BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL FROM THE BOARD OF REAL ESTATE APPRAISERS

In the Matter of	)	
	)	
JACOB GURNEY	)	OAH No. 12-0037-REA
	)	Agency No. 3300-09-003

DECISION

I. Introduction

Jacob Gurney is a certified residential real estate appraiser. He applied for his certification in November of 2007 and certification was granted in January of 2008. On January 27, 2011 the Division of Corporations, Business, and Professional Licensing (division) filed an accusation against Mr. Gurney. Mr. Gurney requested a hearing to dispute the allegations made in that accusation. An amended accusation was filed on April 27, 2012. This amended accusation asserts four counts.

Count I concerns an appraisal of a home located at 5291 Honeysuckle Lane. The division asserts that Mr. Gurney's appraisal certification[1] was false because he did not in fact perform all of the appraisal tasks specified in that certification. Count II alleges that Mr. Gurney provided a false answer on his application to become a certified real estate appraiser because he did not disclose the false certification alleged in Count I. Count III alleges that his application was false because he claimed work experience for the Honeysuckle appraisal even though he allegedly did not perform any work for that appraisal. Count III also alleges that his application was false because he submitted work experience that, when performed, did not comply with the Uniform Standards of Professional Appraisal Practice (USPAP). Count IV of the complaint concerns an appraisal of property on Shivalik Circle. The division alleges that in performing that appraisal, Mr. Gurney did not comply with USPAP in several ways.

Prior to the hearing, Mr. Gurney filed a motion to dismiss the first three counts of the amended accusation. The division opposed that motion. Mr. Gurney's motion was partially granted as discussed in section III A, below, subject to Board ratification.

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[1] The board certifies individuals as certified real estate appraisers. The form used to report the appraisals at issue in this case contain a different type of certification. The Appraiser's Certification in those forms sets out a series of statements that the appraiser is certifying as true.

The hearing in this matter was held June 19 – 21, 2012. The division's exhibits A – H and K – U were admitted into evidence. Mr. Gurney's exhibits 7 and 11 were admitted. Based on the evidence in the record, the board should impose discipline for Mr. Gurney's one violation of USPAP.

II. Factual Background

Mr. Gurney has been a certified residential real estate appraiser since January 10, 2008.[2] Prior to receiving this certification, Mr. Gurney was licensed as a registered trainee pursuant to AS 08.87.310, working under the supervision of Floyd DeLapp.[3] Mr. DeLapp prepared an appraisal on December 26, 2006 for property at 5291 W. Honeysuckle Lane.[4] Mr. Gurney assisted in the appraisal process, but did not sign that appraisal.[5]

A second appraisal was prepared for the same property on February 16, 2007.[6] This time, Mr. Gurney's signature was on the appraisal.[7] Mr. Gurney testified, however, that his involvement in the appraisal process was less for this second appraisal. He only drove to the property to verify that it was still there, and made a few small changes to the prior appraisal at Mr. DeLapp's direction.[8] In submitting his application for certification, Mr. Gurney included six hours of appraisal experience for the December 26 appraisal,[9] and three hours of work on the second appraisal.[10] The effective date of both appraisals was December 18, 2006.[11]

In December of 2008, Mr. Gurney conducted an appraisal for a property on Shivalik Circle, in the Stuckagain Heights neighborhood of Anchorage.[12]

On January 27, 2009, the division notified Mr. Gurney that it had received a complaint concerning the Honeysuckle Lane appraisal Mr. Gurney had signed.[13] On this same date, the

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2 Exhibit L, page APR 474. Most of the division's exhibits contain documents from the agency record, and page numbers proceeded by "APR" refer to the page number from the agency record. Some of those pages were marked "APE" instead, but are also from the agency record. The pages in the exhibits are not always in the same numerical order as originally marked in the agency record.

3 Exhibit K, APR 231.

4 Exhibit B, APR 74 – APR 87.

5 Gurney testimony; Exhibit B, APR 74.

6 Exhibit B, APR 88 – APR 102. This time, the address of the property was listed as North Honeysuckle Lane. From the legal description, photographs, and floor plan sketches, it is clear that this is the same property as was identified in the prior appraisal.

7 Exhibit B, APR 95.

8 Gurney testimony.

9 Exhibit L, APR 537 (Work Verification Log, entry 317).

10 Exhibit L, APR 539 (Work Verification Log, entry 041).

11 Exhibit B, APR 73 & APR 88.

12 Exhibit N, APR 307 – APR 324; Gurney testimony.

13 Exhibit B, APR 183.

division also notified Mr. Gurney that it had received a complaint concerning the Shivalik Circle appraisal.[14] Both notices state that the division had begun an investigation and asked Mr. Gurney to provide additional information concerning each appraisal. There is no evidence that Mr. Gurney did not fully cooperate with the division's investigation.

III. Pre-Hearing Dismissals

Two orders were issued prior to the hearing regarding Mr. Gurney's Motion to Dismiss. The first order, dated June 5, 2012, tentatively denied the motion, but invited additional briefing. The second order, dated June 13, 2012, partially granted the motion to dismiss on one issue, and denied the motion for all remaining issues.

A. The dismissal order held that discipline could be imposed for precertification acts

The first issue addressed was whether the board has the legal authority to discipline Mr. Gurney for acts related to the Honeysuckle Lane appraisal, since that appraisal occurred before he was a certified real estate appraiser. Mr. Gurney argued that the board did not have that authority. The applicable statute provides:

> The board may exercise its disciplinary powers under AS 08.01.075 if, after hearing, the board finds **a certified real estate appraiser** has
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> (1) violated a provision of this chapter or a regulation adopted by the board under this chapter;
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> (2) been convicted of a crime that involves moral turpitude; or
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> (3) committed, **while acting as a real estate appraiser**, an act or omission involving dishonesty, fraud, or misrepresentation with the intent to benefit the appraiser or another person or to injure another person.[15]

This statute uses the term "certified real estate appraiser" to indicate *who* may be disciplined. The board has the power to discipline a certified real estate appraiser, but has no power to discipline an uncertified appraiser, or any other person who may come to the board's attention.[16] Subparts 1 through 3 then indicate *under what circumstances* that power may be exercised. For subpart 3, the statute authorizes discipline for dishonesty, fraud, or misrepresentation, but only if the act was committed "while acting as a real estate appraiser."

The phrase "while acting as a real estate appraiser" is important, as it limits the disciplinary power to acts that have a nexus to the board's responsibility to regulate the

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14 Exhibit P, APR 428.

15 AS 08.87.210 (emphasis added).

16 No ruling is made as to whether the board may discipline a trainee registered pursuant to AS 08.87.310.

profession. But there is a reasonable nexus regardless of whether the act occurred before or after certification. The board's certification of an appraiser informs the public that the certified individual meets certain professional standards. If the board later learns that a certified appraiser committed an act of dishonesty, fraud, or misrepresentation while acting as an uncertified real estate appraiser,[17] the board has the power to review the circumstances and determine whether discipline should be imposed for that act.

Finally, the phrase "certified real estate appraiser" is used several times in AS 08.87 to refer to individuals who have been certified by the board. The use of a less restrictive term, "real estate appraiser", in AS 08.87.210(3) indicates the legislative intent to include all real estate appraisers, not just those who had been certified by the board at the time of the act or omission in question.

