

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

FILED

MAY 09 2011

DEPARTMENT OF REAL ESTATE

By 

In the Matter of the Accusation of)
)
MICHAEL JOSEPH DEVLIN,) NO. H-5499 SAC
)
) OAH NO. 2010110519
Respondent.)
_____)

DECISION

The Proposed Decision dated March 30, 2011, of the Administrative Law Judge of the Office of Administrative Hearings is hereby adopted as the Decision of the Real Estate Commissioner in the above-entitled matter.

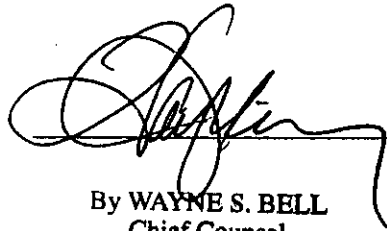
The Decision suspends or revokes one or more real estate licenses on grounds of the conviction of a crime.

The right to reinstatement of a revoked real estate license or to the reduction of a suspension is controlled by Section 11522 of the Government Code. A copy of Section 11522 and a copy of the Commissioner's Criteria of Rehabilitation are attached hereto for the information of respondent.

This Decision shall become effective at 12 o'clock noon on MAY 30 2011.

IT IS SO ORDERED 5/6/2011.

Real Estate Commissioner



By WAYNE S. BELL
Chief Counsel

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

Case No. H-5499 SAC

MICHAEL JOSEPH DEVLIN

OAH No. 2010110519

Respondent.

PROPOSED DECISION

On January 20, 2011 and March 1, 2011, Administrative Law Judge Hannah H. Rose, Office of Administrative Hearings, State of California, heard this matter in Oakland, California.

Jason D. Lazark, Counsel, represented Tricia D. Sommers (complainant), a Deputy Real Estate Commissioner with the Department of Real Estate (Department).

Michael Joseph Devlin (respondent) was represented by Frank M. Buda, Attorney at Law.

Evidence was received, the record was closed, and the matter was submitted for decision on March 1, 2010.

SUMMARY

The Department filed this Accusation after respondent was convicted of several crimes between 2008 and 2010. In April 2008, respondent was convicted of violating Vehicle Code section 23152, subdivision (b), driving under the influence of alcohol (DUI), and Health and Safety Code section 11550, subdivision (a), being under the influence of a controlled substance. Then, in August 2008, respondent was convicted of violating Penal Code section 653m, subdivision (a), making annoying telephone calls. Respondent was next convicted on January 5, 2010, of violating Vehicle Code section 14601.2, subdivision (a), driving on a license that is suspended or revoked due to a previous DUI conviction, and Vehicle Code section 23222, subdivision (b), possession of an ounce or less of marijuana while driving. Finally, on January 8, 2010, respondent was again convicted of violating Vehicle Code section 23152, subdivision (b), DUI, with special allegations of convictions for two prior DUI convictions, and Vehicle Code section 14601.2, subdivision (a), driving on a

license that is suspended or revoked due to a previous DUI conviction. Because these crimes are all substantially related to respondent's license, and respondent has failed to demonstrate sufficient evidence of mitigation or rehabilitation as defined by law and regulation, respondent's real estate broker license is revoked.

FACTUAL FINDINGS

1. On October 19, 2010, complainant made and filed the Accusation in her official capacity. On October 29, 2010, respondent filed a timely Notice of Defense and a request for hearing with the Department.
2. Respondent was licensed by the Department as a real estate broker on May 16, 1986. His license is current and will expire on May 3, 2011.
3. At the hearing complainant amended the Accusation at page 3, paragraph 7, line 9. Line 9 is amended to read: "The facts alleged above in Paragraphs 2 through 5...." Respondent did not object to the amendment.
4. At the March 1, 2011 hearing, respondent renewed a motion for a continuance that he had made on February 28, 2011, by fax transmittal to the Office of Administrative Hearings. The motion was denied. The motion was based on the unavailability of a character witness who had notified respondent by e-mail on the evening of February 27, 2011, that he would be unavailable to testify at the March 1, 2011 hearing. There was no evidence that this witness had been subpoenaed to attend the hearing. For the reasons set forth in the February 28, 2011 Order Denying Continuance (Exhibit O), the renewed motion was denied.

Respondent's Convictions

5. On April 15, 2008, in the Superior Court of the State of California, County of Santa Clara, in Case number CC790142, respondent was convicted, upon a plea of nolo contendere (no contest), of violating Vehicle Code section 23152, subdivision (b), DUI with a blood alcohol of .08 percent or greater, with a prior conviction for DUI, a misdemeanor. Respondent also pled guilty to a violation of Health and Safety Code section 11550, subdivision (a), under the influence of a controlled substance, a misdemeanor. For the DUI conviction, respondent was placed on formal probation for three years, sentenced to 45 days in county jail, ordered to attend a multiple offender DUI program, and ordered to pay fines and fees totaling approximately \$2,000. For the under the influence conviction, the court deferred entry of judgment (DEJ) pursuant to Proposition 36. Respondent was sentenced to and served 45 days in county jail, and he was also remanded to West Coast Recovery Program for 90 days, placed on formal probation for two years, and ordered to pay approximately \$400 in fines and fees. Respondent violated his DEJ probation in January 2010 (Factual Findings 9 and 12). Respondent's probation for the DUI will continue until April 15, 2011.

