IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 73-1279

BARRICK REALTY, INCORPORATED, et al.,

Plaintiffs-Appellants,

v.

CITY OF GARY, INDIANA, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF INDIANA

BRIEF FOR UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the District Court correctly held that Ordinance No. 4685 of the City of Gary, which prohibits the display of "For Sale," "Sold" and similar signs on premises located in residential areas, is a constitutionally valid exercise of the City's police power.

INTEREST OF THE UNITED STATES

In enacting the Fair Housing Act of 1968, Congress declared that

> It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States. 42 U.S.C. 3601.

At the time the Act was passed, racial discrimination and segregation in the housing market were both pervasive and rigid. As Judge Wright recently observed in Mayers v. Ridley, 465 F. 2d 630, 632 (D.C. Cir. 1972) (concurring opinion):

> The evils emanating from governmental acceptance of housing discrimination permeate our entire society. Generations of governmental participation in racial zoning have yielded a bitter harvest of racially segregated schools, unequal employment opportunity, deplorable overcrowding in our center cities, and virtually intractable racial polarization.

Recently, in Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209 (1972), the Supreme Court described the task of securing fair housing as enormous.

The Fair Housing Act confers important responsibilities on the United States and its various agencies with respect to the promotion of equal housing opportunity.*/ In view of the limited federal resources available,**/ however, the Act recognizes that

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*/ See, e.g., 42 U.S.C. 3608, 3609, 3610, and 3613.

**/ Trafficante, supra, at 211.

both private litigants*/ and the states and their various subdivisions**/ play important roles in the elimination of the dual housing market.

Approximately 400 communities, including Gary, have enacted local fair housing ordinances, many of which are patterned after the federal Act.***/ Some of them have also attempted to deal with the problem of resegregation by prohibiting, either entirely or selectively, the use of "for sale" signs and solicitation activities of real estate agents. Such laws are designed to stabilize integrating neighborhoods,****/ and thereby to promote an explicit Congressional policy. 42 U.S.C. 3608; see Shannon v. HUD, 436 F. 2d 809 (3rd Cir. 1970).

This case presents the first federal appellate challenge to the authority of a municipality to enact legislation to attempt to deal with the dual problems of housing segregation and resegregation which have come to be associated with the widespread postin

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*/ 42 U.S.C. 3612, 3610(d).

**/ 42 U.S.C. 3615, 3616, 3610(c).

***/ Prentice Hall Equal Opportunity in Housing Reporter, Para. 2301 (hereinafter P-H EOH Rptr.).

****/ See Amicus Brief, NAACP Legal Defense and Educational Fund, Inc., at 8-10 for a partial list of these communities.

of "for sale" signs in racially changing neighborhoods. It has been found to be a typical phenomenon of such "transitional" areas that, soon after the first black families move in, racial fears are generated, rumors abound, and real estate agents seeking listings flock uninvited to the area like "flies to a leaking jar of honey." United States v. Bob Lawrence Realty Co., 474 F. 2d 115, 124 n. 13 (5th Cir. 1973), aff'g United States v. Mitchell, 335 F. Supp. 1004 (N.D. Ga. 1971). In many cases, they cause or hasten racial transition by preying for profit on the fears of white homeowners.

The federal Fair Housing Act seeks to deal with this problem in a limited way by prohibiting discrimination in sales, including the "steering" of blacks to and whites away from integrated areas,*/ and by making it unlawful to attempt to induce sales by means of racial representation.**/ But heavy real estate activity, including a proliferation of "for sale" signs, in a racially transitional area, may often have an exploitive effect even without explicit racial representations. Accordingly, local communities have serious problems of this kind in spite of the federal legislation.

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*/ 42 U.S.C. 3604(a).

**/ 42 U.S.C. 3604(e).

It is now settled that the United States must exercise its housing responsibilities in such a manner as to avoid contributing to resegregation. Shannon v. HUD, supra; Gautreaux v. Romney, 448 F. 2d 731 (7th Cir. 1971). Since resegregation imperils equal opportunity not only in housing but in education and employment as well, the United States has a substantial stake in the success of local efforts to halt the resegregation process.*/

PROCEEDINGS BELOW AND STATEMENT OF FACTS

The United States has made no independent investigation of the evidentiary facts in this case. Since the decision now on appeal was based upon facts generally not in dispute, and since the facts of record are fully described in the opinion below and in the briefs of the parties, we advert here only to those facts we think most important.