B. The dismissal order did not dismiss Count II

Count II of the accusation is a claim that Mr. Gurney falsely answered "no" to the question on the application that asked whether he had previously committed an act or omission involving dishonesty, fraud, or misrepresentation. Mr. Gurney argued that this question goes beyond what the board is allowed to ask before certifying an appraiser and, therefore, Mr. Gurney cannot be disciplined for an incorrect answer.

In reviewing an application, the board has the discretion to deny certification for any reason that it could impose discipline on an already certified real estate appraiser.[18] The board may discipline a certified appraiser for an act of dishonesty, fraud, or misrepresentation.[19] It follows, therefore, that the board may refuse to certify an applicant for dishonesty, fraud, or misrepresentation. The board may appropriately ask if Mr. Gurney had ever committed such an act while acting as a real estate appraiser in order to determine whether to refuse his certification based on that act.

C. The dismissal order held that at the time of Mr. Gurney's application, work experience submitted in support of his application did not need to comply with USPAP

The next issue raised by Mr. Gurney's Motion to Dismiss was whether the work experience submitted in support of his application had to be work performed in compliance with

[17] Uncertified individuals may conduct appraisals as long as they do not claim to be certified.AS 08.87.340.

[18] *In re Hill*, OAH Nos. 10-0250-GUI & 10-0387-GUI (Big Game Commercial Services Board 2011) at 23 – 24; *In re Downs*, OAH No. 10-0501-REC (Real Estate Commission 2011) at 10.

[19] AS 08.87.210(3).

USPAP. In applying for certification, Mr. Gurney was required to submit a log showing his work experience:

> 1) f applying before January 1, 2008, verification of 2,500 hours of appraisal experience obtained continuously over a period of not less than 24 months;
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> (2) f applying on or after January 1, 2008, verification of 2,500 hours of appraisal experience obtained continuously over a period of not less than 24 months; the board will only accept work experience that was obtained after January 30, 1989 and was performed in compliance with the USPAP in effect at the time that the work experience was obtained.[20]

The two different descriptions of the appraisal experience requirement in 12 AAC 70.108(b) suggest that after January 1, 2008, the work experience had to be in compliance with USPAP, but before that date the work experience merely had to be appraisal experience.

The division argued, however, that "appraisal experience" as required by this regulation was defined as experience that complied with USPAP.

> "[A]ppraisal experience" includes fee and staff appraisals, ad valorem tax appraisals, appraisal reviews, appraisal analysis, real estate counseling, feasibility analysis and study, and teaching of appraisal courses, all of which must have been performed in accordance with the *Uniform Standards of Professional Appraisal Practices* described in 12 AAC 70.900[.[21]]

The rules of construction for regulations that are legislative in nature, such as the ones here, are the same as those used in statutory construction.[22] It is assumed that every word or provision has meaning, and no words or provisions are superfluous.[23] All sections are construed together so that all have meaning and no section conflicts with another.[24] If one section addresses a subject in general terms, and another addresses the subject in a more detailed way, then the more specific controls over the general if they cannot be harmonized.[25] Finally, if two regulations conflict, then the later in time controls over the earlier.[26]

Prior to 2007, 12 AAC 70.108 stated

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20 12 AAC 70.108(b).

21 12 AAC 70.990(1). The regulation referred to, 12 AAC 70.900, does not actually describe the Uniform Standards of Professional Appraisal Practices, but does state that the standards of practice for a certified real estate appraiser are those specified in AS 08.87.200(3). That statute says it is improper for a certified appraiser to fail to comply with the requirements of USPAP. Thus, the definition of "appraisal experience" arguably only includes work performed in accordance with USPAP.

22 *State v. Green*, 586 P.2d 595, 603 n.24 (Alaska 1978).

23 *Nelson v. Municipality of Anchorage*, 267 P.3d 636, 642 (Alaska 2011).

24 *Id.*

25 *Id.*

26 *Id.*

> An applicant for certification as a residential real estate appraiser shall submit verification of 2,500 hours of appraisal experience obtained continuously over a period of not less than 24 months.[27]

In 2007, the current version of the regulation was enacted, which provides a distinction between applicants before January 1, 2008 and those who apply on or after that date. The differences between the revised version of this regulation are 1) only work experience acquired after January 30, 1989 will be accepted,[28] and 2) the work experience must be compliant with the version of USPAP in existence at the time the work was performed.

If, as the division argued, work experience submitted under 12 AAC 70.108(b)(1) must comply with USPAP, there would be no reason to state in (b)(2) that the work must comply with USPAP, and the language in (b)(2) would be superfluous.[29] In addition, the limited regulatory history available[30] supports Mr. Gurney's interpretation of 12 AAC 70.108(b)(1). The change to this regulation occurred in 2007. The board discussed those changes during its May 24, 2006 meeting. Individuals from the Appraisal Standards Board were present to explain some changes that would occur based on a new federal law.

> Ms. Guilfoil stated that one of the experience changes for 2008 is that experience has to be obtained after January 30, 1989 and must be Uniform Standards of Professional Appraisal Practice (USPAP) compliant.[31]

If one *change* was that the work be USPAP compliant, then prior to the change, the work did not have to be USPAP compliant.

The context and regulatory history discussed above indicate that it was permissible for Mr. Gurney to submit work experience that did not comply with USPAP because he submitted his application prior to January 1, 2008. Accordingly, a portion of Count III was dismissed prior to the hearing.[32] The portion of Count III that survived for the hearing was the allegation that the

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[27] Exhibit A to the division's supplemental brief filed June 12, 2012.

[28] January 30, 1989 was the date USPAP was first adopted by the Appraisal Standards Board. Exhibit 11, page 3.

[29] In the alternative, if it was necessary to clarify that the work had to be performed in accordance with the version of USPAP in existence when the work was done, then that clarification would have applied equally to paragraphs (b)(1) and (b)(2), but no such clarification was provided for (b)(1).

[30] The parties were invited to submit additional regulatory history, but only provided different versions of the regulation without providing any public comments, responses to public comments, preliminary drafts, or other historical material.

[31] Board minutes, May 24, 2006, page 4, available at http://www.dced.state.ak.us/occ/pub/apr_Meeting_Minutes_05_24_06.pdf (accessed July 18, 2012).

[32] Originally, all of Count III was dismissed, but that ruling was reconsidered after the division pointed out there were allegations in Count III that were not dependent on whether the work experience complied with USPAP.

amount of work listed in Mr. Gurney's application for the Honeysuckle appraisal was greater than the amount of work actually performed.[33]

D. No counts were dismissed based on the doctrine of laches

Finally, Mr. Gurney argued that the division unduly delayed raising the issues related to the Honeysuckle appraisal and that Counts I, II, and III should be dismissed. To successfully invoke laches, Mr. Gurney must show an unreasonable delay by the division and resulting prejudice to himself.[34] Mr. Gurney has not provided any support for his assertion that a four-year delay is unreasonable, nor has he shown how he has been prejudiced by that delay. He therefore did not establish that those three counts should be dismissed based on laches.

