

TEXAS APPRAISER LICENSING  
AND CERTIFICATION BOARD

vs.

JAMES BRIAN BANKS  
TX-1323923-R

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DOCKETED COMPLAINT  
NOS. 07-036, 07-126,  
07-185 AND 09-007

**FINAL ORDER**

On this 20th day of August, 2010, the Board considered the above-noted matter.

After proper notice was given, the above case was heard by an Administrative Law Judge (ALJ) at the State Office of Administrative Hearings (SOAH). The ALJ made and filed a proposal for decision ("PFD") containing findings of fact and conclusions of law. The proposal for decision was properly served on all parties, who were given an opportunity to file exceptions and replies as part of the administrative record. Petitioner filed exceptions and Respondent filed no exceptions or replies, after which the ALJ issued a letter ruling declining to modify the PFD.

The Texas Appraiser Licensing and Certification Board, after review and due consideration of the proposal for decision, attached as Exhibit A hereto, the evidence in the record, and the provisions of Tex. Occ. Code §§1103.405 and 1103.518 and 22 TEX. ADMIN. CODE §§153.20, 153.24 and 155.1, modifies the findings of fact and conclusions of law of the ALJ contained in the proposal for decision and issues this Final Order for the reasons outlined below in accordance with TEX. GOV'T CODE §2001.058(e). Findings of fact numbers 1-10 and 12-14 and conclusions of law numbers 1-5 of the PFD are adopted without modification as if such were fully set out and separately stated in this Final Order. All proposed findings of fact and conclusions of law submitted by any party that are not specifically adopted in this Final Order are denied.

Finding of Fact No. 11

Finding of fact number 11 is modified to read, "While the evidence did not establish that Respondent produced fraudulent or inflated real estate appraisal reports, it did establish that that Respondent produced misrepresentative, unreliable, or otherwise deficient appraisal reports."

Legal Justification for Modification

The legal justification for this change is that the ALJ failed to properly consider certain uncontroverted evidence of acts and omissions by Respondent that made the appraisal reports misrepresentative, unreliable, or otherwise deficient. Based on the record, it is undisputed that Respondent (1) used a lakefront property as a comparable property when performing an appraisal of a property located on a nearby canal, without making an adjustment for the difference between true lakefront property and property that is located on a canal; (2) failed to analyze the current listing history of at least one property; (3) failed to report or analyze the impact of seller concessions on the sale of a property, including a \$34,500

concession to the buyer; and (4) misstated the square footage of the garage of a property in calculating the value of a property under the cost approach, resulting in an inflated square footage figure. Each of these errors resulted in an appraisal that was deficient, unreliable, and/or misrepresentative.

#### Conclusion of Law No. 6

Conclusion of law number 6 is modified to read, "Based on the Findings of Fact, it was established that Respondent failed to comply with the Uniform Standards of Professional Appraisal Practice, 22 TEX. ADMIN. CODE §155.1(a), and TEX. OCC. CODE §1103.405."

#### Legal Justification for Modification

The legal justification for this change is that modified Finding of Fact number 11 does articulate violations of the Uniform Standards of Professional Appraisal Practice (USPAP), which in turn constitutes a violation of 22 TEX. ADMIN. CODE §155.1(a) and TEX. OCC. CODE §1103.405.

#### Conclusion of Law No. 7

Conclusion of law number 7 is modified to read, "Based upon the foregoing Findings of Fact and Conclusions of Law, Respondent's certification should be suspended for a period of one year, with the suspension fully probated subject to terms and conditions established by the Board, and Respondent is assessed an administrative penalty of \$1,000."

#### Legal Justification for Modification

The legal justification for this change is that 22 TEX. ADMIN. CODE §§153.20(a)(3) and (9) provide for suspension or revocation of a license or certification of a person who has failed to comply with the USPAP in effect at the time of the appraisal or has made a material misrepresentation or omission of material fact, as well as administrative penalties according to the penalty matrix outlined in 22 TEX. ADMIN. CODE §§153.24(9). Modified Finding of Fact number 11 and modified Conclusion of Law number 6 establish that Respondent failed to comply with the provisions of USPAP and made material misrepresentations and omissions of material fact in the appraisals at issue in this matter. The Board has authority to determine the appropriate sanction, and consistent with prior decisions of the Board, probated suspension for a period of one year and an administrative penalty of \$1,000 is appropriate under these circumstances.

NOW, THEREFORE, IT IS ORDERED by the Texas Appraiser Licensing and Certification Board that James Brian Banks is hereby assessed an administrative penalty of \$1,000 and the appraiser license of James Brian Banks is suspended for twelve months, with this suspension being fully probated under the following conditions:

- 1) Every three months during the entire twelve-month period, Respondent shall submit to the Board an appraisal experience log on a form prescribed by the Board. The log shall detail all real estate appraisal activities he has conducted during the previous three-month period. This experience log shall be signed by Respondent and contain a notarized affidavit attesting the log is true, complete and fully accurate. Upon request from the Board, Respondent shall provide copies of his appraisal reports and work files for any appraisal assignments he

performs during the course of his period of probation within the twenty days of notice of any such request; and

2) Respondent shall:

- a. attend and complete a minimum, 15 classroom-hour course in USPAP;
- b. attend and complete a minimum, 15 classroom-hour course in Residential Case Studies;
- c. attend and complete a minimum, 7 classroom-hour course in Valuation by Comparison: Residential Analysis and Logic (no examination shall be required for this course);
- d. attend and complete a minimum, 7-classroom-hour course in Whatever Happened to Quality Assurance in Residential Appraisals: Avoiding Risky Appraisals and Risky Loans (no examination shall be required for this course); and
- e. attend and complete a minimum, 15 classroom-hour course in Sales Comparison Approach.

3) Respondent shall not violate TEX. OCC. CODE Chapter 1103 or the Rules of the Texas Appraiser Licensing and Certification Board.

**ALL CLASSES** required by this Final Order must be classes approved by the Board and must be completed within **TWELVE MONTHS** of the date of this Order and documentation of attendance and successful completion of the educational requirements of this Order shall be delivered to the Board on or before the end of the twelve-month period indicated. None of the classes or seminars required by this Order may be taken through correspondence courses. Unless otherwise noted above, all classes must be in-class, have an exam, and Respondent must have a passing grade on the exam given in each class. None of these required classes will count toward Respondent's continuing education requirements for licensure. Respondent is solely responsible for locating and scheduling classes to timely satisfy the terms of this agreement.

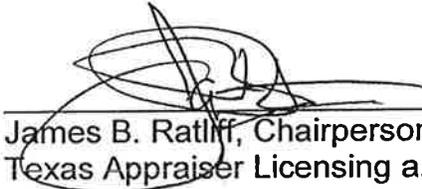
The \$1,000 administrative penalty in this matter shall be due within 30 days of the effective date of this Final Order.

Failure to timely comply with any of the terms of this Final Order shall result in initiation of a contested case proceeding against Respondent and, after opportunity for a hearing, possible imposition of disciplinary sanctions against Respondent as provided for by TEX. OCC. CODE §1103.518, including, but not limited to, revocation of probation and imposition of the suspension.

This order is effective twenty days after the date James Brian Banks is notified of this Final Order.

If enforcement of this Final Order is restrained or enjoined by an order of a court, this order shall become effective upon a final determination by said court or appellate court in favor of the Texas Appraiser Licensing and Certification Board.

Approved by the Board and Signed this 20<sup>th</sup> day of August, 2010.

  
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James B. Ratliff, Chairperson  
Texas Appraiser Licensing and Certification Board

**SOAH DOCKET NO. 329-09-2559.ALC**

**TEXAS APPRAISER LICENSING  
AND CERTIFICATION BOARD,**

**Petitioner**

**v.**

**JAMES BRIAN BANKS,  
TX-1323923-R,**

**Respondent**

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**BEFORE THE STATE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**PROPOSAL FOR DECISION**

Staff of the Texas Appraiser Licensing and Certification Board (Staff/TALCB) brought action against James Brian Banks (Respondent) to revoke his real estate appraiser certificate for violating the Texas Appraiser Licensing and Certification Act, TEX. OCC. CODE (Code) ch. 1103, and the TALCB rules. The Administrative Law Judge recommends that Respondent's license not be revoked and that this case be dismissed.

**I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY**

There are no issues of notice or jurisdiction in this proceeding. Therefore, these matters are addressed in the Findings of Fact and Conclusions of Law without further discussion here.

The hearing convened December 7, 2009, before Administrative Law Judge (ALJ) Michael J. Borkland in the William P. Clements Building, 300 West 15<sup>th</sup> Street, Fourth Floor, Austin, Texas. Staff was represented by Troy Beaulieu, Staff Attorney. Applicant appeared and was represented by Paul I. Aronowitz, Attorney. The record closed on February 1, 2010, following the filing of Respondent's written closing brief.

## II. DISCUSSION

### A. Background, Allegations and Legal Standards

Respondent is a Texas state certified residential real estate appraiser who holds certificate number TX-1323923-R. He was first certified on October 16, 1992.<sup>1</sup> Staff alleges that Respondent violated the Code, TALCB rules, and the Uniform Standards of Professional Appraisal Practice (USPAP) in appraising four properties known as the Darby, Harbor Side, Acapulco, and Mallow properties by producing fraudulent, inflated, misrepresentative, unreliable and otherwise deficient real estate appraisal reports.

The Darby property, a single family residence, was appraised on November 7, 2007. The property was listed for a pre-foreclosure price of \$429,980 and was under contract for \$435,000. Respondent appraised the property for \$620,000 using the sales comparison approach, and for \$659,072 using the cost approach.<sup>2</sup> Staff complains that Respondent:

- failed to disclose an earlier sale of the property on May 1, 2007, for the price of \$310,500;
- failed to analyze the listing history of the property;
- used inappropriate sales as comparables; and
- inflated the cost approach appraisal performed on the property by inflating the square footage of the garage by 1500 square feet.

Respondent appraised the Harbor Side property, a single family residence, on August 25, 2005, for \$890,000 using the sales comparison approach, and for \$886,600 using the cost approach. The property was listed for \$885,000 and was under contract for the list price.<sup>3</sup> Staff complained that Respondent:

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<sup>1</sup> TALCB Ex. 1.

<sup>2</sup> TALCB Ex. 3.

<sup>3</sup> TALCB Ex. 2.

- misrepresented that the property had not sold when it had;
- failed to analyze the listing history of the property;
- used inappropriate sales as comparables; and
- inflated the site value for the cost approach.

The Acapulco property, a single family residence, was appraised on June 16, 2005; the property was under contract for \$160,220. It appraised for \$160,500 using the sales comparison approach and for \$160,710 using the cost approach.<sup>4</sup> Staff complained that Respondent:

- failed to analyze the property's sales history; and
- used inappropriate sales as comparables.

The Mallow properties consisted of two properties located at 5118 and 5122 Mallow Street. Each property was designed for rental to two families. Using the sales comparison approach, Respondent appraised each of the properties for \$98,000, which was the contracted sales price. The property appraised for \$99,000 using the income approach, and for \$102,496 using the cost approach.<sup>5</sup> Staff complained that Respondent:

- omitted material information regarding the prior sales history of the properties;
- failed to analyze the listing history of the properties;
- used inappropriate sales as comparables; and
- presented an inaccurate income approach analysis by incorrectly determining the gross rent multiplier.

Regarding these appraisals, the First Amended Statement of Charges contained two allegations: In its first charge, Staff alleged Respondent violated Code § 1103.405 and 22 TEX. ADMIN. CODE (TAC) §§ 153.20(a)(3) and 155.1(a) by failing to comply with multiple USPAP

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<sup>4</sup> TALCB Ex. 6.

<sup>5</sup> TALCB Exs. 4 and 5.

standards in effect at the times he conducted the appraisals at issue.<sup>6</sup> In its second charge, Staff alleges Respondent violated 22 TAC § 153.20(a)(9) by making material misrepresentations and omissions of material facts in the appraisals.

## **B. Evidence**

Staff submitted 19 exhibits consisting of agency records, appraisal reports, Respondent's responses, and investigative reports, which were admitted. Respondent submitted 17 exhibits consisting of responses, HUD-1 settlement statements, MLS<sup>7</sup> documents, responses, a settlement statement, a sales contract, a survey, appraisal details, and other documents, which were admitted. Testimony was provided by Respondent, Lakisha Jackson, owner of the Mallow properties, David Wilson, a TALCB investigator, and Frank Lucco, an appraiser from Houston, Texas.

### **1. Respondent's Testimony**

Respondent testified that he was first licensed as a real estate sales agent in 1986, which allowed him to begin doing appraisals. He was certified as an appraiser when certification first became available in 1992. During his career as an appraiser, he estimated that he has been involved in around 50,000 appraisals and he stressed that he has had no previous disciplinary problems. He acknowledged that he was involved with a civil case regarding the Harbor Side property but asserted that was the only such case stemming from one of his appraisals and that the case settled for nuisance value. Regarding the various appraisals, he stated that trainees assisted with all of them except for the Acapulco property. He further stated that the Darby, Harbor Side, and Mallow properties were difficult properties to appraise. Respondent stressed that he did not receive any remuneration above

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<sup>6</sup> Code § 1103.405 requires that a licensed appraiser comply with the most current edition of the USPAP or other standards promulgated by the TALCB that are at least as stringent as USPAP. TALCB Rule 155.1(a) requires that an appraisal performed by a person subject to the Act must conform with the USPAP standards in effect at the time of the appraisal. 22 TAC § 155.1(a). Pursuant to 22 TAC § 155.20(a)(3), the TALCB may suspend or revoke the license of an appraiser who has failed to comply with the applicable USPAP.

<sup>7</sup> MLS is the acronym for multiple listing service, which is a data base utilized by real estate agents and appraisers to report real estate listings, including terminated and expired listings, and sales of real estate.

the standard fee of approximately \$350.00 per appraisal and that he had no reason to inflate the appraisals.

Respondent was first examined by TALCB Staff. During this examination, he stated that an appraiser's job in preparing an appraisal report is to analyze the real estate market, reduce the analysis to writing, and then to submit the report to the party who requested the appraisal services.

When questioned about the Darby property, Respondent testified that the property was listed on MLS with a pre-foreclosure price of \$429,000 and was under contract for \$435,000. He stressed that this was not a market sale but rather a distressed sale at an under market price. He valued the property at \$620,000, stating that it was a nice house on four acres of land. He stated that there were no better comparable sales and that comparable number one was in the same subdivision. On the cost approach, Respondent acknowledged that he made a mistake in listing the square footage of the garage as 2152 square feet but this mistake should have been readily apparent to any reader of the report because the garage's dimension were given and it was described as a two-car garage. Respondent stated that he did not disclose the May 1, 2007 sale of the property as a prior sale because it was not on either the tax printout or MLS and he was not aware of it. He further acknowledged that he probably should have reported the listing history but did not since it was listed as a pre-foreclosure property and that he was not required to report prior listings. Respondent denied that there were better comparable sales and he stressed that comparable number one was in the same subdivision. He concluded by stating that he did not inflate the value of the property.

Respondent testified that Casey Vaughn, who was employed by Respondent's company and lived in the vicinity of the subject property, prepared the appraisal report on the Harbor Side property with assistance from Respondent, who acknowledged that he was involved in the analysis of the market data on the property. Respondent did not report any prior sales of the property because only sales within the previous year and the current listing were required by the forms, which were prepared by Fannie Mae and Freddie Mac. USPAP standards required that an appraiser go back three years for sales but the form, which was supposedly compliant with USPAP, only required one year. He stated there is an advisory opinion stating that the forms comply with USPAP. Respondent

stated that the list price of the property increased from \$699,000 in April 2005 to \$725,000 in June 2005 and then to \$885,000 in August 2005 because the property was under construction, which added square footage. Respondent reported the listing as \$885,000 on his appraisal report because that was the current listing. Respondent acknowledged that there may have been a prior transfer of the property for zero dollars. He emphasized, however, that Texas is a non-disclosure state. In explanation, he stated that he depends on MLS for sales history and if a sale is not in MLS he does not report it. He stressed that a prior transfer, not in MLS, with a price of zero dollars is not actually a sale.

Respondent stated that he trusted Mr. Vaughn and Respondent denied telling him to inflate the value of the property. Respondent acknowledged that an adjustment was made in the report for the value of the land based on the builder's combining two lots into one to increase the lot size. He stated that he believes the adjustment was proper. He admitted that the report listed the property as lakefront when in fact it was on a canal leading to the lake. Respondent did not personally view the property but noted that the MLS listing described it as waterfront with a lake view. He stressed that he did not intentionally fail to make an adjustment for the location of the property.

After preparing his appraisal report on the Harbor Side property, Respondent learned that the attempted sale of this property was a mortgage fraud perpetrated by the parties. He acknowledged that part of the fraud was sales concessions contained in the contract. He stressed that an appraiser is not a fraud investigator and that the concessions were under five percent of the sales price, making it unnecessary for Respondent to report them. Respondent asserted that the comparables were good, with two of them on the same street, and Mr. Vaughn believed they were the best comparables available even though there were others that could have been used.

The Mallow properties were appraised on February 14, 2007. Respondent signed the reports as a supervisory appraiser. According to Respondent, the Mallow properties did not exist until an apartment complex was subdivided into duplex units. Thus, he stated the prior sale of the property as an apartment complex could not be used as a comparable to establish value for the duplex units, and, for that reason, he did not report the sale in the appraisal report. When asked why he did not ask

the seller what he paid for the property, he responded that it was not relevant because the property was an apartment complex at the time of the prior sale. Also, he did not look for comparable sales that were more than a year old because the form only requested sales within the previous year. Due to the nature of the neighborhood being a poor and depressed area, Respondent stated that it was difficult to find comparable sales in the MLS data base. Respondent testified that he relied on the sworn information in the HUD-1 settlement statements provided by the title company to assist with establishing market value of the Mallow properties, and nothing in USPAP prohibits this practice. He stated that using official closing statements from a title company is not the same as using statements from an interested party to the transaction and, thus, not prohibited by Fannie Mae guidelines.