6. The circumstances underlying the April 15, 2008 convictions occurred on November 27, 2007. Around 10:24 p.m., a Los Gatos/Monte Sereno Police Officer observed respondent driving a car with two blown out tires on the driver's side of the car, and major damage to the front end of the car. When respondent was stopped, he smelled strongly of alcohol, and his speech was slurred, rapid and non-stop. Parts of respondent's car were found at the scene of a collision, and at another location, where respondent's car had hit a street sign located in the raised cement center divider of the road. There were plastic baggies containing white powder residue, short straws, and "chop cards" throughout respondent's car. Respondent's blood alcohol was .33 percent, and he admitted that he was also under the influence of cocaine that night.¹ He also testified that he did not know if the cocaine and the related paraphernalia found in the car were his or not, because a lot of people had been using his car during that time. Although respondent does not recall much of what happened at the time of his arrest, his testimony regarding the cocaine paraphernalia is inconsistent with his ownership of the car and admitted use of cocaine that night, and it is not credible.

7. On August 14, 2008, in the Superior Court of the State of California, County of Santa Clara, in Case number FF723288, respondent was convicted, upon a plea of nolo contendere (no contest), of violating Penal Code section 653m, subdivision (a)², making annoying telephone calls, a misdemeanor. Imposition of sentence was suspended and respondent was placed on court probation for one year, until August 14, 2009.

8. The incident underlying this conviction occurred on November 16, 2007. On that date, respondent's girlfriend (A.N.), with whom he had been living since 1985, reported to the Morgan Hill Police Department that she had been arguing with respondent, who had not stayed at their home the previous week, and that she had received a phone call from respondent who stated "When I get paid, I'm going to buy bullets, and I'm coming over there and kill you." While the police officer was taking the report, respondent telephoned A.N., who gave the phone to the officer. The officer heard respondent state "You're a thief," and also "You should worry when I get paid....When I get paid, I'm coming to Morgan Hill and you won't want to see me." Respondent also stated he was going to sue A.N. In a subsequent phone conversation with the same officer, respondent at first denied making the

¹ These observations are contained in an official police report of the San Jose Police Department. A police officer's personal observations contained in the official police report may be considered as direct evidence; unsworn statements of third parties are admissible as administrative hearsay under Government Code section 11513. (*Lake v. Reed* (1997) 16 Cal.4th 448; *Hildebrand v. DMV* (2007) 152 Cal.App.4th 1562.)

² Penal Code section 653m, subdivision (a), states, in relevant part:

Every person who, with intent to annoy, telephones or makes contact by means of an electronic communication device with another and addresses to or about the other person any obscene language or addresses to the other person any threat to inflict injury to the person or property of the person addressed or any member of his or her family, is guilty of a misdemeanor. [Emphasis added.]

threatening statements that the officer heard, and then explained that he might have said those things, but he meant only that he was going to sue her. Respondent was upset and angry at the time because A.N. had closed their joint bank accounts and respondent had no money and could not buy gas. At the hearing, respondent denied making the threat that he was going to buy bullets and kill A.N. However, he also testified that he had been drinking and did not recall the details of the telephone calls. Respondent and A.N. have since reconciled and currently live together. The statements made to the Morgan Hill Police Officer were in themselves threatening.

9. On January 5, 2010, in the Superior Court of the State of California, County of Santa Clara, in Case number FF932079, respondent was convicted, upon a plea of guilty, of violating Vehicle Code section 14601.2, subdivision (a), driving on a license that is suspended or revoked due to a previous DUI conviction, and Vehicle Code section 23222, subdivision (b), possession of an ounce or less of marijuana while driving, misdemeanors.³ Respondent was sentenced to 15 days in county jail and two years court probation. He was also ordered to install an interlock device on his car and to pay fines and fees of approximately \$500. Respondent will be on probation for this offense until January 5, 2012.

10. The circumstances underlying these convictions occurred on October 28, 2009. Respondent was observed by a Morgan Hill police officer making an illegal U-turn. When stopped, respondent told the officer that he had left his license at the gym. He later admitted that it had been suspended for a DUI. While processing the car for registration (prior to impound), the officer found a pipe and less than an ounce of marijuana in the center console of the car. Respondent told the officer that a friend had given it to him. At hearing, respondent denied that the marijuana was his. He testified that a friend, who grew marijuana and sometimes used his car, had left it in the car unbeknownst to him. A few days before that, when respondent picked up the car from his friend, they smoked marijuana together. Respondent had possession of the car from then until his arrest on October 28. He was on probation at this time. (See Factual Finding 5.)