IV. Allegations Considered at the Hearing

A. The division did not meet its burden of proof as to Count I

The second Honeysuckle appraisal[35] contains Mr. Gurney's electronic signature as the appraiser.[36] This signature follows a statement that begins "APPRAISER'S CERTIFICATION: The Appraiser certifies that:"[37] This statement is followed by a list of 25 items.[38] This list includes the items alleged in the amended accusation:

> Gurney's appraiser certification certified, among other things, that he 1) inspected the property, 2) complied with USPAP, 3) developed his own opinion of market value, 4) researched many sales agreements, 5) researched the sales history, and 6) selected comparables.[39]

The division argued that Mr. Gurney did not do what his certification says he did. Thus, according to the division, his certification was false and constituted an act of dishonesty, fraud, or misrepresentation. The board may discipline a certified real estate appraiser who has

> committed, while acting as a real estate appraiser, an act or omission involving dishonesty, fraud, or misrepresentation with the intent to benefit the appraiser or another person or to injure another person.[40]

Mr. Gurney testified credibly as to what he thought his signature meant when it was placed on an appraisal by Mr. DeLapp.[41] He did not view his signature on the appraisal as

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33 Oral Ruling on record, July 19, 2012, Part 1, 0:00 – 15:00.
34 *State v. Schnell*, 8 P.3d 351, 358 – 359 (Alaska 2000).
35 Exhibit B, APR 88 – 102.
36 Exhibit B, APR 95.
37 Exhibit B, APR 94.
38 Exhibit B, APR 94 – 95.
39 Amended Accusation, ¶ 14.
40 AS 08.87.210(3).
41 Gurney testimony, Hearing Recording June 21, 2012, Part 1, 1:33:43 – 1:43:17.

certifying anything. He stated that it was an electronic signature and that only his supervisor, Floyd DeLapp, had access to it. Only Mr. DeLapp could place Mr. Gurney's signature on any appraisal and Mr. DeLapp made the decision as to when Mr. Gurney's signature would be on an appraisal. Mr. Gurney asserted that he was not responsible for the items listed in the certification because he was specifically identified on the appraisal as a trainee,[42] and Mr. DeLapp's certification states that the supervisor takes full responsibility for the appraisal.[43] By law, Mr. DeLapp was required to take full responsibility.[44] Mr. Gurney believed he was not misrepresenting his role in the appraisal process because anyone looking at the appraisal would see that it was Mr. DeLapp who was taking responsibility for the contents of the appraisal, and not the trainee.

While Mr. DeLapp was required to take full responsibility for the appraisal, that does not mean that Mr. Gurney had no responsibility. More than one person can have "full" responsibility. Mr. Gurney knew that his signature was being placed on some of the appraisals for which he performed some, but not all of the appraisal work. Contrary to Mr. Gurney's belief, a reasonable person reading the appraisal and seeing Mr. Gurney's signature on it would view his signature as certifying the accuracy of the 25 statements in the certification. This includes certifying that he had inspected the interior and exterior of the property, prepared the appraisal in compliance with USPAP, developed his own opinion of market value, researched sales agreements, researched sales history, and selected comparables.[45] Mr. Gurney agreed at the hearing that his involvement in the Honeysuckle appraisal did not include developing his own opinion of market value, researching sales agreements, researching sales history, or selecting comparables.[46]

Mr. Gurney accepted Mr. DeLapp's decision to control his signature and place it on appraisals even when Mr. Gurney could not accurately certify all of the statements in the appraisal certification. Mr. Gurney believed this procedure was proper, and the division has not proven that Mr. Gurney's belief was anything other than an honest mistake. Thus, the division has not proven an act of fraud or dishonesty. The division has, however, proven a

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42 Exhibit B, APR 95.

43 *Id.*

44 AS 08.87.310(b).

45 *See* Exhibit B, APR 94.

46 Mr. Gurney had inspected the property with Mr. DeLapp when the first appraisal on this property was prepared, so he could properly certify to having inspected the property. Whether the appraisal complied with USPAP was not addressed during the hearing because of the prior ruling on Mr. Gurney's pre-hearing motion.

misrepresentation. By having his signature on the appraisal, Mr. Gurney has certified to the accuracy of the statements in the appraisal certification. Those statements were not accurate, and misrepresent the true state of affairs, which is that Mr. Gurney did not form an opinion of value, research sales agreements or sales history, or select comparables for the Honeysuckle appraisal.

The board is allowed to impose discipline for a misrepresentation if the misrepresentation was made "with the intent to benefit the appraiser or another person or to injure another person."[47] As discussed above, however, Mr. Gurney did not realize he was doing anything improper when he allowed Mr. DeLapp to place his signature on these appraisals, including the Honeysuckle appraisal. He did not view this as a misrepresentation because he honestly believed someone looking at the appraisal would see that he was the trainee and that Mr. DeLapp was taking full responsibility for the contents. Because he did not know he was making a misrepresentation, he did not make that misrepresentation with the intent to benefit himself as alleged in the amended accusation. Of course, in one sense all acts by a real estate appraiser conducting an appraisal are done to benefit someone. The appraiser expects to get paid for his or her work, and the person who pays for the appraisal hopes to use it for his or her own purposes. AS 08.87.210(3) is directed only at acts or omissions involving a misrepresentation where one intentionally made a misrepresentation in order to provide a benefit or to harm someone. Essentially, the second half of AS 08.87.210(3) requires that there be fraud, dishonesty, or *intentional* misrepresentation in order to impose discipline. Negligent misrepresentation is not sufficient to create a violation.

If this statute were interpreted to cover negligent misrepresentations, then every incorrect statement in an appraisal would be subject to disciplinary action under AS 08.87.210(3). Instead, the board's power to discipline negligent misrepresentations comes from AS 08.87.200(1) which prohibits negligence, and AS 08.87.210(1) which allows discipline for the violation of any statutory provision. While Mr. Gurney may have violated AS 08.87.200(1), the division did not charge him with such a violation, and he may not be disciplined for a potential violation that was not charged in the amended accusation.

Although there was evidence that Mr. Gurney knew his signature was being placed on appraisals for which he could not properly attest to the appraisal certification, there was no

[47] AS 08.87.210(3) (emphasis added).

evidence that Mr. Gurney actually knew there was anything wrong with that procedure.[48] The division has not met its burden of proving a violation of AS 08.87.210(3).[49]

B. The division did not meet its burden of proof as to Count II

Mr. Gurney's application for certification asked him a series of professional fitness questions. One of those questions was:

> Have you committed, or had a lawsuit filed against you, while acting as a real estate appraiser, an act or omission involving dishonesty, fraud, or misrepresentation?[50]

Mr. Gurney answered "no."[51]

The division alleged that Mr. Gurney's answer was false, because he had committed an act of misrepresentation in falsely certifying the Honeysuckle appraisal.[52] According to the division, he should have disclosed this prior misrepresentation when he answered this question.

It is a violation of AS 08.87.200 to

> knowingly make a false statement, submit false information, or fail to provide complete information in response to a question in an application for certification or for renewal of a certificate[.[53]]

Because the wording of the question is similar to the wording in AS 08.87.210(3), but does not include the "intent to benefit" phrase, the question may be asking about both intentional and unintentional misrepresentations.[54] Since Mr. Gurney's signature on the Honeysuckle appraisal was an unintentional misrepresentation, it could be held that the correct answer to the question, in Mr. Gurney's case, was "yes."

That Mr. Gurney's answer was factually incorrect does not mean he violated AS 08.87.200(5). A violation of this provision only occurs if the applicant "knowingly" made a false statement. The overwhelming weight of the evidence at the hearing was that Mr. Gurney

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[48] The board may wish to provide guidance to certified real estate appraisers who are supervising trainees. A trainee could reasonably expect a supervisor approved by the board to know the proper use of the trainee's electronic signature. In this case, it appears that Mr. DeLapp did not understand that placing Mr. Gurney's signature on the Honeysuckle appraisal and on other appraisals was improper.

