

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

In the Matter of the Accusation Against:

DONALD JOSEPH LIENING ,

Respondent.

Case No. C101216-03

OAH No. 2013071114

ORDER OF DECISION

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Bureau of Real Estate Appraisers as its Decision in the above-entitled matter.

This Decision shall become effective on 10-30-14.

IT IS SO ORDERED this 9-29-14 day of 2014.

Original Signed

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

In the Matter of the Accusation Against:

DONALD J. LIENING

Certified Residential Appraiser
License No. 033255

Respondent.

Case No. C101216-03

OAH No. 2013071114

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California, on August 18 and 19, 2014.

Erin M. Sunseri, Deputy Attorney General, Department of Justice, represented complainant Elizabeth Seaters, Chief of Enforcement, Office of Real Estate Appraisers.

Mark S. Stiffler, Attorney at Law, represented respondent Donald J. Liening, who was present throughout the administrative proceeding.

The matter was submitted on August 19, 2014.

SUMMARY

The clear and convincing evidence established that respondent violated Uniform Standards of Professional Appraisal Practice (USPAP) in connection with three residential properties he appraised between March 2008 and February 2011; he committed numerous errors that significantly affected the appraisals he provided for those properties; and he provided misleading appraisals.

Respondent has a history of discipline that includes a public reproof. In 2009, respondent was required to pay \$5,000 in fines and costs, complete 30 hours of basic education, and undergo monitoring because he falsely certified that he had inspected the interior of two properties when he had not done so.

In this matter, respondent offered his own testimony and that of an expert witness in an attempt to establish that he has changed his appraisal practices, that his appraisals now comply with USPAP standards, and that he is a person of integrity. The evidence of respondent's rehabilitation was insufficient to meet the negative inferences that must be drawn from the credible evidence concerning respondent's competence and character. Only the outright revocation of respondent's license will protect the public.

FACTUAL FINDINGS

Jurisdictional Matters

1. All pre-hearing jurisdictional requirements were met. On August 18, 2014, the record was opened; opening statements were given; sworn testimony and official notice was taken; and documentary evidence was received. On August 19, 2014, sworn testimony was taken; documentary evidence was received; closing arguments were given; the record was closed; and the matter was submitted.

Real Estate Appraisers

2. Real estate appraisers must be licensed. A licensed real estate appraiser is a fiduciary. Qualifications of honesty, candor, integrity, and trustworthiness are indispensable in the practice of the real estate appraisal profession. A holder of a real estate appraisal license must demonstrate by his or her conduct that he or she possesses those qualities. (Cal. Code Regs., tit. 10, § 3702.)

License History

3. On March 3, 2004, the Bureau of Real Estate Appraisers (the BRE, sometimes referred to as the Office of Real Estate Appraisers or OREA) issued a trainee real estate appraiser license to respondent.

On April 2, 2005, the BRE issued a residential real estate appraiser license to respondent.

On February 14, 2007, the BRE issued a certified residential real estate appraiser license to respondent.

Respondent's current license expires on March 2, 2016, unless revoked.

4. On October 5, 2009, the Decision and Order in Case No. C070607-01, entitled *In the Matter of the Accusation Against: Donald J. Lienes, Certified Residential Appraiser License No. AR033255, Respondent*, became effective. The Decision and Order was based on a Stipulated Settlement and Disciplinary Order respondent signed on September 11, 2009. In that stipulation, respondent admitted all the allegations set forth in Accusation Case Nos.

C 070430-01 and C 070607-01. Among other matters, respondent stipulated that he falsely certified that he had inspected the interior of two properties when he had not done so and that he committed other ethical violations.

As a result of the Decision and Order, the BREa issued a public reproof; in addition, respondent was required to pay \$5,000 in fines and costs, complete 30 hours of basic education, and submit four sets of work samples for Monitoring Review.

5. During the monitoring review period, respondent committed several errors in appraisal reports submitted for review. Among other matters, he failed to accurately describe relevant attributes of a residential real property he appraised, including the cost to cure; he failed to consider comparable sales that were closer to the property being appraised than other sales he used for comparables; he failed to describe relevant attributes of a comparable sale; and he failed to apply appropriate methods and techniques related to a cost approach value. These errors were relatively minor; they did not result in the filing of a formal disciplinary action. However, respondent received a verbal warning that placed him on actual notice that his appraisal practices needed improvement.

Uniform Standards of Professional Appraisal Practice

6. Uniform Standards of Professional Appraisal Practice (USPAP) constitute the benchmark for real property appraisals in the United States.¹ As a result of the savings and loan crisis in the 1980s and 1990s, the Appraisal Foundation (TAF)² was formed and took over the administration of USPAP. TAF promulgates and updates best appraisal practices, as codified in USPAP, in two year cycles that commence on January 1 of even-numbered years.

7. A California real estate appraiser must comply with USPAP. (Bus. & Prof. Code, § 11319; Cal. Code Regs., tit. 10, § 3701.) Disciplinary action may be taken against a real estate appraiser's license for acts involving dishonesty, fraud or deceit with the intent to

¹ Notice is taken that TAF is a non-profit organization that was established in 1987. TAF's stated purpose is to advance professional valuation. TAF is overseen by the Appraisal Subcommittee (ASC), a subcommittee of the Federal Financial Institutions Examination Council. While the federal government does not regulate appraiser qualifications or practices directly, it does so indirectly. If the ASC finds that a state's appraiser certification and/or regulation program is inadequate, all appraisers in that state become ineligible to do appraisals for federally chartered banks.

