ML– Montclair

3/25/71

(Charles WM. Baskerville, Jr., etal v. Montclair)

Opinion – reversed judgment declaring the amendatory zoning ordinance void

Pgs. 8

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NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1813-69

CHARLES WM. BASKERVILLE, JR., MAY DORSEY, JAMES F. BYERS, JOHN L. ROGERS, JULIA A. MILLER, DONALD L. MILLER, DeFOREST B. SOARIES, SYLVESTER R. HALEY, ELAINE MORTIN, JAMES A. WALLING, JUDITH MITCHELL, MONTCLAIR FAIR HOUSING COMMITTEE, an unincorporated association, JOHN M. RICKER, MADELINE T. BASS, JOHN FITZGERALD, NANCY T. DuVAL, ROBERT NEW, BETTY JANE RICKER and BERNARD A. KOECHLIN,

Plaintiffs-Respondents
and Cross-Appellants,

vs.

TOWN OF MONTCLAIR, MATTHEW G. CARTER, Mayor of the Town of Montclair, CONSTANCE B. ARNOTT, Town Clerk of the Town of Montclair, BOARD OF COMMISSIONERS OF THE TOWN OF MONTCLAIR, RICHARD G. PETTINGILL, PETER J. BONASTIA, THEODORE MacLACHLAN and SAMUEL ROSENBLATT, Commissioners of the Town of Montclair,

Defendants-Respondents,

and

HERMAN LUTSKY,

Defendant-Appellant
and Cross-Respondent.

Argued March 16, 1971 -- Decided MAR 25 '71

Before Judges Kilkenny, Halpern and Lane

On appeal from Superior Court of New Jersey, Law Division, Essex County

Mr. Norman N. Schiff argued the cause for defendant-appellant and cross-respondent, Herman Lutsky

Mr. Richard F. Bellman, of the Minnesota Bar, argued the cause for plaintiffs-respondents and cross-appellants (Messrs. Freeman and Bass, Attorneys; Mr. Bellman and Mr. Sol Rabkin, of the New York Bar, on the brief)

Mr. Robert B. Shepard, Jr., argued the cause for defendants-respondents

The opinion of the Court was delivered by

LANE, J.A.D.

In this action in lieu of prerogative writ plaintiffs seek to set aside an ordinance adopted by the Board of Commissioners of the Town of Montclair amending its zoning ordinance. The amendment extended a zone in which garden apartments and town houses could be constructed to include 1.5 acres of a 2.5 acre tract owned by defendant Lutsky. The Trial Court set aside the ordinance. Lutsky has appealed. Plaintiffs have cross-appealed because the Court did not sustain certain of their attacks upon the ordinance. The Town of Montclair has not appealed but in these proceedings has argued that the ordinance was a valid exercise of the zoning power.

Some of the individual plaintiffs are low-income Negroes residing in substandard and deteriorated housing in the "Negro ghetto" of Montclair. The Montclair Fair Housing Committee is organized for the purpose of promoting equal housing opportunities in Montclair for minority group citizens and for the purpose of assuring the existence of a slum-free, ghetto-free community.

Lutsky is a builder and a developer. On October 5, 1968 he applied to the Montclair Planning Board for approval of a subdivision plan for Lot 19, Block A on Map 41 of the Montclair Tax Maps of 1968. The lot consisted of 2.5 acres and was zoned for single-family residences. The subdivision plan submitted proposed the division of the lot into three parcels. On two of these parcels fronting on South Mountain Avenue, conforming single-family homes were to be built. On the remaining interior parcel a town house complex consisting of 12 units was contemplated. The interior parcel consisted of 1.5 acres. The Planning Board adopted a resolution preliminarily approving the subdivision and recommending to the Board of Commissioners the enactment of an amendment to the zoning ordinance to permit the construction of the town house complex. The approval, however, was conditioned upon Lutsky filing a bond and agreement obligating himself, among other things, to construct the proposed single-family dwellings within a two and one-half year period at a construction cost of not less than $35,000 for each house. There were other conditions imposed, such as restricting the use of each single-family lot for a period of 25 years.

On January 14, 1969 Lutsky filed the required agreement and bond. On January 28, 1969 an ordinance was introduced by the Commissioners extending the zone in which town houses could be constructed to include the 1.5 acre lot. This ordinance was referred to the Planning Board as required. At a meeting held February 13, 1969 the Planning Board approved the amendment to the zoning ordinance subject to an amendment

to the bond and agreement that the ground area of all buildings on the 1.5 acre lot should not exceed 19% of the land.

On February 25, 1969 the amendatory ordinance again came before the Board of Commissioners. The minutes of that meeting disclose that a number of people spoke opposing the ordinance on the ground that Lutsky, the owner of the only property affected, had participated in alleged discriminatory practices in the rental of housing units in Montclair. It was argued that the adoption of the ordinance would represent an affront to black citizens and would be detrimental to the morals and welfare of the community. After hearing the interested citizens who were present, the Commissioners considered the ordinance. The Mayor abstained. One of the Commissioners stated that there had not been any allegation that adoption of the amendatory ordinance would be adverse to the orderly development of the properties involved in the light of the master zoning plan. The amendatory ordinance was unanimously adopted by the four Commissioners voting.

