ML – Montclair 3/30/1970

(Charles Wm. Baskerville Jr., et al v. Montclair)

Letter to attorneys notifiying them of plaintiffs action to have an ordinance set aside

Pgs 12

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N FOR PUBLICATION WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS
SUPERIOR COURT OF NEW JERSEY

MM000041L

CHAMBERS OF
MAX MEHLER
JUDGE

COURT HOUSE
NEWARK, N.J. 07102

March 30, 1970

Richard F. Bellman, Esq.
1865 Broadway
New York, N. Y. 10023

Samuel E. Bass, Esq.
c/o Freeman & Bass
24 Commerce Street
Newark, N. J. 07102

Robert B. Shepard, Jr., Esq.
250 Bellevue Avenue
Upper Montclair, N. J. 07043

Norman N. Schiff, Esq.
11 Commerce Street
Newark, N. J. 07102

Re: Charles Wm. Baskerville, Jr., et al
v. Town of Montclair, et al
Docket No. L-25287-68 P.W.

Dear Sirs:-

The plaintiffs, by this action in lieu of a prerogative writ, seek to set aside an ordinance adopted by the Board of Commissioners of Montclair (commissioners), its governing body, which amended the Town's zoning ordinance by extending a garden apartment zone to cover an area theretofore limited to one-family residence use.

Montclair's zoning ordinance provides for 9 residence zones, one of which, R-O(a), is, with certain exceptions not relevant to this case, restricted to one-family detached dwellings. The property affected by the challenged ordinance is the interior or rear portion of a 2 1/2 acre lot fronting on South Mountain Avenue, which is in the R-O(a) zone. This rezoned portion, consisting of 1 1/2 acres, is contiguous to the rear property lines of 2 single and 7 multiple-family dwellings which front on St. Luke's Place, which is in the R-3 or garden apartment zone.

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The lot involved has been vacant since 1956. In 1959 Robert F. Edwards, Montclair's town planner, drew a plan for the development of the lot. He proposed utilizing the frontage for single-family homes to preserve the single-family concept, and the rear for garden-type apartments. The planning board was in accord with his plan, but he was unable to interest a developer in carrying it out.

The defendant Lutsky acquired the lot in 1968. He applied to the planning board for approval of a subdivision plan for the property which called for dividing it into three lots. Two would front on South Mountain Avenue and meet R-O(a) zone standards. The third would consist of the interior portion. Lutsky told the planning board that he would build a single-family dwelling on one of the two front lots for his own use and either sell the other or build a house on it for sale. On the interior lot he would build 12 town houses, which are a form of garden-type apartments. The subdivision that Lutsky proposed was substantially what Edwards had talked about for years. After reviewing Lutsky's application, the planning board adopted a resolution preliminarily approving the subdivision plan and recommending to the commissioners enactment by them of an amendment to the zoning map extending the R-3 zone from the rear property lines of the properties fronting on St. Luke's Place to include the interior lot of the subdivision in that zone. The planning board conditioned its approval, however, on Lutsky's filing with the Town, prior to the adoption of the amending ordinance, a bond and agreement relative to the property. By the agreement, Lutsky was to obligate himself and by deed restrictions, his successors in title, to construct the proposed two single-family dwellings within 2 1/2 years at a construction cost of not less than $35,000 each, exclusive of lot and utilities, with building to begin within six months after commencement of construction of the town houses. The agreement was also to provide that each single-family lot be restricted for a period of 25 years to such $35,000 minimum cost. The bond was to obligate the owner of the property involved in the subdivision to pay to Montclair the penal sum of $50,000 in the event he failed to comply with the terms of the agreement relative to the cost and time of the construction of the two single-family houses. Finally, the resolution provided that the bond and agreement should recite that they are being offered to the Town to induce the commissioners to amend the zoning ordinance as requested, and are to become binding and effective upon the adoption of the ordinance. The resolution provided that a copy of it be transmitted to the commissioners, which was done.

As further conditions, Lutsky was also to agree to limit the ground area of all buildings on the site to a stated percentage of the total ground, to provide such proper screening of garage doors and service areas as may reasonably be required, and to consider recommendations by the planning board as to plans and architectural features for the buildings and as to planting, landscaping and screening of the town houses.

