

TEXAS APPRAISER LICENSING  
AND CERTIFICATION BOARD

vs.

MAX AUSTIN HABRECHT  
TX-1323692-R

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DOCKETED COMPLAINT NO.  
08-055, 08-184, 08-188, & 09-072

**FINAL ORDER**

On this 11 day of Dec, 2009, the Board considered the above-noted matter.

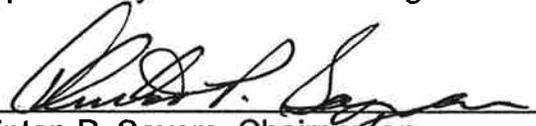
After proper notice was given, the above case was heard by an Administrative Law Judge (ALJ) at the State Office of Administrative Hearings (SOAH). The ALJ made and filed a proposal for decision containing findings of fact and conclusions of law. The proposal for decision was properly served on all parties, who were given an opportunity to file exceptions and replies as part of the administrative record. No such exceptions or replies were filed.

The Texas Appraiser Licensing and Certification Board, after review and due consideration of the proposal for decision, attached as Exhibit A hereto, adopts the findings of fact and conclusions of law of the ALJ contained in the proposal for decision and incorporates those findings of fact and conclusions of law into this Final Order 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.

NOW, THEREFORE, IT IS ORDERED by the Texas Appraiser Licensing and Certification Board that the certification of Max Austin Habrecht in this matter is hereby **REVOKED**, effective twenty days after the date Max Austin Habrecht 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 11 day of Dec, 2009.

  
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Clinton P. Sayers, Chairperson  
Texas Appraiser Licensing and Certification Board

**EXHIBIT A**

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

RECEIVED

OCT 21 2009

Texas Real Estate Commission

October 20, 2009

Douglas E. Oldmixon  
Administrator  
Texas Appraiser Licensing and Certification Board  
1101 Camino La Costa  
Austin, Texas 78752

INTER-AGENCY

RE: Docket No. 329-09-4744.ALC; Max A. Habrecht

Dear Mr. Oldmixon:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.507(c), a SOAH rule which may be found at [www.soah.state.tx.us](http://www.soah.state.tx.us).

Sincerely,

A handwritten signature in black ink, appearing to read "C. Church", written over a horizontal line.

Cassandra J. Church  
Administrative Law Judge

CJC/ds  
Enclosure

xc: Max A. Habrecht, 2710 Tumbling River Drive, Leander, TX 78641 - VIA REGULAR MAIL  
Troy Beaulieu, 1101 Camino La Costa, Austin, TX 78752 -- (with 1hearing CD; Certified Evidentiary Record) VIA-  
INTER-AGENCY

SOAH DOCKET NO. 329-09-4744.ALC

TEXAS APPRAISER LICENSING AND  
CERTIFICATION BOARD,  
Petitioner

V.

MAX A. HABRECHT  
(TX-1323692-R),  
Respondent

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Appraiser Licensing and Certification Board (Staff/Board) seeks to revoke the residential real property appraiser certification held by Max. A. Habrecht (Respondent) on the basis of multiple violations of the appraisers' licensing statute and the Board's rules, including the performance of an appraisal in violation of practice standards. Staff sought to permanently bar Respondent from seeking reinstatement and also requested the assessment of an administrative penalty. This Proposal for Decision (PFD) concludes that Staff established that there is a sufficient basis to revoke Respondent's certification but that there are insufficient grounds to permanently bar Respondent from re-applying for a license.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The hearing on this matter was held August 26, 2009, before State Office of Administrative Hearings (SOAH) Administrative Law Judge (ALJ) Cassandra J. Church at the SOAH hearing facility in Austin, Texas. Staff Attorney Troy Beaulieu represented Staff. Respondent did not appear. The record closed on September 8, 2009, upon the ALJ's receipt of the portions of the Uniform Standards of Professional Appraisal Practice (USPAP) at issue in this case.<sup>1</sup> Matters concerning jurisdiction and notice are set out in the Findings of Fact and Conclusions of Law.

