

STATE OF NEW YORK
DEPARTMENT OF STATE

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In the Matter of the Complaint of

**DEPARTMENT OF STATE
DIVISION OF LICENSING SERVICES,**

Complainant,

DECISION

-against-

CHARLES McCABE,

Respondent.

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This matter came on for hearing before the undersigned, Roger Schneier, on April 12, 1995 at the State Office Building, 333 East Washington Street, Syracuse, New York.

The respondent, of 113 Leach Hill Road, Pine City, New York 14871, having been advised of his right to be represented by an attorney, appeared pro se.

The complainant was represented by Supervising License Investigator Michael Coyne.

COMPLAINT

The complaint alleges that the respondent, a certified general real estate appraiser, rendered appraisal services in a careless and negligent manner, in that he overlooked two bedrooms, a bathroom, a functional living room and a fireplace, with the result that the market value estimate of the property was incorrectly calculated.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served on the respondent by certified mail (State's Ex. 1).

2) The respondent is, and at all times hereinafter mentioned was, a duly certified general real estate appraiser (State's Ex. 2).

3) On October 6, 1993, acting on behalf of Elmira Savings Bank, the respondent completed an appraisal of real property

located at 1012 Watkins Road, Horseheads, New York. In his report he indicated, among other things, that the house contained four bedrooms, one and one-half baths, and one living room, and that there was no fireplace (State's Ex. 4).

4) On November 3, 1993 the owners of the appraised property wrote a letter in which they complained that the respondent's report was inaccurate in several respects (State's Ex. 5).

OPINION AND CONCLUSIONS OF LAW

As the party which initiated the proceedings, the burden is on the complainant to prove, by substantial evidence, the truth of the allegations in the complaint. State Administrative Procedure Act (SAPA), §306[1]. Substantial evidence is that which a reasonable mind could accept as supporting a conclusion or ultimate fact. Gray v Adduci, 73 N.Y.2d 741, 536 N.Y.S.2d 40 (1988). "The question...is whether a conclusion or ultimate fact may be extracted reasonably--probatively and logically." City of Utica Board of Water Supply v New York State Health Department, 96 A.D.2d 710, 465 N.Y.S.2d 365, 366 (1983)(citations omitted).

The complainant attempted to prove its allegations through the testimony of Senior License Investigator Dale Bolton, who had spoken to the respondent on the telephone.¹ In that conversation the respondent acknowledged that he had overlooked two bedrooms and a bathroom and had indicated that the family room was a storage space.

In his testimony the respondent stated that when told about the owners' complaint by Mr. Bolton he had accepted their allegations at face value. Later, however, upon returning to the property and viewing it from the street, he realized that one of the allegations, that he had overlooked a fireplace, appeared to be unsupported. That is so since at the place where one would expect to find a masonry chimney of the type which is normally integral to the construction of a fireplace he observed that there was only a metal stove pipe, an indication that the house contained only a wood burning stove. He also testified that he believed, although he could not be sure without being allowed to reinspect the interior of the house, that the alleged missing bedroom² might

¹ The only other evidence on the issue, the letter of complaint from the owners of the property, who were not called as witnesses, was hearsay, and was offered only to show the nature of their complaint and not for the truth of its contents.

² Although the complaint in the matter speaks of two missing bedrooms the letter from the owners of the house refers to only
(continued...)

actually be part of a room which had been partitioned off with a dividing screen but without a separate door. As for the alleged living room, in his affidavit submitted prior to the hearing (Resp. Ex. A) the respondent stated that it appeared to be an unheated room that had once been an attached garage, shut off from the rest of the house and used for storage.

While the respondent offered no explanation for the alleged missing bathroom, no competent evidence of the existence of that bathroom was presented. There was no evidence offered by the complainant with regards to the value of the property.

In view of the above, I find that the complainant failed to meet its burden of proving by substantial evidence that the appraisal was carelessly and negligently produced, and that the complaint should be dismissed.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT the complaint herein against Charles McCabe is dismissed.

These are my findings of fact together with my opinion and conclusions of law. I recommend the approval of this determination.

Roger Schneier
Administrative Law Judge

Concur and So Ordered on:

ALEXANDER F. TREADWELL
Secretary of State
By:

Michael E. Stafford, Esq.
Chief Counsel