[49] The division has the burden of proving all contested facts by a preponderance of the evidence. AS 44.62.460(e)(1).

[50] Exhibit L, APR 507. This question is garbled but can be understood if the phrase "or had a lawsuit filed against you" is ignored.

[51] *Id.*

[52] Amended Accusation, ¶ 17.

[53] AS 08.87.200(5). The board may discipline a certified real estate appraiser for violating this provision. AS 08.87.210(1).

[54] There is no need to make a ruling in this case as to whether this question asks about unintentional misrepresentations.

did not realize there was anything wrong with the way Mr. DeLapp was applying his signature to appraisals, including the Honeysuckle appraisal. At a minimum, the division did not prove that Mr. Gurney did in fact know there was anything wrong with Mr. DeLapp's procedure. Because he did not know this procedure was wrong, he did not know he had made a misrepresentation at the time he completed his application, and therefore would not have known to answer "no" to this question. Mr. Gurney did not *knowingly* make a false statement on his application. The division has not met its burden of proving the violation alleged in Count II.

C. The division did not meet its burden of proof on Count III

Because of the ruling on Mr. Gurney's pre-hearing motion, the only allegation remaining in Count III was the claim that in his application, Mr. Gurney submitted an inflated number of hours for the Honeysuckle appraisal.

Mr. Gurney stated that he performed three hours of work for the second Honeysuckle appraisal.[55] The amended accusation alleges that Mr. Gurney should not have submitted this time because the work he performed was "limited to the physical inspection of the home."[56] This allegation was expanded in the division's opposition to Mr. Gurney's motion to dismiss, where the division alleged that the inclusion of these three hours was false because Mr. Gurney had admitted to not having done any work on that appraisal.[57] At the hearing and in its written closing argument, the division did not address the claim that a physical inspection of the home does not constitute appraisal experience, and relied only on the allegation that Mr. Gurney did not perform three hours of work on the Honeysuckle appraisal.

Shortly after receiving notice of the division's investigation, Mr. Gurney wrote to the investigator and stated that he believed his work on the Honeysuckle appraisal was limited to "assisting on the physical inspection of the home."[58] During an interview with the investigator, Mr. Gurney, in discussing both Honeysuckle appraisals, stated:

> I don't know if it was this time or if it was this time. But I know that I pulled a tape around the outside. And I threw [sic] the floor plan.
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> And I helped take notes. And he was there. When I went. We never went on an inspection, I never went on an inspection, right --.[59]

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55 Exhibit L, APR 539 (entry 041).

56 Amended Accusation, ¶ 23.

57 Opposition to Motion to Dismiss, page 17.

58 Exhibit B, APR 52.

59 Exhibit D, APR 147. Exhibit D is an uncertified transcript of an interview with Mr. Gurney. The transcript is not entirely accurate, but the portions quoted here appear to be sufficiently reliable for purposes of this hearing.

In discussing the second Honeysuckle appraisal, Mr. Gurney said:

> The report didn't look familiar. And I was like I don't remember doing much. You know I remember the property. Because I remember going on the inspection.
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> But as far as the analysis and everything I didn't remember doing any of it.[60]

The complaint that Mr. Gurney was responding to was that the Honeysuckle property's value was inflated

> in excess of $130,000 and that you failed to report the subject property's listing history (see enclosed MLS listings; failed to account for the discrepancy between the sales contract date (2/7/07) and the appraisal inspection occurrence (12/18/06); inaccurately reported the neighborhood data for the subject property; utilized inappropriate comparable sales; and overvalued the land's worth.[61]

In communicating with the division, Mr. Gurney provided information to show that he was not responsible for the alleged errors that were being investigated. It was only after the investigation was complete that Mr. Gurney was informed the division believed it was improper to include time spent inspecting the home in his hours of appraisal experience, and later that it believed he did not performed three hours of work on the Honeysuckle appraisal.[62]

Because the division had not previously asserted that Mr. Gurney incorrectly included time for the Honeysuckle appraisal in his application, it is not surprising that Mr. Gurney's statements to the division did not fully explain what he did do in connection with that appraisal. Instead, he focused on what he did not do. At the hearing, however, Mr. Gurney did provide more information regarding the second Honeysuckle appraisal. He testified that he drove to Wasilla to confirm that the home was still there, that he might have driven by the comparables, and that he made some changes to the prior appraisal at Mr. DeLapp's request.[63] This is all appraisal work with the possible exception of the time spent driving to and from Wasilla. It is not clear from the applicable regulations that time spent getting to the property may not be included as time devoted to appraisal work. However, the Appraiser Qualification Board of the Appraisal Foundation, whose criteria this Board has adopted in other contexts,[64] treats time spent

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60 Exhibit D, APR 148.
61 Exhibit B, APR 183.
62 Neither of these allegations was included in the original January 27, 2012, Accusation.
63 Gurney testimony, June 21, 2012 Hearing Recording, part 2, 0:16:50 – 0:19:40; 2:05:35 – 2:06:33.
64 *See* 12 AAC 70.140.

driving to an appraisal site as countable time, at least in some circumstances.[65] More importantly, Mr. Gurney is charged with "knowingly" submitting false information in his application. There was insufficient evidence presented to support a finding that Mr. Gurney knew that time spent driving to and from the appraisal site should not be counted, and that he should not have included that time in his work experience log. The division did not meet its burden of proof on this claim.

In the alternative, the administrative law judge should not have permitted the division to raise this claim at the hearing. The amended accusation did not allege that Mr. Gurney failed to spend at least three hours working on the second Honeysuckle appraisal. That assertion was only made after the Motion to Dismiss was filed, and then only in a vague manner in the opposition to that motion. The division did not file a second amended accusation to include this new claim. Mr. Gurney was entitled to receive an accusation that included "a written statement of charges setting out in ordinary and concise language the acts or omissions with which the respondent is charged[.]"[66] Neither the original nor the amended accusation included a written statement alleging that the amount of time recorded on his log was incorrect. Thus, the division should not have been permitted to add this claim.

D. Count IV

1. Desk reviews of the Shivalik Circle appraisal

Count IV relates to the Shivalik Circle appraisal, and alleges five different acts or omissions that the division believes violated USPAP. Two experts were retained by the division to perform desk reviews of Mr. Gurney's appraisal. The Supreme Court has recently called into question the use of desk reviews in disciplinary proceedings.[67] The Supreme Court questioned whether that type of review was sufficient to support a finding that an appraiser violated USPAP. The Court also made specific rulings about the evidence needed to find a USPAP violation. In looking at whether an appraiser selected appropriate comparables[68], there must be evidence that

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[65] Appraiser Qualification Bd., *Real Property Appraisal Qualification Criteria and Interpretations of the Criteria*, at 17 (http://www.georgiaappraiser.com/pdf/USPAP/Appraiser_Qualifications.pdf). Other jurisdictions do likewise. *E.g.*, Mass. Bd. of Real Estate Appraisers, *Real Estate Appraiser Licensing and Certification in Massachusetts: Candidate Handbook*, at 7 (http://www.asisvcs.com/publications/pdf/220201.pdf).

[66] AS 44.62.360(1).