The issues were set forth in the pretrial order as follows:

> Whether the action of the Board of Commissioners in adopting the ordinance amending the building zone code was a reasonable and proper exercise of its powers; whether the ordinance is invalid as having been adopted (a) in violation of the Thirteenth and Fourteenth Amendments to the United States Constitution (b) in violation of the Federal Civil Rights Acts (c) in violation of N.J.S. 40:55-30, 31, 32, 34 and 39 (d) in violation of the law against discrimination N.J.S. 10:4-5 et seq. (e) whether in adopting the ordinance the Board of Commissioners refused to consider the New Jersey Civil Rights Act as in para materia to the zoning statutes and whether such failure, if it occurred, invalidates the ordinance; (f) whether the specification of a sales price of the one-family dwellings

to be built on a portion of the property constitutes an illegal agreement among the defendants, in violation of the above-specified provisions of the United States Constitution and of the Federal and State Civil Rights Acts and Zoning Laws
(g) whether the ordinance constitutes spot zoning
(h) whether the third count of the complaint, which alleges illegal spot zoning, sets forth a cause of action.

The Trial Court filed a letter-opinion dated March 30, 1970. The ordinance was set aside on the sole ground that the Planning Board was without authority to require the bond and agreement establishing a minimum cost for the construction of the single-family houses. It further held that such requirement could not be separated from the action of the Commissioners and that the ordinance would not have been adopted had Lutsky failed to file the bond and agreement. In all other respects the amendatory ordinance was held valid.

All parties admit that the requirement by the Planning Board of a bond and agreement containing a minimum cost provision is not authorized by the Legislature and that neither the Planning Board nor the Board of Commissioners could impose upon a landowner such requirement for subdivision approval or as a condition for re-zoning. The crucial question is whether the amendatory ordinance is invalid because the requirement of the Planning Board was invalid.

The Trial Court found that the requirement of the bond and agreement was the deciding factor motivating the Board of Commissioners to adopt the amendatory ordinance. The record shows, however, that there were other substantial reasons for the Board's action, i.e., the property had been unused and vacant for 13 years; the property was an eyesore

adversely affecting the value of surrounding properties; over the years there had been numerous complaints regarding the accumulation of rubbish and debris on the property; the construction of town houses was compatible with surrounding improvements; and over 10 years earlier the Town Planner had drawn up a proposed plan for the property substantially similar to that proposed by Lutsky. In considering the amendatory ordinance, the Town Commission had in mind not only these factors but also "the comprehensive plan for Montclair and the continued protection of the single-family residence zone of 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. * * * the matter both with respect to the property itself and with respect to neighborhood and town planning."

The finding by the Trial Court that the compliance by Lutsky with the requirement imposed by the Planning Board "did in fact influence and induce the favorable action by the Commissioners" is not supported by substantial, credible evidence.

Of more significance, however, is the fact that whether compliance with the requirement was the inducement for the passage of the amendatory ordinance is irrelevant. It is settled that where the legislation is valid on its face, the motivation of a legislative body cannot be considered in the absence of personal interest, fraud or corruption. American Grocery Co. v. Bd. Commrs. New Brunswick, 124 N.J.L. 293 (Sup. Ct. 1940), aff'd

o.b. 126 N.J.L. 367 (E. & A. 1941); Kirzenbaum v. Paulus, 57 N.J.Super. 80, 84 (App. Div. 1959); Clary v. Borough of Eatontown, 41 N.J.Super. 47, 71 (App. Div. 1956); 2 McQuillan, Municipal Corporations (3d ed. 1966 rev. vol.), § 10.37, p. 833. Unquestionably, ample good and valid reasons for the enactment of the ordinance pursuant to N.J.S.A. 40:55-32 were clear. The Trial Court so held. The amendatory ordinance was clearly valid on its face; therefore, the motive for the adoption of the ordinance was irrelevant. Compare, Wital Corp. v. Denville, 93 N.J.Super. 107 (App. Div. 1966). The action of the Trial Court in declaring the ordinance invalid because of the motivation for adoption was incorrect.

Plaintiffs' other attacks upon the ordinance as stated in their brief: (1) "the equal protection clause of the Fourteenth Amendment requires a local community to exercise its zoning and other land use powers affirmatively to provide decent housing opportunities for all its citizens including its black and low-income citizens"; (2) "the New Jersey zoning enabling legislation also imposes an affirmative duty upon local governments to use zoning and other land use control powers to provide equal housing opportunities for black and low-income residents"; and (3) "the Board of Commissioners violated New Jersey law in refusing to consider appellant Lutsky's past rental practices in Montclair when acting upon his application for an amendatory ordinance" were adequately disposed of by the Trial Court adversely to the plaintiffs. We agree with those holdings substantially for the reasons given by the Trial Court.

There is not an iota of evidence that the action

taken by the Board of Commissioners was directed at exclusion of any person or group of persons from the area involved. It resulted in more authorized housing units than under the then existing zoning. No competing interest for the use of the land in the foreeable future was shown. We note that Montclair is apparently aware of its housing problem. It has established the Montclair Redevelopment Agency, a local housing authority under N.J.S.A. 55:14A-1, et seq.

"We need not labor the point, long settled, that, where legislative action is within the scope of the police power, fairly debatable questions as to its reasonableness, wisdom, and propriety are not for the determination of courts, but for that of the legislative body on which rests the duty and responsibility of decision." Standard Oil Co. v. City of Marysville, 279 U.S. 582, 584, 49 S.Ct. 430, 73 L.Ed. 856, 859 (1929).

The judgment declaring the amendatory zoning ordinance void is reversed.

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Mortimer J. Kerrman
Clerk