Thereafter, Lutsky filed with the Town a bond and agreement which complied with the terms of the planning board resolution. Specifically, they state that they "are being offered to the Town to induce the Board of Commissioners to amend the

Zoning Map as requested and are to become binding and effective upon the adoption of an ordinance of the Board of Commissioners so amending such map." Two weeks later the commissioners introduced the recommended amending ordinance and as required by N. J. S. 40:55-35, referred it back to the planning board for its approval. That board, by resolution granted final approval subject to the making of a minor amendment to the bond and agreement and directed that a copy of the resolution be sent to the commissioners.

On February 25, 1969, the proposed zoning ordinance amendment came before the commissioners for final consideration. Several persons spoke in opposition to the passage of the ordinance. The speakers did not raise the issue of the minimum construction cost requirement for the front lots. The facts concerning this matter were not generally known to the opposition speakers at that time. The ordinance was approved by the vote of all the commissioners except the Mayor who abstained.

Plaintiffs are all residents of Montclair. Among them are low-income negroes who reside in sub-standard and deteriorated housing in the Town's negro ghetto and executive officers of the Montclair Fair Housing Committee, which is interested in promoting equal housing opportunities for minority group citizens. Plaintiffs seek to set aside the ordinance on grounds which can be summarized as follows: that the imposition of a minimum construction cost for the single-family homes violates the 13th and 14th amendments to the United States Constitution and N. J. S. 40:55-32; that the commissioners' refusal to consider Lutsky's past rental practices and the housing needs and other social problems of the black community violated New Jersey law and 13th and 14th amen dment rights of black citizens; and that the ordinance constitutes contract and spot zoning.

I.

Saying that no one other than Lutsky can be aggrieved by the minimum cost condition and therefore only he has the right to contest it, defendants in effect challenge the right of the plaintiffs to attack the ordinance. This issue will first be determined, since it is a preliminary question which should be decided before the merits are considered. Cf. The Jersey City Chapter of the Property Owner's Protective Association v. City Council of Jersey City, 55 N. J. 86, 94 (1969). Defendants' thesis, carried to its logical conclusion, would in reality leave no one to test the legality of the ordinance. Lutsky, who has accepted the condition, cannot be expected to challenge it unless perchance he breaches his covenant and Montclair attempts to hold him to it. Nor is it likely that his neighbors on South Mountain Avenue will when the effect of the condition is to continue the pattern of expensive homes on that street.

Plaintiffs are not intermeddlers with no interest in housing in Montclair. Those who are executive officers of the Town's Fair Housing Committee are interested in promoting equal housing opportunities for minority group citizens. In such capacity and as residents of Montclair, they should have the right to bring into question a legislative act of the Town affecting housing, which they believe is illegal. While there is

no assurance, in fact it may be highly doubtful that inexpensive homes would be built on the two front lots if the condition had not been imposed, the fact remains that such houses may not now be built because of the condition. A resident of a municipality should have the right to have a court determine whether or not the municipality can by legislation of the kind here involved and enacted under the circumstances present here, fix the construction costs of new houses below which they may not be built.

In a comprehensive opinion on the subject of standing, Justice Jacobs, in Al Walker Inc. v. Stanhope, 23 N. J. 657, 661 (1957), said: "In our State, perhaps more than any other, the prerogative writ has been broadly made available as a comprehensive safeguard against wrongful official action." Justice Jacobs pointed with approval to Hudson-Bergen County Retail Liquor Stores Assoc. v. Board of Commissioners of City of Hoboken, 135 N. J. L. 502, 510 (E. &A. 1947), where the Court said on the issue of standing that "it takes but slight private interest, added to and harmonizing with the general public interest", and to Koons v. Board of Commissioners of Atlantic City, 134 N. J. L. 329 (Sup. Ct. 1946), aff'd 135 N. J. L. 204 (E. &A. 1947), where a resident of Atlantic City without any financial interest greater than that of other residents was held to have an interest sufficient to entitle her to attack ordinances imposing sales taxes. The Court said that she was not simply an interloper and that the proceedings served the public interest.

