New York State Association of REALTORS®

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FOURTH QUARTER 2015

'Coming Soon' should not be used solely as a marketing tool

By S. Anthony Gatto, Esq., NYSAR Legal Counsel

The use of "Coming Soon" or other similar terms have been the topic of many Legal Hotline calls. Licensees should be aware that the use of such terms in marketing a property should only be done in specific situations. This article will discuss the permitted and prohibited uses of "Coming Soon."

During the past 12 to 18 months, a great number of members have been inquiring about the use of "Coming Soon" when advertising a property. Many members have expressed concern that they were not permitted into the premises of a "Coming Soon" listing and that when the property was finally listed on the MLS, it was entered as "pending." This effectively prohibited other brokerages from showing the property to their clients or customers. Ultimately, this harmed not only the client or customer by preventing them from submitting an offer on the property, but the seller as well, by limiting their access to potential purchasers and possibly losing out on a sale at a higher price.

New York News

Pursuant to the Real Property Law § 441-c(1)(a), licensees are prohibited from placing misleading and/or untruthful advertisements. This also applies to the advertising of "Coming Soon" listings. At all times, a licensee must act in the best interest of their client and not act in their own best interest (self-dealing). As such, the use of "Coming Soon" listings must be in the seller's best interest and should only be used with the seller's full informed consent. Brokers are prohibited from using "Coming Soon" as a marketing tool when there is no legitimate reason to delay the listing of the property in the MLS.

"Coming Soon" listings should not be used as an alternative method for marketing without a legitimate reason justifying the delay. Licensees should not be advising sellers to use a "Coming Soon" listing merely as a tool for the listing broker to collect the names of potential buyers. This includes limiting a property's market exposure by delaying access for showings or open houses, or limiting the amount of time that the seller will consider offers. Motivation for limiting exposure of the property should be carefully considered by the seller and such decisions should only be made with the seller's fully informed consent. If the property is being marketed as "coming soon" because the seller is preparing it for sale, it would be a legitimate use of a "Coming Soon" listing. Any other

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Teams: A guide for operating within real estate law

By S. Anthony Gatto, Esq., NYSAR Legal Counsel

The use of real estate teams (teams) as part of a brokerage's business model should not be considered a new development. The use of teams has been firmly established by brokerages throughout New York State.

Until recently, teams were not recognized by statute or regulation, and as such brokerages were permitting teams to operate without any specific guidance from the New York State Department of State (DOS). Even today, the new Advertising Regulations only authorize a team to advertise as a group of licensees, but do not address not how a team should operate or what a team is permitted or prohibited from doing. This article will outline permitted and prohibited team activities based on the Real Property Law, other laws and interactions with the DOS.

Unlike a real estate broker, associate real estate broker or real estate salesperson, a team is not licensed individually or as an entity. As such, a team may not perform any licensed activities. A team is nothing more than a name representing one or more licensees that choose to work together as a team. The individual licensees may perform licensed activities, but such activities are being performed on behalf of the brokerage by the individual licensee, not the team. The name of the team should not appear on any document being signed or acknowledged by a consumer. Furthermore, the formation and name of a Team must be approved by the broker.

Teams are prohibited from entering into any type of agreement between the team "leader" and a team member. Agreements including the independent contractor and/or any commission split can only be made between the broker and an associated licensee. If by becoming a member of a team, a different commission split would apply (as compared to a non-team licensee), that must be reflected in the agreement with the broker, as the team is prohibited from entering into any such agreements. As a team is not licensed, it is also prohibited from collecting any type of fee directly. All forms of payment must be made to the broker not the team.

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Broker may have liability for injury occurring during a showing

By Liz Celeone, Esq., NYSAR Associate Counsel

In the recent case of Stimmel v. Osherow (Supreme Court of New York, Appellate Division, First Department), the Appellate Court addressed the issue of the potential liability of a listing broker and their agent(s) when a person is injured at a showing of one of their listings.

In this case, plaintiff Barbara Stimmel was viewing a condominium unit owed by Jeff Kamin, one of the named defendants. She testified that was she re-entering the apartment after viewing the terrace, which was accessible from the living room, when her foot got caught in the cord used to open and close the drapes hanging in the entrance to the terrace, causing her to fall forward. Stimmel further testified that she did not see the cord and was thus unable to avoid it. She subsequently commenced an action against Kamin and the Estate of Ina K. Berkowitz. Berkowitz had been residing in the unit at the time of the incident and her estate representative was Julianne Osherow. Osherow commenced a third-party action against the listing agent, Nora Leonhardt, a real estate broker, as well as her broker, Prudential Douglas Elliman Real Estate.

