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Rodger Fitzwater
Executive Director

February 10, 2005

Virginia M. Gibbs, Chairperson
Appraisal Subcommittee
2000 K Street, NW
Suite 310
Washington, DC 20006

Dear Ms. Gibbs:

The Missouri Real Estate Appraisers Commission (MREAC) received your letter dated November 22, 2004 regarding the results of the Appraisal Subcommittee (ASC) review of the Missouri appraiser program.

In your letter, you requested the Commission to respond to the finding of the reviews. The following is provided:

- **Missouri does not investigate and resolve complaints promptly.**

The ASC states in the letter, the complaint process has deteriorated since the last review in 2001, when that is not a true statement. The number of complaints has grown almost five (5) times but there is 14% reduction in complaints outstanding and complaints outstanding more than one (1) year. As of the end of the October 2004 meeting, the MREAC has forty-one (41) open cases that had been referred to the Attorney Generals office on twenty-seven (27) different appraisers to file charges before the Administrative Hearing Commission (AHC). We then have ten (10) scheduled hearings at the AHC involving twenty-three (23) of these open cases in the next six (6) months.

Cases referred to the Missouri Attorney General's Office are processed pursuant to the policies and procedures established by state law. Sections §§ 339.532.2 and 621.045, RSMO, govern the settlement and litigation of administrative matters pending against licensed and certified real estate appraisers. When appropriate, matters will be settled using the processes set forth in §§ 536.060 or 621.045.3, RSMo. otherwise, such matters will be litigated as a contested case under §§ 536.060 through 536.150, RSMo, Chapter 621, RSMo, and the rules of the Administrative Hearing Commission set forth in 1 CSR 15-3.200 through 1 CSR 15-3.580. A full copy of these statutes and rules are attached for your review.

The litigation process is a two-step process of hearings. The first step involves a hearing before the Administrative Hearing Commission on whether cause exists to discipline the license or certification of a real estate appraiser. This hearing is a full evidentiary hearing before which the parties are entitled to the same discovery rights before hearing as a civil matter pending in the state courts. The second stage involves a hearing before the MREAC regarding the level of discipline to be imposed based on the factual findings of the Administrative Hearing Commission.

The last paragraph of Section E of Statement 10 of the Appraisal Subcommittee, entitled Enforcement, states as follows:

Absent special documented circumstances, final State agency administrative decisions regarding complaints should occur within one year of the complaint filing date.

When the MREAC refers a matter to the Missouri Attorney General, the MREAC has determined to discipline a license or certification of a real estate appraiser. Assuming the Administrative Hearing Commission supports the MREAC's determination by finding cause for discipline, the only matter left undetermined is the level of discipline. Upon referral to the Missouri Attorney General's Office, the MREAC no longer has any material control over the time within which the matter is resolved until after the Administrative Hearing Commission issues its decision and certifies its record to the MREAC, other than to offer increasingly lower and lower settlement terms or to withdraw the referral. Pressing the MREAC to expedite the matters through increasingly lower settlement offers or withdrawal might not be in the best interest of public health, safety and welfare. Since the MREAC has such limited control over the progress of these matters once referred to the Missouri Attorney General for disciplinary action, we request

that the Appraisal Subcommittee treat the referral as a special documented circumstance under Statement 10, as we believe was the practice in prior field reviews. Whenever there are special circumstances that cause delays, we document the information in our licensure system (Promo) for each case. The MREAC should only be held accountable for the time between receipt of a complaint until the complaint is either dismissed or referred to the Missouri Attorney General for settlement or litigation. In addition, the MREAC should be accountable for the time it takes to hold a disciplinary hearing after receipt and certification of a decision from the Administrative Hearing Commission; but, to date, this time period has never been raised as a concern.

- **Missouri accepts examinations that do not conform to AQB Criteria.**

In response to your request that the State of Missouri conform its law to the AQB Interpretation that examinations should be valid for no more than 24 months, please note that the Division has contacted the Governor's office and now has permission to pursue the change in the 2005 legislative session. Furthermore, you requested each appraiser certified more than twenty-four (24) months after examination passage be required to retake their examination. The Commission will take whatever steps it can to see that the change is made in the current legislative session, and keep you updated as to the progress. The MREAC has notified the Certified Appraisers affected by this issue by letter and has set up two (2) examination dates if they wish to retake the certified examination free of charge.

