STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 633 17th Street, Suite 1300 Denver, Colorado 80202	
STATE BOARD OF REAL ESTATE APPRAISERS, Petitioner, vs. **JULIE M. O'GORMAN, C.G. 40012732,** Respondent.	▲ COURT USE ONLY ▲ **CASE NUMBER:** **APR 2007-0004**

INITIAL DECISION

This matter is before Administrative Law Judge (ALJ) Robert Spencer upon Notice of Charges filed by the State Board of Real Estate Appraisers (Board) on June 1, 2007. Hearing was held at the Office of Administrative Courts August 24, 28 and 29, 2007. The Board was represented by Assistant Attorneys General Billy L. Seiber and Jack M. Wesoky. Respondent was represented by Daniel S. Foster, Esq. and Randall M. Chin, Esq. of Foster, Graham, Milstein & Calisher, LLP.

Background and Statement of the Case

On May 31, 2007, the Board summarily suspended Respondent's license, and then on June 1, 2007 filed a Notice of Charges seeking the revocation of her license and civil penalties. Hearing was initially scheduled to begin July 31, 2007, but then vacated upon Respondent's unopposed motion and rescheduled to begin August 24, 2007.

The Notice of Charges allege that, in connection with an appraisal of a conservation easement in Huerfano County, Respondent violated the 2006 *Uniform Standards of Professional Appraisal Practice* (USPAP), §§ 1-1(a) and (b), 1-4(a), and 2-1(a), (b) and (c). Because the Board has, by regulation, adopted the USPAP as its standard of professional practice, violations of USPAP subject licensed appraisers to discipline, pursuant to §§ 12-61-710(1)(b) and (g), C.R.S. of the Real Estate Appraisers Practice Act.

Respondent denies the allegations, and contends that her appraisal did not violate USPAP in any of the ways claimed by the Board.

For reasons explained in this Initial Decision, the ALJ concludes that Respondent did violate the USPAP rules.

Preliminary Matters

Motion for Sanctions

Prior to the hearing, the Board moved for sanctions against Respondent and her

counsel for failing to appear at her deposition when first scheduled. The deposition was scheduled to take place at the office of the Board's counsel on July 19, 2007, but due to a scheduling error by Respondent's counsel, Respondent and her counsel did not appear. There was no allegation, or evidence, that Respondent or her counsel's failure to appear was willful. The deposition was ultimately rescheduled and completed. Nonetheless, the Board moved for sanctions pursuant to C.R.C.P. 37(d) in the form of recovery of attorney fees and costs incurred as a result of the aborted deposition. Respondent's counsel admitted the error and agreed to pay the Board's court reporter fees, but opposed the sanction of attorney fees because the error was not the result of bad faith and the deposition was cooperatively rescheduled without prejudice to the Board.

The ALJ has authority to "award attorney fees for abuses of discovery procedures or as otherwise provided under the Colorado rules of civil procedure." Section 24-4-105(4), C.R.S. When a party fails to attend her own deposition, C.R.C.P. 37(d) authorizes a court to order the failing party, her attorney, or both, to pay to the aggrieved party "the reasonable expenses, *including attorneys fees*, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." *Italics* added.

After hearing argument from both parties, the ALJ found that although Respondent's failure to appear at her deposition was not the result of bad faith, the failure to appear was not substantially justified and an award of reasonable expenses was not unjust. The ALJ therefore ordered Respondent's counsel to pay to the Board the expense of its court reporter's appearance fee, and to pay an additional $250 representing reasonable fees for the Board's attorney to appear at the aborted deposition, reschedule the deposition, and review his notes prior to taking the rescheduled deposition. The ALJ did not allow recovery for the Board's time in preparing and arguing the motion for sanctions. *See Bd. of County Comm'rs v. Kraft Bldg. Contractors,* 122 P.3d 1019, 1022 (Colo. App. 2005) (in applying a different attorney fee provision, the court held that attorney fees incurred in prosecuting a motion for sanctions were generally not awarded unless the court determines that the defense to the motion lacks substantial justification). *See also, Foxley v. Foxley,* 939 P.2d 455, 460 (Colo. App. 1996) and *Parker v. Davis*, 888 P.2d 324, 327 (Colo. App. 1994).

Respondent's counsel shall satisfy this obligation within 30 days of this decision.

Scope of the Charges

From the outset of the hearing, Respondent verbally objected to any evidence or argument by the Board that exceeded the scope of the conduct and USPAP violations charged by the Board in its Notice of Charges. Respondent is entitled to reasonable notice of the charges against which she must defend and, unless waived, is not subject to trial upon charges that were not fairly included in the Notice of Charges. Although Colorado joins the vast majority of states that endorse the concept of notice pleading, charges must still be sufficiently specific to place Respondent upon fair notice of the allegations against which she must defend. *Price Haskel, Inc. v. Denver Dep't of Excise & Licenses*, 694 P.2d 364, 366 (Colo. App. 1984)(notice must be of such nature as to reasonably convey information which will allow the licensee a reasonable opportunity to prepare for the

hearing); *see also Spedding v. Motor Vehicle Dealer Board,* 931 P.2d 480, 484-85 (Colo. App. 1996) and *Colorado State Board of Dental Examiners v. Micheli,* 928 P.2d 839, 842 (Colo. App. 1996)(due process requires that administrative procedures which threaten to deprive a respondent of a significant property interest must be fundamentally fair, thus a respondent must have an opportunity to be heard following adequate notice of the nature of the proceedings); *but see Colo. State Board of Medical Examiners v. Hoffner,* 832 P.2d 1062 (Colo. App. 1992)(a charge of "habitual intemperance" provided sufficient notice of prior alcohol related conduct).

In 27 paragraphs, the Board alleges specific conduct that it contends violated specific provisions of the USPAP. It did not move to amend those charges, and Respondent made clear from the outset that she did not consent to trial of any other charges. Requiring Respondent to defend against allegations of other misconduct and violations of other USPAP sections would not be fundamentally fair. The ALJ therefore will consider in this Initial Decision only the conduct and violations reasonably raised by the Notice of Charges.

Scope of Expert Testimony

Respondent objected to testimony by the Board's expert witness, William Park, to the extent that it exceeded the scope of his expert reports. The ALJ's prehearing order required the parties to exchange, prior to trial, endorsements of their expert witness testimony. The order noted, "opinions offered at hearing which are not fairly encompassed within the scope of the disclosure are subject to exclusion." That order is consistent with Office of Administrative Courts Rule of Procedure 13.C.2, which provides that "information provided in a prehearing statement shall be binding on each party throughout the course of the hearing unless modified to prevent manifest injustice." Amendments are normally allowed only if the need for such amendment "was not reasonably foreseeable at the time of the filing of the prehearing statement and then only if it would not prejudice other parties or necessitate a delay of the hearing." Rule 13.C.2. To the extent the Board attempted to introduce expert testimony beyond the scope of the expert's report, and doing so was not supported by just cause, the ALJ sustained Respondent's objections.

Findings of Fact

General Findings

1. Respondent is licensed by the Board as a Certified General Appraiser. Her license number is CG 40012732. Respondent does business as American Valuation Services, Inc.

2. The Board possesses jurisdiction over Respondent, her real estate appraiser's license, and the subject matter of this proceeding pursuant to Title 12, Article 61, Part 7, C.R.S.

3. On or about August 22, 2006, Respondent appraised property known as Tract 10, as shown on the Master Plan for Los Leones Subdivision in Huerfano County, Colorado. Tract 10 is a parcel of 35.10 acres of undeveloped land lying approximately two

miles south of the city limits of Walsenburg, Colorado. It is bounded on the east by a gravel road known as Ideal Road, and is otherwise surrounded by vacant land of the undeveloped Los Leones Subdivision.

4. The property interest being appraised was that of a proposed conservation easement upon Tract 10. The purpose of the appraisal, as stated in Respondent's report was to "form a supportable opinion of 'market value' for a conservation easement on the subject property." Exhibit A, p. 21.[1] The market value of a conservation easement is the value of the property rights given up by the owner as a result of the restrictions imposed upon the property by the easement.

5. According to Respondent's report, the owner of Tract 10 was a company known as Savant Publishing Inc. (Savant), while her clients were identified as Roger and Suzanne Walker. Exhibit A, p. 5. The evidence does not disclose the nature of the relationship between the Walkers and Savant.

6. Because the purpose of the appraisal was to value the easement for tax deduction purposes, the intended users of the report included federal and state taxing authorities as well as Respondent's clients.

7. Respondent identified her report as a "self-contained" report, which is the most comprehensive form of appraisal report and is intended to include as much information supporting the appraisal as is reasonably feasible.

8. Respondent valued the conservation easement at $670,000.

9. In appraising the value of a conservation easement, the appraiser typically uses either a sales comparison approach or a "before and after" method. The sales comparison approach requires evaluation of a reasonable number of actual sales of comparable easements, which are then compared to the subject property. The before and after method requires the appraiser to determine the fair market value of the property's highest and best use without a conservation easement ("before"), then subtract from it the fair market value of the property's highest and best use with the conservation easement on it ("after"). The difference is the value of the conservation easement. Respondent chose to value the conservation easement using the before and after method.[2]

10. Both the "before" and the "after" values must consider the property's "highest and best use." As explained by Respondent in her report, the highest and best use is "the most probable and reasonable use under current market conditions." Exhibit A, p. 7. Furthermore, the highest and best use must be:

1) Physically possible;

2) legally permissible;

3) financially feasible; and

4) maximally productive.

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[1] All references to the report's page numbers are to the Bates-stamped number in the lower right hand corner.
[2] Respondent nonetheless used sales comparisons to support aspects of her before and after analysis.

11. Respondent determined that the property's highest and best use before easement was as a proposed subdivision of 33 developed residential lots, approved for re-zoning and annexation into the City of Walsenburg.

12. As of the date of appraisal, Tract 10 was not developed, not zoned for the proposed development, and not approved for annexation into the City of Walsenburg. Respondent's highest and best use was thus based upon the "hypothetical condition" that the proposed improvements of the subject property would be completed according to plan and annexed into the City of Walsenburg with the appropriate zoning change from an AG-Agricultural to a UR-Urbanizing Residential district. Respondent clearly identifies this hypothetical condition in the cover letter to her report. Exhibit A, p. 3.

13. In appraisal parlance, a hypothetical condition is a condition that is contrary to what exists but is assumed to be true for the purpose of the appraisal. Use of a hypothetical condition is a recognized appraisal technique. However, when, as here, the hypothetical condition is used to support a higher use than currently is the case, the assumed condition must be reasonably probable, close in time, and factually supported in the report.[3]

14. Respondent determined that the discounted retail value of Tract 10 before conservation easement, assuming a highest and best use as a developed subdivision of 33 lots, was $1,161,049. After subtracting estimated development costs of $414,315, Respondent determined that Tract 10 had a market value of $746,734 as a proposed development without a conservation easement.

15. A conservation easement restricts the owner's right to develop or productively use the property. The easement proposed here included prohibitions on commercial or industrial activity, mining, timber harvesting, diversion of water rights, accumulation of trash, storage of hazardous materials, any recreational activity inconsistent with the purpose of a conservation easement, and construction of any building, road or fence. Exhibit A, pp. 242-53. The easement would also prohibit subdividing the property and would obligate the owner to manage the property in accordance with good conservation practices. In light of these restrictions, Respondent reasonably assumed that the highest and best use after easement was as undeveloped open land suitable only for grazing.

16. Respondent assigned a value of $74,673 to Tract 10 as undeveloped land after the conservation easement was applied.

17. By subtracting the after-easement value of $74,673 from the before-easement value of $746,734, Respondent arrived at $672,061 as the value of the easement, which she rounded down to a valuation of $670,000. Exhibit A, p. 199.

Count I

18. The Board alleges in paragraphs 6 through 25 of its Notice of Charges that

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[3] *See* Exhibit I, *Appraising Easements – Guidelines for Valuation of Land Conservation and Historic Preservation Easements* 20 (3rd ed. 2003). Respondent testified that she agreed with the principles in paragraph III.B.1.b of this treatise.

