons stated above. The Board found that Mr. Wold's highest and best use determination did not violate USPAP. The highest and best use issue was the primary focus of the hearing evidence with respect to this appraisal.

c. Mr. Ferrara provided only brief conclusory testimony on this point. He simply testified that the appraisal was not credible because of Mr. Wold's methodology. He apparently was referring to Mr. Wold's use of the cost approach. But use of the cost approach would not be an USPAP violation for the reasons stated above.[497]

d. Mr. Ferrara testified that Mr. Wold performed the cost approach in a technically correct manner.

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[497] Mr. Ferrara testified that the income approach would be more reliable. He provided no further explanation. He also noted that Mr. Wold had not used the sales comparison approach because no marina sales were available. Mr. Wold did not use the sales approach for the reasons recognized by Mr. Ferrara. Mr. Wold did use the income approach. But he gave more weight to the cost approach. He was permitted to do so under *The Appraisal of Real Estate* (12th ed.).

e. Mr. Ferrara, the Division's expert, testified that he did not place any weight on Judge Jahnke's decision.

6. Explanation for why using cost approach:

a. The Board did not specifically explain why Mr. Wold's explanation was lacking other than to state that the cost approach could be used for older properties only when adequate data is available to measure depreciation and the data is fully explained.

b. The Board did not discuss in any detail the impact of this appraisal being a summary appraisal report.

c. Mr. Ferrara did not discuss in any meaningful way the fact that this was a summary appraisal report. Mr. Ferrara's testimony reflects that his view of intended reader is broader than that contemplated under USPAP.

d. Mr. Wold could use the cost approach under *The Appraisal of Real Estate* (12th ed.) for special purpose property and property for which there were no comparable sales as discussed above. The marina property was special purpose property and there were no comparables.

e. Assuming that there is a separate rule for older special use property or properties for which there are no sales comparisons, Mr. Wold did address depreciation in some detail. Neither Mr. Ferrara nor the Board explain why his explanation and data were lacking or how the same violated USPAP. Mr. Ferrara testified that depreciation adjustments tended to be subjective.

f. Mr. Wold described each of the three approaches to value in the appraisal. He stated that he was not using the sales comparison approach due to a lack of comparable sales. Mr. Ferrara testified that this explanation for not using the sales comparison approach was sufficient.

g. Mr. Wold explained that the cost approach is usually used for relatively new property but that it could also be used when the improvements to the property are relatively specialized and there are limited comparable sales. He had already explained that there were no comparable sales for the marina. He proceeded to discuss the specialized nature of the property in addressing the highest and best use determination. He explained his income approach analysis. He then explained why he was giving more weight to the cost approach.

**B. SR 1-1(b)**

The Board found that Mr. Wold violated SR 1-1(b) because he made a double deduction for depreciation by making a $91,253 deduction for the poor condition of the marina and an additional $24,569 for functional obsolescence for the same characteristic.

The Board's finding was not supported by such evidence that a reasonable mind might accept it as adequate to support the Board's conclusions for the following reasons:

1. The Board applied the 1995 USPAP. The 1995 USPAP is not in the record. The Division did not show that the 1995 USPAP contained the same pertinent language as the 1998 version in effect at the time of this appraisal.[498] The court cannot presume that such is the case given the fact that new additions are published annually and the evidence in the record demonstrates that there can be substantial changes made from edition to edition. This reason is dispositive in and of itself. To the extent that it is not, the court's conclusion is supported by the following considerations.

2. The Board did not discuss in any detail the impact of this appraisal being a summary appraisal report. Mr. Ferrara did not discuss in any meaningful way the fact that this was a summary appraisal report.

3. The Board apparently relied primarily on Mr. Ferrara's opinions. As previously noted: he has no particular USPAP expertise; he has no extensive or recent experience in the Ketchikan or Southeast Alaska markets; he only performed a desk review; and, he did not cite any supporting authorities.

4. Ms. Dineen did not address this issue in her complaint. She briefly addressed it in her deposition testimony. She testified that Mr. Wold made separate deductions for physical depreciation and functional obsolescence. She recognized that there could be separate deductions for each. She questioned the latter because she did not think that there was any functional obsolescence. She did not specifically testify that Mr. Wold made a double deduction for the same thing.

5. Mr. Ferrara recognized in his report that there could be separate deductions for physical depreciation and functional obsolescence.

