

STATE OF NEW YORK
DEPARTMENT OF STATE

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In the Matter of the Complaint of

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

Complainant,

DECISION

-against-

ANN COLLINS,

Respondent.

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Pursuant to the designation duly made by the Hon. Gail S. Shaffer, Secretary of State, the above noted matter came on for hearing before the undersigned, Roger Schneier, on March 16, 1993 at the office of the Department of State located at 162 Washington Avenue, Albany, New York.

The respondent, of Bob Howard Inc., 428 Loudonville Road, Loudonville, New York 12211, was represented by David I. Bacon, Esq., Linnan, Bacon & Meyer, 61 Columbia Street, Suite 300, Albany, New York 12210-2736.

The complainant was represented by Compliance Officer William Schmitz.

COMPLAINT

The complaint in the matter alleges that the respondent violated 19 NYCRR 175.11 by placing a for sale sign on a property without the permission of the property owner and by failing to remove it after being asked to by the property owner.

FINDINGS OF FACT

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

2) The respondent is, and at all times hereinafter mentioned was, duly licensed as a real estate salesperson in association with Bob Howard Inc. (Howard), 428 Loudonville Road, Loudonville, New York.

3) On July 8, 1992 the respondent, acting on behalf of Howard, entered into an agreement with the owner of 8 Cherry Tree Road, Loudonville, New York to act as his agent in the sale of his property (Comp. Ex. 5).

8 Cherry Tree Road is on a lot which has no frontage on a public road. Access to the lot is provided a ten foot wide paved driveway on a twelve foot wide easement which crosses through the center of the lot known as 6 Cherry Tree Road, which is to the north of 8 Cherry Tree Road (Comp. Ex. 4). Because of that physical layout, the respondent perceived that she had a problem regarding the placement of a for sale sign. She therefore asked Frank J. Williams, Esq., attorney for the owner of 8 Cherry Tree Road, if she could place the sign on the easement, next to the paved driveway. Mr. Williams replied that in he thought that such a placement would be a reasonable appurtenance to the easement

The respondent then went to the property and spoke with Sarah Howe, co-owner of 6 Cherry Tree Road, and discussed the matter with her. Mrs. Howe gave the respondent permission to place a for sale sign in a specified position believed to be within the easement¹, and on July 10, 1992 the respondent put up such a sign in the agreed location. At 7:30 P.M. on July 14, 1992 Todd Howe, the other owner of 6 Cherry Tree Road telephoned the respondent's office and left a message that he would like to speak with her about 8 Cherry Tree Road (Resp. Ex. D).

The respondent returned Mr. Howe's call on July 15, 1992, and he told her that he objected to the placement of the sign. Then, several days later, the respondent heard from Frank C. Kiepura, Esq., Mr. Howe's attorney, and was again told that Mr. Howe did not want the sign posted. The respondent explained the situation to Mr. Kiepura, and he opined that she had the right to place a for sale sign within the easement and adjacent to the driveway. He said that he would discuss the matter with his client and get back to the respondent, but she never heard from him again.

The sign was posted for a total of 34 days, during which Mr. Howe removed it and left it in the bushes numerous times. The respondent, not having seen Mr. Howe remove the sign, and thinking that the removal might be the action of neighborhood teenagers, repeatedly put it back in position until she herself removed it after a contract of sale for 8 Cherry Road was signed.

¹ Mr. Howe's contention that his wife did not give permission for the placing of the sign is unsupported hearsay, and is directly rebutted by the sworn testimony of the respondent.

OPINION

19 NYCRR 175.11 states: "No sign shall ever be placed on any property by a real estate broker without the consent of the owner." It is alleged that the respondent violated that regulation when she erected the for sale sign.

If, as the complainant argued, and as the respondent intended, the sign was erected on the Howe property (6 Cherry Tree Road), the sign was originally placed with the consent of one of the owners (Mrs. Howe), and, therefore, there was no violation when the sign was first put in position. But, assuming that the posting of the sign did not fall within uses allowed by the easement, a violation did occur when the respondent failed to remove the sign after being told by Mr. Howe that he objected to its presence.² That, however, does not inevitably lead to the conclusion that the respondent must be held liable for a violation of the regulation.

The respondent did not erect the sign until after she had been advised by an attorney that doing so was proper, and she maintained the sign after being advised by a second attorney, this time the attorney representing the Howes, that he too thought that it was proper. In Flushing Kent Realty Corp. v Cuomo, 55 AD2d 646, 390 NYS2d 146 (1976), it was held that a respondent could not be held to have acted improperly where it undertook certain action on the advice of its attorney, and where there was reasonable basis for the attorney's advice. In the present case, considering that answering the question of what constitutes the reasonable use and enjoyment of an easement allows for a great deal of leeway and subjective reasoning (49 NY Jur2d Easements, §117), it cannot be said that there was no reasonable basis for the advice received by the respondent from two attorneys. This is not a case where the respondent's conduct was clearly in violation of law, as it would have been had the sign been posted on the Howe property outside of the area of the easement, in which case reliance on the advice of counsel would not excuse the violation. Butterly & Green Inc. v Lomenzo, 36 NY2d 250, 367 NYS2d 230; Division of Licensing Services v Christiana, 164 DOS 92.

In light of the foregoing, the question of whether the posting of the sign was a permitted use under the easement is moot, and need not be addressed.

² The respondent, arguing that the complainant has not met its burden of proof, has raised the possibility that the sign might actually have been placed on town property. That argument does not, however, support the respondent's defense, inasmuch as the complaint merely refers to the placement of a sign without the property owner's permission, and does not specify which property owner is referred to, and the respondent's testimony contains an implied admission that she had never sought or obtained town permission to erect the sign.

CONCLUSIONS OF LAW

By reason of her reasonable reliance upon the advice of two attorneys that she could erect a for sale sign within the driveway easement the respondent should not be held liable for a violation of 19 NYCRR 175.11.³

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT the charges herein against Ann Collins are dismissed.

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

Roger Schneier
Administrative Law Judge

Concur and So Ordered on:

GAIL S. SHAFFER
Secretary of State
By:

James N. Baldwin
Executive Deputy Secretary of State

³ In reaching this conclusion, I have not considered the possibility that the sign was on town property, since there is insufficient evidence to conclude that to be the case and, in any event, both the respondent and the Howes did not believe that to be the case.