The City of Gary, Indiana (hereinafter "Gary") has experienced a rapid increase in its minority population, and a substantial decrease in its white population. The district court found that between 1960 and 1970, the black population of Gary increased by

*/ See President Nixon's June 11, 1971 Statement on Equal Housing Opportunity, in which he recognized the need for local and state authorities to press forward "with innovative and positive approaches of their own." P-H E.O.H. Rptr. Para. 5121 at 5132.

34.9%, while the white population decreased 24.9%. 354 F. Supp. at 134. While there are no doubt many reasons for this phenomenon, the authorities of the City of Gary could reasonably find that the activities of some real estate brokers and agents in the integrating areas contributed to the apprehensions of whites, and thereby to their flight.

As black families moved into the formerly white Miller area of Gary, there began the familiar pattern of concentrated real estate solicitation and sales.*/ Some residents of Miller, apparently acting as the Miller Citizens Corporation, complained to the Gary Human Relations Commission (hereinafter GHRC). The GHRC investigated the grievances and recommended the enactment of Ordinance 4685, which banned the use of "for sale" and similar signs on residential property within Gary. The ordinance was adopted by the Gary Common Council on June 25, 1972.

On October 6, 1972, the plaintiffs-appellants, a Gary real estate company, its president, and a homeowner, filed a complaint in state court and obtained a temporary restraining order prohibitin

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*/ For an excellent description of what happens in an integrating neighborhood, see Judge Edenfield's opinion in United States v. Mitchell, 335 F. Supp. 1004, 1005-1006 (N.D. Ga. 1971), aff'd sub nom United States v. Bob Lawrence Realty, 474 F. 2d 115 (5th Cir. 1973).

enforcement of the ordinance. On motion by the City, the case was removed to the United States District Court on October 12, 1972. Plaintiffs moved for a preliminary injunction, and this motion was consolidated with a hearing on the merits. The case was tried on October 27, 1972. On January 18, 1973, the United States District Court for the Northern District of Indiana issued a Memorandum of Decision and Order denying plaintiffs' declaratory and injunctive relief and dismissed the complaint. Barrick Realty, Inc. v. City of Gary, Indiana, 354 F. Supp. 126 (N.D. Ind. 1973). This appeal followed.

Plaintiffs contend on appeal*/ that the Gary ordinance denies both real estate agents and individual homeowners the right to free speech secured by the First Amendment. They further contend that the ordinance impinges on various fundamental rights and can be supported only by a showing of compelling state interest, which showing, so plaintiffs contend, has not been made. Finally, plaintiffs argue that the ordinance is overbroad because it prohibits the posting of signs which bear no relation to racial change.

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*/ We pretermit all but the briefest discussion of several additiona contentions made by plaintiffs, e.g. that the ordinance violates the "right to travel" and the "Thirteenth Amendment", because we believe that the district court's opinion demonstrates that they are insubstantial.

ARGUMENT

I

GARY ORDINANCE 4685 PROHIBITS COMMERCIAL ACTIVITY RATHER THAN PROTECTED SPEECH AND DOES NOT DENY RIGHTS SECURED BY THE FIRST AMENDMENT, EITHER TO PERSONS IN THE REAL ESTATE BUSINESS OR TO HOMEOWNERS

Plaintiffs' first attack on the ordinance in question is that it denies each of them the freedom of expression secured by the First Amendment. We believe, however, that the activity here regulated -- the posting of "for sale" and "sold" signs and the like -- does no more than "propose a commercial transaction." Pittsburgh Press Co. v. Human Rel. Comm., ____ U.S. ____, 41 L.W. 5055 (1973). It was held by the Supreme Court in Pittsburgh Press that such speech may constitutionally be regulated even where such regulation, at least in a limited way, affects the make-up of a newspaper. In the present case, the Gary ordinance does not affect newspapers at all, and the "commercial speech" doctrine applies a fortiori.