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[498] Standards Rule 1-1(b) in the 1998 USPAP edition provided that: "In developing a real property appraisal, an appraiser must: (b) not commit a substantial error of omission or commission that significantly affects an appraisal."

6. *The Appraisal of Real Estate* (12th ed.) at Chapter 16 recognizes that there are three types of depreciation: physical, functional, and external.

7. Mr. Ferrara, in his report, noted Mr. Wold's physical depreciation and functional obsolescence deductions. He did not state that Mr. Wold made a double deduction. His criticism was that the functional obsolescence was really external obsolescence since the floats still functioned.

8. Mr. Ferrara testified that he placed no weight on Judge Jahnke's findings.

9. Mr. Ferrara's testimony concerning SR 1-1(b) on direct consisted of conclusory comments. With respect to depreciation, all he said was that he believed that "the representation of the depreciation is not as complete and as thorough as it should be, and its not convincing." He did not testify that Mr. Wold had violated USPAP by making a double depreciation deduction based on the same characteristic.

10. Mr. Wold's discussion of the depreciation deductions in the appraisal does not reflect that he made deductions for physical depreciation and functional obsolescence for the same characteristic.[499]

**2. Copper Road Appraisal Report**

**A. SR 1-1(b)**

The Board found that Mr. Wold violated SR 1-1(b): by using comparables requiring an unreasonably high adjustment; which did not bracket the subject property; and, if better comparables were not available, he needed to explain and justify that finding in his report.

The Board's finding was not supported by such evidence that a reasonable mind might accept it as adequate to support the Board's conclusions for the following reasons:

1. The Board applied the 1995 USPAP. The 1995 USPAP is not in the record. The Division did not show that the 1995 USPAP contained the same pertinent language as the 1997 version in effect at the time of this

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[499] ***See***, Vol. 6 at pp. 1679-80 (Mr. Wold's work file notes). Whether the amounts of the deductions, the basis for the deductions, of the labeling of the second deduction as being "functional" instead of "external" were appropriate are not at issue. The Board found a violation of SR 1-1(b) based on Mr. Wold making a double deduction for the same characteristic.

appraisal.[500] The court cannot presume that such is the case given the fact that new additions are published annually and the evidence in the record demonstrates that there can be substantial changes made from edition to edition. This reason is dispositive in and of itself. To the extent that it is not, the court's conclusion is supported by the following considerations.

2. The Board did not discuss in any detail the impact of this appraisal being a summary appraisal report. Mr. Ferrara did not discuss in any meaningful way the fact that this was a summary appraisal report.

3. The Board relied primarily on Mr. Ferrara's opinions. As previously noted: he has no particular USPAP expertise; he has no extensive or recent experience in the Ketchikan or Southeast Alaska markets; he only performed a desk review; and, he did not cite any supporting authorities.

4. Mr. Ferrara opined in his report that Mr. Wold's choice of comparables were not appropriate because all were valued substantially higher than the subject property and the comparables did not bracket the subject property as there were no comparables of lower value. He also faulted Mr. Wold for discussing the comparables in an addendum. He noted that the appraisal could not have been used for conventional financing purposes. He questioned how comparables in relatively close proximity to the subject property (a block or half a mile away) could have such higher values. Finally, he opines that there must have been sales of lower valued houses in the Ketchikan area that could have been used to bracket the subject property.

   Mr. Ferrara's related hearing testimony on direct consisted of the following: his main questions with this appraisal were the comparables and the large adjustments; the usual practice is to bracket the subject property with at least one lower valued comparable; it would be unreasonable to assume that there were no lower valued comparables; and, Mr. Wold did not adequately explained – for example, how a property a block or half mile away would merit a $10,000 adjustment – the adjustment might be perfectly reasonable but it is not explained sufficiently.

5. Mr. Wold, in the appraisal report, stated that he had spoken with local realtors and bankers and others with knowledge of the sale of residential properties in the area and that he had obtained related data from other sources. He stated that he conducted a thorough search for comparables,

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[500] Standards Rule 1-1(b) in the 1997 USPAP edition provided that: "In developing a real property appraisal, an appraiser must: (b) not commit a substantial error of omission or commission that significantly affects an appraisal."

the community is small, and the number of comparables was limited. He stated that he had attempted without success to bracket the subject pro-property. He acknowledged that there was great disparities between the comparables and the subject property. He acknowledged that the adjustments often exceed established appraisal guidelines. He stated that this was unavoidable due to the limited available sales data.