The plaintiff in Walker, which was neither a citizen nor a taxpayer of Stanhope and asserted that the borough had adopted an illegal ordinance which had caused it substantial financial harm, was permitted to attack an ordinance without the formal intervention of a local resident who had suffered no such harm. In Haines v. Burlington County Bridge Commission, 1 N. J. Super. 163, 171 (App. Div. 1949), the Court said that "the standing of taxpayers and citizens, under appropriate circumstances and without any showing of increased tax burden, to maintain proceedings seeking to remedy wrongful acts of public officials has long been recognized by our State."

In Oliver v. Jersey City, 63 N. J. L. 96, 99 (Sup. Ct. 1899), reversed on other grounds in 63 N. J. L. 634 (E. &A. 1899), the Court sustained the standing of a taxpayer to attack official action without any showing of injury except as a member of the public using the highway. In doing so it stated that it could find "no consistent rule of law nor any reason of wise public policy" which would deny relief "when the citizen at his own expense, and at the risk of burdensome costs, seeks to intervene for the purpose of averting imminent injury to the public of which he is a part." See also Gimbel v. Peabody, 114 N. J. L. 574 (Sup. Ct. 1935).

Since zoning serves the public at large and the community as well as individual property owners have an interest in the security of the zone plan (Beirn v. Morris, 14 N. J. 529, 536 (1954)), I am of the opinion that plaintiffs in this case have a sufficient standing to challenge the ordinance.

II.

Since it is fundamental that a constitutional question will not be resolved unless absolutely imperative to the disposition of the litigation (cf. State v. Salerno, 27 N.J. 289, 296 (1958); Ahto v. Weaver, 39 N.J. 418, 428 (1963), the Court will first consider whether the minimum cost provision is offensive to New Jersey zoning laws and if it is, whether this and the part it played in the enactment of the ordinance must result in invalidating it.

While it is not the ordinance which imposes the minimum cost provision on the front lots, under the circumstances present here, the proceedings of the planning board cannot be separately considered from the action of the commissioners. The close relationship between the functions of the two bodies is made clear by N.J.S. 40:55-35, which requires that an amendatory zoning ordinance first be submitted to the planning board for approval where one exists. As was said in Abel v. Elizabeth Board of Works, 63 N.J. Super. 500, 512 (App. Div. 1960):

> "The obvious legislative purpose was to make sure that the substance of any proposed zoning amendment would have a critical and expert review by the one municipal agency which has an ongoing concern with municipal planning."

See also "Control of Land Use in New Jersey:, 15 Rutgers L. Rev. 1, 45-46 (1960), where Professor Cunningham said as follows:

> "The close relation between planning, subdivision control and zoning is, of course, obvious. * * * Participation of the planning board in the formulation of both the zoning and subdivision regulations is calculated to insure considerable conformity between them, and with the master plan or any portion thereof which the planning board may have completed."

When Lutsky decided to subdivide his lot, he consulted Edwards, who for years had been trying to have the property developed and whose function as a town planner permitted him to co-operate with Lutsky as a property owner. Lutsky's subdivision plan received preliminary approval from the planning board which imposed the various conditions hereinabove described. The Legislature has authorized a planning board to prescribe conditions in the public interest in connection with subdivision approval, N.J.S. 40:55-1.20, 21. The conditions which may be imposed, however, are only those permitted by the authorizing statute. Battaglia v. Wayne Township Planning Board, 98 N.J. Super. 194, 198 (App. Div. 1967). Minimum cost of housing is not such a condition. Yet a minimum cost of the two houses, enforceable by a $50,000 penalty bond, was imposed not only as a condition of subdivision approval but a complying agreement and bond were required to be filed with the Town to induce the commissioners to amend the ordinance. There is no doubt that the latter were aware of this requirement when they introduced the amending ordinance, since the planning board resolution provided for the resolution to be transmitted to the commissioners. Nor is there any doubt that they knew Lutsky had agreed to the condition and had filed the bond and agreement before the amending ordinance was adopted, for the second resolution of the commis-

sioners which called for a slight change in the bond and agreement filed by Lutsky was also ordered transmitted to the commissioners. There is nothing in the minutes of the meetings of the commissioners or any other evidence which indicates that they were not in complete accord with the planning board's condition or that they would have adopted the ordinance had Lutsky not filed the bond and agreement.

In fact, defendants do not assert that Lutsky's agreement to abide by the condition, backed by his bond, was not an inducing consideration for the commissioners' favorable action. On the basis of the evidence, I conclude that the ordinance would not have received commission approval had not Lutsky filed the bond and agreement before the final vote was taken.

The action taken by the planning board and by the commissioners are inextricably intertwined. Passage of the ordinance was as much conditioned on Lutsky's agreeing to the minimum cost provision as was the planning board's approval of the subdivision plan. It is therefore immaterial that that provision was imposed by planning board resolution rather than by the amendatory ordinance. The condition, if invalid, infects both.

To determine its validity, recourse must be had to the zoning statutes. N. J. S. 40:55-30 provides that a municipality may by ordinance restrict and limit land and building uses and that the exercise of this authority shall be deemed to be within the police power of the State. Section 30 further provides that the authority conferred by the article on zoning shall include the right to regulate and restrict the height, number of stories and sizes of buildings. N. J. S. 40:55-32 requires that zoning regulations shall be in accordance with a comprehensive plan designed to promote the specified statutory purposes related generally to the health, safety and welfare of the community. See Conlon v. Board of Public Works, Paterson, 11 N. J. 363, 366 (1953). See also Village of Euclid v. Ambler Realty Co., 272 U. S. 365 (1926).

Use restrictions upon real property must find their justification in some aspect of the police power reasonably exerted for the public welfare. Katobimar Realty Co. v. Webster, 20 N. J. 114, 122, 123 (1955). As was there said,

> "[C]onstitutional due process and equal protection ordain that the exertion of the authority shall not go beyond the public need;
> * * *
> "The police power is the public right to reasonable regulation for the common good and welfare. The constitutional principles of due process and equal protection demand that the exercise of the power be devoid of unreason and arbitrariness, and the means selected for the fulfillment of the policy bear a real and substantial relation to that end. In a word, the authority coincides with the essential public need. And in zoning there must be a rational relation between the regulation and the service of the general welfare in an area of action within the range of the police power. Excesses in the realization of the statutory considerations are inadmissible."

The power to control the use of property by zoning regulation must be exercised within the statutory limits and for legitimate zoning purposes. Morris v. Postma, 41 N. J. 354 (1964).

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Cases which involve or discuss minimum cost provisions in zoning ordinances are few in number. Only three have been cited by counsel. The probable reason for such dearth is that such a requirement appears to be so clearly unrelated to the health, safety or general welfare of the community that governing bodies have shunned it as part of their zone plans. In Brookdale Homes, Inc. v. Johnson, 123 N.J.L. 602, 606 (Sup. Ct. 1940), aff'd 126 N.J.L. 516 (E.&A. 1941), an ordinance amendment prohibited the erection of a building beyond a certain height. By way of dictum, the Court said that a municipality under the cloak of its zoning power may not provide that a house costing less than a certain sum should be erected in a specified area. In Stein v. Long Branch, 2 N.J. Misc. 121 (Sup. Ct. 1924), an ordinance which, among other restrictions, prescribed a minimum construction cost on residential dwellings was voided with little comment. In Borough of Speers, 28 Wash. Co. 224 (Pa. Q.S. 1949), the Court, in nullifying a minimum cost regulation, said: "We have not found a single case which sustains a regulation that a dwelling house must cost at least a certain sum. This would appear to be rather a means of social exclusion than for the purpose of promoting health, safety, morals or the general welfare." Alexander Building Corp. v. Borough of Carteret, 31 N.J. 37 (1959), cited by Lutsky, is not apposite. There a declaratory judgment action was brought with respect to plaintiff's title to certain land which had been conveyed to it by the borough. The deeds included a requirement, among others, that no houses would be built on the land at a cost of less than $6,000. Determination of the validity of that provision was not necessary to the decision of the Court, which neither commented nor passed upon it.

Defendants do not contend that the minimum cost requirement is related to any of the purposes of zoning. Montclair says that the requirement "was actually not too significant since, as a matter of economics, a builder could not recover his land cost nor hope to sell a single-family residence in the locality which cost less than $35,000 to erect. Possibly a condition fixing floor area of the dwellings would have been more appropriate, but basically, floor area when translated into dollars of construction cost, results in a dollar limitation," citing Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165 (1952). The analogy is not apt. In Lionshead the Court upheld as a health measure a zoning ordinance which limited living-floor space of dwellings to be erected to not less than a specified number of square feet. Lutsky says that the requirement was a condition imposed upon him by the Town and not one which he desired. He also says that a minimum construction price of $35,000 for a house to be erected on land located in the highest residence district of Montclair is immaterial in view of today's highly inflated building costs and the initial cost of the land; that in any event he could not feasibly construct homes on this land for less than the stipulated amount. The fact remains, however, that the provision was imposed by the planning board as a condition of subdivision approval and influenced the commissioners' zoning action. It is plain that the minimum cost requirement is unrelated to the health, safety or general welfare of the community. Its imposition and consideration as an inducing factor to the enactment of the amendatory ordinance were improper and rendered the ordinance invalid.

Finally, Montclair contends that the condition is not a substantial one and even if it is found to be unenforceable this does not adversely affect or void the zone change. I cannot agree. As already noted, the evidence shows that the commissioners passed the ordinance with full knowledge of the planning board's condition and following the filing of the bond and agreement which were furnished to, and did in fact influence and induce the favorable action by the commissioners.

In view of the conclusion reached, it is unnecessary to discuss the contentions that the minimum construction cost imposition violates the 13th and 14th Amendments to the United States Constitution, and that the enactment was an abuse of the zoning power because it was the result of a negotiated contract. See Houston Petroleum Co. v. Automotive Products Credit Association, 9 N. J. 122 (1952).

Since Lutsky may again apply for subdivision approval of the lot which may require an amendatory zoning ordinance, the Court deems it necessary and advisable to decide the remaining issues raised by plaintiffs.

III.

In enacting the ordinance in question the commissioners considered the property itself and the following facts with respect to the property, the neighborhood and town planning: That the property had been unused and vacant since December, 1956, that it was an eye-sore which adversely affected the value of surrounding properties, that over the years there had been numerous complaints regarding an accumulation of rubbish and debris, the growth of noxious weeds and the creation of a fire hazard, the character of the neighborhood and the preservation of neighborhood values, the advice of the Town planner who had drawn up a proposed plan for use of the property over ten years before, that over the years the only development proposals received had been the use of the entire tract, including the South Mountain Avenue frontage, for garden apartments, the comprehensive plan for Montclair and the continued protection of the single-family residence zone on South Mountain Avenue, the character of the whole block in which the property is located and the character of both sides of South Mountain Avenue including the development on the west side of the street, the action of the planning board and the legal questions of zone change as compared with possible variance action.

Plaintiffs say this was not enough. They argue that the commissioners were also obliged to consider the following: 1) Such community problems as the existence of discrimination in housing rentals and sales, segregated racial patterns, deteriorating ghetto housing, school segregation "and the other problems that persist in a racial ghetto"; 2) the housing and social problems arising out of the existence of a racial ghetto in the community; and 3) Lutsky's past rental practices with respect to another property in Montclair owned by him.

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Plaintiffs' assertions with respect to the community, housing and social problems set out above are predicated principally on the contention that the zoning enabling law (N. J. S. 40:55-30, et seq.) and the Law Against Discrimination (N. J. S. 10:5-1, et seq.) are in pari materia and must be interpreted together. Plaintiffs argue that the measures are related statutes in that they both involve the exercise of police powers with respect to housing and that the legislative purposes of both measures are defined in virtually identical terms.*

The fact that statutes are enacted pursuant to the police power expressly stated in the statute or by implication does not require that they be read in pari materia. There are literally scores of statutes in New Jersey which, adopted by virtue of the police power, state in the same or in varying but similar language that they are enacted to protect the public health, safety and morals and to promote the general welfare. It is obvious that by the use of such similar language employed to justify the validity of the statutes the Legislature has not intended that they be read together.

The commissioners were not rezoning Montclair. Nor were they determining what use should be made of town-owned property or converting a section of it by rezoning. In either of those events the housing and related community and social problems which exist in Montclair might be relevant considerations, if they were warranted by the size, location and proposed use of the property. Here the question that the commissioners were resolving was only whether or not to extend a multi-family zone to include a 1 1/2 acre plot which was zoned for single-family use. They decided that question in the affirmative after taking into account the various facts set forth above which were relevant to the problem.

The selection of facts which the commissioners deemed were pertinent to their decision and the exclusion of those factors which plaintiffs say should have been considered did not, as they contend, impede the right of minority group citizens to obtain decent nonghetto, nonsegregated housing. To the contrary, the extension of the R-3 zone to permit multi-family dwellings to be built on the plot made additional housing accommodations available in a nonghetto neighborhood.

The contention that the selectivity by the commissioners of factors which they considered were relevant, violates the equal protection clause of the 14th Amendment because of the possible effect it will have on perpetuating ghetto conditions and because the selection process resulted in the drawing of an impermissible racial classification requires no comment since there is no factual basis for the claims. The same can be said about the further contention that the commissioners' failure to specifically

* N. J. S. 10:5-2 is as follows: "The enactment hereof shall be deemed an exercise of the police power of the State for the protection of the public safety, health and morals and to promote the general welfare and in fulfillment of the provisions of the Constitution of this State guaranteeing civil rights."
N. J. S. 40:55-32 provides that one of the purposes of zoning is to "promote health, morals or the general welfare".

consider the needs of the black community contributed to the maintenance of racial ghettos and thereby imposed a badge of slavery upon black citizens in violation of the 13th Amendment. Both assertions are wholly without merit.

To understand the claim that the commissioners were obliged to consider Lutsky's past rental practices in Montclair, it is necessary to state that when the amendatory ordinance came before the commissioners for final consideration, several persons argued that it should not be approved because Lutsky had engaged in racially discriminatory rental practices at an apartment building in Montclair which he then owned and that complaints had been filed against him in this connection with the New Jersey Division of Civil Rights.

One commissioner noted that the sole reason advanced in opposition to the ordinance was the fact that three complaints of discrimination in the rental of housing units had been lodged against Lutsky and that because of this the commissioners were now being asked to disregard all other interests of the town. He said that to boycott Lutsky or vote against the ordinance on the basis of the past complaints would be illegal and immoral. The mayor said that he would abstain from voting because he had been previously involved in trying to settle a case based on one of the complaints. In the course of announcing the reason for his abstention he remarked that counsel for Montclair had advised him that Lutsky's civil rights record in New Jersey was not legally relevant to the proceeding.

The evidence stipulated at the trial shows that prior to February 25, 1969, the date on which the amendatory ordinance was adopted, three verified complaints of alleged racial discrimination had been filed against Lutsky with the New Jersey Division on Civil Rights by negroes seeking to rent apartments at his Cranetown apartments in Montclair. These complaints, supported by affidavits of white testers and black applicants were denied by Lutsky, whose denials were supported by his own affidavits, the affidavits of other persons and by exhibits. A conciliation conference was held by the Division in each case. While findings of probable cause were issued in each case, no adjudication of discrimination was rendered by the Division or any court.

Plaintiffs say that because of Lutsky's past history, the commissioners were obligated to consider the probability of future discriminatory rental practices in the South Mountain development in order to determine whether he was a proper risk in carrying out existing laws, including the law against racial discrimination, and to consider the possibility that their exercise of the police power could lead to an instance of "white only" housing.

The purposes for which zoning regulations may be adopted and the essential considerations which may enter into zoning are set forth in N. J. S. 40:55-32.* It is for the governing body of a municipality, and not the courts, to decide and weigh

*N. J. S. 40:55-32 provides as follows: "Such regulations shall be in accordance with a comprehensive plan and designed for one or more of the following purposes: to lessen congestion in the streets; secure safety from fire, flood, panic and other

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which of the purposes and considerations should determine what course should be taken in zoning matters. Here the commissioners, after considering, among others, the statutory factors of safety from fire, the promotion of health, the conservation of existing property values, and the most appropriate use of the land, decided that the zone change was warranted, a conclusion about which there is and can be no question.**

This determination can not be invalidated by the Court simply because some of the commissioners did not also consider the fact that unadjudicated complaints had been made against Lutsky with respect to another property. They had the right to assume that any future act of discrimination, if any, would be dealt with by the appropriate agency.

IV.

The final argument presented against the validity of the ordinance is that it was enacted only for the financial benefit of Lutsky and constituted spot zoning, all in violation of N. J. S. 40:55-31 and 32.

Spot zoning is defined as "the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners." Jones v. Zoning Board of Adjustment, Long Beach Tp., 32 N. J. Super. 397, 404 (App. Div., 1954) (emphasis added). It is the very opposite of planned zoning. Bartlett v. Middletown Township, 51 N. J. Super. 239, 270 (App. Div. 1958). The test of whether an ordinance amendment constitutes spot zoning is "whether the zoning change in question is made with the purpose or effect of establishing or furthering a comprehensive zoning scheme calculated to achieve the statutory objectives or whether it is 'designed merely to relieve the lot of the burden of the restriction of the general regulation by reason of conditions alleged to cause such regulation to bear with particular harshness upon it.'" Cresskill v. Dumont, 15 N. J. 238, 249 (1954). If it is in the latter category the ordinance is invalid. Cresskill at 249.

An inspection by the Court, in the presence of counsel, of the South Mountain Avenue neighborhood and a study of a map of the area and the Town's zoning ordinance,

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*N. J. S. 40:55-32 (continued)
dangers; promote health, morals or the general welfare; provide adequate light and air; prevent the overcrowding of land or buildings; avoid undue concentration of population. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view of conserving the value of property and encouraging the most appropriate use of land throughout such municipality."

** The circumstance that the facts justified the passage of the ordinance does not affect or alter my opinion that the ordinance would nevertheless not have received approval had Lutsky not filed the bond and agreement before the final vote was taken.

show the following: There are 3 separate zone designations (RO-(a), R-1, R-3) as well as non-conforming uses. The block is bounded on the south by Hillside Avenue, which is largely designated as an R-1 zone. The 3 lots fronting on this avenue are occupied by a non-conforming hotel, known as the Montclair Inn, a 6-unit non-conforming garden apartment, and a single-family house. On the southerly side of Hillside Avenue is located a 26-unit garden apartment. On the west side of St. Luke's Place, which lies to the east of South Mountain Avenue, are 3 one-family residences, 9 2-family residences, 3 3-family residences, and a 29-unit apartment house. On the east side of St. Luke's Place is located an apartment building with 40 units. The rezoned area abuts an existing R-3 zone and is merely an extension of it.

In the light of the foregoing facts, it is plain that the enlargement of the R-3 zone does not represent "a discordant and irrational note out of harmony" with a comprehensive plan for the orderly development of land use in Montclair. cf. Ward v. Montgomery Township, 28 N.J. 529, 536 (1959). The mere fact that the ordinance affects only a single lot does not necessarily show that it runs counter to N.J.S. 40:55-32. Nor is the size of the lot the controlling test of spot zoning. Palisades Properties, Inc. v. Brunetti, 44 N.J. 117, 135 (1965). Clearly there is here no singling out of a small parcel of land for a use totally different from that of the surrounding area for the benefit of Lutsky and to the detriment of other owners. It is plain that the zone change is in conformity with the surrounding uses, represented good municipal planning and did not constitute spot zoning. cf. Abel v. Elizabeth Board of Works, supra, 63 N.J. Super. at 507.

I find no merit in plaintiffs' assertion that the ordinance was enacted only for the financial benefit of Lutsky. The record is barren of any evidence in support of such contention and it must therefore be rejected.

Counsel are requested to present a judgment in conformity with the views herein expressed.

Very truly yours,

MAX MEHLER,
J. S. C.

MM/b