At the time of the incident, the drapes were drawn open. Leonhardt testified at her deposition that while it was normally her custom to open the drapes before a showing, she could not remember whether it was she who had opened them that day. Prudential and Leonhardt moved for summary judgement to dismiss the third-party complaint, arguing that they owed no duty to the plaintiff to keep the apartment in reasonably safe condition, and that a real estate agent who has no prior knowledge of a dangerous condition, and who only shows a premises to potential buyers and/or tenants, cannot be held liable for an alleged defective condition on the premises. In support of this motion, Leonhardt submitted an affidavit stating that she normally placed the chord in the space between the steps and the wall so that the chord would not obstruct the steps back into the living room. Plaintiff Stimmel later moved to amend her complaint to assert a negligence claim directly against Leonhardt and Prudential.

The trial court granted Prudential and Leonhardt's motion for summary judgement and also denied the plaintiff's motion to add Prudential and Leonhardt as defendants, agreeing that a real estate broker is generally not responsible for a personal injury that occurs in the premises that a broker is showing unless the injured party shows that the broker controlled the property. The court concluded that the record did not reflect that the broker controlled the property in this case.

Defendant Osherow appealed this decision, seeking contribution from Prudential and Leonhardt on the theory that they owed a duty to the plaintiff arising out of the contract between Prudential and Kamin, the owner of the unit. The Appellate Court ruled in favor of Osherow, reversing the decision of the trial court. The court found that there was a potential basis for a case of third-party tort liability, resting upon whether Prudential or Leonhardt launched an "instrument of harm" (in this case, the exposed cord).

Since it was Prudential and Leonhardt who had moved for summary judgment, the Appellate Court found that they had the burden of demonstrating that there were no triable issues of fact. As Leonhardt's testimony and affidavit established that it was possible that she was the one who opened the drapes before the accident occurred, she and Prudential were unable to eliminate the possibility that they were responsible for the hazardous placement of the cord on the floor. On this basis, the Appellate Court determined that Leonhardt and Prudential had failed to meet their prima facie burden of demonstrating that there were no triable issues of fact. The court also found that Leonhardt's prior testimony regarding her custom to make sure the cord was on the steps was insufficient to show a lack of liability, as she was unable to offer specific evidence as to her activities on the day of the accident.

This case brings up the question as to what extent real estate brokers (and their agents) are liable for a personal injury occurring during a showing. As stated above, in the case of Stimmel v Osherow, the estate of one of the defendants claimed that the broker owed a duty to the plaintiff arising out of the contract between the broker and the defendant owner of the premises.

A broker's potential liability in such situations would rest upon a theory of third-party tort liability. Such duty can arise under three circumstances: where the third party is directly responsible for the instrument of

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Teams: Brokers remain responsible for all licensee activities continued from page 1

Teams should not be issuing independent contractor agreements to team members. Independent contractor agreements must only be made between the broker and a licensee associated with the brokerage. A team is not authorized to conduct business with or supervise a licensee and as such is prohibited from acting in such a manner. Teams are also prohibited from setting forth their own policies and/or procedures for team members. Any and all policies and/or procedures must be made by the broker to associated licensees. Any action taken by a team is the same as the broker taking that action. The broker is liable for the actions of each and every team member. Likewise, if a team has a policy or procedure that would cause an independent contractor to be deemed an employee, the broker will be the liable party for the purposes of worker's compensation, unemployment insurance, back wages, payroll taxes, social security and all fines and/or fees. Brokers should also be aware of the use of personal assistants by a team. Personal assistants may only be paid as an employee as they do not meet the requirements to be classified as an independent contractor. In the event the personal assistant files some type of labor related action, it would most likely include the broker as all activity done by the personal assistant is in furtherance of the broker's business.