[67] *State v. Wold*, 278 P.3d 266, 279 n.28 (Alaska 2012). This decision was issued only one month before the hearing in this case, and after the division's experts prepared their reports.

[68] When the appraisal is based on a "sales comparison approach," the value of the property is derived by "comparing it to similar properties that have been recently sold and making adjustments to the sales prices of those properties based on the differences between them and the subject property." *Wold*, 278 P.3d at 271.

better comparables actually exist.[69] Factual speculation by the desk reviewer unsupported by other evidence is not sufficient to support a finding of a USPAP violation.[70] Finally, the desk reviewer's statement of what is the ordinary practice of appraisers, "without additional support, does not provide an adequate analytical basis for identifying the lower bound of acceptable professional conduct as defined by the USPAP."[71] The Supreme Court's holdings in *Wold* place some limitations on the usefulness of the desk reviews in evidence in this case.

2. Square footage of the property

The first allegation in Count IV is that Mr. Gurney violated USPAP standards 1-1 (a) and 1-1 (b) by not measuring the home.[72] Standard 1-1 states

> 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;
>
> * * *
>
> (b) not commit a substantial error of omission or commission that significantly affects an appraisal[.[73]]

The division's first expert, Steve Turner, stated in his report that measuring the actual building is standard practice for residential real estate appraisers.[74] When it is not possible to measure the building for some reason, that inability must be disclosed in the appraisal.[75] Mr. Turner concluded that Mr. Gurney relied on the building plans to obtain the square footage, and that doing this instead of measuring the building violated standard 1-1 (b).[76]

The division's second expert, Fred Ferrara, agreed that measuring the building instead of taking measurements from the building plan was required. However, Mr. Ferrara did not find a

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69 *Wold*, 278 P.3d at 272. The division must present evidence to support the "intuitions" of the desk reviewers. *Wold*, 278 P.3d at 279.

70 *Wold*, 278 P.3d at 274.

71 *Wold*, 278 P.3d at 275.

72 Amended Accusation ¶ 27.

73 Exhibit 11, page 25 (the comments to each of these standards are omitted).

74 Exhibit R, APR 423. Mr. Turner testified that if the appraiser has a set of blueprints, it is not unusual to measure the building to confirm that the numbers match without writing anything down. Turner Testimony June 20, 2012, Part 1 1:06:50 – 1:07:22.

75 Exhibit R, APR 423.

76 Exhibit R, APR 424. Mr. Turner also found a violation of the Conduct section of the Ethics Rule but does not specify which provision of this section was violated. In any event, the Amended Complaint does not allege a violation of the Conduct section of the Ethics Rule, so that finding may not be considered.

violation of standard 1-1(b). Instead, he found a violation of standard 1-1 (a).[77] He also found that any difference in value caused by the failure to measure the building was not significant.[78]

One of the two owners of the Shivalik Circle home, John Mitchell, was present during Mr. Gurney's inspection of the home.[79] Mr. Mitchell testified that Mr. Gurney had an assistant and they were "measuring some things." Mr. Mitchell stated that Mr. Gurney separated from his assistant at times and Mr. Mitchell would follow one or the other of them around the home. When asked whether Mr. Gurney did anything outside, Mr. Mitchell said: "They did take some measurements. I didn't see them measuring everything."[80]

Jeff Barrus was Mr. Gurney's trainee during the Shivalik Circle appraisal. Mr. Barrus testified that he helped Mr. Gurney measure the home both inside and outside.[81] He noted that this inspection was a long time ago so he didn't remember all of the details, but he recalled that it was difficult for them to get all of the measurements on the outside because of the slope and the amount of snow, so they also took measurements inside.

Mr. Gurney also testified that he measured the Shivalik Circle home.[82] He testified that while Mr. Mitchell was getting them a copy of the building plans, Mr. Gurney and Mr. Barrus stayed outside to measure the home.[83] After coming inside, he recalled that he walked around the house to verify key measurements and that the home was built the way the plan said it was built.[84]

The only evidence in the record that Mr. Gurney did not measure the property comes from an inference drawn from his prior written statements. In a letter dated February 24, 2009, Mr. Gurney stated:

> The square footage in the appraisal was developed off the submitted plans. They were verified by me, where I was told by the homeowner that the house was constructed according to plans with no variations in square footage.[85]

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77 Exhibit T, APR 396. It is ultimately the board's decision as to whether USPAP was violated, and if so which standard was not complied with. However, the fact that two experts retained by the division disagree allows for the conclusion that neither was violated.

78 *Id.*

79 Mitchell Testimony, June 19, 2012 Part 1 recording at 1:46:11 – 1:47:12.

80 *Id.*

81 Barrus testimony, June 21, 2012, Part 2 recording at 2:15:58 – 2:27:26.

82 Gurney testimony, June 21, 2012 part 1 recording at 1:08:47.

83 *Id. at 1:53:08 – 1:53:19.*

84 *Id. at 1:53:50 – 1:54:04.*

85 Exhibit P, APE 331.

This statement could be read to say that the only verification of the plans came from his conversation with the homeowner. Alternatively, this statement could be read as saying that he verified the plans and that the homeowner told him the house was built with no variations from the plans. In an e-mail dated January 6, 2009, Mr. Gurney stated that the plans "were provided to me and verified by myself and my assistant."[86] This January statement is more consistent with the second possible interpretation of Mr. Gurney's February 24th letter.

In a December 30, 2008 e-mail, Mr. Gurney stated that the square footage was calculated "right off the plans[.]"[87] If Mr. Gurney had verified that the plans were accurate by taking his own measurements, there would be nothing wrong with calculating the square footage from those plans.[88]

In a letter dated January 11, 2010, Mr. Gurney stated that he made his own measurements of the home. He said "only the building plans and my own measurements verifying those plans were utilized in the report."[89]

Although Mr. Gurney's February 24, 2009 letter could be read to say that he did not make his own measurements, his other written communications at least imply that he verified the accuracy of the building plans by making his own measurements. Because the written statements are ambiguous, more weight is given to the testimony under oath of the three people who were actually present during the home inspection. Mr. Mitchell, Mr. Barrus, and Mr. Gurney all testified that actual physical measurements of the home were made at that time. While Mr. Gurney's testimony could be discounted somewhat because of his interest in the outcome of this proceeding, there is no reason to doubt the testimony of either Mr. Barrus or Mr. Mitchell. The division has not met its burden of proving that Mr. Gurney failed to take measurements of the home. The amended accusation and the experts' opinions are based on the assumption that Mr. Gurney did not make those measurements. Since he did measure, no USPAP violation has been proven.