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<sup>1</sup> On August 31, 2009, Staff submitted copies of all USPAPs referenced in its Notice of Hearing. Because the section of the Occupations Code that adopts the USPAPs as governing Texas appraisers does not include the text of the USPAPs, but only references the most current edition of those standards, the standards at issue are matters that must be established by Staff. The USPAPs submitted are hereby included in the evidence record of this case as *Staff Exhibit P-5*.

## II. DISCUSSION

### A. Applicable Law

In conducting appraisals, a licensee must abide by the most current edition of the USPAPs adopted by the Appraisal Standards Board of the Appraisal Foundation or by Board rules that are at least as stringent as the USPAPs.<sup>2</sup> Staff contended that Respondent violated several USPAPs, specifically the Ethics Rule-Conduct and also Standards 1-1(a), 1-1(b), 1-1(c), 1-4(a), 2-1(a), and 2-1(b)(viii).<sup>3</sup> These standards are summarized below:

- **Ethics Rule-Conduct:** This rule requires an appraiser to perform assignments with impartiality, objectivity, and independence. The rule outlines prohibitions against using, communicating, or allowing others to communicate a misleading or fraudulent report, using unsupported conclusions relating to the characteristics of a population, accepting an assignment with a predetermined outcome, or performing as an advocate for a party.
- **Standard 1-1(a):** This standard requires that an appraiser be aware of, understand, and correctly employ recognized appraisal techniques.
- **Standard 1-1(b):** This standard requires that an appraiser not commit a substantial error of omission or commission that significantly affects an appraisal.
- **Standard 1-1(c):** This standard requires that an appraiser not act carelessly or negligently, such as making a series of errors that, in aggregate, would affect the credibility of the result.
- **Standard 1-4(a):** This standard requires that an appraiser analyze such comparable sales data that are available when a sales comparison approach is necessary.
- **Standard 2-1(a):** This standard requires that an appraiser present his or her report in a manner that clearly and accurately sets forth the appraisal and is not misleading.
- **Standard 2-1(b)(viii):** This standard requires that an appraiser's report must set forth the methods used as well as reasoning in support of the conclusions, including the reasons why certain methods were not used.

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<sup>2</sup> TEX. OCC. CODE ANN. § 1103.405.

<sup>3</sup> Staff Exs. P-2 and P-5.

The Board's administrative rules define the obligations of a licensee. A licensee must answer within 20 days of notice all inquiries concerning matters under the jurisdiction of the Board and also must fully comply with final decisions and orders of the Board.<sup>4</sup> In addition, a licensee's failure to make good on a payment due within 30 days after the Board has mailed a request for payment is grounds for disciplinary action.<sup>5</sup>

The Board has a number of disciplinary options available to it. It has the authority to suspend or revoke a license or to deny issuing a license to a person who violates the statutes, USPAPs, or Board rules.<sup>6</sup> As part of an order suspending or revoking an appraiser's license, the Board may set conditions for the appraiser to re-apply for licensure.<sup>7</sup> If the Board does not set re-application limits, the statute permits a person whose license has been revoked to re-apply for an appraiser's license one year after the date of the revocation. The Board's rules regarding sanctions do not set forth factors that the Board must or may consider either in setting conditions for re-application or barring a person permanently from re-applying.<sup>8</sup> The Board may also impose an administrative penalty or require remedial education.<sup>9</sup>

In regard to defaults, the ALJ has the authority to deem true any factual allegations listed in the notice of hearing.<sup>10</sup> Although requested by Staff to set the conditions for re-application, the ALJ concluded that this sanction is not a matter that must be referred as part of the contested case hearing. The ALJ reached this conclusion because this sanction is not among those disciplinary measures on which an ALJ is required to make a recommendation.<sup>11</sup> However, as Staff included a

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<sup>4</sup> 22 TEX. ADMIN. CODE. § 153.22.

<sup>5</sup> 22 TEX. ADMIN. CODE. § 153.20(a)(15).

<sup>6</sup> TEX. OCC. CODE ANN. § 1103.518(2)(B) and 22 TEX. ADMIN. CODE. §§ 153.20(a)(2) and (3).

<sup>7</sup> TEX. OCC. CODE ANN. § 1103.522.

<sup>8</sup> See 22 TEX. ADMIN. CODE. §§ 153.20 and 153.24.

<sup>9</sup> TEX. OCC. CODE ANN. § 1103.552 and 22 TEX. ADMIN. CODE. § 153.24.

<sup>10</sup> 1 TEX. ADMIN. CODE § 155.501.

<sup>11</sup> TEX. OCC. CODE ANN. § 1103.518.

bar to re-application in the Notice of Hearing and as the Board may consider this a matter that it may, at its discretion, refer for a contested case hearing, this PFD will address this issue.

### **B. Deemed Facts and Discussion**

Because this was a default case, the only facts in evidence regarding the alleged violations are those pled in the Board's Notice of Hearing, and the incorporated Original Statement of Charges. The facts regarding the allegations of failing to respond to the Board's request for information and of failing to honor an insufficient funds check are complete and are sufficient to support findings that Respondent committed those violations.

However, the facts pled in regard to allegations of multiple violations of the USPAPs are not complete. The only facts in the pleadings that relate to the allegedly flawed audit are the date, the address of the subject property, and arguably, the fact that Respondent used inappropriate comparables.<sup>12</sup> Absent from the pleadings are any facts regarding the method Respondent employed, the method he should have employed, why the comparables he used were inappropriate, the nature of the alleged "inappropriate" or omitted adjustments, any indication Respondent refused a request to make adjustments, or any other misrepresentations or errors that may have been in the appraisal report. Staff pled neither the purported correct appraisal value nor the appraisal value Respondent derived, so there was no basis to determine whether any error was substantial. Most significantly for one type of relief requested – a permanent bar on re-applying for a license – the record was devoid of any evidence indicating the audit, even if erroneous, was the fruit of fraud or of any intention to deliberately inflate the appraisal report, or involved inappropriate assumptions regarding any population group. Thus, there were no facts to support findings that find Respondent violated the USPAPs prohibiting deceptive or misleading practices or the ethics standard. The ALJ may only deem admitted any factual allegations set forth in a moving party's notice of hearing and may not assume the existence of facts not pled.

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<sup>12</sup> Staff Ex. P 2.

Based on the facts that may be deemed admitted regarding Respondent's performance of an appraisal, the ALJ concluded that Staff established that Respondent violated USPAP Standard 1-4(a) in regard to inappropriate use of comparables. There being no factual allegations that demonstrated violations of any other USPAP standard, the ALJ concluded that Staff failed to establish a basis for finding violations with regard to all other USPAP sections as alleged, including the ethics violation.

In regard to appropriate disciplinary action, the ALJ concluded that the violations found are sufficient to warrant revocation of Respondent's real estate appraiser certification. Staff contended that the violations in this case were egregious. However, Staff failed to show that there was an agency policy or practice regarding re-application for a license that required a permanent bar under the facts in this case.<sup>13</sup> Given that two of the three violations found were procedural failures and that there was a single USPAP violation, the ALJ concludes that there was no factual basis shown by Staff for barring Respondent permanently from re-applying for a license.<sup>14</sup> Comparing this case with others involving multiple violations, such a harsh sanction is disproportionate to the violations found and appears to be inconsistent with prior practice. In short, the ALJ was unable to discern a clear reason as to why the default provisions of Occupations Code § 1103.522 should not apply or that a waiting period to re-apply would not be appropriate.