Please note that after the 2001 field review, the MREAC did seek through our structure at the Division of Professional Registration to seek the statutory change in Chapter 339.515 (3) RSMo from three (3) years to two (2) years in the 2003 legislative session. We were not allowed to pursue the change at our department level.

In compliance with your request, we have reviewed our records and determined there are fifty-seven (57) people who were certified by the Commission with their examinations over twenty-four (24) months old. We request that the fifty-seven (57) Certified Appraisers should be grandfathered and not be required to re-examine. Why do you want to penalize these people who were simply following the law and the instruction of the state? This is a dispute between the MREAC and the ASC, and not the fifty-seven (57) appraisers impacted by the interpretation.

Regardless of whether you determine to reverse your position on this matter, we request that certified appraisers in the follow four groups be excused from reexamination.

- We have five (5) people who took their certified examination in January, March or May 1998, before the interpretation went into effect on July 1, 2000. Considering the dates these people passed their certified examinations, they were compliant with our State law of thirty-six (36) months but would find it impossible to meet the twenty-four (24) month exam requirement as that time period has already expired by the July 1, 2000 date. These people were certified prior to the 2001 field review of the MREAC but were not identified as a problem at that time.
- There were an additional twenty-four (24) out of the fifty-seven (57) people who took their certified examinations from July 1998 through May 2000, before the interpretation went into effect in July 1, 2000.
- We have one person who got all his information into the Commission in December 2001 to be considered for his certification. Due to circumstances beyond the applicant's control (Commission had a backlog of applicants), he was placed on the next available agenda in late January to be reviewed by the License Committee. The License Committee made the recommendation for approval, the Commission met the next day and letters were sent after the meeting. He returned his *fee* and Commission issued his certification on February 14, 2002. This caused him to miss certification within twenty-four (24) months by 20 days.
- We have one (1) person who was approved after an April Commission meeting and was sent a letter of approval. He chose to send his fee and activate his certificate after July 1st (beginning of a new license cycle). This caused him to be certified more than twenty-four (24) months after his exam, the anniversary of which was in May.

We believe the above situations should be exempted from having to be re-examined.

The MREAC cannot comply with the following ASC requests that the MREAC:

- Take the necessary steps to downgrade to the licensed level any certified appraiser who fails to successfully complete the appropriate examination within the 90-day period,

- Refrain from issuing appraiser certifications that fail to conform to AQB criteria and Title XI.

Based on all information that has been provided to the MREAC, the certifications have been and are being issued in compliance with state and federal law.

The MREAC has not been able to downgrade certifications to licenses within the time frame requested by the ASC, because, under Missouri law, Missouri licensing boards and commissions are not able to discipline a professional certificate without first providing the certificate holder with an opportunity for a hearing before the Missouri Administrative Hearing Commission, or by settlement pursuant to §§ 536.060 or 621.045, RSMo. Bodenhause v. Missouri Bd. of Registration for Healing Arts, 900 S.W.2d 621 (Mo. 1995). At a hearing before the Administrative Hearing Commission, the MREAC must establish grounds for discipline under § 339.532.2, RSMo.

Although subsection 339.532.2(2), RSMo, would authorize revocation when an individual has "[f]ailed to meet the minimum qualifications for certification . . . or renewal," the MREAC is concerned that the Administrative Hearing Commission would find that this section does not apply in these circumstances because the certified appraisers complied with § 339.515.1 and .3, RSMo.¹ Pursuant to § 339.515.1 and .3, RSMo, an individual, who meets the qualification requirements and achieves a passing grade on the written examination, is authorized to be certified as a real estate appraiser at any time within three years of passage of the examination. To prevail in an action to revoke a certification based on the AQB Interpretation that examinations are only valid for 24 months, the MREAC would need to convince the AHC and the state courts that "federal law" was in conflict with and preempts Missouri law in this instance. In evaluating whether to pursue these actions, the MREAC must also evaluate possible exposure to

¹Section 339.515.1 and .3, RSMo, states as follows: "1. An original certification as a state-certified real estate appraiser may be issued to any person who meets the qualification requirements for certification and who has achieved a passing grade on a written examination which is consistent with and equivalent to the uniform state certification examination issued or endorsed by the appraiser qualifications board of the appraisal foundation and the commission.

.....

3. If an applicant is not certified or licensed within three years after passing an examination given pursuant to the provisions of this section, he or she shall be required to retake the examination prior to certification or licensure."

claims for attorneys fees under § 536.087, RSMo, if the MREAC loses. Proceedings to decertify or to downgrade the certification of a real estate appraiser could prove to be both expensive and futile.

Furthermore, the MREAC, based on the information available, does not agree with the Appraisal Subcommittee's position that § 339.515.3, RSMo, is inconsistent with federal law, because such is entirely consistent with the express and implied content of the Examination Criteria for Certified and General Real Estate Appraisers established by the Appraisers Qualification Board, effective January 1, 2003.

Admittedly, section 339.515.3, RSMo, is inconsistent with the AQB interpretation adopted in July 2000, which states that "[s]uccessful completion of the examination is valid for a period of 24 months." However, the MREAC does not agree with the Appraisal Subcommittee's position that this AQB Interpretation is binding as part of the AQB Criteria. The content of the AQB Interpretation, at issue, is neither expressed nor implied in the AQB Criteria language set forth above.

Section 1116(a) of Title XI [12 U.S.C. 3345], states that "the term 'State certified real estate appraiser' means any individual who has satisfied the requirements for State certification in a State or territory whose criteria for certification as a real estate appraiser currently meets the minimum criteria for certification issued by the Appraiser Qualifications Board of the Appraisal Foundation." (Underline added.) Missouri law similarly requires the MREAC to adopt certification qualification requirements for certification equivalent to the "minimum criteria for certification" issued by the AQB. (See § 339.509(3), RSMo.)

The Appraisal Subcommittee has never promulgated any rules defining the word "criteria." (See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, et al.*, 467 U.S. 837 (1984), which authorizes administrative agencies to "[formulate] policy and [make] rules to fill any gap left, implicitly or explicitly, by Congress"). Therefore, the Appraisal Subcommittee has never properly addressed the issue of whether an AQB Interpretation should be treated as equal to the AQB Criteria.

² Examination

- a. Successful completion of the Appraiser Qualifications Board endorsed Uniform State Certified Residential Real Property Appraiser Examination or its equivalent.
- b. Refer to the National Uniform Examination Content Outline for the Certified Residential Real Property Appraiser Classification.

The Appraisers Qualifications Board has adopted criteria which it calls AQB Criteria. These AQB Criteria are adopted after extensive exposure to the public for comment. For example, the AQB Criteria adopted recently and which becomes effective on January 1, 2008, had six exposure drafts. AQB Interpretations, on the other hand, are not submitted to the public for comment. Given the difference in process and the legal significance of a policy being adopted as an AQB Criteria, it is reasonable to conclude that the differences between criteria and interpretations are significant. This is further supported by the fact that the AQB Interpretation has now been adopted as an AQB Criteria with the effective date specified as January 1, 2008. Based on the differences between AQB Criteria and AQB Interpretations, the AQB Interpretation at issue can be nothing more than a recommendation until it becomes effective as an AQB Criteria.

The same analysis would apply to denying certifications based on the AQB Interpretation. Although legislation is pending before the Missouri Legislature to conform Missouri law to the AQB Interpretation, such has not yet been passed or become effective. Therefore, at this time, Missouri law still authorizes the issuance of certificates to those who satisfy the requirements within three years of passing the examination. Also, if a certificate holder successfully appeals a certification denial, the MREAC might be vulnerable to a claim for attorneys' fee.

Nevertheless, the MREAC is informed that the Appraisal Subcommittee intends to remove individual certified appraisers from the National Registry that receive their certifications more than two years after successfully completing the certification examination. Therefore, the MREAC has informed and will continue to inform individual appraisers certified beyond the two years that, even though the MREAC may not take action to downgrade certifications, such action may still be taken by the ASC, unless the individual appraiser retakes and passes the certification examination.

- **Missouri's policy to accept affidavits in support of credential renewal is incorrect with ASC Policy Statement 10.**

The MREAC has sent out letters to randomly audit 15% of the licensed and certified appraisers from our June 30, 2004 renewal. The appraisers will be required to submit copies of their continuing education certificates that were claimed on their renewal, any licensees that are found deficient will be referred to the Commission for possible disciplinary action. Also, the Commission has adopted a policy that all licensees, when submitting their renewals in the future,

must attach a copy of all their continuing education certificates they are claiming in the renewal period.

- **The provisions in Missouri statute for granting a continuing education waiver and extension are not consistent with the AQB Criteria.**

The MREAC has agreed to not grant anymore continuing education waivers or extensions according to our law 339.519 & 339.525(2) RSMo. However, we do feel strongly that the ASC is overstepping their authority requiring those individuals who are in active duty military service not being granted a waiver. The Commission is bound by Missouri Law Section 41.946 RSMo, (see attached sheets) stating we can not require these individuals to complete or make up any continuing education regarding their license or per Section 41.950 RSMo, charge them a penalty fee for late renewal. We are so deeply committed to this matter that the Commission sent a letter to the Appraisers Qualification Board in November 2004 requesting a waiver on this matter. The AQB responded to our request on January 24, 2005 (see attached sheets) stating they were researching this issue and they would study it more broadly and then determine whether a more generic policy, useful to all jurisdictions, might be more appropriate. This letter was very encouraging news to the Commission to see the AQB was going to have some discussion and add thought to the issue before they make a decision.

The Commission has identified two appraisers that were granted waivers for continuing education. One gentleman has already complied by taking the USPAP Update course he was short prior to him having an issue with his health. The other person will be notified to make sure he will come into compliance with AQB Criteria for continuing education.

- **Missouri's approval process for education courses needs to ensure that a course conforms to AQB Criteria.**

The MREAC reviewed the three continuing education courses that were identified during the field review. There was only one of those courses that did not conform to AQB Criteria and the Commission revoked it's approval status at the February 3 & 4, 2005 meeting. The Online Standards of Professional Practice Part B, when it was submitted to the Education Committee of the MREAC in 2002, had the required AQB approval letter through June 30, 2004. This was when the course expired with MREAC. It was not submitted for renewal and is not currently an approved course with the Commission. The last course that was identified is currently approved by the AQB course approval program and is on

the Appraisal Foundation website through September 25, 2007. Therefore, this course is still approved for continuing education expiring June 30, 2006 with the Commission. The MREAC will carefully evaluate all courses to see they meet AQB Criteria before being approved.

- Missouri's statutes and regulations do conform to 2003 AQB Criteria changes.

The MREAC is currently working on new regulations to implement the new AQB Criteria to be in place by January 1, 2008. These will include the USPAP course requirements and the AQB requirements for distance education. The MREAC plans to submit these to the ASC for review as soon as they are adopted by the Commission.

The Missouri Real Estate Appraisers Commission appreciates the time and assistance offered by the Appraisal Subcommittee. Continued cooperation between our agencies will ensure maximum protection for the public and for our real estate appraisers.

If you should have any questions, please do not hesitate to contact this office at 573-751-0038. We look forward to receiving your reply.

Sincerely,



Rodger L. Fitzwater
Executive Director
Missouri Real Estate Appraisers Commission

CC: Sharon Lowman, Chairperson
Craig Jacobs, Assistant Attorney General
Alison Craighead, Division Director, Professional Registration
The Honorable Christopher S. "Kit" Bond
The Honorable Jim Talent
The Honorable William Lacy Clay
The Honorable W. Todd Akin
The Honorable Russ Carnahan
The Honorable Ike Skelton
The Honorable Emanuel Cleaver
The Honorable Samuel B. "Sam" Graves, Jr.
The Honorable Roy Blunt
The Honorable JoAnn Emerson
The Honorable Kenny Hulshof