



# nerej

## **Appraisal associations may be shooting themselves in the foot - by Roger Durkin**

April 14, 2017 - Appraisal & Consulting

Roger Durkin, Durkin Law, P.C

I am sure some appraisal associocrats at ASA, AI, MBREA, honestly believe their proposal is truly virtuous. The activists may not know or care that their actions do not protect consumers but will have devastating consequences to the appraisal profession and the current regulatory system. I am referring to the political lobbying effort to make licensing mandatory for all real estate appraisals in Mass. What is wrong with that proposal?

Let's look at the consequences. If the state licensing board were to take on the supervision, education, regulation, and sanctioning of all real estate appraisals performed for any purpose, then the Board of Real Estate Appraisers would need to be competent in a very diverse set of statutes, regulations, and court cases, which govern equitable division of a marital estate, IRS decedent estate issues, IRS non-cash charitable donation issues, gift tax, the IRS rules of contribution, the proximity rule, the bankruptcy code with its 34 definitions of market value, probate and family court petition to partition, divorce, will disputes, *Bernier v. Bernier*, rules of evidence, land court, easements covenants, Yellow Book, deed preclusions, mass-appraisal methodology, environmental tort value diminution disputes, government seizure issues, Chapter 61A, 61B, the Rivers Act, Archeological Survey Act, Wetlands Act, tax assessment regulations, and eminent domain disputes. None of these issues involve statutory FIRREA, Dodd Frank, Fannie Mae Guidelines, FHA requirements, OCC definition of market value, the Appraisal Subcommittee Regulations, or Massachusetts Chapter 112 or the ever increasing regulations under 264 CMR 1.00 - 12.00.

If, arguendo, the federal and state regulatory scheme governing appraisals for financial institution related real estate were applied to other fields of appraisal work such as litigation work, such application would create a Kafkaesque enforcement nightmare. The various state and federal courts now have the jurisdiction and judicial power to decide whether an appraisal or appraiser meets the credibility test. [see *Commonwealth v. Lanigan*, 413 Mass. 154 (1992) 418 Mass 15 (1994) and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993)]. The courts include Land Court, Superior Court, Appeals Court, Supreme Court, Probate and Family Court, Federal District Courts, IRS Appeals Hearings, Federal Tax Court, Federal Bankruptcy Court, etc. Does the board with its two residential appraisers and one commercial real estate appraiser have the competence to govern this diversity of appraisal assignments?

Do you know what the Professional Licensure Board does with a complaint from a disgruntled borrower? Borrowers are the major source of complaints. You should know that borrowers are the largest source of complaints. Now imagine a complaint from a disgruntled litigant in a divorce, bankruptcy estate, shareholder dispute, will contest, trust dispute. Did you know that the emotional psychodynamic context of divorce work carries the highest risk of lawyer malpractices complaints?

In the world of litigation, a finding by the license board that an appraiser violated USPAP can mean relevant and admissible evidence of gross negligence in civil suit. Your effort will open up all appraisers to lawsuits. Courts are places where disputes are resolved. Disputes are seldom about justice. Disputes are always about money. Appraisers are generally immune when testifying in court as an expert. This proposed legislation will cause a rise in real estate appraiser lawsuits because they carry an E&O target on their back.

Most courts, including bankruptcy, probate, land court, etc., give only passive recognition to USPAP because USPAP has no legal standing in such courts and the rules are vague and ambiguous. The license board has no unique USPAP expertise. Nonetheless the board is the interpreter of USPAP. The board has seven members.

Four members have no training, experience or education in appraisal or USPAP. These are the appraiser's judges. In addition, if the board hires an appraiser as a consultant or as their expert witness against you, that appraiser is immune from USPAP [see 264 CMR 12.03].

Do you think that state licensed real estate appraisers are so sufficiently trained that they make no material errors? Do you believe that a licensed appraiser is superior to appraisers who chose not to work for banks, who instead perform complex appraisals for bankruptcy, IRS, and probate matters? Do the promoters of this legislation hold that non-licensed real estate appraisers are just incompetent duffers in comparison to licensed real estate appraisers? I don't think so!

The Appraisal Associations were once very important. They provided the credentialing in the form of that honored and important "appraisal designation". I hold five individual appraisal designations from the American Society of Appraisers (ASA) and three additional appraisal designations from other national appraisal associations. The designations do not mean what they did 20-years ago. Today designations mean little. Together, all appraisal associations have lost thousands of members. Thousands! The benefit for joining an appraisal association today is a cost saving discount on associations' state approved CE seminars.

Instead of spending time, money, and lobbying effort on mandatory licensing legislation the effort should be on fixing the damnable regulatory system governing currently licensed appraisers. (1) The Associations should start with lobbying for legislation to require clear and convincing evidence as the standard of proof before the Board can take away or sanction an appraiser's license. Today, the prosecutor needs only proof that is 51% more likely true. The defense has a heavy burden to overcome the miniscule board 51% burden of proof. (2) Another important issue is legislation to place a 5-year statute of limitations on charges against appraisers. Currently there is no time limit. Medical and Legal Malpractice has a 3-year statute of limitations. (3) Another important issue is the board's make up. There are two residential appraisers, one commercial appraiser, and four non-appraisers who are the judges of the appraiser's wrong doing. Board members of the Accountancy Board, Medical Board, Nursing Board, etc. are all licensed professionals. (4) Another important issue is due process. The investigator, prosecutor, and hearing officer (judge) are together in the same office space. There is no independent judiciary, no applicable rules of civil procedure, no discovery, no interrogatories, no motions without permission.. Your case will be heard by a lawyer hearing officer who last month was a prosecutor in the same office. The investigatory, prosecutor, and hearing officer have not training, experience, or education in USPAP.

I finish with an example of an appraiser who admitted to making some mistakes. None were such as to materially affect the appraisal. Just some dumb mistakes that under normal circumstances could have been remediated by fixing the mistakes. Instead, the appraiser spend thousands of dollars

trying to “fight” the overbroad charges, then agreed to a “Consent Agreement” that carried 12-month probation, \$1,000 fine, 28 hours of no-credit continuing education courses, a no-credit 15 hour classroom USPAP. He was asked to sign the consent agreement that contains the following wording. Would you sign these admissions?

“The appraisal was performed in a negligent manner, failed to adhere to generally accepted professional standards and violated various Board statutes and regulations. The licensee admits that his conduct violates USPAP and admits that his conduct violates the USPAP Ethics Rule for failing to promote the public trust. Violates the Scope of Work for failing to identify the problem to be solved. Violated the Rule on Conduct for communicating a report that is known to be misleading or fraudulent, As well as GL ch. 112 §§ 189(6); 189(7), 189(8); 189 (9); 61(1) and 61(5).”

FIRREA Title XI requires all states to license real estate appraisers who provide appraisals to federally regulated lenders. Alaska, Arkansas, Oklahoma, New Hampshire, California, Wyoming, North Dakota, Ohio, Georgia, Kentucky, Maryland, Vermont, and Massachusetts require a real estate appraisal license only where the appraisal is for a federally regulated lender. The Appraisal Subcommittee has no jurisdiction or interest in non-FIRREA related real estate appraisals and nor should the Mass. Real Estate Appraisal license board.

Roger Durkin, JD, MS, FASFA is an attorney and appraiser with Durkin Law PC, Boston, Mass.

New England Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540