Respondent acknowledged a mistake was made on the Acapulco property by stating that it had a pool when it did not. He stated that it was readily apparent that there was not a pool and the value of the property was not inflated. He noted that the property was in good condition and it was located in a good neighborhood.

## **2. Lakisha Jackson's Testimony**

Ms. Jackson lives in Houston and works at the Texas Children's Hospital as a nurse. She testified that she and her husband bought the Mallow properties for investment purposes through a friend, Mike Adams, who was a real estate agent and purported owner of the properties. She stated that the properties required extensive renovation, including conversion from gas to electric, new wiring, painting, plumbing, and appliances. She believes the properties are worth \$56,000 each even though Respondent appraised them for \$98,000 each. She acknowledged that she has not made an effort to sell the properties because in her opinion they are worth much less than is owed on them. She stated that she has not made any profits on the property and that she attempts to rent them for \$550 per month. She believes that she was the victim of a scheme and taken advantage of by Mr. Adams. She stated that the properties are now involved in litigation and that she filed a complaint with the Board against Respondent.

On cross-examination, Ms. Jackson stated that she did not make a down payment on the properties and that she received a cash payment after closing of \$5,000 as a side deal with Mr. Adams, which she did not disclose to the lender at the time of her loan application. She admitted she has never met Respondent and that her decision to purchase the properties was not based on his appraisal. She further admitted that she did not look at the properties prior to purchase, get a real estate inspection, and she later learned that Mr. Adams was not the owner of the project as represented. She acknowledged that she and her husband are now suing the title company, the mortgage company, and Mr. Adams over the purchase of the property. She confirmed that she is not suing Respondent.

### 3. David Wilson's Testimony

Mr. Wilson is a certified general appraiser in Texas and Colorado, and has been performing appraisals since 1983. He is currently an investigator with the TALCB, where he reviews complaints to determine if appraisals complied with state law and USPAP standards. He described the appraisal process as a market analysis of the factors that impact the value of real property. He stated that an appraiser reviews the data from public records, inspects, measures, and takes pictures of the subject property, and drives around the neighborhood before preparing the appraisal report. According to Mr. Wilson, appraisals can be based on cost, income, or market approaches. The cost approach takes into consideration the price of the land and the structure, while the market approach compares similar properties, and the income approach looks at the potential income that a property will produce.

Regarding the appraisal reports prepared by Respondent, Mr. Wilson reviewed the data used, inspected the properties, reviewed the complaints, and reviewed Respondent's responses, work files, and the appraisal reports. Following his review, he determined that all of the appraisals violated USPAP standards, lacked credibility, omitted material facts, misrepresented material facts, and were purposefully inflated. He prepared investigative reports with findings on each of the properties.<sup>8</sup>

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<sup>8</sup> Mr. Wilson's reports were submitted as Pet. Ex. 10 (Harbor Side property), Pet. Ex. 11 (Darby property), Pet. Ex. 12 (Mallow properties), and Pet. Ex. 13 (Acapulco property).

Specifically, Mr. Wilson testified that the appraisal for the Darby property lacked documentation to support the site value, inflated the square footage of the garage to 2,152 square feet instead of the actual square footage of 572 square feet, failed to consider that the quality of the structure was not comparable to the rest of the neighborhood, that better comparable houses were not used, and that Respondent failed to disclose the prior listing and sales histories on the property. Mr. Wilson also expressed concern with the comparable sales selected by Respondent to support the appraisal report and that portions of the work file were prepared nine months after the appraisal report had been prepared. Further, in reviewing the cost approach, Mr. Wilson concluded that a valuation of \$95.21 per square foot was more appropriate than the \$120.00 per square foot Respondent cited in the appraisal report. In particular, the subject home is a tract type home located in a neighborhood of custom homes with greater value. Also, Respondent failed to disclose the listing history that went down from \$487,000 to 435,000, even though he appraised the property for over \$600,000. According to Mr. Wilson, researching the deed records showed a prior sale in May 2007 for \$310,000.

According to Mr. Wilson, Respondent "deliberately" prepared a misleading appraisal report on the Harbor Side property. He stated that it was misleading because it did not disclose the prior listing of the property, and did not properly analyze and explain the atypical amount of payouts to third parties in the amount of \$172,000, which are included in the price but do not reflect value. Also, he testified that Respondent failed to report the prior sale of the property for \$475,000, ignored similar sales that were available, and used poor techniques in adjusting for value of the land, which would have reduced the appraised value of the house.

In analyzing Respondent's appraisal report, Mr. Wilson questioned the choice of properties by Respondent for his sales comparison approach. In particular, Mr. Wilson explained that several of Respondent's comparable sales had lake frontage instead of canal frontage like the subject property. Mr. Wilson stated there is a differential in value between canal lots and lots on the open

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lake.<sup>9</sup> He was also concerned with the value assigned to the subject property's lot. He stated that the \$60,000 adjustment was not supportable because two adjoining lots sold for \$135,000 each, and they were much larger than the 1.5 acres lot of the subject property. He stressed that with a proper adjustment for lot size, the appraised value would have been lower.<sup>10</sup>

Mr. Wilson testified that the appraisal report for the Mallow properties was misleading because it did not conform to USPAP. He commented that the original copy of the appraisal was not submitted to the Board and portions of the work file were created after the complaint was submitted to the Board. Also, the prior sale of the property as an apartment building was not disclosed in the appraisal report. Mr. Wilson cited to a USPAP advisory opinion that addressed this requirement.<sup>11</sup> Further, he stated there were superior comparables to those used by Respondent and that Respondent relied on two "seller influenced sales" to support the sales approach in establishing an appraised value by using HUD-1's on sales not marketed through MLS.<sup>12</sup> Mr. Wilson also expressed concerns with the Respondent's choice of comparable sales. He stated that if Respondent had used more appropriate comparables the value would have been lower.<sup>13</sup> The income approach used by Respondent gave Mr. Wilson concern because the Seller provided the rental and income information that was used in the appraisal report prepared by Respondent, and Respondent did not consider that the properties were low income housing with most units vacant. In the cost approach, Mr. Wilson testified that he did not find any support in Respondent's working file to support statements in the appraisal report, such as the \$15,000 lot value.

Mr. Wilson testified to similar concerns with the appraisal report for the Acapulco property. In his written review of the appraisal, he stated that Respondent produced a "misleading appraisal report" by failing to analyze all sales of the subject property in the previous three years, and he found

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<sup>9</sup> Mr. Wilson did not quantify the differential in value between the two. This left the ALJ wondering whether it was a large amount, or an insignificant amount.

<sup>10</sup> Again, the ALJ was left wondering if the adjustment testified to by Mr. Wilson would be significant.

<sup>11</sup> The advisory opinion was not submitted and the specifics of it were not testified to.

<sup>12</sup> Mr. Wilson did not explain what he meant by "seller influenced sales" and the harm that the use of such sales caused.

<sup>13</sup> Mr. Wilson did not quantify the amount that these properties would have lowered the appraisal amount.

that Respondent's selection of comparable properties was not impartial or objective. Specifically, he noted that the property previously sold for \$124,500 and it was appraised for \$160,500 without adequate support.

In general, Mr. Wilson testified that certain "red flags" are apparent in appraisals with inflated values: comparables from dissimilar or inappropriate locations, similar comparable sales in the same neighborhood that are overlooked, "cherry picked" comparables having superior construction, the prior listing history is well below the appraised value, and prior sales have been omitted. Mr. Wilson testified that he saw all of these "red flags" in the various appraisal reports prepared by Respondent, which caused the increased appraised values in the reports. In summary, he stated the appraisal reports cannot be relied on because the values are inflated and lenders will not be able to recover the loan amounts.

On cross-examination, Mr. Wilson acknowledged that he has not had an appraisal practice in Texas. In extensive questioning, he also admitted that he had not found any other complaints against Respondent, USPAP does not require an appraiser to list the prior listing history in an appraisal report, the prior sales of Darby property were not listed in MLS, and a sales price for the Darby property was not listed in the deed records. Mr. Wilson acknowledged that an appraisal is an opinion of value rather than a determination of value, and that in appraising residential real estate, more emphasis is placed on the comparable or sales approach than the cost approach in arriving at an estimated value. He explained that Fannie Mae does not even require an appraiser to use the cost approach in preparing an appraisal report. He stated that an appraiser is generally paid \$350 to \$400 per appraisal and there was no evidence that Respondent was paid anything more than the customary amount to inflate the appraisals.

According to Mr. Wilson, the Harbor Side property was sold to a straw buyer and then went into foreclosure. The buyer was from New York and had never been to Texas to view the property, did not have the income to support the loan of \$890,000, received a loan of 100% of the sales price, and walked away from closing with \$15,000 cash. He stated that fraud occurred in the transaction with the concessions paid to designees of the seller, but he acknowledged that it was not necessary

for the Respondent to discuss the concessions in the appraisal report because USPAP only requires a discussion of concessions paid to the buyer by the seller. He further acknowledged that an appraiser is only required to report the current listing in the appraisal report, an appraiser is not a fraud detective, and that it is rare for a lender to recover all that is owed on a foreclosed property.

In further discussing the Darby property, Mr. Wilson acknowledged that the choice of which comparable sales to be used by an appraiser is within the appraiser's opinion. Mr. Wilson believed that the Darby house was more of a tract home than a custom home, which would have required different comparables. According to Mr. Wilson, a custom home has a unique floor plan designed by an architect. He said the Darby property is in an area with custom homes on acreage and he acknowledged that the Darby property is on four or five acres of land. He also acknowledged that the sales price was lower than the appraisal, the square footage reported for the garage on the appraisal report was no more than a mistake, and that the transaction never closed, which meant there was no harm to a lender from the appraisal report.

Regarding the Mallow properties, Mr. Wilson acknowledged that Ms. Jackson bought the properties sight unseen. On the issue of reporting the prior sale of the subject property, he acknowledged that the subject property is the individual duplexes, and he was unable to confirm there was an advisory opinion in effect at the time of the transaction that would have required Respondent to report the prior sale of the apartment complex. He acknowledged that one of the comparable sales was from the same complex. He stressed that seller-influenced sales must be verified with information from a disinterested third party. In Mr. Wilson's opinion, an appraiser has a duty to disbelieve HUD-1 forms if not supported by the market data. He acknowledged that his opinion is not in USPAP. Also, he admitted that the title company is a disinterested party and the title company's HUD-1 is information from a disinterested party. He agreed that lying on a HUD-1 carries criminal penalties.

In conclusion, Mr. Wilson acknowledged that all of these appraisals were for properties that were difficult to appraise. He testified that often the motive to inflate appraisals is to please the

client and to insure future business. He admitted that he did not investigate motive and that he did not have an opinion on Respondent's possible motives for inflating value.

#### 4. Frank Lucco's Testimony

Mr. Lucco is employed by IRR Residential Appraisers in Houston, Texas. He holds a real estate brokers license and an appraisal license from the TALCB. In preparation for his testimony, he reviewed the appraisal reports prepared on the Harbor Side and Mallow properties. In his opinion, there were some USPAP violations, and the reports were not credible due to misrepresentations and omissions. He also stated that in his opinion the appraisals were inflated.

Specifically, regarding the Harbor Side property, he had issues with the adjustments and selection of comparables for the sales comparison approach. He stated that Respondent should have used more appropriate sales, which were available, of properties with actual lake frontage because panoramic views of the lake have greater value. In his opinion, on this property the cost approach would have had validity because the property was new construction, meaning that it had not yet depreciated. However, he expressed concerns with Respondent's valuation of the site and improvements, which, in his opinion, overstated the value of the property.

According to Mr. Lucco, the Mallow properties were located in a low-income, affordable housing area. He stated that he had concerns with Respondent's appraisal reports because the sales comparison approach had comparable selection issues, and the gross rent multiplier with the income approach was not done properly. Also, when using HUD-1 statements, Fannie Mae, Freddie Mac, and USPAP guidelines require verification of HUD-1 reports or fraudulent HUD-1 reports will be used to establish market value. Mr. Lucco believes an appraiser should look further than HUD-1 reports. He acknowledged that even though Fannie Mae, Freddie Mac, and USPAP requirements would prefer an analysis to include prior sales, he did not believe that it was necessary for Respondent to report the prior sale of the apartment complex.

On cross-examination, regarding the listing price of the Harbor Side property, he agreed that USPAP only requires current listings. He admitted that he did not analyze the site value of the double-sized lot but he agreed with Respondent that combining two lots makes the lots less valuable than if kept separately. Regarding the Mallow properties, Mr. Lucco admitted that it was difficult to find comparable sales data. He acknowledged that the HUD-1 statements relied on by Respondent were properly signed and sworn to, but despite this, Mr. Lucco believed Respondent should have verified who generated them, and performed a MLS search to determine market place value. He admitted that an appraiser can rely on the HUD-1 statements if they are obtained from a neutral party. He also agreed that it is not fair to try to revoke an appraiser's license for complying with Fannie Mae requirements.

### **C. Analysis and Recommendation**

This was a difficult case. The issues were complex, the documentary evidence was substantial, and the oral testimony was primarily from three knowledgeable experts in the field of residential real property appraisals. Much of the testimony from Staff's experts was conclusory in nature. For instance, there was testimony that Respondent should have used more appropriate comparables. However, those comparables were not identified and the amount of change in the appraisals by using better comparables was not quantified. This left the ALJ with sorting through various expert opinions to determine if indeed there had been the grave violations complained of.

Staff opened the case by discussing the fraud committed on thousands of investors by notorious financier Bernard Madoff, the failure of the savings and loan industry in the early 1980's, and the recent financial meltdown caused by subprime lending practices in the mortgage industry. This led the ALJ to believe that Staff would present evidence of fraud and corruption of the highest order by an appraiser attempting to feather his nest with ill gotten proceeds. In its pleadings and evidence, Staff used such words as deliberately misleading, fraudulent, unreliable, and inflated.

Instead, the evidence established that Respondent has been involved in the preparation of an estimated 50,000 appraisal reports since 1986, with only the four complaints that are the subject of

this case filed against him. The evidence further established that Respondent was paid only the customary appraisal fee of around \$350 for each of the appraisals. Staff did not allege that Respondent benefited financially by making inflated appraisals and did not offer evidence regarding Respondent's motives to inflate appraisals.

Respondent acknowledged that mistakes were made in several of the appraisal reports. The most glaring mistakes included a discrepancy in the square footage of a garage, comparing sales of properties with canal frontage to lake frontage, and marking the box that a property had a pool when it did not. Respondent asserted that the appraisals were of difficult properties, which was confirmed by Staff's witnesses. Mr. Lucco agreed with Respondent that an appraiser should not be sanctioned for complying with Fannie Mae requirements.

It is clear to the ALJ that Respondent could have done a better job with some of the appraisals. It is not clear to what extent, if any, the property values would have changed if the mistakes had not been made. The evidence did not establish that Respondent prepared deliberately misleading, fraudulent, unreliable, and inflated appraisal reports. Thus, it is the ALJ's recommendation that this case be dismissed with an order declaring the case file confidential as provided by TALCB rule.

### III. FINDINGS OF FACT

1. James Brian Banks (Respondent) is a Texas state certified residential real estate appraiser holding certificate number TX-1323923-R issued by the Texas Appraiser Licensing and Certification Board (TALCB).
2. Respondent has performed residential real property appraisals since 1986.
3. Respondent has been involved in the preparation of approximately 50,000 appraisals in his career as an appraiser.
4. Other than the four complaints that are the basis of this action, Respondent has no disciplinary history with the TALCB.

5. Respondent appraised the following properties:
  - a. Darby property on November 8, 2007;
  - b. Harbor Side property on August 25, 2005;
  - c. Acapulco property on June 16, 2005; and
  - d. Mallow properties on February 14, 2007.
6. In completing the appraisals referred to in Finding of Fact No. 5, TALCB Staff alleged that Respondent produced fraudulent, inflated, misrepresentative, unreliable, and otherwise deficient real estate appraisal reports.
7. Respondent made mistakes in the preparation of the real estate appraisal reports referred to in Finding of Fact No. 5.
8. Each of the properties referred to in Finding of Fact No. 5 was difficult to appraise.
9. The evidence did not establish that Respondent benefited financially by making inflated appraisals.
10. The evidence did not establish that Respondent had any motive to inflate the appraisals..
11. The evidence did not establish that Respondent produced fraudulent, inflated, misrepresentative, unreliable, and otherwise deficient real estate appraisal reports.
12. On June 23, 2009, Staff mailed notice of administrative hearing to Respondent.
13. The notice of hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
14. The hearing on the merits was held December 7, 2009. All parties appeared and participated in the hearing. The record closed February 1, 2010, following the filing of Respondent's written closing brief.

#### IV. CONCLUSIONS OF LAW

1. The Texas Appraiser Licensing and Certification Board (TALCB) has jurisdiction over this matter pursuant to the Texas Appraiser Licensing and Certification (Act), TEX. OCC. CODE ch. 1103.

2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this matter, including the authority to issue a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T. CODE ANN. ch. 2003.
3. Proper and timely notice was provided to Respondent pursuant to the Administrative Procedure Act, TEX. GOV'T. CODE ANN. ch. 2001.
4. The TALCB had the burden of proof, pursuant to 1 TEX. ADMIN. CODE § 155.427.
5. The TALCB may suspend or revoke a certificate if the certificate holder violates either the Act, a TALCB rule, or failed to comply with the Uniform Standards of Professional Appraisal Practice (USPAP) in effect at the time of the appraisal, pursuant to TEX. OCC. CODE § 1103.518 and 22 TEX. ADMIN. CODE § 153.20.
6. Based on the Findings of Fact, it was not established that Respondent failed to comply with the Act, TALCB rules or USPAP.
7. Based upon the foregoing Findings of Fact and Conclusions of Law, Respondent's certificate should not be revoked, and the TALCB should dismiss this case with an order declaring the case file confidential, pursuant to TEX. OCC. CODE § 1103.518.

**SIGNED April 5, 2010.**

  
MICHAEL J. BORKLAND  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS