

**APPRAISER LICENSING AND CERTIFICATION BOARD
HEBER M. WELLS BUILDING
ROOM 2B
June 23, 2010
9:00 A.M.
TELEPHONIC MEETING**

MINUTES

STAFF MEMBERS PRESENT

Deanna Sabey, Division Director
Dee Johnson, Enforcement Director
Traci Gundersen, Assistant Attorney General
Jennie Jonsson, Hearing Officer
Renda Christensen, Board Secretary
Craig Livingston, Investigator
Jill Childs, Assistant Board Secretary

BOARD MEMBERS PRESENT

Ron Smith, Chair – In person
Craig Morley, Vice Chair – By phone
Debra Sjoblom, Board Member – By phone
Paul Thronsen, Board Member – By phone
Jeanette Payne, Board Member – By phone

GUESTS

Austin Christensen	Niel Jensen
Kevin Prowell	Allen Larsen
Bill Lifferth	Joel Frost
Ryan Sedgwick	

The June 23, 2010 meeting of the Appraiser Licensing and Certification Board began at 9:00 a.m. with Chair Smith conducting.

PLANNING AND ADMINISTRATIVE MATTERS

Approval of Minutes

The Minutes for the May 26, 2010 meeting were reviewed and found to have one correction. On page 4, the word “book” should be changed to “bulk.” A motion was made to approve the Minutes as corrected. Vote: Chair Smith, yes; Vice Chair Morley, yes; Board Member Thronsen, yes; Board Member Debra Sjoblom, yes; Board Member Payne, yes. The motion carries.

DIVISION REPORTS

DIRECTOR’S REPORT – Deanna Sabey

Director Sabey took the opportunity to recognize Chair Smith for his four years of service to the Board and the Division. She presented him a plaque as a token of appreciation and thanked him for his contributions and service to the industry.

Director Sabey announced the replacement for Chair Smith was just appointed by the Governor, and will be Daniel Brammer. The Senate confirmation process is taking place today. Mr. Brammer will join the Appraiser Board in July.

There are 81 AMCs registered with the Division as of June 22, 2010. This number has been increasing on a regular basis.

Director Sabey reviewed AMC legislation throughout the country and wanted to share her results today. In late 2008 there was a joint effort of a number of groups that decided to put together draft model legislation for Appraisal Management Company regulation. Those groups were the Appraisal Institute; American Society of Appraisers; American Society of Farm Managers and Rural Appraisers; and the National Association of Independent Fee Appraisers. Shortly after the draft model legislation was prepared and released for comment, Utah was the first state to enact AMC regulations. There were two states immediately following: New Mexico and Arkansas. Since that time, there are now a total of 18 states that have AMC laws on their books. There are a number of states ready to enact laws: Missouri; North Carolina; Ohio; Pennsylvania.

In comparing the legislation in these various states, Director Sabey noticed there are some provisions that are in common with Utah's provisions, and some that are different. Some of the differences involve the requirement of surety bonds, generally in the amounts of \$20,000 to \$25,000. The Division of Real Estate had surety bonds in the past for mortgage licensees before the Mortgage Recovery and Education Fund. The purpose of the surety bonds is to have a fund to compensate a consumer who is damaged by egregious activity; there is a way to make a claim against the surety bond for recompense. Some states have Appraiser Fee escrow requirements, where the funds will go into an escrow account until the deal is complete, and then the funds are released. Other states do not have the Appraiser Boards govern AMCs, and they use the Consumer Protection Divisions or their licensing divisions. A few states have fees paid directly from the lender to the appraiser, and then have the AMC bill the lender directly for the AMC fee. Other differences include the use of fee schedules; requirements that all of the control persons have passed USPAP courses; exemptions for bank owned AMCs (this is not in Utah); and a process for review of a decision that an AMC has made to remove an appraiser.

The Division held its first Salt Lake City Caravan presentation last Thursday. It was well received, and there were approximately 200+ in attendance.

ENFORCEMENT REPORT – Dee Johnson

Mr. Johnson reported in May the Division received 6 complaints; screened 2 complaints; opened 6 cases; closed 2 cases; leaving the total number of appraiser cases at 92.

Mr. Johnson said the Division has received its first complaint against AMC conduct.

There is one Stipulation for the Board's review:

Kent Wilkey, CR

The respondent was offered the opportunity to attend the meeting today, but has declined to do so. Mr. Livingston was the investigator on the case and is available for any questions the Board might have regarding the Stipulation.

EDUCATION AND LICENSING REPORT – Dee Johnson

Mr. Fagergren is out this week, and Ms. Westbroek is out for today. Mr. Johnson will give the report for education and licensing for this meeting.

The licensing numbers for May show a decrease in two trainees, but the figure for licensed appraisers went up by the same amount. Other numbers show the same slight increases and/or changes, and the total number of licensees and entities has slightly risen to 2,211.

Mr. Johnson presented the following list to the Board:

Certified and Licensed Appraiser Applicants Approved by both Education and Experience Review Committees:

Richard R. Matheson, CG Candidate
Cameron Chris Wright, CR Candidate
Kelby Wegwitz, LA Candidate

Certified and Licensed Appraiser Applicants Approved by Education Review Committee and Denied by Experience Review Committee

William K. Cole, Jr., CR Candidate

Discipline List for Board's Consideration

Aaron J. Brown
William H. Pruett, III

COMMISSION AND INDUSTRY ISSUES

Discussion: Proposed Rules – Jennie Jonsson

Ms. Jonsson said there is a need at the Division to have a system to track the business address and the business affiliation of appraisers and trainees. The Division has proposed a definition of the term "affiliation," and has drafted rules that require an applicant for licensure provide to us a business and a home address, and the name and business address of any appraisal companies with which the applicant is affiliated. Similarly, when an appraiser or trainee moves from one appraisal company to another, a change card must be filled out and submitted to the Division.

In addition, the Division would propose a change to the trainee registration rule so as to require the trainee to submit the name of the state-certified appraiser(s) with whom the trainee will affiliate, and the name and business address of any appraisal company with which the trainee is affiliated. A change card must be filled out and submitted when the trainee changes a supervising appraiser or an appraisal company. These rules would give us the information we need to find licensees and trainees through their home address or business address or through a company or another appraiser with whom they were affiliated.

The discussion of “Day” vs. “Business Day” is in this same rule draft, and will be discussed at this time as well. The State has adopted a four-day work week, and the Administration of the Department of Commerce has asked us to go through our rules and identify sections where we refer to deadlines or use the word “day” to make sure our rules still work since the change to the four-day work week. The proposed definition of “day” says that unless specified as “business day,” the term “day” means calendar day. An example would be if someone were given ten days to respond to a notice, it would mean calendar days. A “business day” is a day other than a Saturday, Sunday, or a federal or state holiday. This definition is consistent with the statutory definitions in the other professions (real estate and mortgage).

It was also brought to the Division’s attention that in order to have electronic meetings we are supposed to have a rule in place to govern the purpose of the meeting. Proposed rule R162-109-7, Electronic Meetings, states the meetings may convene to conduct business that is unrelated to a hearing. The public may attend the meeting, but a separate electronic connection may not be provided for or used by members of the public.

Chair Smith suggested that under R162-101.2.1, the definition of the word “affiliation,” should be changed to read “...between a trainee, a state-licensed appraiser, or a state-certified appraiser and..” Under (a), it was suggested that an addition of “government agency” be added, so (a) would now read “an appraisal company, or government agency; or..” Ms. Jonsson will search the remainder of the rule to make sure this change is consistent in the language.

It was suggested that Ms. Jonsson draft language to carve out an exemption so that a one-time affiliation with a company does not have to be reported to the Division.

There is no language that can be voted on today because Ms. Jonsson will draft a carve out. There will be a new draft presented in the next meeting to be voted on at that time.

Discussion: AMC Rules – Jennie Jonsson

The AMC Rules Committee has helped draft additions and changes to the existing AMC rules. One of the primary things done was to create a definition for “competency statement.” This is a statement where the appraisers sign they are 1) competent to do each job according to Utah standards, 2) recognize and agree to comply with laws and regulations, assignment conditions, scope of work outlined by the client, and 3) have independent access to the records necessary to complete a competent appraisal, including MLS listings and county records.

There is a requirement that the AMC present this competency statement to the appraiser at the time that the job is offered, and this should take care of many concerns about AMCs allowing appraisers to complete jobs where they are not geographically competent or don’t have access to records. The responsibility will be on the appraiser to be competent, but the AMC plays some part in ensuring competence.

The AMC committee created a definition of “client”, but Ms. Jonsson found the Division currently has a definition in place in statute. She suggested the committee strike the new wording and just refer to the statute for a definition.

There is also a definition for the word “select.” The statute says that AMCs select appraisers to be on the panel and select someone from the panel to complete a job.

A new section (3) was added that requires the AMC to register with the Division in the name of the legal entity under which it conducts the business of appraisal management in Utah, and in other states. The AMC shall notify the Division of a DBA, trade name, or assumed business name under which the legal entity operates in Utah.

Other sections in the rule have been added to cover use of licensed or certified appraisers; adherence to standards; and recordkeeping. Changes and additions were made to the required disclosure section.

The section on unprofessional conduct brought changes and additions. The new draft states that unless first prohibited by the client or applicable law, an AMC may not prohibit or inhibit an appraiser from contacting the lender; real estate licensee; or any other person with whom the appraiser reasonably needs to communicate in order to obtain information necessary to complete a credible appraisal report.

Board Member Payne has submitted language to rewrite the definition of “select,” and it was discussed and reviewed by the Division, Board, and members of the public. Chair Smith called for a motion to exchange the wording on (4) “select” to the wording proposed by Board Member Payne. Vote: Chair Smith, no; Vice Chair Morley, no; Board Member Thronsdon, no; Board Member Debra Sjoblom, no; Board Member Payne, yes. The motion is defeated.

Chair Smith opened discussion to review each page of the proposed rule. Under (3) “Competency statement”, item (iv)(A), “MLS” should be written out specifically to say “Multiple Listing Service.” Under the same section, item (iv) states the appraiser must have independent access to the records necessary to complete a competent appraisal. Discussion was held on the term “independent access” to the Multiple Listing Service, and Ms. Jonsson said the wording can be changed to read “disinterested third party.” Chair Smith pointed out that USPAP prefers using “credible” instead of “competent,” and it was approved by the Board to make this change in wording. Chair Smith recommended changing the term “Multiple Listing Service” to add the word “data.”

In Section 201 Registration required – qualification for registration, item (3)(b) it was suggested to add a 10-day deadline, so it would read “An AMC shall notify the division within ten days...” Ms. Jonsson will also include a definition of “day.”

In Section 302 Adherence to standards, Chair Smith suggested the wording might be changed to add the word “assignment” after “appraisal.”

In Section 303 Recordkeeping, Chair Smith suggested the change from “firm” to “entity.”

In Section 304 Required disclosure, Chair Smith suggested in item (b)(iii) the language mirror USPAP, and change the wording from “professional involvement” to “have been involved with any service...”

In Section 305 Employee requirements, Chair Smith suggested changing item (b) to remove the wording “six months after initial registration.”

In Section 401 Unprofessional conduct, Chair Smith said the paragraphs need to be renumbered after the changes. Vice Chair Morley pointed out that (i) should read “client” instead of “lender.” A motion was made to make the change in (i) and leave the remaining part of (c) as currently written. Vote: Chair Smith, yes; Vice Chair Morley, yes; Board Member Thronsdon, yes; Board Member Debra Sjoblom, yes; Board Member Payne, yes. The motion carries.

In section 401 (c)(ii), Ms. Jonsson suggested the term “real estate licensee” be change to read “person licensed under Section 61-2(f).” Under (g), Chair Smith suggested changing “facilitating” to “originating.” After opening this suggestion to the Board and public, there were no further comments. The language remains the same.

Ms. Jonsson will take all of the above changes and come up with another draft for next month’s meeting. A copy of the draft will be sent out to the Board and the AMC Rule Committee before the meeting.

Chair Smith proposed two recommended changes to 401 Unprofessional conduct under sections (3) and (4). There were several written comments on these two recommendations. All three of these individuals want their comments as part of the record. Chair Smith asked for comments from the Division, Board, and public.

Director Sabey said the most significant concern the Division has, and it could stop the discussion at this point, is that both of these recommended rules go beyond the scope of the Board’s rulemaking authority, because these are things that need to be addressed in statute and not in rule. These recommendations can be reviewed at the time we are reviewing the statute for any revisions, but they are outside the scope of authority for these particular provisions to be inserted into the rule.

Having said that, Chair Smith’s proposed provision #(3) which deals with indemnification, would need to be revised so that it is crafted to allow an AMC to require indemnification as to the appraiser’s misconduct, but to prohibit a AMC from requiring an appraiser to indemnify against damages resulting from the AMC’s misconduct.

With regard to Chair Smith’s proposed provision #(4), it is of great concern. The Division believes it might be illegal and would need to seek opinion from the Attorney General’s office with regards to that provision. A similar provision was proposed in New Mexico, SB 138, that caps fees in a similar matter at 10% of the appraisal costs. However, there was a change from the original draft to the final draft, presumably because they determined as well that this was illegal.

Chair Smith said if these two recommendations go beyond the scope of the language in the statute, they probably won’t hold water and we should not pass them. Chair Smith told the Board how he arrived at these two recommendations, and what laws he was relying on. If the Board agrees there is backing, then we can continue the discussion. If the Board agrees there is no backing in law for this sort of rule, then we will cut it off at this point.

First, Chair Smith's proposal #(3) says an appraisal management company commits unprofessional conduct if they require the appraiser to sign any indemnification agreement. A typical indemnification agreement that the appraiser sign says: "If a mortgage lender is required to repurchase a mortgage loan for any reason, in any way related to, or resulting from an appraisal report submitted by an appraiser, the appraiser shall pay the company an amount equal to the repurchase price paid by such mortgage lender to repurchase such a mortgage loan." This says, "in any way related to", or if there is any problem with the appraisal then the appraiser is on the hook to repurchase the loan and make a check for that loan amount to the appraisal management company.

At AARO, they said that individual appraisers are signing these because they lack the power to say No. It (AARO) says it attributes this to a fear instilled in many appraisers that is currently causing appraisals to come in low. AARO is concerned that all of a sudden the issues about bad appraisals are not coming in too high; they are coming in too low.

Chair Smith said someone reading that might feel intimidated, coerced, or induced if they lacked the power to say No. He made reference to the law in state statute 61-2-307, which says "the appraisal management company may not influence or attempt to influence the development reporting of an appraisal through: (a) coercion, (f) inducement, (g) intimidation, (i) any other matter that causes undue influence." The next section of the law, this is state law, "a violation of this subsection includes doing one or more of the following: any other act or practice that impairs or attempts to impair an appraiser's independent objectivity or impartiality." Chair Smith is concerned that AMCs are, through the use of indemnification agreements, indicating that if one mistake is on your appraisal, you might end up paying the whole loan. This is a form of intimidation, inducement, and coercion. Therefore, the rule that Chair Smith recommends is based on the prohibition that we have to make sure that our appraisers are not intimidated, coerced, or induced.

Comments from the Board: Board Member Sjoblom, does not have the expertise to make that decision; Board Member Throndsen, he understands where Chair Smith is coming from, and he thinks that his argument makes a lot of sense, but he doesn't believe he has the knowledge or ability to implement it. Director Sabey said, just for the record, the Division isn't opposed to this rule in concept, it just believes it is inappropriate in rule and needs to be in statute. Comments were made from Mr. Sedgwick, Mr. Christensen, Mr. Jensen, and Mr. Lifferth. Chair Smith asked the Board if they were willing to consider the recommended wording in his proposal #(3) knowing that the Division has questions as to whether or not it oversteps the law: Chair Smith, yes; Board Member Throndsen, yes; Vice Chair Morley, no; Board Member Sjoblom, no; Board Member Payne, no. Chair Smith asked the Board for all of those who want to add (3) to the Unprofessional conduct statute: Chair Smith, yes; Board Member Throndsen, yes, Board Member Payne, yes. Vice Chair Morley and Board Member Sjoblom did not vote. Board Member Sjoblom left the meeting for a previous appointment.

Director Sabey stated for the record, the Division is unable to enforce rules that are outside the statutes. If this did become rule, before we could enforce it, we would need an opinion from the Attorney General's office.

Chair Smith introduced recommended language for #(4). Director Sabey stated for the record, this not only is this not in statute, but it is illegal to set fees. The Division will need to get an opinion from the Attorney General's office. Chair Smith based his recommendations on statute 61-2(e)-304(ii), "the Board may define by rule (a) what constitutes the total compensation that an Appraisal Management Company pays to an appraiser who performs a real estate activity except that the rule shall provide for disclosing this amount (1) as a dollar amount, or (2) as a percentage of the total amount charged to the client by an Appraisal Management Company." Comments were made from Mr. Sedgwick, Mr. Larsen, Mr. Jensen, Mr. Prowell, Mr. Christensen, and Mr. Lifferth. Chair Smith asked the Board if they were willing to consider the recommended wording in (4) knowing that the Division has questions as to whether or not it oversteps the law and is illegal: Chair Smith, yes; Board Member Thronsdon, no; Vice Chair Morley, no; Board Member Sjoblom, absent; Board Member Payne, no.

Discussion: Use of MLS Photos Used in Appraisals – Craig Morley

Vice Chair Morley said the Appraisal Institute asked why the Appraisal Board was prohibiting the use of MLS photos, and that it is not a USPAP requirement. For the public's information, the Appraisal Board was running into problems when we were doing experience reviews. We had discovered that a number of appraisals were being rejected by the experience reviewers. They were finding that every photo being used in the appraisal was out of the MLS. As the Board brought people in and asked them about their work, we would ask them if they physically inspected the comparable sales in accordance with the scope of work defined by the appraisal. In almost every case, the appraisers would indicate they had not. The Board determined, for purposes of experience reviews, to instruct the experience reviewers that if there was a large number of MLS photos being used in the appraisal, to reject the appraisal and have the person come before the Board and testify that they had in fact inspected those comparable sales. The Board recognized that USPAP did not require, or have any kind of requirement, that you not use MLS photos or photos provided by a third party. The only concern and problem that the Board had was that people were violating USPAP by not completing the scope of work, and certifying that they had done things that were not done.

Vice Chair Morley wanted to make it clear that no appraiser was every disciplined for just using an MLS photo if they had inspected the property.

Discussion: Scope of Authority for Licensed Appraisers on Vacant Land – Paul Thronsdon

Board Member Thronsdon would like to table this discussion until the next meeting. He is waiting for input from residential appraisers.

CLOSED TO PUBLIC

A motion was made to go into Executive Session. Vote: Chair Smith, yes; Vice Chair Morley, yes; Board Member Thronsdon, yes; Board Member Payne, yes. The above Board Members have voted to close this meeting for the sole purpose of discussing the character, professional competency, physical and mental health of the individual. The Executive Session was held from 12:23 p.m. to 1:07 p.m.

Executive Session: The Strategy Session to Discuss Pending Litigation – Blaine Ferguson and Traci Gundersen, Assistant Attorneys General.

OPEN TO PUBLIC

Certified and Licensed Appraiser Applicants **Approved** by both Education and Experience Review Committees:

The Board has upheld the decisions made by the Committees:

Richard R. Matheson, CG Candidate

Cameron Chris Wright, CR Candidate

Kelby Wegwitz, LA Candidate

Certified and Licensed Appraiser Applicants Approved by Education Review Committee and **Denied** by Experience Review Committee

The Board has upheld the decisions made by the Committees:

*William K. Cole, Jr., CR Candidate

*Chair Smith has recused himself

Discipline List for Board's Consideration

Aaron J. Brown - Approved

William H. Pruett, III - Approved

Results of Stipulation

Kent Wilkey – Approved

The Board recognized Chair Smith for his service to the Board over the years.

A motion was made to adjourn the meeting. Vote: Chair Smith, yes; Vice Chair Morley, yes; Board Member Thronsen, yes; Board Member Payne, yes. The meeting was adjourned at 1:09 p.m.