

**FILED**

BEFORE THE BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

AUG 30 2017

BUREAU OF REAL ESTATE

By B. Nicholas

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In the Matter of the Accusation of	)	CalBRE No. H-6529 SAC
	)	
GENEVIEVE ANNE	)	OAH No. 2017050406
MACALOLOOY-DOWNES,	)	
	)	
Respondent.	)	

DECISION

The Proposed Decision dated July 20, 2017, of the Administrative Law Judge of the Office of Administrative Hearings, except as modified herein, is hereby adopted as the Decision of the Real Estate Commissioner in the above-entitled matter.

Pursuant to Section 11517(c)(2)(C) of the Government Code, the following corrections are made to the Proposed Decision.

1. Page 1, Intro Paragraph, Line 3: change "Patricia" to Tricia D."
2. Page 6, Legal Conclusion 4, Line 20: change "253153" to "23153".

Pursuant to Section 11517(c)(2)(B) of the Government Code, the proposed penalty set forth in Paragraph 1 of the "ORDER" on page 8 is reduced from "REVOKED" to "Revoked with rights to a restricted real estate salesperson's license issued pursuant to Business & Professions Code Section 10156.5 if Respondent makes application therefore and pays to the Bureau the appropriate fee for the restricted license within 90 days from the effective date of this Decision.

1. The restricted license issued to Respondent shall be subject to all of the provisions of Section 10156.7 of the Code as to the following limitations, conditions and restrictions imposed under authority of Section 10156.6 of that Code:

(a) The restricted license issued to Respondent may be suspended prior to hearing by Order of the Commissioner in the event of Respondent's conviction (including by plea of guilty or nolo contendere) to a crime which is substantially related to Respondent's fitness or capacity as a real estate licensee; and,

(b) The restricted license issued to Respondent may be suspended prior to hearing by Order of the Commissioner on evidence satisfactory to the Commissioner that Respondent has violated provisions of the California Real Estate Law, the Subdivided Lands Law, Regulations of the Real Estate Commissioner, or conditions attaching to the restricted license.

2. Respondent shall not be eligible to apply for the issuance of an unrestricted real estate license nor for removal of any of the conditions, limitations or restrictions of a restricted license until four (4) years have elapsed from the effective date of this Decision.

3. Respondent shall notify the Commissioner in writing within 72 hours of any arrest by sending a certified letter to the Commissioner at the Bureau of Real Estate, Post Office Box 137000, Sacramento, CA 95813-7000. The letter shall set forth the date of Respondent's arrest, the crime for which Respondent was arrested and the name and address of the arresting law enforcement agency. Respondent's failure to timely file written notice shall constitute an independent violation of the terms of the restricted license and shall be grounds for the suspension or revocation of that license.

4. With the application for license, or with the application for transfer to a new employing broker, Respondent shall submit a statement signed by the prospective employing real estate broker on a form approved by the Bureau which shall certify as follows:

(a) That the employing broker has read the Decision which is the basis for the issuance of the restricted license; and,

(b) That the employing broker will carefully review all transaction documents prepared by the restricted licensee and otherwise exercise

close supervision over the licensee's performance of acts for which a license is required.

5. All licenses and licensing rights of Respondent are indefinitely suspended unless or until Respondent pays the sum of \$664.50 for the Commissioner's reasonable cost of the investigation which led to this disciplinary action. Said payment shall be in the form of a cashier's check made payable to the Bureau of Real Estate. The investigative costs must be delivered to the Bureau of Real Estate, Flag Section at P.O. Box 137000, Sacramento, CA 95813-7000, to the effective date of this Decision and Order

6. Respondent shall, within nine (9) months from the effective date of this Decision, present evidence satisfactory to the Commissioner that Respondent has, since the most recent issuance of an original or renewal real estate license, taken and successfully completed the continuing education requirements of Article 2.5 of Chapter 3 of the Real Estate Law for renewal of a real estate license. If Respondent fails to satisfy this condition, the Commissioner shall order the suspension of the restricted license until the Respondent presents such evidence. The Commissioner shall afford Respondent the opportunity for hearing pursuant to the APA to present such evidence.

Pursuant to Government Code section 11521, the Bureau of Real Estate may order reconsideration of this Decision on petition of any party. The party seeking reconsideration shall set forth new facts, circumstances, and evidence, or errors in law or analysis, that show(s) grounds and good cause for the Commissioner to reconsider the Decision. If new evidence is presented, the party shall specifically identify the new evidence and explain why it was not previously presented. The Bureau's power to order reconsideration of this Decision shall expire 30 days after mailing of this Decision, or on the effective date of this Decision, whichever occurs first.

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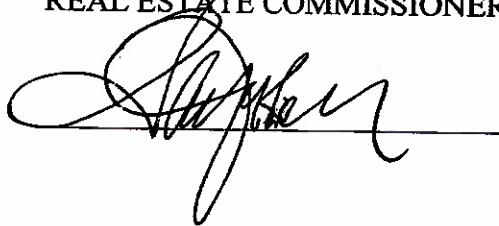
The right to reinstatement of a revoked real estate license or to the reduction of a penalty is controlled by Section 11522 of the Government Code. A copy of Sections 11521 and 11522 and a copy of the Commissioner's Criteria of Rehabilitation are attached hereto for the information of respondent.

This Decision shall become effective at 12 o'clock noon on SEP 20 2017

IT IS SO ORDERED

8/29/2017

WAYNE S. BELL  
REAL ESTATE COMMISSIONER

A handwritten signature in black ink, appearing to read 'Wayne S. Bell', is written over a horizontal line.

BEFORE THE  
BUREAU OF REAL ESTATE  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA

In the Matter of the Accusation of:

GENEVIEVE MACALOLOY-  
DOWNES,

Respondent.

Case No. H-6529-SAC

OAH No. 2017050406

**PROPOSED DECISION**

This matter was heard before Joy Redmon, Administrative Law Judge, Office of Administrative Hearings, State of California, on July 3, 2017, in Sacramento, California.

Megan Lee Olsen, Real Estate Counsel, represented <sup>Tricia D.</sup> Patricia Parkhurst (complainant), a Supervising Special Investigator, Bureau of Real Estate (Bureau), Department of Consumer Affairs.

Paul Chan, Attorney at Law, represented respondent who was present throughout the hearing.

Evidence was received, the record was closed, and the matter was submitted for decision on July 3, 2017.

**FACTUAL FINDINGS**

1. Complainant made and filed the Accusation in her official capacity. Complainant seeks to revoke respondent's license based upon her misdemeanor conviction described below and her failure to report this conviction to the Bureau. Complainant also seeks investigative and enforcement costs incurred in this matter.
2. On August 9, 2006, a real estate salesperson license was issued to respondent. Respondent's license was in full force and effect at all times relevant to the charges set forth in the Accusation, and will expire on July 24, 2020, unless renewed or other action taken regarding her license.

### *Respondent's Conviction and Failure to Report*

3. On October 26, 2016, in the San Joaquin County Superior Court, Case No. CR-2016-9075, respondent, on a plea of nolo contendere, was convicted of a misdemeanor violation of Vehicle Code section 23153 subdivision (b), driving under the influence of alcohol causing bodily injury. Imposition of sentence was suspended. Respondent was placed on three years' probation, was ordered to complete a first time offenders alcohol program, complete six days of community service, and pay restitution, fees, and fines. Respondent's driver's license was also suspended until she completes the first time offenders program. Respondent is currently on probation; she completed her community service, is current on her repayment schedule for her fees, fines, and restitution. Respondent is enrolled in a twelve-week first time offenders program and anticipates it will be completed in September 2017, after which her driving privileges will be reinstated.

4. The incident underlying respondent's conviction occurred in the early morning hours of April 30, 2016. Respondent and a friend, Kerina Bianchini, met shortly before midnight at a bar in Tracy, California. She consumed alcohol and left the bar in her car with Ms. Bianchini as a passenger. While driving Ms. Bianchini home, respondent lost control of her car when she failed to negotiate a curve in the roadway. The vehicle collided with a concrete irrigation canal and rolled over. Ms. Bianchini sustained a head contusion and pain and bruising to her hip and was released from the hospital after being examined. Respondent complained of neck pain at the scene and was released from the hospital with bruises and cuts but no major injuries. Respondent did not report this conviction to the Bureau.

### *Respondent's Evidence*

5. Respondent works full time as a staff accountant for an electrical contracting business. She has worked for that company since December 2015. She obtained an Associates of Arts degree from Delta College in 2013 and intends to enroll in college and obtain an accounting degree. Respondent previously worked as a full time realtor from 2006 until 2010. She has continued to work part-time as a realtor continuously since obtaining her license. Her current broker is Richard Hundley with Advance 1 Real Estate. She requires income from both her full-time position and her real estate transactions to provide financially for herself and her children.

6. Respondent testified that this accident occurred during a significantly stressful time in her life. Respondent explained that for most of her life she drank alcohol infrequently; occasionally having a glass of wine at holiday dinners and special occasions. On April 11, 2016, respondent and her husband of twenty years separated and he moved out of the house. She explained that she was emotionally upset about the break up and attempted to work excessive hours to avoid dealing with the situation. She also consumed between two and three bottles of wine per week between the break up and the car accident.

7. On the night of the accident, respondent met Ms. Bianchini at a bar. They planned to have a few drinks and then return to Ms. Bianchini's house where respondent

would spend the night. The two women were participating in a fundraiser the following day to raise money to send their children on a sports-related trip. She acknowledges that she consumed too much alcohol that night and should not have driven. She does not recall many details of the accident. Following the accident, she and Ms. Bianchini have remained close friends.

8. Respondent has no other criminal or administrative record. This was her first arrest. After the accident, respondent committed to complete abstinence from alcohol. She has not consumed alcohol since April 30, 2016. Respondent enrolled in Alcoholics Anonymous following the incident and attended several meetings per week for approximately six weeks. Respondent explained that she learned valuable lessons while attending AA. She acknowledged that her alcohol intake increased in the weeks before her accident but she does not consider herself an alcoholic. She believes that if she were to develop an urge to drink again she would return to AA, but is confident that eliminating alcohol all together will not be a problem as she did not regularly consume alcohol prior to April 2016. She also wanted to establish to the presiding judge in her criminal court matter that she abstained from alcohol. As part of her bail bond requirement, respondent had to participate in a SoberLink alcohol monitoring program where she manually tested her blood alcohol level five times per day and the results were electronically transmitted to her bondsman. Her commitment ended in May 2016, but she continued to voluntarily test through July 2016 to help establish her abstinence to the criminal court judge.

9. Respondent submitted four support letters. William Peters, the administrator for Bill's Bail Bonds, confirmed respondent's participation in SoberLink. He described respondent as, "... an outstanding client," who noted that, "... while working and maintaining her obligation to her family she still managed to maintain the tight regimental schedule of this [SoberLink] program."

Respondent also submitted a letter from Ms. Bianchini, her passenger the night of the accident. Ms. Bianchini confirms she harbors no ill will toward respondent for the accident. She describes respondent as a, "... respectful, hardworking, supportive friend." She confirmed that respondent, "... has stayed committed to the program [abstinence] and to work on her now tainted reputation."

Respondent submitted a letter from her current broker, Mr. Hundley. Mr. Hundley confirms that respondent informed him about her conviction. He does not condone her conduct, but confirms that respondent, "has accepted full responsibility," and that, "[s]he knows that it was wrong and that impaired judgement is something that is unacceptable." He finds her to be hard-working and described the great deal of care and concern she shows her real estate clients. Mr. Hundley considers, "[h]er level of professionalism is second to none and is something that should be commended in our industry."

Respondent also submitted a letter from her long-time friend Lynda Hawkins. Ms. Hawkins is also a licensed real estate agent. Ms. Hawkins expressed similar sentiments as Ms. Bianchini and Mr. Hundley. She confirmed that respondent's marital situation

contributed to her struggles but that the accident was “a wakeup call to never make this mistake again.”

10. Respondent did not report her arrest and conviction to the Bureau. She testified that she thought there may have been an obligation to report the conviction and she asked her criminal defense attorney regarding the obligation. According to respondent, her attorney erroneously explained that she had to report the conviction at the time she submitted her renewal application. Respondent testified that despite his instruction, it was her obligation to know when she was required to report her arrest and conviction to the Bureau. She explained that she should have independently researched the obligation on her own and had she done so, she certainly would have reported the conviction.

### *Discussion*

11. As discussed more fully in the Legal Conclusions, the Bureau established cause to revoke respondent’s license based upon her criminal conviction and her failure to report the conviction to the Bureau. In determining whether revocation or suspension is warranted in a particular case, the applicable rehabilitation criteria are set forth in California Code of Regulations, title 10, section 2912. Relevant rehabilitation criteria include: (1) the passage of not less than two years from the most recent criminal conviction; (2) expungement of the conviction which culminated in the administrative proceeding to take disciplinary action; (3) successful completion or early discharge from probation or parole; (4) abstinence from the use of alcohol for not less than two years if the criminal conviction was attributable in part to the use of alcohol; (5) payment of any fine imposed in connection with the criminal conviction that is the basis for revocation of the license; (6) 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 in question; (7) stability of family life and fulfillment of parental and familial responsibilities subsequent to the criminal conviction; (8) completion of, or sustained enrollment in, formal educational or vocational training courses for economic self-improvement; (9) significant and conscientious involvement in community, church or privately-sponsored programs designed to provide social benefits or to ameliorate social problems; and (10) change in attitude from that which existed at the time of the commission of the criminal acts in question.

12. Respondent has made efforts toward rehabilitation. Respondent testified in a straightforward, clear, and contrite manner. She persuasively testified that April 2016 represented a low point in her life. Her twenty-year marriage ended and she acknowledged that her action in driving while intoxicated on April 30, 2016, could have had deadly consequences. She has committed to alcohol abstinence since that day. Respondent now has a stable family life and she is able to financially provide for herself and her children, in part, due to her supplemental real estate income. Those efforts are commendable and should continue. However, fewer than two years have passed since her criminal conviction. Respondent has not finished paying her court ordered fees, fines, and restitution. She has not had her conviction dismissed or expunged. She is no longer in a sobriety program and fewer than two years have elapsed since she last consumed alcohol. Respondent did not present



evidence of new or different business and social relationships than existed at the time of the accident. Respondent has not completed or enrolled in formal educational or vocational training courses for economic or self-improvement. While she attends church, respondent did not present evidence of significant and conscientious involvement in community, church or privately-sponsored programs designed to provide social benefits or to ameliorate social problems. When all the evidence is considered, respondent did not meet her burden to establish rehabilitation consistent with the Bureau's criteria.

13. Respondent should have reported her conviction to the Bureau. She provided the explanation regarding her former attorney's advice, but as she acknowledged, it was her independent obligation to have known and reported the conviction to the Bureau. She did not meet that obligation.

14. When all of the evidence is considered, respondent did not present sufficient evidence that it would be consistent with the public interest, safety and welfare to retain her real estate license at this time.

#### *Costs*

15. Complainant has requested that respondent be ordered to pay investigation costs in the amount of \$286.25, and enforcement costs in the amount of \$378.25, for total costs of \$664.50.

16. Complainant submitted a Certified Statement of Investigation Costs. The Certified Statement of Investigation Costs are detailed and broken down by task and amount of time spent on each task. The investigation costs sought from respondent are reasonable.

17. Complainant also submitted a Certified Statement of Costs seeking reimbursement of the costs of enforcement. Attached to the Certified Statement of Costs is a printout of the tasks performed by Bureau counsel, the time spent on each task, and the method of calculating the costs. From a review of the Certified Statement of Costs and its attachment, it appears that the time spent by the Bureau's counsel was appropriate in light of the allegations and legal issues in this matter, and that the amounts charged were reasonable.

### LEGAL CONCLUSIONS

1. Complainant had the burden of proving the grounds for discipline alleged in the Accusation by clear and convincing evidence to a reasonable certainty. (*Realty Projects, Inc. v. Smith* (1973) 32 Cal.App.3d 204, 212 [discussing the appropriate standard of proof in license discipline proceedings].)

2. Pursuant to Business and Professions Code section 490, a professional license may be suspended or revoked if 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.”

3. Pursuant to Business and Professions Code section 10177, subdivision (b), a real estate license may be disciplined when the licensee has “[e]ntered 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.”

4. Pursuant to California Code of Regulations, title 10, section 2910, subdivision (a)(8), a conviction is deemed to be substantially related to the qualifications, functions or duties of a real estate licensee if it involves doing an unlawful act with the intent or threat of doing substantial injury to the person or property of another. The Bureau asserts that respondent’s conviction meets this definition of substantially related because she and Ms. Bianchini suffered injuries that were substantial because both women required medical attention at the hospital before being released. Respondent argues that subdivision (a)(8) is inapplicable to her DUI conviction because one drunk driving conviction is not deemed substantially related to the qualifications, functions, or duties of a real estate licensee under subdivision (a)(11), which states that, “[t]wo or more convictions involving the consumption or use of alcohol or drugs when at least one of the convictions involve driving and the use or consumption of alcohol or drugs.” Respondent asserts that the specific provision regarding the need for two DUI convictions should take precedence over the general provision regarding doing an unlawful act with the threat of substantial injury, or the former would be meaningless. (See, *Dix v. Superior Court* (1991) 53 Cal.3d 442, 460 [“Unless unreasonable, or clearly contrary to the statutory language or purpose, the consistent construction of a statute by an agency charged with responsibility for its implementation is entitled to great deference”].) That conflict does not need to be resolved in this case. Respondent was not convicted of a single DUI in violation of Vehicle Code section 23153 subdivision (a). Rather, respondent was convicted of violating vehicle code section 23153 subdivision (b) which includes as an element proximately causing bodily injury to a person other than the driver.<sup>1</sup> In this case, respondent was convicted of a crime that specifically contains an element regarding causing bodily injury to another. That crime meets California Code of Regulation, title 10, section 2910 subdivision (a)(8), and is deemed substantially related to the qualifications, functions, or duties of a real estate agent.

5. Business and Professions Code section 10186.2, provides:

(a) (1) A licensee shall report any of the following to the department:

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<sup>1</sup> Vehicle Code section 23153 subdivision (b) states, “[i]t is unlawful for a person, while having a 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle and concurrently do any act forbidden by law, or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver.”

(A) The bringing of an indictment or information charging a felony against the licensee.

(B) The conviction of the licensee, including any verdict of guilty, or plea of guilty or no contest, of any felony or misdemeanor.

(C) Any disciplinary action taken by another licensing entity or authority of this state or of another state or an agency of the federal government.

(2) The report required by this subdivision shall be made in writing within 30 days of the date of the bringing of the indictment or the charging of a felony, the conviction, or the disciplinary action.

(b) Failure to make a report required by this section shall constitute a cause for discipline.

6. Respondent failed to report her misdemeanor conviction to the Bureau within 30 days after she was convicted. Respondent's failure to disclose her conviction within 30 days violated Business and Professions Code section 10186.2, subdivision (a)(2). This violation establishes cause to discipline her license under Business and Professions Code section 10177, subdivision (d).

7. Respondent's conviction and subsequent failure to report the conviction establish cause to revoke her license. Respondent failed to provide sufficient evidence of rehabilitation establishing that it is consistent with the public interest, safety, and welfare to permit her to retain her real estate salesperson license even on a restricted basis at this time.

8. Business and Professions Code section 10106, which permits the award of costs, in relevant part, provides:

(a) Except as otherwise provided by law, in any order issued in resolution of a disciplinary proceeding before the department, the commissioner may request the administrative law judge to direct a licensee found to have committed a violation of this part to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

9. California Code of Regulations, title 1, section 1042, subdivision (b)(1), sets forth the information that must be provided by an agency in order to obtain cost recovery from a respondent for work performed by agency employees:

(b) Except as otherwise provided by law, proof of costs at the Hearing may be made by Declarations that contain specific and sufficient facts to support findings regarding actual costs incurred and the reasonableness of the costs, which shall be presented as follows:

(1) For services provided by a regular agency employee, the Declaration may be executed by the agency or its designee and shall describe the general tasks performed, the time spent on each task and the method of calculating the cost. For other costs, the bill, invoice or similar supporting document shall be attached to the Declaration.

10. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth factors to be considered when determining the reasonableness of costs sought pursuant to statutory provisions like Business and Professions Code section 10106. These factors include: (a) whether the licensee has been successful at hearing in getting charges dismissed or reduced; (b) the licensee's subjective good faith belief in the merits of his or her position; (c) whether the licensee has raised a colorable challenge to the proposed discipline; (d) the financial ability of the licensee to pay; and (e) whether the scope of the investigation was appropriate in light of the alleged misconduct.

11. Complainant seeks \$664.50 in investigative and enforcement costs. When all the *Zuckerman* factors are considered, the requested costs are reasonable. Consequently, respondent should be ordered to pay these costs in full to the Bureau.

### ORDER

1. All licenses and licensing rights of Respondent, Genevieve Macalooloy-Downes, under the Real Estate Law are REVOKED.

2. Respondent shall reimburse the Bureau its costs of investigation and enforcement in the sum of \$664.50. Respondent shall be permitted to pay the costs in a payment plan approved by the Bureau.

DATED: July 20, 2017

DocuSigned by:  
*Joy Redmon*  
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JOY REDMON  
Administrative Law Judge  
Office of Administrative Hearings

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Bureau of Real Estate

JUL 21 2017

Not Adopted