6. Mr. Ferrara did not do any market research. There is no evidence in the record that there were better comparables. There is no evidence in the record that there were other comparables.[501] There is no evidence in the record that there was a comparable that could have been used to bracket the subject property. There is no evidence in the record that Mr. Wold used improper values for the comparables.

7. Neither Mr. Ferrara nor the Board cited any authorities for the position that failing to bracket the subject property as part of employing the sales comparison approach in and of itself violates USPAP or some other authoritative standard.[502]

8. Mr. Ferrara acknowledged that adjusters sometimes have to make large adjustments[503] when working with very unusual property. He noted that Mr. Wold had a very difficult assignment due to the unfinished condition of the house. He also acknowledged that Mr. Wold's adjustments may have been perfectly reasonable but were not adequately explained.

9. Mr. Wold did explain the adjustments in some detail. The fact that he did so in an addendum is immaterial, the addendum was part of the report. He used the approach/format referenced in *The Appraisal of Real Estate* (12th ed.) at pp. 429-48. Mr. Ferrara, as noted above, did not discuss in any detail the fact that this was a summary report and he did not focus at all on

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[501] The court notes, but does not rely on, AHO Stebing's related finding during the hearing.

[502] The Board relies only on the decision in ***Snowbank Enterprises, Inc. v. U.S.,*** 6 Cl.Ct. 476, 485 (Cl.Ct. 1984). This is a pre-USPAP case. The Court therein did not cite to *The Appraisal of Real Estate.* The property at issue was a lodge. It was not a residence. The Court found that the value of the lodge would be more accurately determined using the income approach. The income approach is generally not used for residential property. It appears that no courts have cited this case for the proposition advanced by the Board. *The Appraisal of Real Estate* (12th ed.) does reference bracketing (p. 430). But it uses the word "may" and does not state that such bracketing absolutely must be done in a sales comparison approach.

[503] The court notes that Mr. Ferrara and Mr. Coan fault Mr. Wold's Ellis Island appraisal report because he failed to use the sales comparison approach even though doing so would have resulted in much larger adjustments than those used in this appraisal report and the record reflects that he would not have been able to bracket the property – all the comparables would be of lower values.

the intended reader of the appraisal report and what they would have known.[504] He cited no authorities in support of his claim that more explanation was required in this summary report to satisfy the requirements of USPAP.

10. Mr. Ferrara acknowledged in his hearing testimony that his comment that the adjustments in this appraisal report exceeded what lenders would require have nothing to do with whether Mr. Wold violated USPAP.

11. Mr. Ferrara opined that the problems he perceived with this appraisal report were not such that he would have filed a complaint with the Division.

**B. SR 1-1(c)**

The Board found that Mr. Wold violated SR 1-1(c) because he "blithely relied on" Mr. Dima's "very short letter to further reduce the estimated value of the residence from $115,000 to $77,500" given that the $115,000 value "was derived using larger than normal adjustments" and a "further reduction of 23% in estimated value requires more than a belief that the contractor's reputation in the community was good."

The Board's finding was not supported by such evidence that a reasonable mind might accept it as adequate to support the Board's conclusions for the following reasons:

1. The Board applied the 1995 USPAP. The 1995 USPAP is not in the record. The Division did not show that the 1995 USPAP contained the same pertinent language as the 1998 version in effect at the time of this appraisal.[505] The court cannot presume that such is the case given the fact

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[504] Mr. Ferrara's criticism in this regard is puzzling. It would appear that even non-appraisers would readily agree that properties a block apart could have very different values – for example a property on the water as opposed to a property across the street on the uphill side of the road. The court again notes that this was a summary appraisal report and the focus is on what would be understood by the intended user of the report.

[505] Standards Rule 1-1(c) in the 1998 USPAP edition provided that: "In developing a real property appraisal, an appraiser must: (c) not render appraisal services in a careless or negligent manner, such as a series of errors that, considered individually, my not significantly affect the results of an appraisal, but which, when considered in the aggregate, would be misleading." The related Comment provides that an appraiser is required to use due diligence and care and that the

that new additions are published annually and the evidence in the record demonstrates that there can be substantial changes made from edition to edition. This reason is dispositive in and of itself. To the extent that it is not, the court's conclusion is supported by the following considerations.

2. The Board relied primarily on Mr. Ferrara's opinions. As previously noted: he has no particular USPAP expertise; he has no extensive or recent experience in the Ketchikan or Southeast Alaska markets; he only performed a desk review; and, he did not cite any supporting authorities.

3. Mr. Ferrara, in his report and testimony, disputed the factual basis for Mr. Wold's supplemental opinion of value and, in his report, opined that Mr. Entwit had improperly pressured Mr. Wold to reduce the appraised value of the house to gain some advantage in his divorce action and Mr. Wold acquiesced by failing to take the necessary steps to verify the extent of the problem described by Mr. Dima.

   But Mr. Ferrara then testified that he is not saying that Mr. Dima was not reliable or that his estimate was not reasonable. So, Mr. Ferrara's bottom line opinion is that Mr. Wold did not adequately investigate the situation to make sure that Mr. Dima's estimate was reasonable and he did not take the steps necessary to properly adjust the value (i.e. looking for houses worth under $100,000 with sagging floors).

4. The record does not support the conclusion that Mr. Wold "blithely"[506] relied on Mr. Dima's letter.

   The evidence in the record reflects that: Mr. Wold and Ms. Cessnun had personally inspected the residence and they had not noticed the sagging described by Mr. Dima. There is no contrary evidence.

   The undisputed evidence in the record shows that Mr. Wold stated in his updated market value appraisal that: he had read the letter and had spoken with Mr. Dima; Mr. Dima had explained how the settling could have occurred after Mr. Wold's inspection; Mr. Dima had recently cured similar problems at two local residences; Mr. Dima had provided the $25,000 cost of cure estimate; a purchaser would want the problem fixed because otherwise the property would not qualify for conventional financing; a purchaser would require an additional entrepreneurial incentive; he did not

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fact that an appraiser's carelessness or negligence did not significantly affect their opinions or conclusions does not excuse the carelessness or negligence.

[506] Blithe means "carefree", "casual" per Webster's II New Riverside University Dictionary (1984).

re-inspect the property as that was outside the scope of his assignment; and, he relied on Mr. Dima's expertise.

The undisputed evidence in the record shows that Mr. Wold's work file contains notes which reflect that: he called Mr. Dima; Mr. Dima explained how the "settlement" could have occurred after Mr. Wold's inspection; Mr. Dima explained the basis of his bid, Mr. Dima explained he had recently done two similar projects and this bid is consistent with the bids for those jobs; Mr. Dima has a very good reputation; and, Mr. Wold had reviewed a video of the premises which confirmed Mr. Dima's inspection.

5. Neither the Board nor Mr. Ferrara pointed to any authority that supports a finding that Mr. Wold could not rely on a contractor he found to be reliable in concluding that there had been recent settling and with respect to the cost of cure. The parties argued over the applicability of Advisory Opinion No. 9. The Division argued that it is limited to the circumstance specifically addressed in the opinion (environmental contamination). That position is supported by the stated limited purpose of Advisory Opinions. But it is obvious that the rationale of the Advisory Opinion would apply in other situations, including the instant situation. The competency requirement does not mandate that an appraiser have the knowledge or expertise of a contractor under such circumstances. It is clear that appraiser's routinely rely on information from other persons they deem to be reliable in preparing appraisals. Standards Rule 1-2 for 1997 and 1998 are not in the record but SR 1-2 from the 2002 edition demonstrates this point. Moreover, *The Appraisal of Real Estate* (12th ed.) countenances the same.[507]

6. Neither the Board nor Mr. Ferrara pointed to any authority that supports a finding that USPAP required Mr. Wold to personally hire another contractor for a second opinion or that he had to have his client do this. Neither discuss the scope of Mr. Wold's assignment or the fact that he is in the Seattle area and the property is in Ketchikan.

7. Neither the Board nor Mr. Ferrara pointed to any authority that supports a finding that Mr. Wold violated USPAP by using Mr. Dima's cost to cure figure in his revised valuation. Mr. Ferrara simply claims that a buyer would not pay to have the problem fixed. He provided no support for this claim. Mr. Wold believed that a buyer would have the problem fixed because the property otherwise could not be financed. It appears that Mr. Wold and Mr. Ferrara simply have a difference of opinion. But that does not show an USPAP violation. Mr. Ferrara also claims that Mr. Wold should have done an analysis using homes in Ketchikan valued at less than

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[507] *See,* pp. 57, 149-152, 201, 209, 214, 223, 423.

$100,000 with sagging floors. He cites no supporting authorities. He did no market research to see if any such "comparables" exist. Nothing in the record indicates that such "comparables" existed. To the contrary, the record shows that Mr. Wold was unable to find a comparable property to bracket the subject property on the lower end (with or without sagging floors). The entrepreneurial incentive component Mr. Wold used is consistent with *The Appraisal of Real Estate* (12th ed.) at p. 360.

**3. Ellis Island Appraisal**

**A. SR 1-1(a)**

The Board found that Mr. Wold violated 1-1(a) because: he unreasonably used only the cost approach when it is well recognized that the correct use of the sales comparison approach will produce the most accurate result; he unreasonably limited his search to high-end island properties when higher priced, non island properties in Ketchikan or Southeast Alaska could be used; USPAP requires that appraisers produce a credible result by using the best recognized valuation method and, if it is not used, then there must be strong justification; and, the cost approach was inadequate to produce a credible result without a much greater showing of due diligence.

The Board's finding was not supported by such evidence that a reasonable mind might accept it as adequate to support the Board's conclusions for the following reasons:

1. Standards Rule 1-1(a) in the 2002 USPAP edition provided that: "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 result."

2. The gist of the Board's finding is that Mr. Wold did not use the technique necessary to produce a credible result – the sales comparison approach.

3. The Board is correct inasmuch as it was recognized by the experts and in the literature that the sales comparison approach is generally the best valuation method for residential properties. But it is axiomatic that the sales comparison approach cannot be used if there is insufficient data in the form of comparables. This conclusion is supported by SR 1-4 and *The*

*Appraisal of Real Estate* (12th ed.).[508] It is also supported by the testimony of both Mr. Coan and Mr. Ferrara.

4. The Board found that Mr. Wold violated USPAP by limiting his search for comparables to high-end island properties – apparently finding that this demonstrates that he did not understand and correctly employ the sales comparison approach.

The Board, Mr. Coan, and Mr. Ferrara all state that Mr. Wold should have employed broader search parameters. But they cite no authorities for this position. USPAP does not directly address this issue. *The Appraisal of Real Estate* (12th ed.) provides that: "The sales comparison approach is most useful when a number of similar properties have recently been sold or are currently for sale in the subject property's market. Using this approach, an appraiser produces a value indication by comparing the subject property with similar properties, called *comparable sales.*"[509] *The Appraisal of Real Estate* (12th ed.) provides that "comparables" are "properties that are similar to the subject property in terms of characteristics such as property type, date of sale, size, physical condition, location, and land use constraints. The goal is to find a set of comparable sales as similar as possible to the subject property."[510]

Ellis Island is trophy property. The property was an island that was accessible by vehicle over a causeway. The improvements were of very high quality, relatively new, and in very good condition. The improvements included a large house, a guest house, a very large boat house, a pump house, and a dock.

Mr. Wold stated in this appraisal that he had spoken with realtors, buyers, sellers, and other knowledgeable people regarding real estate values in general and sales of the specific properties referenced. And that: "we searched public records and contacted parties knowledgeable of the real estate market in Ketchikan for comparable sales data." The record reflects that Mr. Wold has a database. And Mr. Coan testified Mr. Wold's experience in the area was such that he could do comparables in his head

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[508] *The Appraisal of Real Estate* (12th ed.) identifies the three methods of data analysis and then provides that: "One or more of these approaches are used in all estimations of value, the approaches employed depend on the type of property, the intended use of the appraisal, the identified scope of work, and the quality and quantity of data available for analysis. . . Appraisers should apply all the approaches that are applicable and for which there is data. (p. 62), ***See also,*** p. 419. Neither USPAP nor *The Appraisal of Real Estate* (12th ed.) state that the sales comparison approach must be used in a residential appraisal.

[509] ***Id.*** at p. 63 (emphasis in the original).

[510] ***Id.*** at p. 422.

and conclude that other properties would not be reliable to provide an opinion of value.

Given the above, Mr. Wold could not have violated USPAP by looking for properties comparable in type, size, condition (luxury) and location (island) in the market area and by determining, after conducting the above-described research, that there were no comparables.

This conclusion is supported by Mr. Coan's hearing testimony. It was noted that Mr. Wold did not include any market research on luxury residences in Ketchikan in this appraisal and Mr. Coan was asked what Mr. Wold should have done. Mr. Coan responded that: "You will find as many answers to this question as appraisers you query." And he added that he would have included that data, even if it was not applicable, and then address the adjustments in the reconciliation.

5. The conclusion that Mr. Wold did not exercise due diligence is not supported by the record. Neither the Board nor Mr. Ferrara (or Mr. Coan) identify what research steps he should have taken but did not take other than limiting the scope of comparables to luxury island properties. His "comparable" decision is discussed above.

6. The Board's finding is implicitly based on facts that are not in the record – "that higher priced, non island properties in the Ketchikan area and in nearby Southeast Alaska communities could be used." To the contrary, the evidence in the record reflects that such "comparables" were not available. Mr. Ferrara opined that such properties were out there but he had not researched the market and had little familiarity with the market. Mr. Coan did make limited inquiries and did receive some sales information. The sales Mr. Coan learned about, if used in a sales comparison approach analysis, would have necessitated very high adjustments – adjustments much higher than those for which the Board found Mr. Wold had violated USPAP in the Copper Road appraisal. And he would not have been able to bracket the sale with a higher sale – another reason that the Board found that he had violated USPAP in the Copper Road appraisal.[511]

7. The cost approach can be used to value properties such as Ellis Island. *The Appraisal of Real Estate* (12th ed.) states that: "In any market, the value of a building can be related to its cost. The cost approach is particularly important when a lack of market activity limits the usefulness

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[511] The court also notes that the sales referenced by Mr. Coan were all from Sitka. Sitka is in Southeast Alaska but it is not a community that is "nearby" Ketchikan. The court also notes that Mr. Ferrara testified that a $500,000 home could not be used as a comparable for the Ellis Island property.

of the sales comparison approach when the properties to be appraised – e.g. single family residences – are not amenable to valuation by the income capitalization approach. Because cost and market value are usually more closely related when properties are new, cost and market value are usually more closely related when properties are new, the cost approach is important in estimating the market value of new or relatively new construction. The approach is especially persuasive when the land value is well supported and the improvements are new or suffer only minor depreciation . . ."[512] Mr. Ferrara testified that the cost approach could be used for homes that have unusual aspects or custom features. Both describe the Ellis Island property.[513]

8. Mr. Ferrara testified that, even if there were no comparables, the sales comparison approach could still be used as support for the cost approach. *The Appraisal of Real Estate* (12th ed.) does note that the sales comparison approach is a significant part of the valuation process even when its reliability is limited as it can be used to determine a probable range of values in support of the value indication from one of the other approaches and it provides data needed for other approaches, such as the cost approach.[514] Mr. Wold did do a sales comparison approach on the real property as part of his cost approach analysis. And here the lack of comparables resulted in the approach not being applicable, not just that the results would be of limited reliability.

9. Mr. Ferrara testified that the fact that Mr. Wold did not use sales comparison approach and said he was not going to was not was not an USPAP violation.

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[512] ***Id.*** at pp. 354-55.

[513] The Division cites ***Lewis v. County of Hennepin,*** 623 N.W.2d 258, 263 (Minn. 2001) in support of its claim that the cost approach could not be used for valuing luxury homes. The decision does not support that proposition. The Court upheld the lower tax court's rejection of the use of the cost approach. The Court noted that the appraisers had testified that the luxury features of the home did not add to the property's value, thereby creating functional obsolescence requiring significant depreciation. The Court did not hold that in general the cost approach could not be used for luxury homes. And here Mr. Wold used replacement costs and *The Appraisal of Real Estate* (12th ed.) provides that: "The use of replacement cost can eliminate the need to measure many, but not all, forms of functional obsolescence. . . A replacement structure typically does not suffer functional obsolescence resulting from super adequacies." (pp. 357-58).

[514] ***Id.*** at p. 421.

**B. SR 1-1(b)**

The Board found that Mr. Wold violated SR 1-1(b)[515] by not exercising due diligence, specifically by not including all high end residential properties in Southeast Alaska.

The Board's finding was not supported by such evidence that a reasonable mind might accept it as adequate to support the Board's conclusions for the following reasons:

1. Those reasons stated above with respect to SR 1-1(a).

2. Mr. Wold testified that he tried without success to find comparables by obtaining information from Ms. Cessnun (Ketchikan), Mr. Corak (Sitka), and Mr. Canary (Juneau), and in his database. He testified that in so doing he described the Ellis Island property. He testified that Mr. Corak was familiar with the property. He testified that Mr. Corak and Mr. Canary told him they were not aware of comparables. The Division did not present evidence that Mr. Wold did not take these steps with said results.

**C. SR 1-1(c)**

The Board found that Mr. Wold violated SR 1-1(c) by "failing to reasonably exhaust his search for the sale of comparable properties which in turn pushed him to use the cost approach in a residential setting." The Board noted that the prohibition against careless or negligent services is strict and that departure from the rule is not permitted.

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[515] SR 1-1(b) in the 2002 USPAP edition provided that: "In developing a real property appraisal, an appraiser must: (b) not commit a substantial error of omission or commission that significantly affects an appraisal." The Comment provided that:

> In performing real estate appraisal services, an appraiser must be certain that the gathering of factual information is conducted in a manner that is sufficiently diligent, given the scope of work as identified according to Standards Rule 1-2(f), to ensure that the data that would have a material or significant effect on the resulting opinions or conclusions are identified and, where necessary, analyzed. Further, an appraiser must use sufficient care in analyzing such data to avoid errors that would significantly affect his or her opinions and conclusions.

The Board's finding was not supported by such evidence that a reasonable mind might accept it as adequate to support the Board's conclusions for the reasons stated above with respect to SR 1-1(a) and SR 1-1(b).

**D. SR 2-2(a)(xi)**

The Board found that Mr. Wold violated SR 2-2(a)(xi) by failing to adequately explain his rejection of the sales comparison approach.

The Board's finding was supported by substantial evidence for the following reasons:

1. SR 2-2(a)(xi) requires that an appraiser explain the reason for excluding any of the usual valuation approaches. The Comment provides that the amount of detail required "will vary with the significance of the information to the appraisal."[516]

2. Excluding the sales comparison approach for the Ellis Island property was significant inasmuch as it is residential property.

3. Mr. Wold stated that he was not using the approach because there were no comparables. But he did not explain his decision in any great detail. If he had done so it appears that the Division likely would not have pursued certain of their claims concerning this appraisal.

4. The finding is consistent with the testimony of Mr. Ferrara and Dr. Kilpatrick, and Dr. Kilpatrick's report, that more of an explanation should have been provided.[517]

**e. Negligence**

The Board did not separately discuss its finding that Mr. Wold violated AS 08.87.200(1). Thus the Board found that Mr. Wold violated AS 08.87.200(1) due to the USPAP

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[516] The court is not focusing on the departure rule aspect of SR 2-2(a)(xi) because the Board did not do so and the record reflects that it was not necessary for Mr. Wold to use the departure rule.
[517] Though Dr. Kilpatrick opined that this did not constitute an USPAP violation.

violations it found under AS 08.87.200(3). So the court's decision above with respect to the USPAP findings is dispositive with respect to AS 08.87.200(1).

### f. Penalties

The case is being remanded to the Board for reassessment of the penalties imposed in light of the court's decision herein and the fact that the only violation remaining is of SR 2-2(a)(xi) for the Ellis Island appraisal report. So it is not necessary for the court to address Mr. Wold's excessive penalty claims.

## VII. CONCLUSION

The Board's decision is REVERSED[518] in part, and AFFIRMED in part, and REMANDED to the Board for its determination of the appropriate sanction for the one remaining USPAP violation.

**IT IS SO ORDERED.**

Dated at Ketchikan, Alaska this 11th day of December 2009.

Trevor N. Stephens
Superior Court Judge

SEAL OF THE TRIAL COURTS OF THE STATE OF ALASKA FIRST JUDICIAL DISTRICT

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[518] The court has focused primarily on the evidence presented by the Division and relied on by the Board. The court has not weighed the competing evidence presented by Mr. Wold. To the extent appropriate, the court does note that Dr. Kilpatrick testified that Mr. Wold did not violate USPAP. He does have USPAP expertise. The court also notes that it found unpersuasive the Division's attempts to discredit Dr. Kilpatrick's testimony by claiming that he is biased, he perjured himself with respect to his licensing in Alaska, and he made a mistake in one of his publications. The Division took his statement that he is "defending" Mr. Wold out of context. The Division overstated the significance of his testimony concerning his Alaska licensing. There was a mistake in the publication. It clearly was a mistake, and not a situation in which Dr. Kilpatrick meant what was written and is saying something different in this case. He is aware of it and testified that it will be changed in the next edition. The change will involve a couple of words and the mistake was in the nature of typo, albeit one involving an important matter.