Respondent committed numerous errors in the conduct of the appraisal and the preparation of her appraisal report. The ALJ will address the allegations in the order in which they appear in the Notice of Charges (NOC).[4]

NOC ¶ 6

19. Respondent's appraisal report assumed as a hypothetical condition that the proposed improvements necessary to subdivide Tract 10 into 33 residential lots would be completed according to preliminary plans and specifications provided by the client, and that the property would include annexation into the City of Walsenburg and a zoning change from AG-Agricultural to UR-Urbanizing Residential approved. Exhibit A, pp. 3, 15, 41.

20. To evaluate the reasonableness of this hypothetical assumption, it was essential that Respondent have communication with City of Walsenburg planning officials to assess whether the proposed annexation and zoning change would be favorably considered at the present time.

21. Although Respondent reports that she had "discussions" with Walsenburg planning officials and analyzed "data" received from those officials (Exhibit A, pp. 19 and 20), she in fact did not discuss the subject of annexation or zoning change with any planning official of the City of Walsenburg. Although she did have some discussion regarding the proposed subdivision with a representative of Huerfano County, approval of the assumed annexation and zoning change rests with the City of Walsenburg, and therefore speaking with the county representative was not an adequate substitute for speaking with a city planner.[5]

22. Although Respondent did not discuss the possibility of annexation with any City of Walsenburg planning official, Respondent probably reviewed minutes of a Walsenburg City Council meeting prior to preparing her report. A copy of those minutes (Exhibit K) shows that on August 7, 2001 the City Council approved annexation of "Parcel A" and "Parcel B" of the Los Leones Subdivision. Unlike Tract 10, Parcels A and B were pieces of property lying contiguous to the City of Walsenburg, and were separated from Tract 10 by approximately a mile. Because Tract 10 is not part of Parcel A or Parcel B and does not lie contiguous to the City, the 2001 minutes approving Tract A and B for annexation are of limited value in assessing the City's willingness, five years later, to annex Tract 10.[6] Respondent did not disclose or discuss these limitations in her report.

23. Respondent testified that she based her hypothetical condition upon information that the owners currently planned to seek annexation of the property; however, she was unable to adequately explain where she got that information.

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[4] The reader is referred to the NOC for the wording of the allegations.

[5] Respondent testified that a city employee her to Scott King, who she thought was a City of Walsenburg planning official. She later discovered that Mr. King was not with the City, but was a county official.

[6] In fact, it is unlikely the City of Walsenburg would authorize annexation of Tract 10, by itself, given that state law requires at least one-sixth of the perimeter of an area proposed for annexation to be contiguous to the annexing municipality. *See* § 31-12-104(1), C.R.S.

NOC ¶¶ 7, 8 and 9

24. A plat map in Respondent's report (Exhibit A, p. 12) shows that tract 10 is but one of 28 tracts of undeveloped land known collectively as the Los Leones Subdivision. The Los Leones Subdivision encompasses a large tract of land with more than 1000 proposed lots. Tract 10 contains only 33 proposed lots on a much smaller parcel of land.

25. It is clear from Respondent's report that the subject of the report is Tract 10, and not the entire Los Leones Subdivision. This is apparent from the title of her report,

Walsenburg – Tract 10
Los Leones Ranches Subdivision
Conservation Easement

as well as the subject line of her transmittal letter, "Re: A Self-Contained Appraisal of a Conservation Easement on; 35.10 Acres – 33 Residential Lots; Identified as Tract 10 of Los Leones Subdivision;" and the summary page of her report which describes the subject property as, "35.10 Acres – 33 Residential Lots; Identified as Tract 10 of Los Leones Ranches Subdivision." Exhibit A, pp. 2, 3, 5. Additional references confirm that the subject property is Tract 10 and not the entire Los Leones Subdivision. *See* Exhibit A, pp. 11, 12, 13, 14, 17, 26, 31, 32 and 212.

26. Although Respondent does, throughout her report, use the generic term "subdivision" to refer to both the Los Leones Subdivision and to Tract 10, the overall content of the report makes it reasonably clear that the property subject to appraisal is Tract 10 and not the entire Los Leones Subdivision. The report is not misleading in this regard.

27. In the late 1990's, the owners of the Los Leones Subdivision property formed preliminary plans to change the zoning of the land from agricultural to residential, subdivide the land into residential lots, and seek annexation into the City of Walsenburg. In approximately 2001, the owners entered into partnership with a land development company known as Accurate EngiServ, LLC (Accurate) to develop a portion of the property. In 2002, Accurate and the landowners were advised that the City of Walsenburg had placed a moratorium on annexation due to drought driven water shortages. Because of this advice, the proposed annexation was never officially presented to the City and the City never actually denied annexation.

28. Accurate and the owners then focused their attention on developing the proposed subdivision "in the county," that is to say, developing it without annexation into the City. Although legally permissible, development in the county never occurred due to a falling out between the development's partners.

29. Contrary to the allegations of NOC ¶¶ 7, 8 and 9, neither the annexation of Tract 10 nor annexation of the greater Los Leones Subdivision was ever denied.

NOC ¶10

30. In paragraph 10, the Board alleges that Respondent omitted any discussion

of "the relationship between Los Leones Ranches Subdivision and Tract 10," and this omission was misleading. The ALJ agrees with this allegation in one respect.

31. Internal Revenue Service regulations require that, when valuing a conservation easement on property that is contiguous to other property owned by the donor or the donor's family, the value of the easement "is the difference between the fair market value of the entire contiguous parcel of property before and after the granting of the restriction." *See* 26 CFR § 1.170A-14(h)(3), Exhibit 10, pp. 160-61. This is known as the "larger parcel" rule. Because application of the larger parcel rule may have a significant impact upon the value of the easement, it was an important consideration in performing the appraisal.

32. Respondent notes on page 21 of her report that an intended use of the appraisal is "for filing with the Internal Revenue Service," but she does not address the larger parcel requirement anywhere in her report. This is a significant oversight because Savant not only owned Tract 10, but also owned some or all of the contiguous property.[7]

33. Respondent explained, at the hearing, that the reason she did not address the larger parcel rule in her report was because her clients (the Walkers) were the donors, not Savant. Respondent, however, did not explain how the donor could be anyone other than the owner of the property, which in this case was Savant. Respondent's failure to include within her report a discussion and resolution of this critical issue renders her report incomplete and misleading.[8]

NOC ¶ 11

34. In a single sentence on page 33 of her report, Respondent assesses the availability of utilities and public services by saying, "Currently, electricity, gas, sewer and telephone are located near the eastern boundary of the site along Ideal Road." Although several documents pertaining to utilities are attached to the report, Respondent's appraisal does not reference, discuss or assess the applicability of those documents.

35. One such document is a letter dated November 25, 1996 from San Isabel Electric Association to Mr. and Mrs. Stanley Mann. Exhibit A, pp. 65-67. The letter concerned a request by the Association for an electric power line right-of-way easement across their property at the northern end of the Los Leones Subdivision. The letter suggests that if the line is constructed as proposed, it may be available to provide service to the Mann's property. The proposed power line easement was approximately a mile north of Tract 10.

36. Respondent's report fails to disclose that the proposed utility easement is not near the boundary of Tract 10, but is some distance to the north of it. It also fails to disclose whether the easement was ever granted or the proposed power line ever built,

[7] Although not specifically stated in her report, Respondent testified at the hearing that Savant owned contiguous property. This is supported by documents attached to her report (e.g. Exhibit A, pp. 42, 64, 238).
[8] On pages 17 and 21 of her report, Respondent briefly addresses another IRS requirement that the value of a donated easement be offset to the extent that the easement enhances the value of surrounding property owned by the donor or a related person. This, however, is separate from the "larger parcel" issue.

and fails to disclose whether the power line, if built, would be available to provide power to Tract 10 or of sufficient capacity to satisfy the needs of the 33 homes proposed to be built on Tract 10.

37. Respondent's report includes a photograph labeled "View South From Ideal Road" that shows a power line along Ideal Road. Exhibit A, p. 39. However, Respondent's report does not address whether this line would be adequate to supply the 33 residential lots planned for Tract 10.

38. Another document attached to Respondent's appraisal report, but not analyzed in her conclusion of the availability of utilities, is a Water and Sewer Service Agreement dated January 28, 2005 between the City of Walsenburg and Los Leones Subdivision LLC for a tract of land known as Filing No. 2. Exhibit A, pp. 68-75.

39. The Water and Sewer Service Agreement was not an agreement to provide water and sewer service to or even near Tract 10, but only to Filing No. 2 which is an entirely different tract of land lying approximately a mile to the north. Contrary to Respondent's testimony at trial, Filing No. 2 is not the entirety of the Los Leones Subdivision, but is a tract of approximately 27 acres of land located at the northeastern edge of the Los Leones Subdivision. Furthermore, although the Water and Sewer Service Agreement had been signed, the water and sewer service was never installed. None of these limitations are discussed in Respondent's report.

40 Respondent's conclusion that gas service is located near the eastern edge of Tract 10 is also unsupported. Although Respondent includes in her report a photograph of some form of utility marker that she labels "Utilities Along Ideal Road," she includes no explanation or description of the type of utility to which the marker refers. Exhibit A, p. 40. In fact, the nearest residential use gas line which might serve as a source of gas to Tract 10 was located in Filing No. 1, a tract of land lying approximately a mile to the north.

41. Respondent's failure to include in her report an analysis of the applicability and limitations of the San Isabel Electric Association letter, the Water and Sewer Service agreement, and the nondescript photographs of power line poles and a marker along Ideal Road, rendered her report misleading. The inclusion of these documents without disclosure and discussion of their limitations tended to suggest support for her conclusion that utilities were located near the eastern boundary of the property, when in fact that conclusion was not supported.

42. Respondent's misleading treatment of the topic of the availability of utilities directly affects both her assessment of the highest and best use to which the property may be put, and to the final valuation of the conservation easement. Availability of utilities affects the highest and best use because residential development may not be financially feasible if utilities are not available or the developer must incur substantial expense to make them available. Similarly, availability of utilities affects the valuation of the conservation easement because the more expense a developer must incur to make utilities available, the less profitable the development will be and thus the less valuable the development rights are.

NOC ¶ 12

43. Respondent includes in her report a May 27, 1997 document entitled, "Revision to the Impact Report and Benefit/Cost Analysis: Proposed Annexation of Los Leones Development To the City of Walsenburg" (the Impact Report). Exhibit A, pp. 44-61. The document was prepared at the request of the original developers of the Los Leones Subdivision to estimate the costs and benefits to the City of Walsenburg if annexation of the subdivision was approved.

44. Respondent's only reference to the Impact Report is a single line on page 43 that reads, "Additionally there was a study done for the Town of Walsenburg to establish the impact of the proposed subdivision. This study is as follows:" Respondent provides no discussion or analysis of the applicability of this nine year old report.

45. Respondent's inclusion of this report, without analysis or discussion, is misleading because not only is the subdivision to which it relates the entire Los Leones Subdivision and not just Tract 10, but the data in the report is nine years old and therefore of doubtful relevance.

NOC ¶¶ 13, 14 and 15

46. In the transmittal letter addressed to her clients, Respondent states her assumption that the proposed improvements "will be completed according to the preliminary plans and specifications supplied by Rodney Atherton." Exhibit A, p. 3.

47. The letter does not identify who Rodney Atherton is, nor does it identify the documents that are "the preliminary plans and specifications."[9] Respondent does, however, summarize those plans by stating that they include "annexation into the Town of Walsenburg and a zoning change from AG-Agricultural to a UR/Urbanizing Residential District." Exhibit A, p. 3.

48. Because the only plat map (Exhibit A, p. 12) and annexation proposal (Exhibit A, p. 44) included in the report relate to the entire Los Leones Subdivision, and not just Tract 10, the unexplained reference to "preliminary plans and specifications" is ambiguous and unsupported by any document relating just to Tract 10.

49. Respondent's highest and best use analysis relies upon the assumption that annexation of Tract 10 into the City as 33 residential lots is reasonably probable in the near future. Although, contrary to the Board's allegations, the City of Walsenburg never denied a petition to annex either Tract 10 or the Los Leones Subdivision, Respondent provides no discussion, analysis or documentation to support her assumption that prompt annexation of Tract 10 is reasonably probable.

50. Respondent's hypothetical condition cannot be sustained without an accurate analysis of the likelihood that annexation would be approved by the City of Walsenburg. Given the absence of a clear description or inclusion of the "preliminary plans and specifications" for Tract 10's development and the absence of any meaningful discussion between Respondent and Walsenburg City planning officials about the political climate for

[9] Respondent testified at the hearing that she believed Mr. Atherton was her clients' attorney.

such an annexation, zoning change and development, the report's assumption that timely annexation was reasonably probable was unsupported and misleading.

51. During the hearing, Respondent testified that development of Tract 10 could have occurred "in the county," and therefore annexation into the City was not necessary to make development of Tract 10 economically feasible. As support for this position, Respondent points to the fact that the developer of Filing No. 2 believed development in the county was financially feasible, and sued the development's owners for over one million dollars in lost profits when the owners declined to proceed with the development. Exhibits Q and R. Respondent contends that because development of Tract 10 without annexation into the City was financially feasible, her valuation was not dependent upon the hypothetical condition of annexation.

52. The ALJ discounts Respondent's explanation. Respondent's reliance upon the economic feasibility of the development of Filing No. 2, with no discussion or analysis of the differences in location, development costs, utility availability, and other limitations between Filing No. 2 and Tract 10, renders her assumption that Tract 10 was also economically feasible for development in the county unsupported.

53. Furthermore, Respondent's report specifically relies upon the hypothetical condition of annexation. Nowhere in the report does she disclose the alternative hypothetical condition of development in the county without annexation. Respondent's failure to disclose and evaluate the alternative hypothetical condition renders her report misleading.

54. Because the hypothetical condition of annexation was not supported and the alternative hypothetical condition of development in the court was neither disclosed nor supported, Respondent's assumed highest and best use of residential development is also unsupported. The lack of support for this assignment of highest and best use substantially undermines Respondent's valuation of the conservation easement.

NOC ¶¶ 16, 17, 18 and 19

55. To value a proposed subdivision, it is appropriate for the appraiser to deduct the cost to develop the subdivision from the expected income from sale of the lots. To estimate the development costs, Respondent relied upon a December 19, 2005 report by a consulting company called Core Corp, which estimated the development costs for Filing No. 2 as well as several additional tracts of land located at the southern end of the Los Leones Subdivision. The Core Corp report did not directly address development costs for Tract 10.

56. According to the Core Corp report, the estimated development costs for Filing No. 2 and the tracts at the southern end of the Los Leones Subdivision would be $8,117 per lot. Respondent used this figure as the estimated development cost for lots in Tract 10 with no documented analysis or allowance for possible differences in development costs between Tract 10 and those lots addressed by the Core Corp report. Such differences include the fact that the number of potential lots addressed by the Core Corp report was far greater than those in Tract 10, and therefore the average cost per lot would likely be higher

when developing a smaller number of lots.

57. The evidence presented at the hearing is not sufficient to know what adjustments, if any, must be made to the development cost estimate of $8,117 to make that estimate relevant to Tract 10. However, because the Core Corp report assessed properties other than Tract 10, and assessed a significantly larger development than Tract 10, Respondent could not directly apply the Core Corp estimate to her valuation of Tract 10 without at least recognition and discussion of those differences. Her failure to do so rendered her valuation unsupported and misleading.

NOC ¶¶ 20 and 21

58. To value the proposed subdivision, Respondent estimated the income stream that would result from sale of the proposed lots. To arrive at a sale price for the proposed lots, Respondent employed a direct sales comparison approach that compared the 33 proposed lots in Tract 10 to lots sold in another subdivision known as Black Diamond Park.

59. Black Diamond Park is a subdivision located on the west side of Walsenburg, approximately two miles to the northwest of Tract 10. Black Diamond Park is composed of approximately 160 lots, 46 of which sold in 2005 and 2006.

60. Of the available sales in Black Diamond Park, Respondent selected eight that sold between September and December 2005.

61. On pages 174 to 176 of her report, Respondent set out twelve factors she considered in comparing Tract 10 to the Black Diamond Park sales. The only adjustment in value Respondent made between the Black Diamond Park lots and the proposed Tract 10 lots was an across-the-board adjustment of five percent due to the fact that Tract 10 is near a railroad track on the western boundary, and thus the "appeal" of the Tract 10 lots would be less than that of the Black Diamond Park lots.

62. Based upon an average of the Black Diamond Park sales, adjusted for their relatively greater appeal, Appellant arrived at an estimated per lot market value for the Tract 10 lots of $45,000, and a total sales value of the 33 lots of $1,485,000.

63. The evidence was not sufficient to find that Appellant's use of the Black Diamond Park sales as comparables was inappropriate, that her comparison analysis was faulty, or that her across-the-board adjustment of five percent for the relative lack of appeal of the Tract 10 lots was erroneous. Though Black Diamond Park's better highway access and closer proximity to Walsenburg, Walsenburg Golf Course, and Lathrop State Park might warrant a greater adjustment in value, no expert opinion or other evidence was offered to support this speculation, and therefore the ALJ does not find it as fact.

NOC ¶¶ 22, 23 and 24

64. After discounting the income stream produced by the sale of the 33 lots, and subtracting the cost of the land,[10] cost of development and developer profit, Respondent

[10] Respondent arrived at the cost of the land by assessing six sales of comparable vacant land. Exhibit A, p. 155. There was no evidence that this approach was inappropriate.

valued Tract 10's proposed development of 33 lots at $746,734. In other words, this is Respondent's valuation of Tract 10's highest and best use with its development rights intact. Respondent labels this the "Value of Foregone Development Opportunity." Exhibit A, p. 199.

65. To arrive at the net value of the conservation easement, Respondent subtracted from the $746,734 an amount representing her estimate of the property's highest and best use with the conservation easement in place. Respondent arrived at the post-easement value of Tract 10 by determining the expected percentage "diminution in value" that would result when the land, as proposed for development, was encumbered by a conservation easement prohibiting development.

66. Respondent calculated the diminution in value percentage by examining a sale of property in Larimer County that was subject to a conservation easement with similar restrictions. That easement involved 130 acres of agricultural land situated west of I-25 north of Fort Collins.[11] By comparing the value of the land prior to easement with the sales price of the land subject to easement, Respondent calculated that the application of the conservation easement upon the Larimer County property resulted in loss of approximately 91 percent of its market value.

67. Based upon the single sale in Larimer County, Respondent used a 90 percent diminution in value for Tract 10. Respondent made no adjustments to the diminution percentage based upon the differences in location, size of the land tract, potential uses of the land, or any other characteristic.

68. Applying 90 percent as the diminution in value, Respondent arrived at a post-easement value of $74,673. Subtracting this amount from Tract 10's pre-easement value of $746,734 resulted in a net value of the conservation easement of $672,061, which Respondent rounded to $670,000. Exhibit A, p. 199.

69. It is generally accepted appraisal practice to value property by analyzing a reasonable number of sales of comparable properties. Although Respondent testified that no sales of properties with similar easement restrictions were available in Huerfano County, she provided no discussion or explanation of this in her report. To the contrary, the Board's expert testified that other properties with conservation easements were certainly available for comparison, and that using a single comparison was improper. Although the Board's expert was not prepared to identify the other properties available for comparison, it is unreasonable to believe there were none anywhere. Comparable properties need not be in the same county or even have identical deed restrictions to be used for comparison, provided that in making the comparison the appraiser appropriately adjusts for those differences.[12] Respondent's decision to rely upon a single comparison without a valid explanation for doing so impairs the credibility of her valuation and renders her report misleading.

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[11] The ALJ takes judicial notice that Fort Collins lies approximately 200 miles due north of Walsenburg.

[12] By way of illustration, instructional materials relied upon by Respondent and contained in her file use an example of a sales comparison employing fifteen properties with varying degrees of easement restriction located in eleven different Colorado counties. Exhibit J, pp. 732-41.

70. The Board alleges that Respondent failed to assess the highest and best use of Tract 10 with the conservation easement on it. However, in the last sentence on page 198 of her report, Respondent states that "The only use of the subject parcel would be eligible for would be grazing, which, on only 35.10 acres would be of negligible value." Contrary to the Board's allegation, though brief, this statement is an assessment of the value of Tract 10's highest and best use with the easement on it.[13]

NOC ¶ 25

71. The value of a donated conservation easement, when valued in accordance with IRS regulations, may be claimed as a charitable deduction from federal income taxes. A valuation that is excessive may result in avoidance of taxes by the donor and thus harm to the U.S. Treasury and citizens of the United States.

72. The value of the donated conservation easement may also be used to create a Colorado income tax credit, with resulting harm to citizens of Colorado if the donation is excessively valued.

73. A donor could face federal and state penalties for claiming an excessively valued donation.

74. Due to the errors described above, Respondent's valuation of the conservation easement of $670,000 is inadequately supported and unreliable. However, the evidence does not establish the true value of the proposed conservation easement.

75. Though numerous errors were made, the evidence is not sufficient to find that Respondent intended to inflate her appraisal or intended to mislead the intended users.

Discussion and Conclusions of Law

The Board Bears the Burden of Proving the Alleged USPAP Violations

Section 12-61-710(1), C.R.S. of the Real Estate Appraisers Practice Act defines the prohibited activities that constitute grounds for discipline of an appraiser's license. If, after compliance with the procedures set forth in §§ 12-61-710 and 24-4-105, C.R.S., the Board has proven violations of any of the provisions of § 12-61-710(1), the Board may revoke, suspend or censure an appraiser's license. Section 12-61-710(5), C.R.S. In addition, the Board may impose a monetary penalty pursuant to § 12-61-710(6), C.R.S.

Hearings concerning appraiser licenses are conducted according to the provisions of § 24-4-105, C.R.S. of the Administrative Procedure Act (APA). Section 12-61-710(4), C.R.S. APA § 24-4-105(7) provides that the proponent of an order shall have the burden of proof. The proponent of an order is the party who seeks to change the *status quo*. *Orsinger Outdoor Advertising, Inc. v. Dept. of Highways*, 752 P.2d 55, 67 (Colo. 1988); *Renteria v. State Dept. of Personnel*, 811 P.2d 797, 803 (Colo. 1991). Here, the Board is the party seeking an order changing the *status quo* by revoking or otherwise disciplining

[13] Though Respondent concludes that Tract 10's post-easement value would be "negligible," she nonetheless assigns it a value of $74,673 by using diminution of value approach. Respondent fails to address or reconcile these two opinions.

Respondent's license. Therefore, the Board bears the burden of proving its charges.

The Board has alleged, in NOC paragraph 27, that Respondent's conduct violates §§ 12-61-710(1)(b) and (g), C.R.S. Those sections read, in pertinent part:

> A real estate appraiser is in violation of this part 7 if the appraiser:
>
> . . . .
>
> (b) Has violated, or attempted to violate, directly or indirectly, or assisted or abetted the violation of, or conspired to violate any ... rule or regulation promulgated pursuant to this part 7 ... [or];
>
> . . . .
>
> (g) Has acted or failed to act in a manner which does not meet the generally accepted standards of professional appraisal practice as adopted by the board by rule and regulation.

Pursuant to its authority under § 12-61-704(1)(a), C.R.S., the Board has adopted rules and regulations defining the standards of professional practice. That rule, Rule 11.1, adopts the USPAP (2006) as the standards of practice for all licensed appraisers. It reads:

> *Chapter 11 Standards of Professional Appraisal Practice*
>
> 11.1 Pursuant to Section 12-61-710(1)(g), C.R.S. (as amended), the Board adopts, and incorporates by reference ... as the generally accepted standards of professional appraisal practice ... the Uniform Standards of Professional Appraisal Practice ... known as the 2006 edition.

Because the Board has by rule adopted the USPAP as the standards of professional practice, the USPAP forms the measure by which both § 12-61-710(1)(b) (violation of rule) and § 12-61-710(1)(g) (violation of standard of practice) must be judged. As alleged by the Board in NOC paragraph 26, the USPAP rules in question are Rules 1-1(a) and (b), 1-4(a), and 2-1(a), (b) and (c). The ALJ will therefore focus upon whether Respondent's conduct, as described in the Findings of Fact, violates any of these rules.

Need for Expert Testimony

Each of the parties endorsed and called a qualified expert witness. The ALJ duly considered the admissible testimony of each expert; however, under the circumstances of this case, the expert testimony, though helpful, was not essential to determine whether or not Respondent violated the USPAP rules alleged.

Expert testimony is appropriate and admissible if the expert's scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, and the expert is appropriately qualified. *People v. Shreck,* 22 P.3d 68 (Colo. 2001); CRE 702. In some cases, expert testimony is essential, such as when the standard of care involves questions beyond the competence of ordinary persons. *Goodson v. Amer. Standard Ins. Co.,* 89 P.3d 409, 415 (Colo. 2004)(in most cases of professional negligence the applicable standard must be established by expert testimony

because it is not within the common knowledge and experience of ordinary persons.) In medical malpractice cases, for example, the scope of a physician's duty is often determined on the basis of expert testimony because the ordinary trier of fact would be unfamiliar with the special knowledge and skill required for the exercise of reasonable care in the practice of medicine. *Palmer v. A.H. Robins Co., Inc.,* 684 P.2d 187, 209-10 (Colo. 1984); *Bloskas v. Murray,* 646 P.2d 907 (Colo.1982).

However, in cases where the standard of care is defined by agency rule, no expert testimony is required. *American Family Mut. Ins. Co. v. Allen,* 102 P.3d 333 (Colo. 2004) (expert testimony is not required to establish the standard of care when a legislative enactment or administrative rule establishes the standard of care.) In the present case, the standard of care is established by Board Rule 11.1, which adopts the USPAP as the standard of professional practice. Because the standard of practice is set by rule, expert testimony is not essential.

Furthermore, even in cases where the standard of care is not defined by statute or rule, expert testimony may still not be necessary when the standard of care "is regarded as within the common knowledge of laymen, as where the surgeon saws off the wrong leg, or there is injury to a part of the body not within the operative field." *Palmer, supra* at 210. *See also, Am. Family Mut. Ins. Co. v. Allen,* 102 P.3d 333, 3433 (Colo. 2004) (reasonable investigation and denial of an insured's claim within the common knowledge and experience of ordinary people).

Here, the issue of whether Respondent's errors and omissions affected the credibility of her report, made her report misleading, detracted from the intended users' ability to understand the report properly, and whether Respondent clearly and accurately disclosed all assumptions and hypothetical conditions, were all issues within the common knowledge of a layman (and the ALJ). Expert testimony was not essential to determine these issues. Therefore, although the ALJ considered the expert opinions presented by both parties, and gave weight to those opinions where helpful, the following conclusions are not necessarily confined by the experts' opinions.

USPAP Rule 1-1(a)

This rule states, "In developing a real property appraisal, an appraiser must ... be aware of, understand, and correctly employ those recognized methods and techniques that are necessary to produce a credible appraisal."

Respondent's appraisal violated USPAP Rule 1-1(a) in the following ways:

1) For an appraisal to be credible, the appraiser must demonstrate that a hypothetical condition assuming a higher use than presently exists is reasonably probable, close in time, and supported by evidence. Respondent failed to do so because she assumed a hypothetical condition that annexation and rezoning would be approved by the City of Walsenburg without making a reasonable effort to verify the likelihood of that assumption by contact with City planning officials and accurate research of the political climate for such annexation and rezoning. Instead, Respondent negligently relied upon contact with a county official who had no direct responsibility for City planning decisions,

relied upon City Council meeting minutes that related to different property not subject to the same conditions as Tract 10, relied upon a dated annexation "Impact Report" that involved the entire Los Leones Subdivision rather than just Tract 10, and relied upon an assumption that the owners were planning to seek annexation of Tract 10 without verifying the source of that information. Although annexation of Tract 10, either alone or as part of the entire Los Leones Subdivision, had not previously been denied, that fact alone was not sufficient to support the assumption that annexation of Tract 10 would be approved in the near future.

2) For the appraisal of a conservation easement to be credible, where as here the purpose of the appraisal is to support a charitable tax deduction, the appraisal must comply with federal tax regulations and must fully analyze the ownership interests in the contiguous properties to determine whether the "larger parcel" rather than just the property subject to easement must be appraised. Although Respondent briefly addressed other aspects of the IRS regulations, she neglected to discuss how the ownership interests in the contiguous properties would implicate the "larger parcel" rule and assess the impact upon the easement valuation. This is an error that could substantially affect the credibility of her valuation.

3) For an appraisal that assumes a highest and best use of residential development to be credible, the appraiser must investigate and accurately analyze the availability of utilities. Respondent failed to do so. The report's statement that "currently, electricity, gas, sewer and telephone are located near the eastern boundary of the site along Ideal Road" is inadequately supported. Respondent's assumption was based largely upon review of a water and sewer agreement and a power line easement for other properties that did not show utilities suitable to support development on Tract 10 were available at those locations, much less "near the eastern boundary" of Tract 10. To the extent that Respondent supplemented her opinion by personal inspection and photographs of Tract 10, the information depicted in the photographs added little support for her opinion.

4) For an appraisal that assumes a highest and best use of residential development to be credible, the appraiser must reasonably estimate the costs to develop the property as a residential subdivision. Respondent failed to do so. By adopting for Tract 10 the estimated development for a much larger subdivision involving different property (the 2005 Core Corp report), with no discussion or adjustment made for the differences in size, location and circumstances of the properties, Respondent failed to reasonably estimate the proposed development costs for Tract 10.

5) To be credible, an appraisal of a conservation easement must reasonably estimate the value of the property with the easement on it. Although Respondent's use of the "diminution of value" method was not in and of itself incorrect, she inappropriately relied upon a single sales comparison in a distant county, and failed to adequately explain her rationale for doing so. These failings undermined the credibility of her report.

USPAP Rule 1-1(b)

This rule reads, "In developing a real property appraisal, an appraiser must ... not

commit a substantial error of omission or commission that significantly affect an appraisal."

Respondent's conduct, as described in paragraphs 1 through 5, above, also violates Rule 1-1(b) because her errors of omission and commission were substantial and significantly affected the credibility of the appraisal.

USPAP Rule 1-4(a)

Rule 1-4(a) reads, "When a sales comparison approach is necessary for credible assignment results, an appraiser must analyze such comparable sales data as are available to indicate a value conclusion." Rule 1-4(a) thus requires the appraiser to use the sales comparison approach when it is necessary for credible results; and when it is used, the appraiser must evaluate "such comparable sales data as are available."

In valuing the conservation easement, Respondent chose to use the "before and after" method, which arrives at the value of the easement by first determining the market value of its highest and best use prior to placement of the easement, and then subtracting the market value of its highest and best use after placement of the easement. Following the mandate of Rule 1-4(a), it was appropriate for Respondent to use the sales comparison method to arrive at both of these valuations.

In determining the market value of the property as a development of 33 residential lots, it was necessary for Respondent to determine both the cost of the raw land for development, and the per lot sale price once the land was developed ready for sale. In both instances, she employed a sales comparison approach. To value the raw land, she evaluated six sales of raw land of comparable size in the Walsenburg area and arrived at a projected per acre price for Tract 10. To value the developed lots, she evaluated eight sales of lots in a nearby subdivision and arrived at a projected per lot sales price for Tract 10 lots. The evidence is not sufficient to conclude that Respondent's choice of comparables, number of comparables, or analysis of the comparables was unreasonable in either case. Therefore, there is no violation of Rule 1-4(a) in this aspect of her appraisal.

In determining the market value of Tract 10 subject to the conservation easement, Respondent should have once more employed a sales comparison approach. Although sales of property subject to easement may be uncommon, the ALJ discounts Respondent's testimony that there were no other properties that could have been used for comparison. As Respondent recognized when she selected the Larimer County property, it was not essential to confine her search for comparables to Huerfano County, provided appropriate adjustments were made for differences in deed restrictions and other factors affecting sales price. Respondent's reliance upon a single property in Larimer County, without any discussion or explanation for her failure to evaluate other comparables, undercut the credibility of her appraisal report and violated Rule 1-4(a).

Rule 2-1(a), (b) and (c)

These rules all deal with the content of the report, and will be discussed together. Rule 2-1 states,

Each written or oral real property appraisal report must:

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

(b) contain sufficient information to enable the intended users of the appraisal to understand the report properly; and

(c) clearly and accurately disclose all assumptions, extraordinary assumptions, hypothetical conditions, and limiting conditions used in the assignment.

Respondent's report violates Rule 2-1 in the following ways:

1) A self-contained appraisal report must contain a full analysis of the hypothetical condition upon which the property's highest and best use is based, and identify the data that supports it. Respondent's appraisal report fails to meet this standard because her report does not adequately discuss the basis for her hypothetical condition and documents little if any support for it.

2) Respondent failed to disclose her assumption that if Tract 10 was not annexed, the property could be developed in the county and that development in the county would not affect the valuation of the property. This is a critical assumption that was totally hidden and undisclosed.

3) Respondent's appraisal was misleading in that she reported having had discussions with City of Walsenburg officials regarding annexation when in fact she did not; reported that electricity, gas, sewer and telephone utilities were currently available near the eastern boundary of the property along Ideal Road when in fact all not all those utilities were available at that location; failed to clearly disclose that the Water and Sewer Agreement related to different property located some distance to the north and that water and sewer utilities were never actually installed; attached a letter from the electrical association as evidence of the availability of electrical service when in fact the property to which the letter related was located some distance to the north and there was no confirmation that the electrical line had ever been built or that it was available and adequate to serve Tract 10's needs; attached a dated annexation Impact Report without explanation that it involved the entire Los Leones Subdivision rather than just Tract 10; and included the Core Corp report as evidence of development costs for Tract 10 without making it clear that the report was based upon development of different tracts of land much larger in total acreage and anticipated number of lots.

4) Respondent's report contained insufficient information for the intended users of the report to understand the reasonableness of the assumption of annexation, to understand the actual availability (or lack thereof) of utilities, to understand the proper application of the IRS rules relating to valuation of donated conservation easements, to understand the actual development costs for the proposed project, to understand why the value of the property as encumbered by an easement was based upon the diminution of value of a single property in a distant county, to understand the economic feasibility of the proposed development, and ultimately to understand the reliability (or lack thereof) of

Respondent's valuation.

Summary

Respondent's appraisal and appraisal report violated USPAP Rules 1-1(a) and (b) and 2-1(a), (b) and (c), and in so doing violated Board Rule 11.1 and §§ 12-61-710(1)(b) and (g), C.R.S. Respondent's license is therefore subject to discipline pursuant to §§ 12-61-710(5) and (6), C.R.S.

Sanction

Although Respondent's errors were significant and violated several USPAP rules in multiple ways, this is Respondent's first disciplinary action and the evidence is not sufficient to prove that her errors were willful or that her valuation of the property was intentionally inflated.

The ALJ therefore concludes that revocation of Respondent's license is not appropriate, but that her appraiser's license be suspended for a period of six months with credit given for the period her license has been under summary suspension.

Respondent's license shall also be placed upon probation for three years.

In addition, Respondent shall be fined $500.

Initial Decision

Respondent's license to practice real estate appraisal in Colorado is suspended for six months with credit given for the period her license has been under summary suspension. Her license is also to be placed on probation for three years, and Respondent is ordered to pay a fine of $500.

Done and Signed
September 14, 2007

ROBERT N. SPENCER
Administrative Law Judge

Digitally recorded CR#2
Exhibits admitted:
For the Board: 4 (for limited purpose), 5A-5E, 10
For the Respondent: A-H, I and J (for limited purpose), K, Q, R, BB, CC

CERTIFICATE OF SERVICE

This is to certify that on the 24th day of September, 2007, I placed a true and correct copy of the INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE IN THE MATTER OF THE COLORADO STATE BOARD OF REAL ESTATE APPRAISERS VS. JULIE O'GORMAN, CASE NUMBER APR 2007-0004, in the United States mail, postage prepaid, addressed as follows:

Randall M. Chin, Esq.
621 17th Street, Suite 1900
Denver, CO 80293

and in the interagency mail to:

Billy Seiber, Esq.
Business and Licensing Section
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