11. Respondent's denial of criminal intent or conduct with regard to either his threatening phone calls to A.N. or his possession of marijuana was not credible. Respondent cannot impeach his convictions. (*Arneson v. Fox* (1980) 28 Cal.3d 440, 449 ["regardless of the various motives which may have impelled the plea, the conviction which was based thereon stands as conclusive evidence of appellant's guilt of the offense charged."].) By pleading guilty or no contest, respondent stands convicted of every element of each of the crimes. Respondent argued at hearing that he pled no contest to "annoying" phone calls, and not to "threatening" phone calls. An element of this crime, and the circumstances set forth in Factual Finding 8, establish the threatening nature of the calls. Respondent's failure to acknowledge that his statements were threatening, and to continue to minimize his culpability, evidences his lack of rehabilitation and responsibility with regard to this offense.

³ Since respondent's conviction, Vehicle Code section 23222, subdivision (b), has been amended and the crime is now designated as an infraction.

12. On January 8, 2010, in the Superior Court of the State of California, County of Santa Clara, in Case number CC935742, respondent was convicted, upon a plea of nolo contendere (no contest), of violating Vehicle Code section 23152, subdivision (b), driving under the influence of alcohol (DUI), with a blood alcohol of .08 percent or greater, with special allegations of convictions for two prior DUI convictions, and Vehicle Code section 14601.2, subdivision (a), driving on a license that is suspended or revoked due to a previous DUI conviction, misdemeanors. Respondent was placed on probation for three years, sentenced to 220 days county jail (the first 40 days of which respondent served in county jail, and the last 180 days of which respondent served in a residential treatment program). The court also revoked respondent's driver's license for three years, ordered respondent to install an interlock device on any car that he owned, and ordered him to pay fines and fees of approximately \$2600. Respondent is currently making payments of \$75 per month. At a court appearance subsequent to sentencing, respondent was ordered to attend a multiple-offender DUI program for 18 months. He will be on probation for these offenses until January 8, 2013.

13. The incident underlying these convictions occurred on February 12, 2009. A San Jose police officer was responding to an unrelated event at a Carl's Jr. parking lot, when he observed respondent drive a car into the parking lot at a high rate of speed, run the car into the curb, rebound backwards, and roll into the driving lane of the lot. Respondent got out of his car, having left it "in the middle of the parking lot," and went into the Carl's Jr. The police officer pulled up to the driver's side door of respondent's car and observed respondent come out of Carl's Jr. and walk toward the car, with keys in his hand. When respondent saw the officer, he turned and walked away. The officer followed respondent, who was found hiding behind a tree; he had a "heavy" odor of alcohol, slurred speech and was unsteady. Respondent at first denied drinking any alcohol. He also denied having driven a car. Respondent had a .19 percent blood alcohol at the scene. Once in custody, he refused to submit to any chemical test. Respondent testified that he had been drinking on the day of the incident, that he was "very intoxicated," and that he did not remember the details of his arrival at the parking lot or his arrest. He does not dispute the police officer's report. Respondent was on probation at this time. (See Factual Findings 5 and 7.)

Matters in Aggravation

14. On April 29, 2003, in the Superior Court of the State of California, County of Santa Clara, in Case number CC935742, respondent was convicted, upon a plea of nolo contendere (no contest), of violating Vehicle Code section 23152, subdivision (b), DUI with a blood alcohol of .08 percent or greater, a misdemeanor. There was a special allegation that respondent's blood alcohol was .20 percent or more. Respondent was sentenced to three years court probation, 10 days in county jail, ordered to pay approximately \$1300 in fines and fees, and ordered to attend a First Offender Alcohol Program. Respondent testified that he was intoxicated and did not remember what happened that night. He had blacked out, which was not unusual when he had been drinking.

15. At the hearing, respondent also admitted that he had two additional convictions for DUI.⁴ The "first DUI" was in 1978 or 1979, in Minnesota. He testified that this conviction was not "technically" a DUI, but was for reckless driving. Respondent's other admitted DUI conviction occurred in 1982, in Santa Cruz County.

Respondent's Evidence/Mitigation and Rehabilitation

16. Respondent is 57 years old. He is a college graduate. Respondent is not married, although he has lived with A.N. in a domestic relationship for approximately 20 years. He has no children. Respondent has worked as a real estate broker at Century 21 Alpha in San Jose/Campbell since 1989. He is currently a vice president, and his work is principally in administration, teaching trainees to take licensing exams and training new sales associates. He actively manages other agents in the office. He knows of no complaints to his employer regarding his professional activities. There is no prior discipline of respondent's broker license. In order to maintain his license, respondent takes 45 hours of continuing education every four years. Although respondent does not act as a sales associate, he is required to have a license in order to work for the company in his present capacity.

17. Respondent admits that he is an alcoholic. He denies that his alcoholism has ever affected his work or professional activities. By this respondent meant that he was never intoxicated while on duty as a real estate licensee. Respondent has been drinking alcohol since he was 14 years old. He began smoking marijuana and using cocaine when he was in college. His drug use was daily at that time. His first driving violation involving alcohol occurred in 1978 or 1979. His first DUI was in Santa Cruz County in 1982. At that time he was ordered by the court to attend a few Alcoholics Anonymous (AA) meetings, and complete a First Offender DUI program. That was the first time respondent went to AA. However, he did not want to stop drinking, and he did not continue with AA. Respondent first attended AA "seriously" in 1988 when he realized that he had a problem with alcohol and he wanted to stop drinking. He voluntarily went into a 28-day residential rehabilitation program first, and then continued in AA. He was sober for four years until 1992, when he moved to Morgan Hill and failed to get a new sponsor in AA. He wanted to "test" his sobriety at that time. He also used marijuana and cocaine when he was not sober. Respondent attended AA occasionally between 1992 and 2009. He is not sure whether he stopped using cocaine in 2007 or 2008, but he is certain that he stopped using all drugs by April 15, 2008, when he appeared in court for sentencing. Respondent's alcohol sobriety date is March 21, 2009. However, respondent did use marijuana again one time in October 2009, a few days before he was arrested for driving while in possession of marijuana, but he does not consider this a break in his sobriety, and continues to regard his sobriety date as March 2009. Respondent minimizes this use of marijuana. He testified that in October 2009 he only had "one hit" and he doesn't remember if it was more than that. He also testified that his friend, who grew marijuana and who had been using respondent's car and driving respondent around in exchange for the use of the car, insisted that respondent smoke the marijuana before he would relinquish the car to respondent. Respondent's minimizing of the

⁴ The Department did not allege these convictions as matters in aggravation.

amount he smoked and blaming his friend for contributing to his use of marijuana evidences a failure to take full responsibility for his own actions and lack of rehabilitation. Respondent no longer associates with this former friend.

18. In February 2009, when respondent was arrested for his second DUI in 15 months, he had reached a state of "incomprehensible demoralization" and was suicidal. He finally stopped drinking alcohol on March 20, 2009. From 2007 to early in 2009, respondent had been living away from home, with his friend who grew marijuana, for days, weeks, or sometimes months at a time, and his domestic life was not stable. Since March 21, 2009, respondent regularly attends AA meetings at least five times a week. He has had two sponsors since April 2009. His first sponsor was Randy Sargenti, who stopped sponsoring respondent when he and respondent each moved in October 2010. Since then, Dennis O'Malley has been respondent's sponsor.

19. Dennis O'Malley testified that he has been respondent's AA sponsor for five months, and that he has himself been active in AA and sober for 30 years. He currently sponsors eight men, and works with new AA members to orient them and work the 12 Steps. Mr. O'Malley only knows respondent through AA, where they see each other five to seven times a week. Respondent is an active member who does service at meetings and is well liked. For service in AA, respondent sometimes acts as the chair of meetings, as a speaker, and he is the secretary for one of the largest meetings in the area. As secretary, respondent sets up the physical space for the meeting, sets up refreshments, and obtains speakers. Respondent and Mr. O'Malley have discussed respondent's convictions going back to the 1980's "generally," but Mr. O'Malley does not know the specifics. He believes that respondent has been open, candid, and sincerely wants to change his life. In Mr. O'Malley's opinion, respondent has a "very good opportunity to remain clean and sober if he continues to work the steps." Respondent has not had a relapse since Mr. O'Malley has been his sponsor.

20. After respondent's January 8, 2010 convictions, he was admitted to a 30-day rehabilitation program at Parkside Hospital and then to a six-month residential rehabilitation program at West Coast Recovery. Respondent chose to go to West Coast Recovery instead of serving four months in jail as a condition of his DEJ probation. While at Parkside and West Coast Recovery respondent was drug and alcohol tested and he had to attend AA meetings. He was at West Coast Recovery from April 13, 2010 to October 10, 2010, and the director of that program reported to the superior court that respondent was successful in the program. Respondent is not currently mandated to attend AA or to be drug or alcohol tested, but he continues to attend AA in order to stay sober and to change his life. In November 2010, respondent began a court-ordered 18-month Multiple Offender DUI Program in which he has attended six two-hour educational meetings and six two-hour group meetings. He has also had 1.75 hours of individual counseling. For the next 13 months he will meet on alternate weeks for either a two-hour group meeting or a fifteen-minute individual counseling session. Respondent did not explain any specific benefit he has gained from this program.

21. In addition to respondent's service at his "home" AA meetings, he is a frequent speaker at other meetings in the community where he shares his experience, strength

and hope with other alcoholics. He estimates that he has spoken more than 50 times at different locations and 25 of these times were at meetings other than his "home" meeting. Respondent has spoken three times to troubled youth at AA meetings at James Ranch in Morgan Hill, and one time at a meeting at Envision Homeless Shelter.

22. Respondent believes that his substance abuse problems and alcoholism did not affect his business or licensing-related activities. His one-year probation for making annoying telephone calls (Factual Finding 7) is ended. Respondent is still on formal probation for his April 2008 DUI conviction (until April 8, 2011), and as of December 9, 2010, court records indicated that he was in full compliance with that probation. Respondent's probation for his driving on a suspended license and possession of marijuana convictions (Factual Finding 9) will not end until January 5, 2012. He testified that he has paid the fine in full and that he is in compliance with probation. Respondent will remain on probation for his January 8, 2010 convictions for DUI and driving on a suspended license until January 8, 2013. (Factual Finding 12.) He is still paying his fines and fees and still has 13 months more to complete the Multiple Offender DUI Program.

23. Respondent's attitude has changed since his arrest in February 2009 and sobriety in March 2009. He realizes that he has a serious problem with alcohol and drugs, that he was harming himself and others, and that his behavior was dangerous to himself and others. Respondent is grateful that he was never in an accident with another person. He knows that if he had not changed his behavior, others would eventually have been hurt. As a result of this new understanding, he has changed the way he lives, the places he goes and the people with whom he socializes. He no longer associates with the people with whom he used to drink and use drugs, and he understands that working the AA steps and performing AA service is important to support his sobriety. Respondent provided documentation of his regular attendance at AA since March 2009.

24. Respondent provided nine letters of support, which were considered to the extent permitted under Government Code section 11513, subdivision (d).⁵ Sue Czeropski, the Director of Training and Employee Development at Process Distribution Group, and also the treasurer at respondent's "home" AA meeting, describes respondent as a good and trustworthy person in whom she has observed a change in attitude and behavior in the two years she has known him. She is aware of respondent's convictions. Ronald Key, President of Keycon, Inc., has known respondent as a fellow AA member, and he has praises respondent's service to the AA community and sees the change in respondent through his understanding of the disease of alcoholism and how it affected his life. Five other members of the AA fellowship, all of whom have known respondent for the almost two years he has been in AA, wrote to corroborate respondent's service to the AA community and to describe his transformation from an angry and bitter man, to the kind, generous, strong and sober

⁵ Government Code section 11513, subdivision (d), states in pertinent part, "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. ..."

person he is now. They were all familiar with his criminal convictions. Randy Sargenti, respondent's former AA sponsor, wrote to apologize for his inability to testify on respondent's behalf because he was recently hired in a new job that began on February 28, 2011. He corroborates respondent's strong commitment to his recovery and remorse for his past misconduct, and expresses confidence in respondent's continued recovery. The last letter is from Sander Huang, who is the Sales Manager at Century 21 Alpha, where respondent works as a real estate broker. Mr. Huang is also familiar with respondent's criminal convictions. He writes that he has never seen respondent intoxicated or under the influence at work or anywhere, and that respondent has always conducted himself "in a professional, honest manner." Mr. Huang corroborates that respondent's job requires him to have a real estate broker's license.

LEGAL CONCLUSIONS

Burden of Proof

1. In an Accusation seeking to revoke, suspend, or otherwise discipline respondent's professional license, the department has the burden to establish the allegations in the Accusation by "clear and convincing evidence." (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.) As set forth below, complainant has met her burden to establish that respondent's real estate broker's license should be disciplined pursuant to section 10177, subdivision (b), and section 490, subdivision (a), of the Business and Professions Code.

Applicable Statutes and Regulations

2. Business and Professions Code section 490 provides, in relevant part, that a board may suspend or revoke a license on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued, and that this section establishes an independent basis for a board to impose discipline upon a licensee. A conviction includes a plea of guilty or nolo contendere.

3. Business and Professions Code section 10177, subdivision (b), states, in relevant part, that the commissioner may suspend or revoke the license of a real estate licensee who has entered a plea of guilty or nolo contendere to, or been found guilty of, or been convicted of, a felony, or a crime substantially related to the qualifications, functions, or duties of a real estate licensee, irrespective of an order granting probation following that conviction, suspending the imposition of sentence, or of a subsequent order under Section 1203.4 of the Penal Code allowing that licensee to withdraw his or her plea of guilty and to enter a plea of not guilty, or dismissing the accusation or information.

4. In California Code of Regulations, title 10, section 2910, the Department has set forth criteria for determining whether a conviction is substantially related to the qualifications, functions or duties of a licensee. Subdivisions (a)(8), (a)(9), (a)(10) and

(a)(11) of section 2910, provide that a conviction will be deemed to be substantially related if it evidences:

[¶]...[¶]

(8) Doing of any unlawful act with the intent of conferring a financial or economic benefit upon the perpetrator or with the intent or threat of doing substantial injury to the person or property of another.

(9) Contempt of court or willful failure to comply with a court order.

(10) Conduct which demonstrates a pattern of repeated and willful disregard of law.

(11) Two or more convictions involving the consumption or use of alcohol or drugs when at least one of the convictions involves driving and the use or consumption of alcohol or drugs.

[¶] ... [¶]

Substantial Relationship

5. Respondent's January 8, 2010 convictions, as set forth in Factual Findings 12 and 13, posed a threat of substantial injury to himself, to pedestrians and to other passengers and drivers on the road. Additionally, respondent was convicted of DUI with an enhancement for having two prior DUI convictions, and his blood alcohol was more than twice the legal limit. His convictions for DUI and driving on a suspended license (Factual Finding 12) are therefore substantially related to the qualifications, functions, and duties of a real estate broker under California Code of Regulations, title 10, section 2910, subdivision (a)(8).

6. Respondent's January 8, 2010 convictions, as set forth in Factual Findings 12 and 13, constituted the willful failure to comply with a court order, as respondent was on probation at the time of this conviction (Factual Findings 5 and 7). His convictions for DUI and driving on a suspended or revoked license are therefore substantially related to the qualifications, functions, and duties of a real estate broker under California Code of Regulations, title 10, section 2910, subdivision (a)(9).

7. Respondent's January 5, 2010 convictions, as set forth in Factual Findings 9 and 10, constituted the willful failure to comply with a court order, as respondent was on probation at the time of this conviction (Factual Finding 7). His convictions for driving on a suspended or revoked license and possession of marijuana while driving are therefore substantially related to the qualifications, functions, and duties of a real estate broker under California Code of Regulations, title 10, section 2910, subdivision (a)(9).

8. Respondent's August 14, 2008 conviction, as set forth in Factual Findings 7 and 8, constituted the doing of any unlawful act with the intent or threat of doing substantial injury to the person or property of another (Factual Findings 7, 8 and 11). His conviction of violating Penal Code section 653m, subdivision (a), making annoying telephone calls, is therefore substantially related to the qualifications, functions, and duties of a real estate broker under California Code of Regulations, title 10, section 2910, subdivision (a)(8).

9. Respondent's April 15, 2008 convictions, as set forth in Factual Findings 5 and 6, posed a threat of substantial injury to himself, to pedestrians, and to other passengers and drivers on the road. Additionally, respondent had a blood alcohol level more than three times the legal limit. His convictions for DUI and being under the influence of a controlled substance are therefore substantially related to the qualifications, functions, and duties of a real estate broker under California Code of Regulations, title 10, section 2910, subdivision (a)(8).

10. Respondent's convictions as set forth above in Factual Findings 5, 7, 9 and 12, in conjunction with his 2003 DUI conviction (Factual Finding 14), constitute a pattern of repeated and willful disregard for the law and are therefore substantially related to the qualifications, functions, and duties of a real estate broker under California Code of Regulations, title 10, section 2910, subdivision (a)(10).

11. Respondent's convictions as set forth above in Factual Findings 5 and 12 constitute two or more convictions involving the consumption or use of alcohol or drugs when at least one of the convictions involves driving and the use or consumption of alcohol or drugs, and are therefore substantially related to the qualifications, functions, and duties of a real estate broker under California Code of Regulations, title 10, section 2910, subdivision (a)(11).

Cause for Discipline

12. When all the evidence is considered, cause for discipline of respondent's license and licensing rights was established pursuant to Business and Professions Code sections 490 and 10177, subdivision (a)(8), (9), (10), and (11), by reason of Factual Findings 5 through 13, and Legal Conclusions 1 through 11, in that respondent was convicted of crimes that are substantially related to the qualifications, functions and duties of a real estate licensee.

Rehabilitation

13. In California Code of Regulations, title 10, section 2912, the Department has set forth the criteria to be applied when reviewing whether a real estate license should be revoked when the licensee has been convicted of a crime.⁶ Application of those criteria reveal the following:

⁶ California Code of Regulations, title 10, section 2912, in pertinent part, lists these criteria:

- (a) The passage of not less than two years from the most recent criminal conviction that is "substantially related" to the qualifications, functions or duties of a licensee of the department. (A longer period will be required if there is a history of criminal convictions or acts substantially related to the qualifications, functions or duties of a licensee of the department.)
- (b) Restitution to any person who has suffered monetary losses through "substantially related" acts or omissions of the licensee.
- (c) Expungement of the conviction or convictions which culminated in the administrative proceeding to take disciplinary action.
- (d) Expungement or discontinuance of a requirement of registration pursuant to the provisions of Section 290 of the Penal Code.
- (e) Successful completion or early discharge from probation or parole.
- (f) Abstinance from the use of controlled substances or alcohol for not less than two years if the criminal conviction was attributable in part to the use of a controlled substance or alcohol.
- (g) Payment of any fine imposed in connection with the criminal conviction that is the basis for revocation or suspension of the license.
- (h) Correction of business practices responsible in some degree for the crime or crimes of which the licensee was convicted.
- (i) New and different social and business relationships from those which existed at the time of the commission of the acts that led to the criminal conviction or convictions in question.
- (j) Stability of family life and fulfillment of parental and familial responsibilities subsequent to the criminal conviction.
- (k) Completion of, or sustained enrollment in, formal educational or vocational training courses for economic self-improvement.
- (l) Significant and conscientious involvement in community, church or privately sponsored programs designed to provide social benefits or to ameliorate social problems.

Respondent has engaged in some rehabilitation. His commitment to his sobriety and service to the AA community are praiseworthy. Respondent's most recent DUI conviction was in January 2010, less than two years ago, and he is still on probation for that and for a prior conviction. He has not yet paid his restitution, fine or fees for the January 2010 offense. (Factual Findings 9 and 12.) Since 2008, respondent has had two convictions for DUI, two convictions for driving on a suspended license, one conviction for possession of marijuana while driving, one conviction for being under the influence of a controlled substance (at the same time he was driving under the influence of alcohol), and one conviction for making annoying telephone calls. (Factual Findings 5 through 13.) None of the crimes has been expunged. Although respondent is currently living in a stable domestic relationship with A.N., this relationship has a history of significant turmoil, and periods of separation, and stability is recent. (Factual Findings 8 and 18.) Respondent currently attends AA, and provides meaningful service to the community through his service to AA. He is in counseling with the Multiple Offender DUI program. There is no evidence that respondent has ever had any complaints relating to his licensure as a real estate broker. (Factual Findings 16 and 24.) Respondent has recently gained insight into the seriousness of his alcoholism and drug abuse and demonstrated a change in attitude. The letters of others corroborate respondent's own testimony. (Factual Findings 20 through 24.) However, he has been an alcoholic for a very long time; by his own description he has used and abused drugs and alcohol for over forty years. Until 2009, respondent had only been sober for four years between 1988 and 1992. His recent sobriety, if the October 2009 use of marijuana is not considered a relapse, is 23 months. (Factual Finding 18.) Respondent's testimony regarding the threats made in the telephone calls to A.N., or with respect to the amount of marijuana he smoked in October 2009 was not forthcoming and not credible. (Factual Finding 11.)

(m) Change in attitude from that which existed at the time of the commission of the criminal acts in question as evidenced by any or all of the following:

- (1) Testimony of applicant.
- (2) Evidence from family members, friends or other persons familiar with the licensee's previous conduct and with subsequent attitudes and behavioral patterns.
- (3) Evidence from probation or parole officers or law enforcement officials competent to testify as to applicant's social adjustments.
- (4) Evidence from psychiatrists, clinical psychologists, sociologists or other persons competent to testify with regard to neuropsychiatric or emotional disturbances
- (5) Absence of subsequent felony or misdemeanor convictions that are reflective of an inability to conform to societal rules when considered in light of the conduct in question.

14. Respondent has made progress in his rehabilitation efforts, for which he is to be commended and encouraged. However, respondent's 2010 convictions are recent and he is still on probation for another 23 months. (Factual Findings 9 and 12.) Respondent does not appear to have violated his current probation; however, compliance with the law when one is on court-ordered release "does not necessarily prove anything but good sense." (*Windham v. Board of Medical Quality Assurance* (1980) 104 Cal.App.3d 461, 473.) When a person is on criminal probation or parole, rehabilitation efforts are accorded less weight, "[s]ince persons under the direct supervision of correctional authorities are required to behave in exemplary fashion..." (*In re Gossage* (2000) 23 Cal.4th 1080, 1099.) Therefore, an insufficient period of time has passed for respondent to demonstrate rehabilitation.

15. In addition, the potential harm to the public from respondent's conduct cannot be overstated. The California Supreme Court, in *Taylor v. Superior Court* (1979) 24 Cal.3d 890, 897, stated: "One who willfully consumes alcoholic beverages to the point of intoxication, knowing that he thereafter must operate a motor vehicle, thereby combining sharply impaired physical and mental faculties with a vehicle capable of great force and speed, reasonably may be held to exhibit a conscious disregard of the safety of others. The effect may be lethal whether or not the driver had a prior history of drunk driving incidents." Furthermore, multiple drinking and driving convictions create a potential for harm to clients that warrant action by a licensing agency before actual harm to clients occurs. "The protection of the public, the primary purpose of licensing statutes, does not require harm to a client before licensing discipline can take place." (*Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 773, citing *In re Kelley* (1990) 52 Cal.3d 487, 495-6.)


Conclusion

16. For the reasons stated above, it would be contrary to the public interest, safety and welfare to permit respondent to retain his real estate broker license, with or without restrictions.

ORDER

The license and licensing rights of respondent Michael Joseph Devlin are revoked.

DATED: 3/30/11


For HANNAH H. ROSE
Administrative Law Judge
Office of Administrative Hearings

FILED

OCT 26 2010

DEPARTMENT OF REAL ESTATE

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7
8
9 BEFORE THE DEPARTMENT OF REAL ESTATE
10 STATE OF CALIFORNIA

11 * * *

12 In the Matter of the Accusation of)
13) No. H-5499 SAC
14 MICHAEL JOSEPH DEVLIN,) ACCUSATION
15 Respondent.)
16)

17 The Complainant, TRICIA D. SOMMERS, acting in her official capacity as a
18 Deputy Real Estate Commissioner of the State of California, for cause of Accusation against
19 MICHAEL JOSEPH DEVLIN (herein "Respondent"), is informed and alleges as follows:

20 1.

21 Respondent is presently licensed and/or has license rights under the Real Estate
22 Law Part 1 of Division 4 of the Business and Professions Code (herein "the Code") as a real
23 estate broker.

24 2.

25 On or about January 8, 2010, in the Superior Court of the State of California,
26 County of Santa Clara, Case No. CC935742, Respondent was convicted of violating Section
27 23152(b) of the Vehicle Code (driving with a blood alcohol level at or above .08%) and Section

1 14601.2(a) of the Vehicle Code (driving on a license that is suspended or revoked due to a
2 previous DUI conviction), misdemeanors which bear a substantial relationship under Section
3 2910, Title 10, California Code Regulations (herein "the Regulations") to the qualifications,
4 functions or duties of a real estate licensee.

5 3.

6 On or about January 5, 2010, in the Superior Court of the State of California,
7 County of Santa Clara, Case No. FF932079, Respondent was convicted of violating Section
8 14601.2(a) of the Vehicle Code (driving on a license that is suspended or revoked due to a
9 previous DUI conviction), and Section 23222(b) of the Vehicle Code (possession of an ounce or
10 less of marijuana while driving), misdemeanors which bear a substantial relationship under
11 Section 2910, Title 10 of the Regulations to the qualifications, functions or duties of a real estate
12 licensee.

13 4.

14 On or about August 14, 2008, in the Superior Court of the State of California,
15 County of Santa Clara, Case No. FF23288, Respondent was convicted of violating Section
16 653m(a) of the Penal Code (making annoying telephone calls), a misdemeanor which bears a
17 substantial relationship under Section 2910, Title 10 of the Regulations to the qualifications,
18 functions or duties of a real estate licensee.

19 5.

20 On or about April 15, 2008, in the Superior Court of the State of California,
21 County of Santa Clara, Case No. CC790142, Respondent was convicted of violating Section
22 11550(a) of the Health and Safety Code (under the influence of a controlled substance) and
23 Section 23152(b) of the Vehicle Code (driving with a blood alcohol level at or above .08%),
24 misdemeanors which bear a substantial relationship under Section 2910, Title 10 of the
25 Regulations to the qualifications, functions or duties of a real estate licensee.

26 ///

27 ///

1 MATTERS IN AGGRAGATION

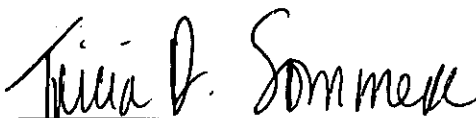
2 6.

3 On or about April 29, 2003, in the Superior Court of the State of California,
4 County of Santa Clara, Case No. FF201556, Respondent was convicted of violating Section
5 23152(b) of the Vehicle Code (driving with a blood alcohol level at or above .08%), a
6 misdemeanor which bears a substantial relationship under Section 2910, Title 10 of the
7 Regulations to the qualifications, functions or duties of a real estate licensee.

8 7.

9 The facts alleged above in Paragraphs 2 through 6 constitute grounds under
10 Sections 490 and 10177(b) of the Code for suspension or revocation of all licenses and license
11 rights of Respondent under Part 1 of Division 4 of the Code.

12 WHEREFORE, Complainant prays that a hearing be conducted on the
13 allegations of this Accusation and that upon proof thereof, a decision be rendered imposing
14 disciplinary action against all licenses and license rights of Respondent under the Real Estate
15 Law, and for such other and further relief as may be proper under the provisions of law.

16
17 

18 TRICIAL D. SOMMERS
19 Deputy Real Estate Commissioner

20 Dated at Sacramento, California,
21 this 19th day of October, 2010.