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benefit himself or another, or to injure another; a violation of USPAP standards; a violation of the Real Estate Appraisers' Licensing and Certification Law or regulations promulgated pursuant thereto; or any provision of the Business and Professions Code that applies to real estate appraisal licensees. (Bus. & Prof. Code, §§ 11314-11315.3, 11319; Cal. Code Regs., tit. 10, § 3721.)

8. USPAP rules and standards were in effect at all times relevant to this matter.

Under the USPAP's Ethical Rule, an appraiser must perform assignments ethically and competently. An appraiser must not accept an assignment that includes the reporting of predetermined opinions and conclusions.

The USPAP Competency Rule states:

Prior to accepting an assignment or entering into an agreement to perform any assignment, an appraiser must properly identify the problem to be addressed and have the knowledge and experience to complete the assignment competently; or alternatively, must:

1. disclose the lack of knowledge and/or experience to the client before accepting the assignment;
2. take all steps necessary or appropriate to complete the assignment competently; and
3. describe the lack of knowledge and/or experience and the steps taken to complete the assignment competently in the report.

Under USPAP record keeping rules, an appraiser must prepare a workfile for each appraisal, appraisal review, or appraisal consulting assignment that includes: the name of the client and the identity, by name or type, of any other intended users; true copies of any written reports, documented on any type of media; summaries of any oral reports or testimony, or a transcript of testimony, including the appraiser's signed and dated certification; and all other data, information, and documentation necessary to support the appraiser's opinions and conclusions. An appraiser must retain the workfile as required.

Under USPAP Standard Rules, in developing a real property appraisal, a real estate appraiser must identify the problem to be solved, determine the scope of work necessary to solve the problem, and correctly complete research and analyses necessary to produce a credible appraisal. In reporting the results of a real property appraisal, the appraiser must communicate each analysis, opinion, and conclusion in a manner that is not misleading. An appraiser must be aware of, understand, and correctly employ recognized methods and techniques necessary to produce a credible appraisal. An appraiser must not commit a

substantial error of omission or commission that significantly affects an appraisal. An appraiser must not render appraisal services in a careless or negligent manner, including making a series of errors that, although individually might not significantly affect the results of an appraisal, in the aggregate, affects the credibility of those results.

Evidence of Respondent's USPAP Violations

9. John Hopp is employed by the BREAA as a Senior Property Investigator/Appraiser. He has been so employed since February 2010.

Mr. Hopp holds a bachelor's degree in History awarded by the University of Texas at Austin. In August 2003, Mr. Hopp was certified as a general real estate appraiser by the State of Minnesota. That certification is inactive. In May 2005, the BREAA certified Mr. Hopp as a general real estate appraiser in California. That certification is active.

Mr. Hopp is familiar with USPAP and with the statutes, rules, and regulations that a licensed real estate appraiser must follow.

Mr. Hopp was assigned to investigate respondent's activities as a result of a complaint filed concerning respondent's 2008 appraisal of a Long Beach condominium unit and a 2010 appraisal of a Chula Vista residence. Mr. Hopp also investigated respondent's 2011 appraisal of a Lakeside residence. Mr. Hopp reviewed the data that respondent provided, conducted his own investigation, spoke with respondent concerning the three appraisals at issue, spoke with market participants, applied USPAP standards and rules, and prepared a comprehensive 40-page narrative report. The report sets forth an introduction, respondent's background, and detailed information related to the Long Beach appraisal, the Chula Vista appraisal, and the Lakeside appraisal. The report included area maps, location maps, sales maps, respondent's appraisals, and the data Mr. Hopp discovered during his investigation. The report included Mr. Hopp's findings and conclusions, and respondent's rebuttal statements.

The Long Beach Appraisal

10. Respondent issued a March 10, 2008, appraisal report related to a condominium unit situated in a converted industrial loft building in Long Beach. The eight-story building in which the unit was located was constructed in 1923, was used as a five-and-dime store for many years, and was converted into a condominium project in 1995. The 920 square foot unit that respondent appraised included typical condominium loft amenities such as open beam ceilings and brick walls.

Respondent prepared an appraisal report for use in a mortgage refinance transaction. In respondent's appraisal, he provided a value opinion of \$555,000. His appraisal report failed to mention that the unit had been listed in the area's MLS system twice in the previous year, and it failed to mention that the most recent listing price was \$549,000 before the listing expired in October 2007.

11. Based upon his review of respondent's appraisal report, the data he reviewed, and applicable USPAP provisions, Mr. Hopp concluded that respondent failed to submit information required to be retained in his workfile and violated USPAP as follows:

a. Incorrectly identified the neighborhood as Alamitos Beach and as a suburban area, when the subject property was located in downtown Long Beach; failed to accurately identify the name, size, unit count, and non-residential uses within the subject building; failed to report that the subject building had been converted into condominium use from a prior non-residential use; incorrectly described the subject zoning as R-1 (residential); and failed to identify and analyze the effect on use and value of existing land use regulations.

b. Failed to provide adequate support for his opinion of a stable market, which, according to available market data, was actually in decline before the effective date of the valuation; failed to accurately identify and analyze the economic attributes affecting the subject property; and failed to adequately analyze the market trends.

c. Failed to include relevant, market-based sales in the sales analysis by utilizing a Trustee's Deed transfer; utilized the sale of 2-bedroom condominium units when the subject unit was effectively a studio unit; failed to accurately report and analyze another sale; failed to provide adequate market support for adjustments applied to the comparable sales and omitted other relevant adjustments; and failed to analyze the comparable sales data that was available to establish a credible value conclusion.

d. Failed to report the prior MLS listings of the subject unit, which was required under the stated scope of work.

e. Failed to reconcile the quality and quantity of data available and analyzed within the Sales Comparison Approach.

12. Mr. Hopp concluded that respondent committed substantial errors of omission or commission that significantly affected the credibility of the appraisal. Mr. Hopp concluded that respondent failed to clearly and accurately set forth an appraisal that was not misleading. Mr. Hopp concluded that respondent failed to take all steps necessary to perform the appraisal assignment in a competent manner because respondent performed an appraisal assignment in Long Beach, an area with which he was not familiar, thereby violating the Competency Rule. Finally, Mr. Hopp concluded that respondent failed to cooperate in the investigation by failing to provide the OREA with a true and correct copy of the report that he submitted to his client and added additional pages to the appraisal report he submitted to OREA in an attempt to mislead investigators, thereby violating the Record Keeping section of the Ethics Rule.

13. Respondent did not dispute Mr. Hopp's factual findings or conclusions. Respondent admitted that he did not know how to access the multiple listing services available in Los Angeles County. He admitted that he "unknowingly" violated USPAP's competency rule by evaluating a property that was located outside his geographic area of expertise. He claimed his error was the result of improper training he received early in his career.

The Chula Vista Appraisal

14. The Chula Vista appraisal at issue involved respondent's appraisal report related to a three-bedroom, 3.5 bathroom, 3,752 square foot detached single family residence constructed in 2008. The residence was located in the San Miguel Estates subdivision on a lot that was slightly larger than one-half acre. The residence included an in-ground pool and a four-car attached garage. There was a view amenity.

Respondent prepared an appraisal report for the Chula Vista property that was dated August 18, 2010. The report was prepared for use in a refinance transaction. Respondent provided a value opinion of \$688,750. During the investigation, respondent provided a revised copy of the appraisal to OREA that was signed on August 24, 2010. The revised report included corrections of errors found in the original report, as well as rebuttal statements to issues raised by respondent's client. Respondent told Mr. Hopp during an interview that he forgot about the original report and had overwritten the original report with revisions. Mr. Hopp's findings and conclusions relate to the original appraisal report respondent provided to his client.

15. Based upon his review of respondent's appraisal, the available data he reviewed, his conversation with respondent, his review of respondent's rebuttal statements, and applicable USPAP provisions, Mr. Hopp found that respondent violated USPAP as follows:

a. Failed to correctly describe and report the neighborhood, utilizing boundaries located well outside of the subject area; failed to identify the characteristics of the subject area that were relevant to the value and intended use of the appraisal, including its location, physical, and legal attributes.

b. Failed to correctly report the zoning for the property; failed to identify and analyze the effect of zoning on the use and value of existing land use regulations.

c. Failed to include all relevant sales in the sales analysis by excluding a legitimate sale located two houses away that sold approximately six months before the date of respondent's appraisal; failed to provide adequate market support for adjustments applied to the comparable sales; failed to consider other appropriate adjustments;

and failed to analyze the comparable sales data that was available to establish a credible value conclusion.

d. Failed to develop a credible opinion concerning the subject's site value; failed to analyze such comparable cost data that was available in order to estimate the cost of the improvements; failed to provide adequate support for the estimate of functional obsolescence; and failed to develop and report a credible Cost Approach to value.

e. Failed to adequately analyze the prior sale of the subject property, which occurred within three years of the effective date of his appraisal.

f. Failed to reconcile the quality and quantity of data available within the approaches used.

g. Failed to reconcile the prior sale price of the property, which had occurred one year, eight months before his appraisal, with the estimate of value developed in his report; failed to reconcile the applicability and relevance of the approaches, methods and techniques he used to arrive at the value conclusion; and improperly allowed his client to direct the reconciled value of the report.

16. Mr. Hopp concluded that respondent failed to understand and correctly employ recognized methods and techniques necessary to produce a credible appraisal; he failed to clearly and accurately set forth the appraisal in a manner that was not misleading; he rendered appraisal services in a careless or negligent manner; he made a series of errors that, although individually might not have significantly affected the results of an appraisal, in the aggregate affected the credibility of those results; he failed to cooperate in the investigation by failing to provide documents that he was required to maintain, including the original version of the appraisal report that he submitted to his client; and he failed to perform an appraisal assignment with impartiality, objectivity, and independence.

17. Respondent disputed some of Mr. Hopp's factual findings and conclusions. Respondent claimed that there was limited data available for the geographic area in which the property was located. He asserted that an unhappy homeowner filed a deceptive complaint. Respondent asserted that a comparable property he emphasized in his report "was a very similar property" and was more "comparable" than a property two doors away. He testified that the lack of comparable sales in the immediate area of the subject property required him to use sales outside the immediate area to develop an appraisal. Respondent testified that his failure to consider the sale of the nearby property was not a significant oversight. Respondent admitted that his clients had more influence than they should have had when he developed his appraisal.

18. Respondent's testimony in defense and mitigation of the Chula Vista appraisal report was not persuasive. Respondent's expert, Sara Schwarzentraub, conceded that respondent's appraisal of the Chula Vista property indicated he was "out of his depth."

The Lakeside Appraisal

19. The Lakeside appraisal involved respondent's appraisal report concerning a three-bedroom, two bath, 1,527 square foot single family residence constructed in 1987. The Lakeside residence was located on an approximately one-acre acre lot. The residence included an in-ground pool and an attached garage. In his appraisal report, respondent stated the residence was in "average" condition. Respondent's appraisal report, which was dated February 10, 2011, was subject to monitoring review as a result of the 2009 Decision and Order.

Respondent prepared the Lakeside appraisal report for a HUD repurchase. At the time of the appraisal, the residence was listed in a multiple listing service as being a "short sale." In his appraisal, respondent provided a value opinion of \$274,000.

20. Based upon his review of respondent's appraisal, the available data he reviewed, his conversation with respondent, his review of respondent's rebuttal statements, and applicable USPAP provisions, Mr. Hopp found that respondent violated USPAP as follows:

a. Failed to accurately report or analyze the condition of the property, which was a "major fixer" according to the MLS listing; he failed to accurately identify and report the relevant physical attributes of the property.

b. Failed to utilize the most similar and proximate comparable sales; he failed to accurately describe the sales utilized in the report; and he failed to report prior sales of two comparable sales that were relevant to the analysis.

c. Failed to develop a credible opinion of the property's site value by an appropriate appraisal method; he failed to appropriately describe the curable physical depreciation in the valuation of the improvements; and he failed to prepare a credible value opinion via the Cost Approach.

d. Failed to adequately analyze the current MLS listing of the subject property, and he failed to reconcile the opinion of value contained in the report to the asking price of the subject.

e. Failed to adequately reconcile the quality and quantity of data available and considered within the Sales Comparison Approach.

f. Failed to adequately reconcile the applicability and relevance of the approaches, methods, and techniques he used to arrive at the value conclusion.

21. Mr. Hopp concluded that respondent failed to be aware of, understand, and correctly employ those recognized methods and techniques that are necessary to produce a credible appraisal; he committed a substantial error of omission or commission that significantly affected the appraisal; he failed to clearly and accurately set forth an appraisal that was not misleading; and he failed to perform an appraisal ethically and competently.

22. Respondent admitted that the Lakeside property had a roof leak that would cost approximately \$15,000 to repair, and he conceded that he did not present the physical condition of the Lakeside property in an appropriate manner. Respondent said he used sales of comparable properties outside a one mile radius of the subject property because "I grew up there" [in Lakeside], and "knew what property was worth." Respondent claimed it was inappropriate to use sales occurring within a one mile radius of the subject property because they were more expensive than the property he was appraising and were not comparables. He explained that the print date on certain documents that he presented for Mr. Hopp's review included dates that were more recent than the date of his appraisal report because that was the date the documents were printed, that he had previously had electronic access to the sales data he later printed, and that he had reviewed but not printed that data.

23. Respondent's testimony as it related to the print dates on documents related to certain properties he reviewed as comparables is accepted as true.

24. Respondent's expert, Sara Schwarzentraub, testified that "Lakeside is a strange area" and it was "difficult to appraise in that area." Respondent's expert testified that respondent's appraisal report for the Lakeside property "was not perfect," but the "valuation was probably OK."

25. Respondent's testimony and the testimony of his expert did not make Mr. Hopp's expert testimony unpersuasive. Mr. Hopp's testimony on the issues related to the Lakeside appraisal was clear and convincing.

Respondent's Evidence

26. Respondent retained Sara Schwarzentraub to provide expert testimony. Ms. Schwarzentraub is self-employed as an independent appraiser. She currently does business as Inter-State Appraisal Service in La Mesa, California. She holds an active certified general real estate appraiser's license.

Ms. Schwarzentraub has a bachelor's degree in Actuarial Science from the University of Illinois. She primarily provides litigation support, family law valuations, and estate appraisals, although she also provides appraisals for financing and refinancing purposes. She has taught real estate appraisal practices in California since 1989. She is a member of

numerous professional organizations. Ms. Schwarzentraub is familiar with USPAP and with the statutes, rules, and regulations a licensed real estate appraiser must follow.

27. Ms. Schwarzentraub was provided with materials related to this matter on August 12, 2014, four days before the hearing commenced. She reviewed the accusation, Mr. Hopp's report, and the evidence on which Mr. Hopp relied. In addition, she selected at random three of the 29 appraisal reports that respondent prepared between April and July 2014 for purposes of review. The three appraisals she selected involved different kinds of properties located in different areas of San Diego County. She did not conduct a full technical review of the workfiles she selected.

Based on the workfiles she reviewed over the course of approximately six hours, Ms. Schwarzentraub concluded that respondent provided competent appraisals in each instance. She believed that each workfile met USPAP standards. When she compared the three recent workfiles she reviewed with the Long Beach, Chula Vista, and Lakeside appraisals that are the subject of the accusation, she found that respondent demonstrated "improvement" and "discussed more things that needed discussing."

Ms. Schwarzentraub did not conduct a standard review of respondent's three recent appraisals she testified about because of the very limited time between her receipt of the workfiles and the hearing. She did not review zoning. She did not confirm that the workfiles she reviewed actually contained the appraisals respondent sent to his clients. She did not find any egregious errors in the appraisals; she concluded, "It looks like he [respondent] is doing an adequate job."

28. Mr. Hopp had even less time than Ms. Schwarzentraub to review the three workfiles respondent provided to Ms. Schwarzentraub. Mr. Hopp did not have enough time to determine whether the appraisals respondent produced were credible, but he had enough time to determine that in at least one instance, respondent's appraisal report set forth incorrect zoning for the property respondent appraised.

29. Respondent testified that he has been licensed as a real estate appraiser since 2004. He obtained his initial training from Allied Business School and, according to respondent, he has "been in constant training" since then. His first mentor was Dan Norris. Respondent testified he received incomplete and inappropriate training from Mr. Norris, but he said he did not become aware of that until 2010 when the first accusation was filed. After his training with Mr. Norris, respondent worked for many appraisal management companies. Respondent was critical of the limited oversight provided by those appraisal management companies. He testified that the real estate appraisal industry was a "fast paced, free for all" at the time and that he believed what he was told.

30. Respondent's explanations for the errors he made and the services he provided in connection with the Long Beach, Chula Vista, and Lakeside appraisals were previously described. Respondent testified that his errors were a result of his poor training and a lack of

oversight. He testified that he has learned a great deal since the first accusation was filed, and the errors that were established in this disciplinary proceeding will not be repeated.

31. Respondent currently works for StreetLinks, an independent appraisal management company. Respondent testified he receives 15 to 25 appraisal assignments a month from StreetLinks, depending on the season.

32. Respondent testified he earned \$18,000 in gross income in 2013 from his real estate appraising activities. He claimed that the “fine” sought in this matter is “very threatening and difficult to fathom.” Respondent said the filing of the accusation resulted in respondent having “a little nervous breakdown.” He testified that imposing any kind of license discipline would result in his unemployment due to the impact license discipline has upon a real estate appraiser. He has been told by StreetLinks that StreetLinks would terminate his services if his real estate appraiser’s license was placed on probation.

33. Respondent produced an undated letter signed by Don Tittle, Chief Instructor, White Dragon Martial Arts. That letter stated that respondent has been employed by White Dragon as a part-time martial arts instructor since 2008; that respondent has exhibited the highest moral character; has stood out as a leader, has strived to make himself better in all aspects of his life; and is an upstanding young man.

Respondent provided transcripts that demonstrated he has taken continuing professional education courses and is taking general education courses at a community college with the hope of attending San Diego State University.

Respondent produced a document from StreetLinks that established the number of appraisals assigned to respondent, that StreetLinks deemed respondent’s appraisals were competent, and that respondent had not submitted a report in an untimely manner.

Respondent provided a letter from Evette Nolta, who was previously a licensed real estate appraiser, which stated that, as a result of Ms. Nolta’s unintentional misconduct in 2004 through 2006, “Don Liening was punished by the OREA and required to pay a fine.”

Respondent provided a letter from Steve Bogard, Manager, Appraiser Services, StreetLinks, dated June 6, 2013. That letter stated that respondent’s history with StreetLinks contained no complaints of misconduct or unprofessional behavior. In this proceeding, respondent admitted that this letter of reference was written for a Department of Real Estate disciplinary action in which respondent was involved. Complainant provided Mr. Bogard’s affidavit, dated August 18, 2014, which stated: “On August 12, 2014, Liening requested another referral letter from StreetLinks which was denied.”

34. Respondent was not a credible witness. He blamed others for his misconduct. He took very little responsibility for his wrongdoing. He expressed absolutely no remorse for the victims of his misconduct. Many of respondent’s answers to questions on cross-examination were evasive. He intentionally provided a character reference letter in this

proceeding that he previously obtained for use in a prior disciplinary proceeding, and he did so without the author's authorization. Respondent failed to demonstrate that he is a competent and trustworthy real estate appraiser.

Substantial Relationship

35. The misconduct in this matter arose out of respondent's licensed activities. It bears a substantial relationship to the qualifications, functions and duties of a licensed real estate appraiser. Respondent's misconduct involved willful violations of the Real Estate Appraisers' Licensing and Certification Act. (Cal. Code Regs., tit. 10, § 3722, subd. (b).)³

Disciplinary Evaluation

36. California Code of Regulations, title 10, section 3273, sets forth OREA's criteria of rehabilitation. The regulation provides in part:

(a) Upon a determination . . . that a substantial relationship exists between particular acts or omissions and the qualifications, functions or duties . . . by a licensee. . . , the Chief shall consider all competent evidence provided by the . . . licensed appraiser or known to the Chief, consisting of testimony or other facts showing:

(1) The effect of the passage of time since the most recent conviction or offense;

(2) Restitution to any person who has suffered monetary losses through "substantially related" acts or omissions of the Applicant;

[¶] . . . [¶]

(7) Stability of family life and fulfillment of parental and familial responsibilities subsequent to the conviction or offense;

(8) Completion of, or sustained enrollment in, formal education or vocational training courses for economic self-improvement;

³ Although the term "willful" has no single, uniformly applicable definition, it refers generally to intentional conduct undertaken with knowledge or consciousness of its probable results. Willful conduct does not require a purpose or specific intent to bring about a result. However, it does require more than negligence or accidental conduct. (*Patarak v. Williams* (2001) 91 Cal.App.4th 826, 829.)

[¶] . . . [¶]

(10) Correction of business practices resulting in injury to others or with the potential to cause such injury;

(11) Significant or conscientious involvement in community, church or privately-sponsored programs designed to provide social benefits or to ameliorate social problems;

[¶] . . . [¶]

(13) Change in attitude from that which existed at the time of the crime or offense as evidenced by any or all of the following:

(A) Testimony of applicant or licensed appraiser;

(B) Evidence from family members, friends or other persons familiar with applicant's previous conduct and with his or her subsequent attitudes and behavioral patterns. . . .

37. Using OREA's criteria for rehabilitation as a guideline, the passage of time has not produced significant positive effects. Ms. Schwarzentraub did not dispute the many violations Mr. Hopp testified about, and her testimony that respondent's current practice was "adequate" was based on nothing more than her review of three of respondent's workfiles. The discipline imposed in 2009 did not motivate respondent to comply with USPAP, and respondent's blame of others and failure to take responsibility for the many USPAP violations did not promote confidence in his willingness or ability to comply with those standards in the future. Respondent's testimony about his additional education and training was conclusory, and he utilized very little of that education and training, if any, to understand and explain where he went wrong in his appraisals of the Long Beach, Chula Vista, and Lakeside properties. Respondent has not made restitution to anyone who suffered monetary loss as a result of his substantially related misconduct. No adjudicated debts or monetary obligations were established. The stability of respondent's family life was not established, and the existence of a support group in San Diego County, other than support from a martial arts organization, is unknown. Respondent did not establish an involvement in any community organization other than the martial arts studio. Most importantly, respondent expressed virtually no remorse; he demonstrated no significant change in his attitude from that which existed at the time of the misconduct that gave rise to the accusation in this matter.

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Costs of Investigation and Enforcement

38. Complainant provided a certification of investigative costs that established that OREA expended \$12,523 in costs of investigation, which included 232 hours of Mr. Hopp's expert services billed at rates of \$51.98 per hour and \$54.39 per hour. Mr. Hopp's time spent in the investigation of the matter and the preparation of his comprehensive report was reasonable, as was his hourly rate.

OREA's reasonable costs of investigation total \$12,523.

39. Complainant provided a declaration in support of prosecution costs that established the Attorney General's Office billed OREA \$18,122 for legal services. A detailed billing was attached to counsel's declaration that described the legal services provided, the dates of those services, and the individual providing the services. The hourly rate for legal services was reasonable. This disciplinary matter was factually and legally complicated. Counsel for complainant was well prepared and highly professional.

OREA's reasonable costs for legal services total \$18,122.

40. *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32 applies in this proceeding. Respondent used the hearing process to obtain a reduction in the severity of the discipline that was proposed. He admitted past wrongdoing. While he did not raise a colorable challenge to the proposed discipline, he established that he currently lacks the financial ability to pay a significant amount of enforcement costs. OREA's total costs of approximately \$30,600 related to the investigation and enforcement of this disciplinary action were not disproportionate to the misconduct that was established.

LEGAL CONCLUSIONS

Purpose of the Real Estate Appraiser Law

1. Protection of the public is the highest priority of the Office of Real Estate Appraisers in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount. (Bus. & Prof. Code, § 11310.1.)

2. An agency's authority to take disciplinary action against a licensee derives from the state's inherent power to regulate the use of property to preserve public health, morals, comfort, order and safety. Administrative proceedings to revoke, suspend, or impose discipline on a professional license are noncriminal and nonpenal; they are not intended to punish the licensee, but rather to protect the public. (*Sulla v. Board of Registered Nursing* (2012) 205 Cal.App.4th 1195, 1206.)

Burden and Standard of Proof

3. In an administrative proceeding involving a professional license, grounds for imposing discipline must be established to a reasonable certainty and cannot be based on surmise or conjecture, suspicion or theoretical conclusions, or uncorroborated hearsay. (*Small v. Smith* (1971) 16 Cal.App.3d 450, 457.) The proper standard of proof in an administrative proceeding to revoke or suspend a professional license is clear and convincing proof to a reasonable certainty and not a mere preponderance of the evidence. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853.) “Clear and convincing” evidence means evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the facts for which it is offered as proof. Such evidence requires a higher standard of proof than proof by a preponderance of the evidence. (BAJI No. 2.62.)

The Director’s Authority to Impose Discipline

4. Business and Professions Code section 11313 authorizes the Director to adopt and enforce rules and regulations that are reasonably necessary to carry out the purposes and the enforcement of the Real Estate Appraisers’ Licensing and Certification Law.

5. Business and Professions Code section 11314 requires OREA to enact regulations for the “discipline of real estate appraisers that ensure protection of the public interest and comply in all respects with Title XI of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Public Law 101-73, and any subsequent amendments thereto.”

6. Under California Code of Regulations, title 10, section 3721, the Director of may suspend or revoke any license of any person who has “. . . (6) Violated any provision of USPAP; (7) Violated any provision of the Real Estate Appraisers’ Licensing and Certification Law . . . , or regulations promulgated pursuant thereto. . . .”

Statutes, Regulations, USPAP Standards and Rules

7. Business and Professions Code section 11319 provides that USPAP constitute the minimum standards of conduct and performance for real estate appraisers.

8. California Code of Regulations, title 10, section 3701, provides that licensees must conform to and observe USPAP and any subsequent amendments thereto as promulgated by the Appraisal Standards Board of the Appraisal Foundation, which standards are incorporated into OREA’s regulations by reference as if fully set forth.

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9. USPAP Standard 1 states:

In developing a real property appraisal, an appraiser must identify the problem to be solved, determine the scope of work necessary to solve the problem, and correctly complete research and analyses necessary to produce a credible appraisal.

10. USPAP Standards Rule 1-1 states:

In developing a real property appraisal, an appraiser must:

[¶] . . . [¶]

(b) not commit a substantial error of omission or commission that significantly affects an appraisal. . . .

11. USPAP Standards Rule 1-2 states:

In developing a real property appraisal, an appraiser must:

[¶] . . . [¶]

(b) identify the intended use of the appraiser's opinions and conclusions;

[¶] . . . [¶]

(e) identify the characteristics of the property that are relevant to the purpose and intended use of the appraisal, including: . . . (i) its location and physical, legal, and economic attributes. . . .

12. USPAP Standards Rule 1-3 states:

When necessary for credible assignment results in developing a market value opinion, an appraiser must:

(a) identify and analyze the effect on use and value of existing land use regulations, reasonably probable modifications of such land use regulations, economic supply and demand, the physical adaptability of the real estate, and market area trends. . . .

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13. USPAP Standard Rule 1-4 states:

In developing a real property appraisal, an appraiser must collect, verify, and analyze all information necessary for credible assignment results.

(a) When a sales comparison approach is necessary for credible assignment results, an appraiser must analyze such comparable sales data as are available to indicate a value conclusion. . . .

14. USPAP Standard Rule 1-6 states:

In developing a real property appraisal, the appraiser must:

(a) reconcile the quality and quantity of data available and analyzed within the approaches used. , , ,

15. USPAP Standard 2 states:

In reporting the results of a real property appraisal, an appraiser must communicate each analysis, opinion, and conclusion in a manner that is not misleading.

16. USPAP Standards Rule 2-1 states:

Each written or oral real property appraisal report must:

(a) clearly and accurately set forth the appraisal in a manner that will not be misleading. . . .

17. USPAP Standards Rule 2-2 states:

Each written real property appraisal report must be prepared under one of the following three options and prominently state which option is used: Self-Contained Appraisal Report, Summary Appraisal Report, or Restricted Use Appraisal Report.

[¶] . . . [¶]

(b) The content of a Summary Appraisal Report must be consistent with the intended use of the appraisal, and, at a minimum;

[¶] . . . [¶]

(iii) summarize information sufficient to identify the real estate involved in the appraisal, including the physical and economic property characteristics relevant to the assignment;

[¶] . . . [¶]

(vii) summarize the scope of work used to develop the appraisal;

(viii) summarize the information analyzed, the appraisal methods and techniques employed, and the reasoning that supports the analyses, opinions, and conclusions; exclusion of the sales comparison approach, cost approach, or income approach must be explained. . . .

18. The USPAP Ethic Rule states:

To promote and preserve the public trust inherent in professional appraisal practice, an appraiser must observe the highest standards of professional ethics. This ETHICS RULE is divided into four sections: Conduct, Management, Confidentiality, and Record Keeping. The first three sections apply to all appraisal practice, and all four sections apply to appraisal practice performed under Standards 1 through 10. Compliance with USPAP is required when either the service or the appraiser is obligated by law or regulation, or by agreement with the client or intended users, to comply. In addition to these requirements, an individual should comply with USPAP in any situation in which the individual represents that he or she is providing service as an appraiser.

The Ethics Rules prohibits an appraiser from misrepresenting his or her role when providing valuation services that are outside of appraisal practice; requires that assignments be performed ethically and competently, in accordance with USPAP; prohibits criminal conduct; requires assignments be performed with impartiality, objectivity, and independence, and without accommodation of personal interests; prohibits advocating the cause or interest of any party or issue; prohibits any assignment requiring the reporting of predetermined opinions and conclusions; prohibits misleading or fraudulent communications; prohibits the use or reliance on unsupported conclusions relating to characteristics such as race, color, religion, national origin, gender, marital status, familial status, age, receipt of public assistance income, handicap, or an unsupported conclusion that homogeneity of such characteristics is necessary to maximize value.

The Ethical Rules apply to record keeping practices. An appraiser must prepare a workfile for each appraisal, appraisal review, or appraisal consulting assignment; a workfile must include certain data; and a workfile must be retained as required by USPAP.

19. The USPAP Competency Rule states:

Prior to accepting an assignment or entering into an agreement to perform any assignment, an appraiser must properly identify the problem to be addressed and have the knowledge and experience to complete the assignment competently; or alternatively, must:

1. disclose the lack of knowledge and/or experience to the client before accepting the assignment;
2. take all steps necessary or appropriate to complete the assignment competently; and
3. describe the lack of knowledge and/or experience and the steps taken to complete the assignment competently in the report.

Applicable USPAP Standards for January 1, 2010, through December 31, 2011

20. USPAP Standards Rule 1 states:

In developing a real property appraisal, an appraiser must identify the problem to be solved, determine the scope of work necessary to solve the problem, and correctly complete research and analyses necessary to produce a credible appraisal.

21. USPAP Standards Rule 1-1, states:

In developing a real property appraisal, an appraiser must:

- (a) be aware of, understand, and correctly employ those recognized methods and techniques that are necessary to produce a credible appraisal;
- (b) not commit a substantial error of omission or commission that significantly affects an appraisal; and
- (c) not render appraisal services in a careless or negligent manner, such as by making a series of errors that, although individually might not significantly affect the results of an appraisal, in the aggregate affects the credibility of those results.

22. USPAP Standards Rule 1-2, states:

In developing a real property appraisal, an appraiser must:

[¶] . . . [¶]

(e) identify the characteristics of the property that are relevant to the type and definition of value and intended use of the appraisal, [footnote omitted] including: . . . (i) its location and physical, legal, and economic attributes. . . .

23. USPAP Standards Rule 1-3, states:

When necessary for credible assignment results in developing a market value opinion, an appraiser must:

(a) identify and analyze the effect on use and value of existing land use regulations, reasonably probable modifications of such land use regulations, economic supply and demand, the physical adaptability of the real estate, and market area trends. . . .

24. USPAP Standards Rule 1-4, states:

In developing a real property appraisal, an appraiser must collect, verify, and analyze all information necessary for credible assignment results.

(a) When a sales comparison approach is necessary for credible assignment results, an appraiser must analyze such comparable sales data as are available to indicate a value conclusion.

(b) When a cost approach is necessary for credible assignment results, an appraiser must:

(i) develop an opinion of site value by an appropriate appraisal method or technique;

(ii) analyze such comparable cost data as are available to estimate the cost new of the improvements (if any); and

(iii) analyze such comparable data as are available to estimate the difference between the cost new and the present worth of the improvements (accrued depreciation). . . .