A team may form an unlicensed LLC or corporation under Real Property Law §442. (It should be noted that only an individual may be licensed as an associate broker or salesperson. An LLC or corporation can only be licensed as a brokerage. The term unlicensed refers to the inability of a team to obtain a real estate license). The broker may pay the commissions directly to the unlicensed LLC or corporation so long as all of the members of the unlicensed LLC or corporation have their licenses associated with the brokerage (no other individuals may be a part of the LLC or corporation). When §442 was amended to permit an unlicensed LLC or corporation to be paid a commission, all of the memorandums submitted, including the sponsor's memorandum, indicated it was for the purpose of collecting commissions only, not to have the LLC or corporation act in a business capacity beyond the purpose of commissions. In fact, the purpose of the amendment in the sponsor's memo was for licensees to be able to take advantage of certain tax issues relating to commissions. As such, the formation of an unlicensed LLC or corporation should only be done for the purposes of commissions to be paid by the broker to members of the LLC or corporation. Teams are prohibited from holding themselves out as an LLC or corporation.

> Brokers should be aware as to how the team operates and approve all team policies and procedures. . . A team is not and should not be operating as a 'mini brokerage.'

In 2013, the Department of State permitted a brokerage to have a team occupy a branch office. While the branch office may only contain members of the team, the branch office is still subject to the same requirements as any other branch office including compliance with the advertising regulations. Furthermore, 19 NYCRR §175.20(a) states that a branch office shall not be conducted, maintained and operated under an arrangement whereby a team, licensee or employee of the broker shall pay, or be responsible for, any expense or obligation created or incurred in its conduct, maintenance or operation, or under any other arrangement, the purpose, intent or effect of which shall permit a team, licensee salesperson or employee to carry on the business of real estate broker for his own benefit, directly, or indirectly, in whole or in part. (This author added the term team to the text of the regulation as the DOS indicated the regulation applied to teams as well).

Teams are also prohibited from giving team members a corporate title. In 2013, the DOS issued two opinions relating to the use of corporate titles by real estate licensees. According to the DOS, the use of such terms as "President, Vice President, Treasurer, Secretary, Director or Manager (other than an Office Manager as set forth in RPL §440(6))" are prohibited unless the licensee is a principal broker. Any title that implies an associate broker or salesperson is involved in the management, supervision and control is prohibited. There is no such title as "Team President, Team Manager, Vice President of Team Marketing, etc." Licensees should be using their license type as it appears on their license in advertisements, not a title that appears important merely for the purpose of marketing.

Teams are also prohibited from retaining documentation and files relating to closed transactions. Pursuant to 19 NYCRR §175.23, only a broker is authorized to retain documentation related to a transaction, client or customer. Associate brokers and salespersons should not be retaining documents and since a team is nothing more than a group of licensees choosing to work together, the team is also prohibited from retaining documents. All documents are the property of the broker and only the broker should be keeping them.

Brokers should be aware as to how the team operates and approve all team policies and procedures. If a team member takes some type of action, it is the same as the broker taking action. A team is not and should not be operating as a "mini brokerage." Brokers that permit a team to operate in such a way are doing so at their own risk and may face disciplinary action by the DOS.

Reed v. Town of Gilbert: No death knell for open house signs

By Ralph Holmen

Recently, some commentators have expressed concerns that the United States Supreme Court's decision in Reed v. Town of Gilbert, 135 S.Ct. 2218 (2015) is likely to cause municipalities to prohibit open house signs, or to initiate broad limits on all signs without exemption for open house signs. While vigilance in monitoring the activities of municipalities regulating real estate signs is always important, it's not necessarily the case that Gilbert spells doom for real estate open house signs.

In Gilbert, the Supreme Court held that the sign code of the town was unconstitutional because it regulated various types of signs differently depending on their content, based on 23 categories of signs set forth in the code. In particular, "temporary directional signs" were regulated most rigorously, political signs were regulated somewhat less strictly, and "ideological signs" were provided the most favorable treatment. Notably, "temporary directional signs" were permitted under the Gilbert ordinance, but regulated more strictly than other types of signs: they were limited to four signs on a single property, could not be more than six square feet (2'x3'), and could not be displayed more than 12 hours before the event to which they directed attention and not more than 1 hour after.

National Case

The court broadly held that sign regulations that depend on the particular content of the signs must be strictly scrutinized and could be enforced only if such content-based distinctions in regulation of signs are consistent with the ordinance carefully and narrowly serving an important government interest. In Gilbert, the court held that such a strict analysis of the ordinance revealed that content-based distinctions it contains were insufficiently tailored to narrowly serve the justifications offered by the town, which were to preserve town aesthetics and serve public safety. In particular, the court held that the town's aesthetic and safety concerns were adversely affected by signs that were not subject to the same limitations applied to temporary directional signs, and, therefore, temporary directional signs could not be more rigorously regulated in the order to preserve those interests.

The National Association of REALTORS® has considerable prior experience as amicus and providing financial support for challenges to various municipal limitations on real estate for sale or sold signs as unconstitutional under the First Amendment. NAR participated as amicus in the seminal case on the issue, Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977), where the Supreme Court held a prohibition on real estate for sale signs was unconstitutional. In virtually all of those cases the challenger has been successful.

The holding of Gilbert: that all content based exemptions on sign restrictions require strict scrutiny to determine if they adequately and narrowly serve important government interests - should not be understood to suggest

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use of "Coming Soon" must be at the seller's request, in the seller's best interest and for a legitimate purpose.

Furthermore, listing agents are prohibited from showing a "Coming Soon" listing unless other brokers are given the same opportunity, and in that case, the property should not be listed as "Coming Soon" because that is misleading/dishonest if there are any showings, even one. If you are showing the property, it is obviously not "Coming Soon." The actions of the listing agent violate a number of sections in the Real Property Law and would subject them to discipline by the DOS. This practice would be looked at by the DOS as a dishonest effort for the listing broker to acquire a buyer and receive "both sides" of the transaction. This is a clear violation of the license law because the broker is not exercising reasonable skill and care, and is putting their own interest above that of the seller.

Brokers are prohibited from utilizing "Coming Soon" listings for their own benefit. A broker that places "Coming Soon" listings in the MLS that are already pending or under contract may be subject to discipline and may be liable for return of commissions and other damages if it is found by the DOS that the use of "Coming Soon" is misleading or untrustworthy. There could also be liability by violating MLS rules and acting contrary to the Code of Ethics.

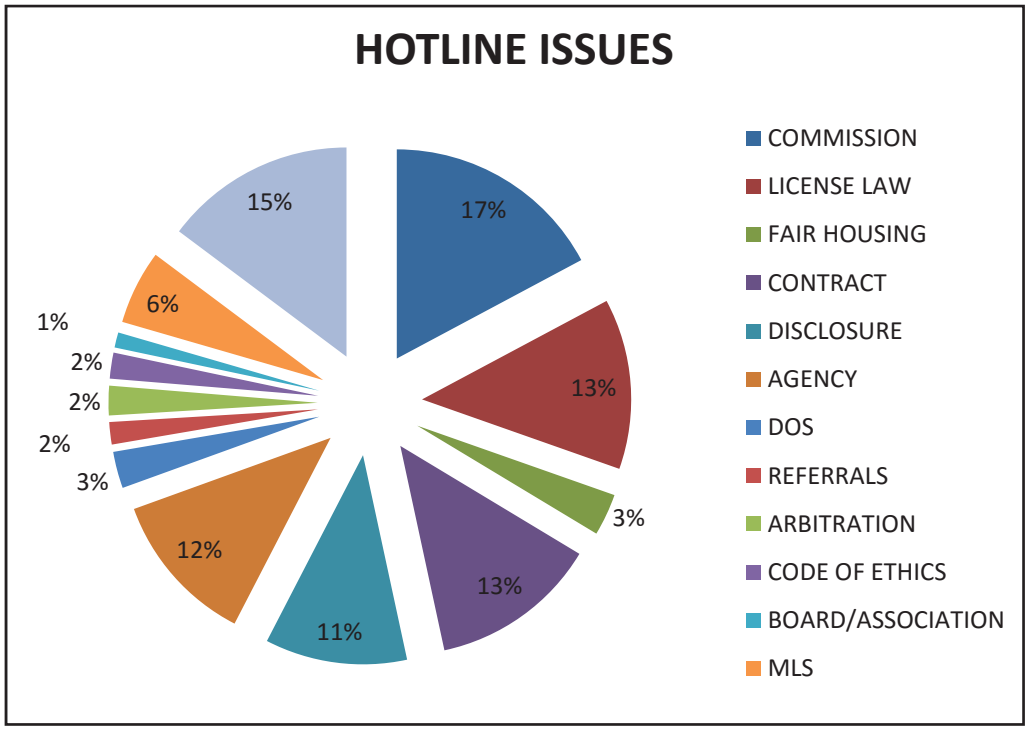
"Coming Soon" listings should be used carefully and under appropriate circumstances. If they are not used to promote the seller's best interest and if they limit opportunities for potential sales, there could be significant liability for the licensee and broker.

NYSAR Legal Update

Tuesday, February 9, 2016
The Desmond, Albany, NY
12 p.m.

Presented by NYSAR Director of Legal Services
S. Anthony Gatto, Esq.

NYSAR Legal Hotline call report
Third Quarter 2015



ISSUES		
COMMISSION	249	17%
LICENSE LAW	191	13%
FAIR HOUSING	47	3%
CONTRACT	188	13%
DISCLOSURE	159	11%
AGENCY	172	12%
DOS	41	3%
REFERRALS	25	2%
ARBITRATION	33	2%
CODE OF ETHICS	29	2%
BOARD/ASSOCIATION	17	1%
MLS	83	6%
OTHER HOTLINE ISSUE	214	15%
TOTAL ISSUES.....	1448	

The NYSAR Legal Hotline is available to members by calling 518-436-9727 Monday through Friday from 9 a.m. to 3 p.m.

Maine court considers arbitration challenge

A Maine court has considered a challenge to an arbitration conducted by the Greater Portland Board of REALTORS® (association).

The Maine Real Estate Network (challenger) filed a lawsuit seeking to vacate an arbitration award made to E to P LLC (company) by a hearing panel of the association. In its lawsuit, the challenger argued that the panel had failed to issue any findings of facts or conclusions of law in making its determination, and also failed to release a tape of the hearing. Because of those failings, the challenger argued that the arbitration award should be vacated.

The Superior Court of Maine, Cumberland, denied the challenger's arguments, confirmed the award, and allowed the company to seek reimbursement for its costs and attorney fees incurred in confirming the award. A court has very limited statutory grounds under which it can review an arbitration proceeding. The challenger asserted that one of the grounds for review, an arbitrator's refusal to stay a hearing after a party demonstrated sufficient cause that caused prejudice to the party, allowed the court to review the association's arbitration proceeding.

The court rejected the challenger's argument because the asserted failure of the association's arbitration panel to issue findings of fact or conclusions of law had nothing to do with the asserted grounds for review, the refusal to postpone a hearing; indeed, the challenger didn't allege that the association refused to postpone the hearing. The court found that there is no requirement that the arbitration panel issue findings of fact or conclusions of law and noted that the NAR *Code of Ethics and Arbitration Manual* specifically prohibits a panel from issuing either of these. The challenger had also not asserted a denial of due process (another possible ground for review), and so the association's refusal to release the hearing tape did not give the court grounds to overturn the arbitration award.

Therefore, the court confirmed the arbitration award in favor of the company.

Next, the court reviewed the company's request for its costs and fees in seeking judicial confirmation of the award. In its arbitration request with the association, the challenger had included a provision that if any party had to seek judicial confirmation of an arbitration award, then that party could obtain reimbursement for the reasonable costs and fees incurred in obtaining judicial confirmation. Based on that language, the court ordered additional proceedings to determine the amount of fees and costs that the company could receive.

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harm; where the plaintiff suffers an injury as a result of his or her reasonable reliance upon the defendant's continued performance of the contractual obligation; and where the contracting party has "entirely displaced the other party's duty to maintain the premises safely." (See also, Megaro v Pfizer, Inc., 1st Dept 2014)

In this particular case, the first of the above three circumstances (whether the agent had opened the drapes and placed the cord in a hazardous spot) was found to be a triable issue of fact. The second of the three was not applicable in this case due the fact that it was the defendant and not the plaintiff who was relying upon the contract between the owner of the premises and Prudential. The third of the circumstances was also determined by the court to not apply to this case as there was no evidence of the broker assuming liability by taking on the owner's duty to maintain a safe premises. There was no such obligation set forth in the contract between the owner and Prudential. Furthermore, Prudential and Leonhardt never took control of the premises, as there was a tenant residing there at the time of the incident. Prudential's agent, Leonhardt, did state that she gave the tenant instructions as to how to keep the apartment presentable, but such instructions did not include safety issues.

As can be seen from this particular case, the broker and their agent may have prevailed in this case had the agent been able to demonstrate that she was not the one who had opened the drapes, leaving a cord exposed for a visitor to trip on. To limit potential liability, it is in the listing broker's (and their agent's) best interest to thoroughly examine the premises before a showing to check for any potentially hazardous conditions that could cause injury to a person viewing the property. Any changes to the way the owner/occupant(s) has left the property should be noted by the agent and agents should make sure that they have not created any safety hazards in making such changes. Agents should also discuss property safety as well as any known safety hazards with the owner/occupant(s) of the property beforehand and document in writing that such conversation and inspection took place.

US Appeals Court considers ADA and fair housing case

The United States Court of Appeals for the Sixth Circuit considered whether a municipal ordinance (ordinance) banning horses from residential property violated the Americans with Disabilities Act (ADA) and the Fair Housing Amendments Act (FHAA).

Ingrid Anderson (owner) lived in the City of Blue Ash (city) with her disabled daughter. Her daughter's disabilities made it difficult for her daughter to maintain her balance independently, so the owner bought a miniature horse for her daughter. The miniature horse allegedly helped the daughter maintain her balance, and also allowed her to use the backyard for recreation and exercise.

The city passed an ordinance prohibiting farm animals from being kept on residential properties within the city limits after making multiple requests to the owner seeking the removal of the horse. In response to the city's actions, the owner unsuccessfully attempted to argue that the ADA and the FHAA allowed her to keep the miniature horse on her property. The owner later filed a lawsuit against the city alleging that the city's refusal to allow her to keep the horse on her property was a violation of the ADA and the FHAA. The trial court granted summary judgment to the city. The owner appealed.

The United States Court of Appeals for the Sixth Circuit partially reversed the trial court. The court found that the owner had produced enough evidence under the ADA for a court evaluate whether it would be reasonable for her to keep the horse on her property and so sent the case back to the trial court for further proceedings. However, the court rejected the owner's argument that the city intentionally discriminated against the owner in violation of the ADA because the owner had failed to properly allege the necessary elements for a claim under the ADA.

Next, the court considered the FHAA allegations. The owner had requested a reasonable modification of the ordinance, and also alleged disparate treatment and disparate impact by the city. A reasonable modification under the FHAA requires "accommodations that are necessary for the same enjoyment of a dwelling that a non-disabled person would receive," and that making exceptions to the city's rules and zoning policies is exactly what the FHAA requires. Therefore, the court reversed the trial court's grant of summary judgment to the city on this claim. The court upheld the dismissal of the disparate impact and disparate treatment allegations, as the owner failed to establish a discriminatory intent and the city's ordinance specifically exempted animals protected by federal law.

The court remanded the case for further proceedings in accordance with its opinion.

Anderson v. City of Blue Ash, 798 F.3d 338 (6th Cir. 2015)

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municipalities may, or should, respond by banning outright all signs without exemption. There are at least two reasons for this. First, any broadly stated municipal restriction on all signs, without exemptions, must be justified by a compelling government interest. And while aesthetic and safety concerns have been recognized as interests sufficient to warrant some limitations on the time, place or manner of signs (size, placement, etc.), the Linmark case holds directly that real estate for sale signs cannot be prohibited outright. So it's possible, and perhaps even likely, that real estate open house signs would be treated similarly - subject to reasonable limits on size, placement or duration (similar to the limits imposed on temporary directional signs in Gilbert), but not subject to absolute prohibition.

Second, where a municipality asserts aesthetics or safety as a justification for regulating signs, a municipal sign ordinance exemption for open house signs may nevertheless be reasonably warranted on the thesis that open house signs are generally modest in number and size, and displayed for only a few hours in a day. Therefore, such signs do not unreasonably offend community aesthetic considerations in the same way that other signs not subject to similar display limits do. The constitutionality of such an exemption would only be problematic where, as in Gilbert, other types of signs, categorized by their content, are permitted without such limits. In such a case allowing display of some signs while restricting others in the interests of aesthetic considerations belies the legitimacy of that aesthetic justification, and invites a court reviewing such an ordinance to hold it unconstitutional. Associations that may be confronted with municipalities considering sign codes that do not allow brokers and agents to display open house signs can contact NAR for more information and assistance.

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