Staff's pleadings requested the imposition of an administrative penalty both as an alternative to revocation and also in addition to the revocation. In the brief default hearing, Staff focused on revocation. However, as Staff did not withdraw its request for assessment of an administrative penalty, the ALJ treated this as a live request for imposition of an administrative penalty *in addition to* revocation. As Staff did not allege that Respondent had committed prior violations, the ALJ inferred this was the first allegation of any violation against Respondent, who

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<sup>13</sup> Compare Staff Ex. P-4. The facts the case submitted by Staff included admissions of wrongdoing by the licensee, material errors in zoning information, lack of site-source data, and material omissions in appraisal reports, among others. The Board permitted him to re-apply after a five-year wait. (Final Order, Docketed Complaint Nos. 06-033, 06-046, and 06-114, December 19, 2008).

<sup>14</sup> Compare Staff Exs. P-3 (Final Order, Docketed Complaint No. 08-052, February 20, 2009 [Revocation, no conditions on re-application]) and P-4.

has held his license since 1992.<sup>15</sup> Per the Board's penalty matrix, a first time violation is not subject to an administrative penalty. For a first-time violator to be fined, the Board requires evidence of additional culpability factors, specifically evidence of a serious inability or unwillingness to comply, a serious but remediable deficiency, or a violation committed willfully or in a grossly negligent manner.<sup>16</sup> No such factors were alleged in this case, therefore, the ALJ concluded that no administrative penalty would be warranted.

### C. Recommendation

The ALJ recommends that the Board find that there are sufficient grounds to revoke Respondent's license based on his failure to respond to staff requests to provide information on multiple complaints, his failure to timely honor an insufficient funds check, and his failure to use appropriate comparables in performance of an audit. The ALJ further recommends the Board find that Staff failed to sufficiently allege a factual basis in regard to other allegations of violations of the USPAPs, and also that the Board assess no administrative penalty.

In the event that the Board considers the issue of sanctions regarding re-application for licensure to be a referable issue, the ALJ recommends that no conditions for re-application be imposed on Respondent above the one-year waiting period set forth in Occupations Code § 1103.522. This recommendation is based on the absence of facts that can be admitted deemed as true in connection with allegations of any deceptive or misleading acts Respondent may have committed in preparation of the disputed appraisal.

### III. FINDINGS OF FACT

1. Max Austin Habrecht (Respondent) holds residential real property appraiser certification number TX-1323692-R (license) issued by the Texas Appraiser Licensing and Certification Board (Board).
2. Respondent has been licensed since 1992.

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<sup>15</sup> Staff Ex. P-1.

<sup>16</sup> 22 TEX. ADMIN. CODE § 153.24(h).

3. Respondent has not previously violated statutes or administrative rules applicable to appraisers.
4. Respondent's most recent address of record with the Board is 2710 Tumbling River Drive, Leander, Texas 78641.
5. On August 13, 2007, Respondent appraised real property located at 2320 Gracy Farms Lane, No. 113, Austin, Texas 78758 (the Gracy property).
6. In appraising the Gracy property, Respondent failed to use comparable sales that were readily available in the immediate area and that were lower than the comparable sales used by Respondent.
7. In appraising the Gracy property, Respondent produced an appraisal that was significantly higher than would have resulted from using readily-available comparable sales.
8. Staff for the Board (Staff) did not allege that Respondent used misleading or deceptive practices in appraising the Gracy property or in the preparation of the appraiser's report.
9. Three persons or entities filed complaints with the Board against Respondent in 2008: Complaints Nos. 08-184, 08-188, and 09-072 (the Complaints).
10. Staff notified Respondent of the Complaints on three dates in 2008, on May 22 and 23, and on December 18, and provided Respondent an opportunity to respond to the Complaints.
11. Respondent did not respond to any of the Complaints.
12. On October 1, 2008, Respondent paid by check fees required to renew his appraiser certification.
13. On October 20, 2008, Staff notified Respondent by certified mail sent to his most recent address of record that the check for his fees had been returned for insufficient funds and requested payment within 30 days.
14. Respondent did not pay the fees required to renew his appraiser certification as requested.
15. On June 10, 2009, Staff filed an Original Statement of Charges against Respondent, served by certified mail to his most recent address of record.
16. On June 16, 2009, the Staff of the Board issued Respondent a Notice of Hearing informing him of the date, time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing would be held; and the particular sections of the statutes and rules involved. The Notice of Hearing also included a short, plain statement of the matter asserted.
17. Staff incorporated the Original Statement of Charges in the Notice of Hearing.
18. The Notice of Hearing contained the following language in at least 12-point, boldface type: "Failure to appear at the hearing will result in the Original Statement of Charges being admitted as true, the relief sought by TALCB granted, and a default judgment being taken against you."