25. USPAP Standards Rule 1-5, states:

When the value opinion to be developed is market value, an appraiser must, if such information is available to the appraiser in the normal course of business: [footnote omitted]

(a) analyze all agreements of sale, options, and listings of the subject property current as of the effective date of the appraisal; and

(b) analyze all sales of the subject property that occurred within the three (3) years prior to the effective date of the appraisal. [footnote omitted].

26. USPAP Standards Rule 1-6, states:

In developing a real property appraisal, an appraiser must:

(a) reconcile the quality and quantity of data available and analyzed within the approaches used; and

(b) reconcile the applicability and relevance of the approaches, methods and techniques used to arrive at the value conclusion(s).

27. USPAP Standards Rule 2, states:

In reporting the results of a real property appraisal, an appraiser must communicate each analysis, opinion, and conclusion in a manner that is not misleading. [footnote omitted]

28. USPAP Standards Rule 2-1, states:

Each written or oral real property appraisal report must:

(a) clearly and accurately set forth the appraisal in a manner that will not be misleading. . . .

29. USPAP Standards Rule 2-2, states:

Each written real property appraisal report must be prepared under one of the following three options and prominently state which option is used: Self-Contained Appraisal Report, Summary Appraisal Report, or Restricted Use Appraisal Report. [footnote omitted]

[¶] . . . [¶]

(b) The content of a Summary Appraisal Report must be consistent with the intended use of the appraisal and, at a minimum: . . . (iii) summarize information sufficient to identify the real estate involved in the appraisal, including the physical and economic property characteristics relevant to the assignment; [footnote omitted] . . . (viii) summarize the information analyzed, the appraisal methods and techniques employed, and the reasoning that supports the analyses, opinions, and conclusions; exclusion of the sales comparison approach, cost approach, or income approach must be explained.

30. USPAP Ethics Rule, states:

An appraiser must promote and preserve the public trust inherent in appraisal practice by observing the highest standards of professional ethics.

An appraiser must comply with USPAP when obligated by law or regulation, or by agreement with the client or intended users. In addition to these requirements, an individual should comply any time that individual represents that he or she is performing the service as an appraiser.

USPAP standards in effect for January 1, 2010, through December 31, 2011, provide many examples of required conduct and prohibited conduct in the appraisal practice, as well many examples of requirements and prohibitions related record keeping.

Cause Exists to Impose Discipline

31. Cause exists to impose discipline against respondent's real estate appraiser license under the applicable statutes and regulations set forth herein. The clear and convincing evidence established that respondent committed numerous violations of applicable statutes, regulations, and USPAP standards in connection with his appraisal of the Long Beach property (first cause for discipline) as set forth in Factual Findings 10-12; that respondent committed numerous violations of applicable statutes, regulations, and USPAP standards in connection with his appraisal of the Chula Vista property (second cause for discipline) as set forth in Factual Findings 14-16; and that respondent committed numerous violations of applicable statutes, regulations, and USPAP standards in connection with his appraisal of the Lakeside property (third cause for discipline) as set forth in Factual Findings 19-21. The violations were substantially related to the qualifications, functions or duties of licensed real estate appraiser.

The Appropriate Measure of Discipline

32. Respondent has a significant disciplinary history. Despite his claim that he had engaged in continuing professional education after that discipline was imposed in 2009, respondent continued to make the same kinds of errors after 2009 that he made before. The evidence respondent presented in an effort to establish his rehabilitation was not impressive. Respondent lacks the competence and character required to hold a real estate appraiser license. Only an outright revocation of respondent's license will protect the public.

Costs of Investigation and Enforcement

33. Business and Professions Code section 11409 provides in part:

(a) Except as otherwise provided by law, any order issued in resolution of a disciplinary proceeding may direct a licensee . . . found to have committed a violation or violations of statutes or regulations relating to real estate appraiser practice to pay a sum not to exceed the reasonable costs of investigation, enforcement, and prosecution of the case. . . .

34. *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32 held that a regulation imposing costs for investigation and enforcement under California Code of Regulations, title 16, section 317.5 (which is similar to Bus. & Prof. Code, § 11409) did not violate due process. However, it was incumbent on the State Board of Chiropractic Examiners to exercise discretion to reduce or eliminate cost awards so that costs imposed under section 317.5 did not “deter chiropractors with potentially meritorious claims or defenses from exercising their right to a hearing.”

The California Supreme Court set forth four factors that should be considered in deciding whether to reduce or eliminate costs: (1) whether the licensee used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed; (2) whether the licensee had a “subjective” good faith belief in the merits of his position; (3) whether the licensee raised a “colorable challenge” to the proposed discipline; and (4) whether the licensee had the financial ability to make payments.

The reasoning of *Zuckerman* must be applied to Business and Professions Code section 11409 since the cost recovery regulation in *Zuckerman* contains substantially the same language.

35. Complainant seeks an outright revocation of respondent's license. OREA's reasonable costs of investigation and enforcement total approximately \$30,600. Those costs were not disproportionate to the wrongdoing that was established. Respondent used the hearing process in an effort to dismiss the present accusation. Respondent admitted past discipline, admitted some wrongdoing relating to this proceeding, but did not raise a

persuasive challenge to the discipline complainant proposed. Respondent established that he currently lacks the financial ability to pay a significant amount of enforcement costs.

Under all the circumstances, it is appropriate to order respondent to pay \$15,000 in costs of investigation and enforcement.

ORDER

Certified Residential Real Estate Appraiser License No. 03325 issued to respondent Donald J. Lienen is hereby revoked.

Respondent Donald J. Lienen shall pay \$15,000 to the Office of Real Estate Appraisers.

DATED: September 17, 2014

Original Signed

 JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings