

**BEFORE THE NEW MEXICO
REAL ESTATE APPRAISERS BOARD**

IN THE MATTER OF:

Case No. 36, 13-10-22

**M. PATRICK O'BRIANT,
License No. 02983-R,**

Respondent.

FINAL DECISION AND ORDER

THIS MATTER comes before the New Mexico Real Estate Appraisers Board (the "Board") upon the October 26, 2014, filing of a Notice of Contemplated Action ("NCA"), and subsequent service to Respondent M. Patrick O'Briant (hereinafter "Respondent").

A hearing before Gareth N. Burman, designated hearing officer, was held on February 5, 2015, at the Curry County Administrative Office in Clovis, New Mexico. The hearing officer was assisted by Board counsel, Assistant Attorney General Joseph Dworak. The purpose of the hearing was to take evidence concerning allegations contained in the NCA and related conduct of Respondent. The state appeared through its prosecuting attorney, Sally Galanter. Respondent appeared in person and through his attorney, Matt Chandler, Esq.

On April 8, 2015, during a regularly scheduled and properly noticed meeting, the Board entered into executive session, pursuant to NMSA 1978, Sections 10-15-1(H)(1), (3), to discuss the aforementioned matter. The Board reconvened immediately following its executive session, entered back into open session and made a determination.

Pursuant to the Uniform Licensing Act, Sections 61-1-1 to -34, having reviewed the Hearing Officer's Report, the testimony and exhibits presented during the hearing and duly admitted into the record, the Board hereby proffers the following:

FINDINGS OF FACT

The Board hereby adopts and incorporates by reference, as if fully stated herein, the Hearing Officer's Proposed Findings of Fact numbered 1 through 82, such findings being based on the record, testimony, and exhibits from the February 5 hearing, and attached hereto.

CONCLUSIONS OF LAW

1. Respondent is licensed as a Residential Certified Appraiser (#02983-R) and is subject to the jurisdiction of the Board pursuant to the Uniform Licensing Act; the New Mexico Real Estate Appraisers Act, Sections 61-30-1 to -24; and the New Mexico Real Estate Appraisers Board Rules and Regulations, Title 16, Chapter 65, NMAC.
2. Pursuant to the Real Estate Appraisers Act, Section 61-30-7(L), the Uniform Licensing Act, and rules promulgated pursuant to the Real Estate Appraisers Act, the Board held a proper hearing on the above-referenced matter.
3. Respondent was provided timely notice of the hearing and was advised of his rights, including that he could appear at the hearing in person or through an attorney; that he would have the opportunity to admit evidence, testify, call witnesses, and cross-examine witnesses presented by the administrative prosecutor.
4. There is sufficient support to recognize Brenda Barber as an expert witness and adopt the findings of Ms. Barber's peer review analysis and related testimony.
5. Respondent's appraisal in question included multiple factual and reporting errors, contradicting statements, and significant omissions.

6. The appraisal in question erred in accounting for the subject property's effective age with inconsistent numbers from 8 years to 30 years and a contradicting application of property condition that was noted as "fair to average" to account for an effective age that was reduced from the house's physical age of approximately 60 years.
7. The appraisal in question contained multiple reporting errors related to multiple sale price comparisons and sale price ratios used as comparables throughout the appraisal.
8. Respondent applied an incorrect approach to viewing the unaccounted basement area and any corresponding value when no value was provided at all for the basement in the appraisal in question.
9. The Board has adopted the Uniform Standards of Professional Appraisal Practice ("USPAP") pursuant to Rule 16.62.1.8 NMAC.

"The national uniform standards of professional appraisal practice (USPAP) as promulgated by the appraisal standards board of the appraisal foundation, and adopted and incorporated by reference are the minimum requirements. The appraisal standards board's code of professional responsibility, as filed in the federal register, are the minimum professional and ethical standards that will govern appraisers practicing in New Mexico."

10. The Preamble to the Uniform Standards of Professional Appraisal Practice states, in relevant part:

"The purpose of the Uniform Standards of Professional Appraisal Practice (USPAP) is to promote and maintain a high level of public trust in appraisal practice by establishing requirements for appraisers. It is essential that appraisers develop and communicate their analyses, opinions and conclusions to intended users of their services in a manner that is meaningful and not misleading."

11. Based on the record, including the number of minor errors and significant inaccuracies, contradicting statements, and omissions in the appraisal report, a preponderance of evidence demonstrates that Respondent violated the Preamble to USPAP.
12. USPAP Standards Rule 1-1 states, in relevant part:

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 appraisal; and
 - c. 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.
13. Based on the record, including the failure to correctly apply a sales comparison approach and cost approach, a preponderance of evidence demonstrates that Respondent did not fully understand or employ recognized appraisal methods and significantly affected the overall credibility of the appraisal in question, and thus violated USPAP Standard 1-1(a).
14. Respondent's statement that "[w]ithout a comp the same or near to the same subject I cannot prove the value of the basement, therefore, it was my decision and my decision only not to use it[,]'" is not an appropriate approach and is not defensible.
15. Based on the record, Respondent's failure to account for the basement in the appraisal in question is a substantial omission that significantly affects the appraisal, and violates USPAP Standard 1-1(b).
16. Based on the record, the series of smaller errors and omissions; including, but not limited to, language copied over from other forms, errors and omissions related to comparable

properties, inconsistent sale price ratios and effective age calculations, incorrect dates and fields inputted into the appraisal form all affected the credibility of the appraisal in question, and constituted violations of USPAP Standard 1-1(c).

17. The Board concludes that a preponderance of the evidence reveals that Respondent violated the USPAP Preamble and USPAP Standards 1-1(a), (b), and (c).
18. Failure to comply with USPAP Standard Rules is a violation of the Real Estate Appraisers Act, Section 61-30-15(B).
19. Pursuant to Section 61-30-15, the Board is authorized to revoke, suspend, reprimand, or place on probation Respondent's license for violations of the Real Estate Appraisers Act.

ORDER

Based upon these Findings of Fact and Conclusions of Law, a quorum of the Board renders the following order:

IT IS THEREFORE ORDERED that Respondent:

- i. Pay a fine of five-hundred dollars (\$500.00) to the Board office within six (6) months from the date of this Order; and
- ii. Successfully complete fourteen (14) hours of professional continuing education courses within six (6) months from the date of this Order; including seven (7) hours in sales comparison approach and seven (7) hours in appraisal report writing, and none of which shall be credited toward any other continuing education requirements of Respondent.

IT IS SO ORDERED.

May 5, 2015

DATE

/s/ e-signature

DEAN ZANTOW, CHAIR
ON BEHALF OF THE BOARD

*Executed electronic signature via-email
confirmation dated 5/5/2015*

JUDICIAL REVIEW

This Order constitutes a final decision for purposes of initiating any contemplated judicial review pursuant to NMSA 1978, Section 39-3-1.1. An aggrieved party has the right to judicial review of this Order by filing a notice of appeal under Rule 1-074 NMRA within thirty (30) days.

SERVICE COPIES

Administrative Prosecutor:

Sally Galanter, Esq.
Administrative Prosecutor
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Santa Fe, NM 87504-1508

Respondent:

Counsel:
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M. Patrick O'Briant
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Certified Mail to Respondent No.: 7010 1670 0000 8693 4301

Date: May 6, 2015

Return Receipt Requested

**BEFORE THE REAL ESTATE APPRAISERS BOARD
FOR THE STATE OF NEW MEXICO**

IN THE MATTER OF:

**M. Patrick O'Briant
License No. 02983-R**

Case No. 36, 13-10-22

Respondent.

HEARING OFFICER'S REPORT

THIS MATTER came before the duly appointed Hearing Officer Gareth Burman upon the filing of the Notice of Contemplated Action (“NCA”) dated October 26, 2015 with the New Mexico Real Estate Appraisers Board (the “Board”). An evidentiary hearing was held on February 5, 2015, at the Curry County Administrative Office in Clovis, New Mexico. The purpose of the hearing was to take evidence regarding the NCA and possible disciplinary action against Respondent’s license. Assistant Attorney General Joseph M. Dworak was present to advise the hearing officer. Respondent, Mr. M. Patrick O’Briant (hereinafter “Respondent”), appeared in person and through his counsel, Mr. Matt Chandler, Esq. The State appeared through its Administrative Prosecutor, Assistant Attorney General Sally Galanter.

The prosecuting attorney and Respondent each had opportunity to present their respective cases and elicit evidence through witness testimony. Witnesses testified under oath before the Board and each had the opportunity to be cross-examined by opposing counsel and questioned by the hearing officer during the hearing. Respondent requested to invoke the rule of sequester and the prosecution’s witnesses were directed to remain outside of the hearing room until called to testify.

The hearing officer submits this report pursuant to the Uniform Licensing Act (“ULA”), NMSA 1978, Sections 61-1-1 to -34, and hereby recommends the following:

PRELIMINARY MATTERS

Motion to Suppress Witness Testimony

As a preliminary matter Respondent raised an objection to the state’s introduction of Ms. Brenda Barber as an expert witness. Respondent alleged that there was insufficient time to depose the witness and conduct relevant discovery because he did not receive a copy of the administrative prosecutor’s proposed witness list until January 16, 2015.

Respondent contends that the Amended Notice of Hearing was untimely because it did not provide Respondent with adequate time to conduct depositions. The original Notice of Hearing was mailed on or about December 8, 2014, and the Amended Notice of Hearing was only to substitute the name of the hearing officer. Respondent mailed a request for documents, including a witness list, on or about January 5 or 6. The request was sent to the Board office and the administrative prosecutor stated that she did not receive a copy of the request until January 15, at which point she provided copies of the requested documents the next day, January 16, including a witness list with Ms. Barber named as an intended witness. Respondent’s counsel contacted the prosecuting attorney one day before the hearing to request any documents related to the testimony of Ms. Barber and the matters to which she would testify. The prosecuting attorney was traveling at the time and provided Respondent’s counsel with Ms. Barber’s telephone number. Respondent’s counsel called Ms. Barber the day before the hearing and asked her for more information about her testimony in the case. Ms. Barber allegedly stated that she

had completed a peer review appraisal of Respondent's appraisal involved in the current case, but Ms. Barber refused to discuss the case further.

Respondent stated that he was entitled to depose opposing witnesses under the ULA, and argued that Ms. Barber's testimony should be suppressed because he had insufficient time to conduct discovery and depose Ms. Barber prior to the hearing.

Respondent cited to Section 61-1-9(C) of the ULA, which states:

C. The . . . hearing officer may impose any appropriate evidentiary sanction against a party who fails to provide discovery or to comply with a subpoena.

In response, the prosecuting attorney stated that the original Notice of Hearing was sent out on or about September 26, 2014, and that Respondent had over three months to request the witness list, conduct discovery, and depose witnesses. The prosecuting attorney argued that there was more than sufficient time for Respondent to request the proposed witness list and depose Ms. Barber, and that Respondent's decision to wait until the weeks immediately preceding the hearing was no fault of hers or the Boards, and that Ms. Barber's testimony should not be suppressed.

The hearing officer denied Respondent's motion to suppress Ms. Barber's testimony but asked that foundation be laid prior to Ms. Barber's testimony as an expert witness and that Respondent may raise additional objections at that time. It was also noted there was no subpoena or other request related to the issue sent to the hearing officer prior to the hearing. Respondent indicated his intent to raise

objection and move to suppress any evidence used by Ms. Barber in her testimony that Respondent did not have knowledge of or access to prior to the hearing.

FINDINGS OF FACT

1. Respondent, was, at all times relevant, licensed by the Board to practice as certified appraiser under the New Mexico Real Estate Appraisers Act, NMSA 1978, Sections 61-30-1 to -24 (the “Act”).
2. Real estate appraisers licensed by the State of New Mexico are subject to the Uniform Standards of Professional Appraisal Practice (“USPAP”) promulgated by the Appraisal Standards Board of the Appraisal Foundation and as adopted by rule pursuant to provisions of the Act.
3. On October 1, 2013, Respondent completed a Uniform Residential Appraisal Report for a residence in Portales, New Mexico owned by Mr. Kris Key.
4. The Board received a complaint dated January 11, 2014, from Mr. Key against Respondent, alleging that his appraisal was inaccurate, misleading, and unreliable. [Exhibit (“Ex.”) 1; labeled REAB PO 1-66].
5. The major issue lodged by Mr. Key alleged that Respondent’s appraisal was artificially low because he failed to give value to a basement apartment in Mr. Key’s residence.
6. The complaint stated that Mr. Key was applying for a reverse mortgage and because of delays had to have a second appraisal done by Respondent. The first appraisal was conducted by an appraiser from Clovis in April 2014 and the residence was appraised at \$162,500. The complaint further stated that, because of delays from the company, Mr. Key had to reapply and obtain another appraisal, at which time he alleged that it

took two additional months for Respondent to conduct his appraisal. Mr. Key stated that Respondent was “sloppy, rude, disinterested in the facts” and was “just in a hurry” when conducting his appraisal. The complaint alleged that Mr. O’Briant was intentionally lowering his appraisal, which was \$105,000, and that Respondent erred in his appraisal by calculating the basement apartment at zero dollars (\$0) and the master bedroom and master bathroom at zero dollars (\$0). [Ex. 1; PO 4-5].

7. Respondent took particular offense to Mr. Key’s statements regarding his demeanor and professionalism, and Respondent contested the allegations in both his response to the Board and through his testimony at the February hearing. [PO 70-72] [Respondent Testimony].
8. On January 17, 2014, the Board notified Respondent of the complaint and requested a response. [Ex. 2 (January 17 CID letter); PO 67-68].
9. On January 30, 2014, the Board received a response from Respondent that included copies of correspondence with Mr. Key, documents related to the appraised property, and copies of several MLS reports for other homes in the area. Respondent denied Mr. Key’s allegations that he was unprofessional and further stated that the earlier appraisal is the report that should be reviewed for violations, of which he cited several. [Ex. 3; PO 69-185].
10. Respondent claimed that portions of the residence were not given value because they were under construction at the time. In response to not including parts of the residence in his appraisal, Respondent stated in his response to the Board that he “was not comfortable in doing a hypothetical condition on the bedroom and the bathroom based on [Mr. Key’s] very vague answers” and that he “did not allow credit for

something that was not there at the time or in the [foreseeable] future.” [Ex. 3; PO 70-72].

11. In his January 30 response, Respondent also defended his decision to not include a value for the basement, stating that “at the time of inspection there was no bedroom [in the basement]-it was a room with a cement floor, an attempt to make some sort of closet but was about twenty percent done; the area called a bathroom had no toilet, no sink, no plumbing intact.” He stated:

The basement was not used because I could not find a comparable in the same or similar neighborhood. Without a comp the same or near to the same subject I cannot prove the value of the basement, therefore, it was my decision and my decision only not to use it. . . . The basement has no functional utility as there is no bathroom, kitchen or laundry available without going upstairs, thus the value is minimum.

[Ex. 3; PO 70-72].

12. At the February 5 hearing, Respondent’s attorney opened by stating that Respondent has completed approximately fifteen hundred (1,500) appraisals and had never had any prior disciplinary action regarding his license. Counsel further stated that Respondent admitted minor, human errors in his appraisal of Mr. Key’s residence, but that those minor errors did not amount to a violation of the Board’s rules. [Respondent’s Opening].

13. Respondent testified under oath at the February 5 hearing that his work is only in residential appraisals and that he was requested by Liberty Mutual to do an appraisal

of Mr. Key's residence. He testified further that he is on a panel for AMCs who call on him and other appraisers when an appraisal is needed. [Respondent Testimony].

14. Respondent provided an email received from Liberty Mutual dated September 11, 2013, with an order to conduct an appraisal for Mr. Key's property with a due date of September 16. [Ex. 3; PO 164].

15. Respondent testified that he communicated with Mr. Key via email because the engagement letter indicated that the homeowner preferred to communicate through email, and further testified that Mr. Key claimed to not have a functioning telephone. [Respondent Testimony].

16. Respondent provided a series of emails sent on September 13 and 15 to Mr. Key notifying him that Respondent would be conducting the appraisal. Mr. Key responded on September 16 to confirm a date for inspecting the property. [Ex. 3; PO 167-170].

17. Respondent testified that the residence in question included only a partial basement – meaning it did not have a full bathroom, full rooms, and was not fully furnished. The kitchen and bathroom for the basement were actually on the first floor of the residence and accessible by stairs to the basement. [Respondent Testimony].

18. Respondent testified that Respondent could not find a comparable basement in the area that was sold within the last twelve months to use as a “comp” and that he was told that if you couldn't find a comp you couldn't use the space in an appraisal. [Respondent Testimony].

19. Respondent testified that his “rule of thumb” was to add 8-12% of home value for a basement addition. [Respondent Testimony].

20. Respondent testified that the residence in question was located in an old part of town with the average age of homes being 60-85 years. He stated that a 60 year old home would be categorized in an appraisal for quality of construction as a “Q4” if it had not be updated or remodeled. [Respondent Testimony].
21. Respondent admitted several inconsistencies and errors in his appraisal report.
- A. Admitted that his signature in his report under both “appraiser” and “supervisory appraiser” were duplicative, and that the second signature was a “bleed over” as a result of a “computer glitch.” [PO 38];
 - B. Admitted that the summary of sales comparison approach section on his report incorrectly stated that “there were only three comps in the entire town that have sold between [\$]185,000 & [\$]250,000.” [PO 40]. Respondent testified this language was a “bleed through” that was inadvertently copied over from another appraisal report. [Respondent Testimony].
22. The prosecuting attorney called Ms. Brenda Barber as an expert witness at the hearing. Ms. Barber testified under oath that she lives has been a certified real estate appraiser and has worked in the industry for approximately 34 years, first for her husband and currently self-employed. She received her appraiser’s license in 1991 at the time New Mexico first established licensing for appraisers, and stated that she has received training through various national organizations. Ms. Barber’s practice is focused on residential property and she testified that she has conducted appraisals on approximately four to five thousand properties. Ms. Barber stated that she has served on the New Mexico Real Estate Appraisers Board as a professional member for nearly four years and that her current role is chairman of the Board’s complaint

committee. Ms. Barber stated that she had testified as an expert witness for real estate appraising in state District Court and that she had been called as an expert for a proceeding in federal bankruptcy court in Albuquerque but that the case was settled prior to hearing. Ms. Barber has not testified before in a Board disciplinary proceeding. [Barber Testimony].

23. Respondent raised concern about Ms. Barber's potential conflict of interest in the case and Ms. Barber testified that she abstains from any Board voting or action on disciplinary matters she is involved with. [Barber Testimony].

24. Respondent requested that Ms. Barber be admitted as an expert witness and the hearing officer qualified her as an expert witness without objection.

25. Ms. Barber was called by Respondent's attorney the day before the hearing and testified that she informed the attorney that she would be testifying about her review of Respondent's appraisal but that she did not feel comfortable about discussing the specifics of the case or testimony at that time. On redirect examination Ms. Barber testified that had she received a formal deposition request or subpoena she would have complied with the request. [Barber Testimony].

26. Ms. Barber reviewed Respondent's entire disciplinary file (Exhibits 1 to 4; PO 1-185), including all the material provided by Respondent in his response to the original complaint. Ms. Barber testified that her role as a peer reviewer was to identify and determine whether there were any violations of the Appraiser's Act. [Barber Testimony].

27. Ms. Barber made the assumption that the information provided by Respondent to the Board was the complete file of everything he had, and that everything reported on the subject property was accurate. [Barber Testimony].
28. Ms. Barber testified that she did not physically visit the subject property or the comparable properties used in the appraisal in questions, and that her review was limited to the material and information provided by Respondent. [Barber Testimony].
29. Respondent signed his name as both the “Appraiser,” dated 9/24/13, and “Supervisory Appraiser,” dated 10/1/13, on the appraiser’s certification page of the appraisal. [PO 38]. This was acknowledged by Respondent as a “bleed over” error as a result of a “computer glitch.” [Respondent Testimony].
30. Respondent input 9/26/13 as the date of inspection and effective date of on the appraisal [PO 40], but dated the first signature on the appraiser’s certification page as 9/24/13 [PO 38], two days before the inspection and effective date.
31. Ms. Barber testified that an appraiser cannot certify an appraisal that has not yet occurred. [Barber Testimony].
32. Listing price to sale price ratio descriptions for neighborhood properties provided in Respondent’s appraisal are inconsistent. Page 1 of the appraisal report, under neighborhood description, states a “listing to sale price ratio of 94.6% to 100%.” [PO 39]. This ratio is not identical, but similar to the list price to sale price ratios (92% and 96%) included on the appraisal’s Market Conditions Addendum [PO 59]. However, the comparable analysis page of the appraisal states that “[m]ost of the homes in this area will sell between 84% and 95% of there listing price.” [PO 54].

33. Respondent renewed his objection of Ms. Barber's testimony, arguing that because she refused to answer his questions regarding her testimony Respondent should be entitled to evidentiary sanctions. Ms. Barber affirmed that her review was limited only to Respondent's appraisal and evidence contained in the disciplinary file. The hearing officer overruled the objection.
34. The effective age calculated in the appraisal is inconsistent. The house was built in 1953. Page 1 of the appraisal report, under General Description, states an effective age of 30 years. [PO 39]. The Supplemental Addendum page of the appraisal states that "[t]he subject has an effective age of 8 years, as to all of the comps . . ." [PO 45].
35. Ms. Barber testified that a property with a physical age of 60 could be given an effective age of 30 years if the property was in good condition. However, in addition to noting the inconsistent numbers in the appraisal, Ms. Barber believed that the effective age should not have been 30 years for a 60 year old home that is only in "fair to average" condition. [Barber Testimony].
36. On cross examination, Ms. Barber testified that if the effective age error by itself would not likely amount to a violation of USPAP. [Barber Testimony].
37. The appraisal included a 544 square foot basement in the building sketch but labeled it as "non-living area" in the appraisal. [PO 65]. The appraisal did not label or calculate the basement as being "finished" space. Respondent stated in the appraisal that there are few homes in the area with basements and "[d]ue to the lack of data and no market information for the basement I cannot support the cost; therefore I have not included this in the GLA in the appraisal." [PO 45].

38. Ms. Barber testified that the basement should have been labeled as “100% finished” because it was livable space and not comparable to that of a garage. She testified that the basement was heated, had carpet, and was occupied by the owner, and that the area should be considered furnished space. Ms. Barber stated that the basement area should have been included by Respondent under the line titled “Basement & Finished Rooms Below Grade” on page 2 [PO 40] of the appraisal. [Barber Testimony].
39. On cross examination Ms. Barber stated that a basement with only cinderblock walls and carpet would still be considered a “finished basement,” even if the basement did not have a bathroom or kitchen in it. Although Ms. Barber was not able to place a value on the basement herself, she stated that the exact value of the basement is not the issue with the report but, instead, that Respondent’s omission of considering a value of the basement is the problem. [Barber Testimony].
40. Respondent had difficulty including the sketch of the basement in the appraisal, and stated: “I have done this sketch three times and it keeps showing the basement as a second floor . . . I have a software issue hear, please disregard the second floor in calculations as it is the basement.” [PO 45].
41. Ms. Barber testified that she uses the same or similar software, Alamode, and that there is a way to account for the basement and it should be included on a second page. On cross examination Ms. Barber testified that she did not know what version of the program Respondent used and she could not be certain that they use the same software. [Barber Testimony].
42. The appraisal indicated that the subject property had a carport but all three options (attached, detached, built-in) were marked. [PO 39]. Ms. Barber testified that it is not

appropriate to select all boxes, and that the sketch of the property indicate that the carport is attached. [Barber Testimony].

43. The appraisal checked off all the boxes under appliances (refrigerator, range/oven, dishwasher, microwave, washer/dryer). [PO 39]. Ms. Barber testified that an appliance should only be noted in an appraisal if it is built-in. She stated that if the appliance is not built-in it should not be marked in the appraisal and should be categorized as “personal items.” [Barber Testimony].

44. Complainant, Mr. Key, the subject property owner, testified under oath at the hearing that none of the appliances were built-in. [Key Testimony].

45. On cross examination Ms. Barber testified that personal items checked off on the appraisal [PO 39] would likely not affect the final appraisal value very much. [Barber Testimony].

46. The appraisal’s description of the condition of the property appears to contradict. Page 1 of the appraisal report states “this home is in fair to average maintenance and is in fair to average conditions” and then immediately follows proceeds to state that the property “[a]ppears to be very well maintained.” [PO 39]. Ms. Barber noted that “fair to average maintenance” implies something notably different than “very well maintained.” [Barber Testimony].

47. Additional discrepancies about the condition of the property are raised in Respondent’s January 26, 2014, response letter to the Board. In his letter, Respondent states that “the property is in very rough condition both exterior and interior. The subject needs a lot of work in and out and the appraisal reflects the neighborhood as such.” [PO 71].

48. On cross examination Ms. Barber testified that the apparent contradictions from the appraisal's summary of property conditions do not constitute a specific USPAP violation. [Barber Testimony].
49. Details of comparable properties currently offered for sale and their sale price contradict. The sale price of comparable #1 is stated as \$99,500 on page 2 of the appraisal [PO 40], but the MLS report on the property [PO 107] indicates that the property sold for \$95,500, a \$4,000 difference from the price included in Respondent's appraisal.
50. Details of comparable properties and their actual sale prices contradict within the appraisal. The Market Conditions Addendum includes four comparable sales in the last months with sale prices of \$120,000, \$95,500, and a median price for two other properties of \$107,750. [PO 59]. The second line of page 2 of Respondent's appraisal states that there are "4 comparable sales in the subject neighborhood within the past twelve months ranging from \$90,000 to \$123,000." [PO 40].
51. Page 2 of the appraisal, under "Summary of Sales Comparison Approach," states that "[t]here were only three comps in the entire town that have sold between [\$]185,000 & 250,000." [PO 40]. This is inconsistent with other references to sale prices of comparable properties made within the appraisal as well as the sale prices listed on the MLS reports. Respondent testified this language was a "bleed through" that was inadvertently copied over from another appraisal report. [Respondent Testimony].
52. The size of the property site listed on the appraisal for comparable #2 was inconsistent with the lot size in the MLS report. The appraisal indicated a site of

15,126 square feet. [PO 40]. The MLS report indicated a lot size of 100x145 (14,500), which is 626 square feet less than the appraisal. [PO 108].

53. The comparable sale summary in the appraisal is not consistent with the pictures of the comparable property. Page 2 of the appraisal notes that there is no garage for property labeled as comparable sale #1. [PO 40]. However, the picture of comparable #1 shows a picture of an attached two car garage. [PO 53].

54. Respondent argued that these errors occur and that many are a result of inconsistent listing information on the MLS website. It was pointed out that while the MLS listing for comparable #1 [PO 106] noted an attached garage, the garage capacity was labeled as "0" (zero) and Respondent stated that this was evidence of common and excusable errors. This point was also made with the MLS report for comparable #3 that was labeled in MLS as being a detached garage when in fact it appears to be an attached carport. [PO 110].

55. On cross examination Ms. Barber testified that she did not believe there was a specific USPAP violation with Respondent's report on comparable #3 in the appraisal. [PO 40] [Barber Testimony].

56. Ms. Barber testified that effective age already considers condition of a property and that the \$15,000 adjustment made in Respondent's appraisal for comparable #2 for its C3 condition was not necessary. [PO 40] [Barber Testimony].

57. Ms. Barber noted the three blank rows on the middle of page 2 of the appraisal and testified that the lines could have been used to account for other features that add value to the property, such as the fireplace, outside sprinkler system, and security system. [PO 40] [Barber Testimony].

58. Respondent included active listings as comparable properties in the appraisal but did not adjust the value of the active properties. In the appraisal, the summary of Respondent's comparables #4 and #5 includes a statement under "Analysis/Comments" that reads, in part: "I do not adjust active comps as they are not closed sales and I do not know what the final price will be, nor if it is a Foreclosure, REO, Short Sale etc. and this would be against USPAP rules and I believe that it is misleading to the final appraisal." [PO54].
59. Ms. Barber testified that the USPAP does not have rules against using listing prices for active comparables and that Respondent should have adjusted active listings in the same manner as the other comparables. Ms. Barber stated that a comparable included in an appraisal but not adjusted in the same manner as other comparables, regardless of whether the property is currently on the market, renders the comparable irrelevant because it is not adjusted properly. She further testified that the USPAP is silent on the use of active listings for comparables and that it is matter of client preference, not any limitation or prohibition from the USPAP. [Barber Testimony].
60. There is a contradiction regarding the use of a cost approach analysis in the appraisal. Page 2 of the appraisal included an indicated value by sales approach of \$105,000, and an indicated value by cost approach of \$94,485. Immediately following in the appraisal, Respondent stated "Cost [A]pproach not done due to age of home that and would not be reliable." [PO 40].
61. Ms. Barber noted the contradiction regarding the use of a cost approach, stating that a cost approach was included in the appraisal [PO 41], but that she could not find anything in Respondent's work file provided to the Board to support a locally

developed cost approach. Ms. Barber could not find evidence in the file to support the 07/2013 effective age of cost data. She testified that the depreciation amount estimated in the appraisal might be acceptable for a house that has an effective age of 30 years with fair to average condition, but not of a house with an effective age of 8 years. She also stated that the Cost Approach to Value section had a blank row that could have been utilized by Respondent to add value for the basement but it was not. [Barber Testimony].

62. Page 3 of the appraisal provided an “Opinion of Site Value” of \$6,000 [PO 41], but Ms. Barber testified that she did not find anything in the file provided by Respondent that documents or otherwise supports the site value. [Barber Testimony]. Respondent later testified that he used property value provided by the city of Portales and added some value because the last property assessment was from several years prior. [Respondent Testimony].

63. Ms. Barber raised concern that photos of comparable properties provided by Respondent in the appraisal were copies of photos found on the MLS website. Ms. Barber testified that USPAP requires appraisers to personally conduct an in-person inspection of properties used as comparables. Ms. Barber was not able to give a definitive position on whether she believed that Respondent failed to conduct a visual inspection of the comparable properties, and on cross examination she testified that there was no evidence that Respondent did not conduct an in-person inspection of the comparables. [Barber Testimony].

64. Ms. Barber testified to the general need of providing appraisals that include sufficient detail so that a reader can clearly understand the relevant considerations of the property. [Barber Testimony].
65. Ms. Barber testified to the nature of requirements under the USPAP Preamble and that appraisers are required to provide reports in a manner that is not misleading for the reader or user of the appraisal and protect public trust of the profession. In Ms. Barber's opinion, based on the amount of errors, contradicting statements, and omissions in the appraisal report, Respondent's appraisal is a misleading report and violates the USPAP Preamble. [Barber Testimony].
66. On Cross examination Ms. Barber testified that the Board did not receive and she was not aware of any complaint that the intended user of the appraisal (Liberty Mutual) was misled. [Barber Testimony].
67. Ms. Barber testified to the nature of requirements under Section 1-1A of USPAP, which states that an appraiser must "be aware of, understand, and correctly employ those recognized methods and techniques that are necessary to produce a credible appraisal." In Ms. Barber's opinion, based on the errors and omissions in Respondent's sales comparison approach and cost approach, the recognized methods and techniques were not used properly and amounted to a violation of USPAP Section 1-1A. [Barber Testimony].
68. Ms. Barber testified to the nature of requirements under Section 1-1B of USPAP, which states that an appraiser must not commit a substantial error of omission or commission that significantly affects an appraisal." In Ms. Barber's opinion,

Respondent's failure to properly account for the basement in his appraisal was a serious omission and a violation of USPAP Section 1-1B. [Barber Testimony].

69. Ms. Barber testified to the nature of requirements under Section 1-1C of USPAP, which states that an appraisal must "not render appraisal service 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." In Ms. Barber's opinion, the large omission of the basement in the sales comparison approach and cost comparison approach affected the credibility of the report. She further testified that the series of smaller errors and omissions throughout the appraisal in the aggregate affect the credibility of the appraisal and amount to a violation of USPAP Section 1-1C. [Barber Testimony].

70. Ms. Barber testified to the circumstance of when there is no comparable available to use as support for valuing a property feature, such as the basement of Mr. Key's house. In her opinion, Ms. Barber stated that it is important to find a way to place a value on the basement, whether it be a comparable peer sale or market recognition to determine what someone would pay for the basement. She stated that an appraiser should start in an area near the subject property and search outward until a comparable is found, even if that means including nearby towns in the search. It is even permissible to go back in time to find a sale and adjust for time accordingly. [Barber Testimony].

71. Ms. Barber testified that if a comparable property is simply not available, that an appraiser needs to do a market extraction or find a way to determine an estimated value for a basement. This might include conducting a depreciated cost approach. Ms.

Barber believed that simply omitting a portion of a subject property because the appraiser cannot find a comparable property is not permissible and constitutes a serious omission. [Barber Testimony].

72. On cross examination Ms. Barber testified that her review was not a Standard 3 Review or a Field Review, which she is not qualified to do because she is not competent in the geographical area of the subject property. She stated that her review is not intended to provide a value of the property, but only a review of the methods and standards utilized in Respondent's appraisal. [Barber Testimony].

73. On cross examination Ms. Barber testified that there was no complaint from the intended user of the report (Liberty Mutual) of being unable to use Respondent's appraisal, but that the only complaint came from the property owner (Mr. Key) as a result of receiving two very disparate appraisals for his property. [Barber Testimony].

74. Ms. Barber testified that the first appraisal done on the subject property by another appraiser raised concern from the Board's complaint committee but no complaint was received on the appraisal. She testified that there was discussion among the committee on whether to file a separate complaint against the first appraiser, but the committee chose not to file its own complaint. [Barber Testimony].

75. On cross examination Ms. Barber testified that omission of the basement on a specific page of the appraisal is cause for a USPAP 1-1A violation, but she did state that a person reading through the entire appraisal would understand that there is a basement in the subject property. Ms. Barber further testified that omission of the basement square-footage is a violation and that the inconsistencies of effective (30 versus 8 years) and subsequent adjusted age are also a violation. [Barber Testimony].

76. On cross examination Ms. Barber testified that the inconsistencies of describing the condition of the property (C4 condition, fair to average, very well maintained) may lead an intended user of the appraisal to read conflicting perspectives and does not provide clear support for the appraisal's included depreciation rate of nearly fifty percent. [Barber Testimony].
77. On cross examination Ms. Barber testified that several of the smaller inconsistencies and discrepancies noted in her peer review of Respondent's appraisal do not constitute specific USPAP violations. [Barber Testimony].
78. Ms. Barber testified that multiple small omissions tend to question the credibility of the appraisal report and that the omissions, while not individually, as a collective constitute a USPAP violation. [Barber Testimony].
79. Mr. Key testified on cross examination that his home was undergoing renovations at the time Respondent conducted his appraisal. These renovations including tiling floors, converting a laundry room into a bathroom, constructing a closet, and painting, among other projects. Mr. Key also testified that he never requested that Respondent revisit his home after completion of any of the projects nor did he ever provide Respondent with photographs or other information evidencing that any of the renovation projects had been completed. [Key Testimony].
80. Mr. Key testified on cross examination recanted on some of his accusations against Respondent. Specifically, when asked about stating in his complaint that Respondent "did not present himself in a professional manner," Mr. Key stated "I don't think I said that" and, instead, that Respondent simply "was non-talkative" during his inspection of the property. [Key Testimony].

81. There is no evidence that Respondent was unprofessional or not punctual regarding his communication with Mr. Key or during his inspection of Mr. Key's property. In fact, emails provided by Respondent evidence Respondent's timely communication and do not provide any evidence of rude or unprofessional communication with Mr. Key. [PO 167-173

82. Mr. Key testified on cross examination that he had been desperate to sell his house. He testified that in September 2011 the property was listed on the market at \$115,000 but did not sell; December 2013 the property was listed at \$110,000 and subsequently lowered to \$90,000, on the market for 119 days, but did not sell; June 2014 the property was listed at \$139,000 and subsequently lowered to \$124,000 but did not sell. [Key Testimony].

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Commission accept this Report and adopt the Proposed Findings of Fact.

Respectfully Submitted,

/s/ executed via email confirmation
Gareth N. Burman, MAI
Board Hearing Officer

March 26, 2015
DATE