19. The Notice of Hearing was served by certified mail, return receipt requested, Item No. 7008-0500-0001-9708-6289, to Respondent at 2710 Tumbling River Drive, Leander, Texas 78641, his most recent address of record with the Board.
20. On June 17, 2009, Respondent signed for receipt of the Notice of Hearing.
21. The hearing on this matter was convened on August 26, 2009, before Administrative Law Judge (ALJ) Cassandra J. Church at the State Office of Administrative Hearings (SOAH) facility in Austin, Texas.
22. Staff Attorney Troy Beaulieu appeared for the Board; Respondent did not appear.
23. The record closed on September 8, 2009, after submission of the portions of the Uniform Standards of Professional Appraisal Practice (USPAP) at issue in this case.

#### IV. CONCLUSIONS OF LAW

1. The Texas Appraiser Licensing and Certification Board (Board) has jurisdiction over this matter pursuant to TEX. OCC. CODE ANN. ch. 1103 (the Texas Appraiser Licensing and Certification Act).
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. chs. 2001 and 2003 and TEX. OCC. CODE ANN. § 1103.518.
3. Applicant received proper and timely notice of the hearing pursuant to TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052, TEX. OCC. CODE ANN. § 1103.502, and 22 TEX. ADMIN. CODE § 157.9(b).
4. The factual allegations listed in the Notice of Hearing are deemed admitted pursuant to 1 TEX. ADMIN. CODE § 155.501.
5. Based on the Findings of Fact above, Respondent violated TEX. OCC. CODE ANN. § 1103.405, 22 TEX. ADMIN. CODE §§ 153.20(a)(3) and 155.1, and Uniform Standard of Professional Appraisal Practice (USPAP) Standard 1-4(a) in preparation of an appraisal.
6. Based on the Findings of Fact above, Respondent violated 22 TEX. ADMIN. CODE §§ 153.20(a) and 153.22 by failing to provide information requested by the Board regarding consumer complaints.
7. Based on the Findings of Fact above, Respondent violated 22 TEX. ADMIN. CODE § 153.20(a)(15) by failing to make payment to the Board within 30 days of the notice of an insufficient funds check.
8. Based on the Findings of Fact above, Staff failed to make factual allegations that showed that Respondent violated the USPAP Ethics Rule-Conduct or USPAP Standards 1-1(a), 1-1(b), 1-1(c), 2-1(a), and 2-1(b)(viii).

9. The Board is authorized to suspend or revoke an appraiser's certification for violations of the Texas Appraiser Licensing and Certification Act or the Board's rules pursuant to TEX. OCC. CODE. ANN. § 1103.518(2)(B) and 22 TEX. ADMIN. CODE § 153.20(a)(2).
10. Based on the above Findings of Fact and Conclusions of Law, the Board should revoke Respondent's residential real estate appraiser certification.
11. Based on the above Findings of Fact and Conclusions of Law, the Board should not assess an administrative penalty against Respondent.
12. Based on the above Findings of Fact and Conclusions of Law, the Board should not set conditions on Respondent's re-application for licensure above those provided in TEX. OCC. CODE. ANN. § 1103.522.

SIGNED October 20, 2009.



CASSANDRA J. CHURCH

ADMINISTRATIVE LAW JUDGE

STATE OFFICE OF ADMINISTRATIVE HEARINGS