3. Selection of comparables for the appraisal

In reaching a value for the Shivalik Circle property, Mr. Gurney used four other properties as comparables.[90] Three of these were in the Stuckagain Heights neighborhood,[91] and

86 Exhibit P, APE 333.
87 Exhibit P, APE 337.
88 *See* Turner Testimony June 20, 2012, Part 1 1:06:50 – 1:07:22.
89 Exhibit R, APE 403.
90 Exhibit P, APE 343 and 348.

one was more than seven miles away.[92] The home being appraised was new construction.[93] The Stuckagain comparables were all older homes, built 21, 27, and 11 years before.[94] The sales histories for these three homes were a year or more before Mr. Gurney prepared his report.[95]

The fourth home was in a different neighborhood in the Anchorage Hillside area.[96] This home was only four years old, and the sales history shows that it was sold about four months before Mr. Gurney's appraisal of the Shivalik property.[97]

Mr. Gurney explained the selection of his comparables in his report:

> Four sales were used in the analysis. The sales used are considered the best available to the appraiser and bracket the subject in total square footage, effective age, design, appeal, condition, quality and total amenities.
>
> Note that the subject is located in an area where few properties have changed hands in the last year. The appraiser has searched the Anchorage MLS for closed and pending sales in the last year in the subject's subdivision. This search revealed 3 sales total in the neighborhood. These three sales were used as comparable sales 1 – 3 due to their proximity to the subject. Though dated, these sales are still considered good indicators of market value as the Anchorage market has been stable to improving. No time adjustments are warranted.
>
> The subject offers excellent views of the inlet and mountains. The appraiser is aware of properties that offer a more recent date of sale, however, these properties are not considered comparable to the subject as they do not offer similar views and the net and gross adjustments would far exceed normal guidelines. The appraiser has use[d] only view properties in the analysis.[98]

Both of the division's experts criticized the use of the Stuckagain Heights comparables. Mr. Turner objected to the use of two of the comparables. In his initial report he stated:

> Comparable 1 is a 14 month old sale of a 21 year old home, and comparable 2 is a 17 month old sale of a 27 year old home. Neither sale necessarily represents property values as of the date of the appraisal.[99]

Mr. Turner further stated that Mr. Gurney should not have limited comparables to the immediate area, and should have considered comparables of newer homes from other hillside subdivisions.[100] He concluded:

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91 Exhibit P, APE 343.
92 Exhibit P, APE 348.
93 Exhibit P, APE 343.
94 *Id.* The appraisal did give them a younger effective age based on remodeling or other upgrades.
95 *Id.*
96 Exhibit P, APE 351.
97 Exhibit P, APE 348. This home was given an effective age of 0 based on its condition.
98 Exhibit P, APE 349.
99 Exhibit R, APR 391.
100 Exhibit R, APR 392.

> In my view, limiting comparables to the immediate area without considering sales of newer homes from other hillside subdivisions results in a less than credible appraisal and is a violation of Standards Rule 1-1 (b) and (c).[101]

In his supplemental report, Mr. Turner asserted that "Buyers of new construction are not necessarily interested in older homes."[102] In his supplement, Mr. Turner acknowledged the fourth comparable, but still concluded that Mr. Gurney's appraisal was "less than credible."[103] In this supplement, Mr. Turner only found a violation of standard 1-1 (b).[104]

During the hearing, Mr. Turner explained that his finding of a violation was based on his opinion that buyers of new homes only consider other new homes.[105] He found support for that opinion in a publication titled *Appraising Residential Properties*, published by the Appraisal Institute.[106] He would not have reached his conclusion in this case if he had not found this support.[107] This text states that a comparable "should appeal to many of the same people who would consider purchasing the subject property."[108] It also states: "Properties that do not appeal to the same market population should not be considered competitive, even if they are comparable to the subject in other ways."[109]

Mr. Ferrara's report found a violation of Standard 1-1 (a).[110] Mr. Ferrara speculated that because Mr. Gurney did not include any comparables valued at more than $599,000, he may have restricted his search to sales of less than $600,000.[111] Mr. Ferrara conducted his own search in MLS and found six sales which he believes would have been better choices as comparables.

> While these sales were not adjusted to estimate the final conclusion, the range in building sizes was similar to the range of the sale used in the appraisal and the age adjustments would have been far lower.[112]

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101 *Id.* Standard 1-1 (b) is quoted in section IV D 2, above. Standard 1-1 (c) provides that an appraiser "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 affects the credibility of those results." Exhibit 11,page 25.

102 Exhibit R, APR 424.

103 *Id.*

104 *Id.* However, Mr. Turner testified that he had not changed his opinion between the two reports. Turner testimony, Hearing Recording June 20, 2012, part 1, 1:16:43 – 1:17:18.

105 Turner testimony, Hearing Recording June 20, 2012, part 1, 011:42 – 0:11:50, 0:30:00 – 0:30:20.

106 Exhibit S, page 741, 790 – 792.

107 Turner Testimony, Hearing Recording June 20, 2012, part 1, 0:22:15 – 0:29:56.

108 Exhibit S, page 790.

109 Exhibit S, page 791.

110 Exhibit T, APR 396. This standard is quoted in section III E 2, above.

111 *Id.*

112 Exhibit T, APR 397.

In his supplemental report, Mr. Ferrara addressed Mr. Gurney's explanation as to why he selected the comparables used in his appraisal. Mr. Ferrara wrote:

> While use of the comparable sales in the appraisal can be defended as reasonable, there is still no explanation as to why the appraiser limited his search for comparable data to a $600,000 upper limit.[113]

Mr. Gurney's appraisal described the Stuckagain Heights neighborhood as "located about 10 miles from the 'Downtown' area of Anchorage in what is known as the 'Upper Hillside.'"[114] In selecting comparables, Mr. Gurney stated that he did a broad search for anything sold in the Stuckagain Heights neighborhood during the last two years. He did not place any value limits or square footage limits on his search.[115] He understands that new construction is desired by the public, but also believes location is important, and is arguably one of the most important things.[116] Because the three comparables from Stuckagain were older homes, he used comparison number four to bracket the subject property's "new construction" attribute.[117]

The Amended Accusation states:

> The comparables in Gurney's appraisal were from the immediate neighborhood. However, two of the comparables were of older homes: a 21 year old home and a 27 year old home, despite the fact that the subject home was newly constructed in an upper hillside subdivision. Thus, Gurney should have selected some new construction sales from other hillside neighborhoods. Gurney's conduct in limiting comparables to the immediate area without considering the sales of newer homes from other hillside subdivisions resulted in a less than credible appraisal and violates Standards Rule 1-1 (b) and (c) of USPAP.[118]

To establish a violation of standard 1-1 (b), the division must show there was a substantial error that significantly affected the appraisal.[119] Both of the expert witnesses testified that Mr. Gurney committed an error by not selecting the most appropriate comparables. Neither expert did the additional analysis necessary to determine whether the error significantly affected the appraisal. They did not use their own comparables and reach an opinion of value for the Shivalik Circle property. While it is possible that the use of different comparables would have resulted in a significantly different value for the appraisal, the division has not met its burden of

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113 Exhibit T, APR 420.

114 Exhibit P, APE 342.

115 Gurney testimony, Hearing Record, June 21, 2012, Part 1, 2:01:50 – 2:02:46. He stated that he felt the market had been stable for about two years.

116 Gurney testimony, Hearing Record, June 21, 2012, Part 1, 2:03:05 – 2:03:32.

117 Gurney testimony, Hearing Record, June 21, 2012, Part 1, 2:05:38 – 2:05:56.

118 Amended Accusation, ¶ 28.

119 Exhibit 11, page 25.

proving that it is more likely true than not true that the value would have in fact been significantly different. The division has not proven a violation of standard 1-1 (b).

To prove a violation of standard 1-1 (c), the division must show carelessness or negligence that affects the credibility of the appraisal results.[120] Not using appropriate comparables would affect the appraisal's credibility. The Amended Accusation alleges that the appraisal was less than credible because Mr. Gurney did not use any new construction sales from other hillside neighborhoods. In fact, comparable number four was a new construction sale from a different hillside neighborhood.[121] Thus, Mr. Gurney did what the Amended Accusation alleges he failed to do.

The testimony from both experts appears to be that Mr. Gurney should have selected more comparables that were new construction even if they were outside the Stuckagain Heights neighborhood. Mr. Turner's reasoning was that the Shivalik Circle property was new and potential buyers who might be interested in that home would also be interested in other new homes even if they were not in Stuckagain Heights, but would not be interested in buying an older home in Stuckagain Heights.[122] Mr. Ferarra's testimony stated that it would have been appropriate to use newer homes in competing neighborhoods,[123] and that an older home would not be as good a comparable.[124]

Mr. Gurney acknowledged that the subject's new construction was an important factor, which is why he selected comparable number four. It was his opinion, however, that location was just as important and arguably one of the most important factors.[125] Both Mr. Ferrara and Mr. Turner testified that Stuckagain Heights was a "very unique" neighborhood.[126] Both Mr. Ferrara and Mr. Turner based their opinions, at least in part, on the assumption that, despite the uniqueness of the neighborhood, someone shopping for a new home in Stuckagain Heights would prefer a new home in a different hillside neighborhood over an older home in Stuckagain. While this assumption may be correct, there is no empirical support for it in the record. Their

120 Exhibit 11, page 25.
121 Exhibit P, APE 348.
122 Turner testimony, Hearing Recording June 20, 2012, Part 1, 0:27:15 – 0:33:35.
123 Ferrara testimony, Hearing Recording June 20, 2012, Part 2 2:40:01 – 2:40:14.
124 Ferrara testimony, Hearing Recording, June 20, 2012, Part 2, 2:47:47 -2:48.21.
125 Gurney testimony, Hearing Recording, June 21, 2012, Part 1 2:01:50 – 2:05:56.
126 Turner testimony, Hearing Recording June 20, 2012, Part 1, 0:12:20 – 0:13:16; Ferrara testimony, Hearing Recording, June 20, 2012, Part 2, 2:03:40 – 2:03:57.

assumption is no more or less likely than Mr. Gurney's assumption that location was more important when appraising a home in the unique Stuckagain Heights neighborhood.

The Amended Accusation says that Mr. Gurney should have used a newer comparable from a different hillside neighborhood. Mr. Gurney's comparable number four meets that criterion. Mr. Turner said he would not have found a violation if he had not found published support for the idea that someone interested in the subject property would not be interested in an older home in the same neighborhood. The publication he relied on, however, does not support his conclusion. *Appraising Residential Properties* does not say that people looking at new homes would prefer a new home in a different neighborhood over older homes in the subject property's neighborhood. Instead, this text says that that the comparables should appeal to the same people as the subject property. It does not say that new construction in a different location is a better comparable than older construction in the same neighborhood.

Mr. Ferrara said that Mr. Gurney's selection of comparables could be defended as reasonable.[127] Everyone at the hearing agreed that the Stuckagain Heights neighborhood is unique. Mr. Gurney's appraisal disclosed his reasoning for including four older homes from the neighborhood as comparables.[128] The division has not proven that Mr. Gurney's decision to place greater emphasis on location than on the age of the comparables resulted in a less than credible appraisal in violation of standard 1-1 (c).

4. Failure to use AMDS data

In preparing his appraisal, Mr. Gurney obtained information about comparable sales from the Multiple Listing Service (MLS) and not from the Alaska Market Data System (AMDS). Mr. Turner did not address this issue in his report, but Mr. Ferrara did. He concluded that the failure to use the AMDS data violated standard 1-1 (b) and standard 1-4 (a).[129] Standard 1-4 (a) requires an appraiser using the sales comparison approach to analyze the available comparable sales data.[130] Mr. Ferrara interpreted this to mean that the appraiser must use the *best available* data. He expressed his opinion that AMDS data was more reliable than the data contained in the

[127] At the hearing, however, Mr. Ferrara explained that this statement only meant that sometimes an appraiser has to use less than desirable comparables because better data is not available. Ferrara testimony, Hearing Recording June 21, 2012, Part 1, 0:11:05 – 0:12:05. That is a strained interpretation of the words actually used in Mr. Ferrara's supplemental report, and is not persuasive.

[128] Exhibit P, APE 349.

[129] Exhibit T, APR 398.

[130] Exhibit 11, page 28.

MLS system.[131] He testified that it "has to be" more correct.[132] He was unable, however, to present any empirical evidence to support that opinion. Instead, he based his opinion on the fact that the information in AMDS comes from appraisers who gather the information and put it in an appraisal report. Buyers and lenders make important decisions based on that appraisal report.[133] Therefore, in Mr. Ferrara's opinion, AMDS data will be more reliable than MLS data.

Mr. Ferrara's reasoning is a good basis for a working hypothesis. Without some empirical evidence to actually support that hypothesis, however, it cannot form the sole basis for a finding that Mr. Gurney violated USPAP by failing to use the AMDS data.[134] The division has failed to meet its burden of proving that AMDS is the best available data. Accordingly, it has not proven that Mr. Gurney violated standards 1-1 (b) or 1-4 (a) by not using this data source.

In addition, even if AMDS is viewed as more reliable, and if standard 1-4 (a) is correctly interpreted as requiring that the appraiser use the most reliable data, the evidence in the record would not support a finding that Mr. Gurney violated standard 1-1 (b). This standard is only violated if the appraiser's error "significantly affects" the appraisal.[135] There is no evidence in the record that shows there would have been a significant difference had Mr. Gurney used AMDS data instead of MLS data.[136]

5. Site value used in cost approach valuation

In using the cost approach to calculate value, Mr. Gurney expressed an opinion that the value of the Shivalik Circle lot was $150,000.[137] Mr. Gurney testified that this value was supported by three recent land sales. Two were from the Stuckagain neighborhood, and the third was from another hillside neighborhood.[138] He analyzed all three properties for topography, view, access and other attributes, and determined that they were similar. He then reached an opinion of value for the subject property based on the square footage cost of the comparables.[139]

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131 Ferrara testimony, Hearing Recording June 20, 2012, Part 2 at 3:08:43 – 3:08:55.

132 Ferrara testimony, Hearing Recording June 20, 2012, Part 2 at 3:09:47 – 3:09:56.

133 Ferrara testimony, Hearing Recording June 20, 2012, Part 2 at 3:08:55 – 3:09:40.

134 *See Wold*, 278 P.3d at 274 (factual speculation is insufficient to find a USPAP violation).

135 Exhibit 11, page 25.

136 It is not necessary to address whether the board can require certified real estate appraisers to use AMDS data. It is worth noting, however, that membership in the AMDS system costs $10,000 and requires approval by a majority of the existing members. While denial of membership status may be rare, it is possible. If the board determines an appraiser can be disciplined for not using this data, then the board would be creating a *de facto* regulation requiring appraisers who conduct appraisals in Anchorage to join AMDS. AMDS members would then be able to control the extent of competition by denying membership to additional appraisers.

137 Exhibit P, APE 344.

138 Exhibit P, APE 373 – 375.

139 Gurney testimony, Hearing Recording June 21, 2012, part 1 2:19:06 – 2:20:31.

Mr. Ferrara expressed some concerns over Mr. Gurney's land valuation, but he found no standards violation.[140] Mr. Turner, however, found that Mr. Gurney had violated several standards. Mr. Turner conducted his own search and found four vacant land sales that he believed should have been used.[141] Mr. Turner incorrectly believed that only one of Mr. Gurney's comparables was within the Stuckagain Heights neighborhood,[142] and that Mr. Gurney failed to take into account site differences such as topography, view, and location.[143]

Mr. Gurney relied on three land sales to support his opinion of value for the land in the cost value approach. He determined that all three were similar in relevant attributes.[144] Mr. Turner found four different land sales which he believes should have been used instead. There was no evidence, however, as to why Mr. Turner's comparables should have been used instead of Mr. Gurney's. The Amended Accusation alleges that Mr. Gurney violated standard 1-1 (b) (not commit a substantial error) and 1-1 (c) (not act carelessly or negligently). The division did not prove the existence of these violations, because there is inadequate evidence that Mr. Gurney's selection of comparables was wrong.

The Amended Accusation also alleges a violation of standard 2-1, and Mr. Turner found a violation of 2-1 (a).[145] This standard requires that the appraisal report "clearly and accurately set forth the appraisal in a manner that will not be misleading."[146] Mr. Gurney's appraisal states the value assigned to the land, and states that the source of that value is supported by MLS listings of vacant land sales. There is nothing unclear, inaccurate, or misleading in the appraisal, and the division did not prove a violation of this standard.

Finally, this section of the Amended Accusation alleges a violation of standard 1-4 (b)(i). This provision states that when using the cost approach, an appraiser must "develop an opinion of site value by an appropriate appraisal method or technique."[147] There was no evidence presented that using nearby vacant land sales as the method of developing the site value was improper. Mr. Turner did testify that adjustments should be made for varying site attributes, but

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140 Exhibit T, APR 400.

141 Exhibit R, APR 392 & 425.

142 Two of the three comparables used by Mr. Gurney were from Stuckagain Heights. Exhibit P, APE 374 & 375; Gurney testimony.

143 Exhibit R, APR 425.

144 Mr. Turner criticized Mr. Gurney for not adjusting for differences in characteristics, but if they are all similar as Mr. Gurney concluded, there would be no adjustment to make.

145 Exhibit R, APR 425.

146 Exhibit 11, page 31.

147 Exhibit 11, page 28.

Mr. Gurney testified that the three comparables he used all had similar attributes. Thus, there would have been no adjustments to make. Since there was no evidence to contradict Mr. Gurney's testimony, the division did not prove a violation of this standard.

6. Failure to account for functional obsolescence in cost approach

The final allegation in Count IV is that Mr. Gurney violated USPAP standards 1-1 (a) and 1-1 (b) when he failed to make an adjustment for functional obsolescence in valuing the property under the cost approach method.[148]

Mr. Turner's first report did not note any error regarding Mr. Gurney's cost approach analysis. In his supplemental report, Mr. Turner found that the failure to make a functional obsolescence adjustment was a violation of USPAP.[149] Mr. Ferrara's report also found that the failure to make this adjustment violated USPAP.[150] Mr. Gurney acknowledged that it was an error not to include this adjustment.[151]

Under standard 1-1 (a), an appraiser must correctly employ the methods and techniques necessary to produce a credible report.[152] Mr. Gurney agrees that he should have made a functional obsolescence adjustment when employing the cost approach method. Accordingly, Mr. Gurney violated this standard.

Standard 1-1 (b) states that an appraiser must "not commit a substantial error of omission or commission that significantly affects an appraisal."[153] The evidence at the hearing did not establish that Mr. Gurney's error was substantial, or that the error significantly affected the appraisal. Indeed, Mr. Turner did not even notice this error when he prepared his first report. The division has not established a violation of this standard.

V. Appropriate Sanctions

Mr. Gurney violated USPAP by not making an adjustment for functional obsolescence when using the cost approach method in the Shivalik Circle appraisal. Failure to comply with USPAP is a violation of AS 08.87.200(3). Accordingly, the board may impose discipline.[154] In doing so, the board is required to seek consistency with prior discipline, or explain its reasons for

148 Amended Accusation, ¶ 31.

149 Exhibit S, APR 425. In his supplemental report, Mr. Turner also found that an incorrect statement regarding depreciation was a violation of USPAP. The Amended Accusation did not charge Mr. Gurney with that alleged violation.

150 Exhibit T, APR 400.

151 Gurney testimony, Hearing Recording June 21, 2012, part 1, 2:25:15 – 2:26:58.

152 Exhibit 11, page 25.

153 Exhibit 11, page 25.

154 AS 08.87.210(1).

departing from previous decisions.[155] Neither party has cited to any prior discipline imposed by this board. However, the board has disciplined certified real estate appraisers on at least two prior occasions.

In *Wendte v. State*, the board disciplined a certified real estate appraiser for having stolen $250,000 from two nonprofits.[156] His license was suspended for two years, followed by five years of probation.[157] This case provides only limited guidance, however, because the factual basis for the discipline is so dissimilar.

The more relevant case is *Wold*, discussed above. There, the board found eight violations of USPAP.[158] The board found that Wold's errors included the improper selection of comparables for two different appraisals, relying on a contractor's estimate to make a large adjustment in reaching an opinion of value, providing inadequate explanations for the methods he did use, and making a double deduction for functional obsolescence. These errors occurred in three separate appraisals. The board's sanctions included a formal reprimand, fines, and 109 hours of classroom training.

Even with eight violations, the board did not suspend Mr. Wold's license, and no suspension should be imposed here. Nor does there appear to be a need to impose a civil fine, a formal reprimand, or require additional classroom training beyond what is already required for the next renewal of Mr. Gurney's certification. Mr. Gurney only committed one violation in one appraisal, and he readily admitted his mistake during the hearing. The mistake he made did not have a significant impact on his opinion of value because Mr. Gurney relied primarily on the market comparison approach to reach his opinion. Unlike the multiple errors found by the board in *Wold*, there is no apparent pattern of USPAP violations here.

A more effective route toward ensuring future USPAP compliance can be found in the board's authority to require peer review.[159] To ensure that Mr. Gurney is correctly employing the methods and techniques necessary to produce a credible report, he should be required to submit four appraisals for peer review during the next twelve months. One appraisal should be submitted every third month, and Mr. Gurney would be required to pay the cost of the peer

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155 AS 08.01.075(f).

156 70 P.3d 1089, 1090 (Alaska 2003).

157 *Id.*

158 *Wold*, 278 P.3d 266. Although all eight findings were reversed on appeal, the board's penalty still serves as guidance for the proper level of discipline when there are eight violations of USPAP.

159 AS 08.01.075(5) (authorizing the board to require peer review).

review. The reviewer should be a certified real estate appraiser in Alaska selected by Mr. Gurney and acceptable to the Board, or acceptable to a single Board member designated by the board. The peer reviewer would have the discretion to report any potential violations of AS 08.87 found during the review to the division for further investigation. This process provides an opportunity to confirm that Mr. Gurney does understand USPAP requirements and is correctly complying with those requirements when performing residential real estate appraisals.

VI. Conclusion

Mr. Gurney violated USPAP standard 1-1 (a) on one appraisal when he failed to adjust for functional obsolesce. Accordingly, he is required to submit four appraisals for peer review as discussed above.

DATED this 30th day of July, 2012.

Signed
Jeffrey A. Friedman
Administrative Law Judge

Adoption

The Board of Certified Real Estate Appraisers adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 25th day of September, 2012.

By: *Signed*
Signature
Richard Olmstead
Name
Chair
Title

[This document has been modified to conform to the technical standards for publication.]