Discrimination in housing and the exploitation of racial fears are necessarily accomplished by words. Such words constitute a form of commercial activity which has been uniformly held to be subject to regulation without any impairment of First Amendment rights.

In United States v. Hunter, 459 F. 2d 205, 211-212 (4th Cir. 1972), cert. den. 409 U.S. 934 (1972). reh. den. ____ U.S. ____ (1973), the Court, in affirming a district court decision which sustained the prohibition in the Fair Housing Act against racially discriminatory advertising,*/ summarized the controlling law as follows:

> The court's conclusion is supported by an unbroken line of authority from the Supreme Court down which distinguishes between the expression of ideas protected by the First Amendment and commercial advertising in a business context. It is now well settled that, while "freedom of communicating information and disseminating opinion" enjoys the fullest protection of the First Amendment, "the Constitution imposes no such restraint on government as respects purely commercial advertising." Valentine v. Chrestensen, 316 U.S. 52, 54, 62 S.Ct. 920, 921, 86 L.Ed. 1262 (1942). See Breard v. City of Alexandria, 341 U.S. 622, 641-645, 71 S.Ct. 920, 95 L.Ed. 1233 (1951); New York State Broadcasters Ass'n., Inc. v. United States, 414 F. 2d 990, 998-999 (2nd Cir. 1969), cert. denied, 396 U.S. 1061, 90 S.Ct. 752, 24 L.Ed. 2d 755 (1970); Banzhaf v. FCC, 132 U.S. App. D.C. 14, 405 F. 2d 1082, 1099-1103 (1968), cert. denied, sub nom. Tobacco Institute, Inc. v. FCC, 396 U.S. 842, 90 S.Ct. 50, 24 L.Ed. 2d 93 (1969); Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D. D.C. 1971), (three-judge court), aff'd, sub nom. Capital Broadcasting Co. v. Kleindienst, Acting Attorney General, 405 U.S. 1000, 92 S.Ct. 1289, 31 L.Ed. 2d 472 (1972).
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> Relying on this difference, district courts have uniformly held that §3604(e), banning block-busting practices, does not contravene the First

*/ 42 U.S.C. 3604(c).

Amendment. United States v. Mitchell, 327 F. Supp. 476, 486 (N.D. Ga. 1971); United States v. Bob Lawrence Realty, Inc., 313 F. Supp. 870, 872 (N.D. Ga. 1970); United States v. Mintzes, 304 F. Supp. 1305, 1312 (D. Md. 1969).

In United States v. Bob Lawrence Realty Co., 474 F. 2d 115, 121 (5th Cir. 1973), the Court upheld the constitutionality as against a First Amendment attack of 42 U.S.C. 3604(e), which prohibits racial inducements to sell made "for profit." Relying heavily on Hunter and the authorities there cited, the court held that the statute regulates "commercial activity, not speech," and that Congress had the authority to enact it under the Thirteenth Amendment, as construed in Jones v. Mayer Co., 392 U.S. 409 (1968) and its progeny.

Plaintiffs seek to distinguish the "blockbusting" cases (brief, pp. 14-18) upon the ground that the activity condemned by 42 U.S.C. 3604(e) is malicious as well as commercial. Once the commercial character of the activity prohibited by the Gary ordinance is established, however, the motivation of the person engaged therein is not controlling. The City may regulate "sophisticated as well as simple minded" [modes of inducing resegregation], cf. Lane v. Wilson, 307 U.S. 268, 275 (1939). It is of no consolation to an individual denied the opportunity*/ to

*/ Cf. Trafficante v. Metropolitan Life Ins. Co., supra; Shannon v. HUD, supra.

reside in an integrated neighborhood that it was done in good faith. Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961). Conduct with a discriminatory effect may be prohibited, no matter what its motivation. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Wright v. Council of the City of Emporia, 407 U.S. 451 (1972). Those who enacted the Gary ordinance knew -- indeed, it is common knowledge -- that a characteristic phenomenon of neighborhoods in the process of resegregation is the proliferation of "for sale" and "sold" signs. Gary could reasonably find that the very ubiquitousness of these signs is, to the beleaguered homeowners, the equivalent of a representation that blacks are moving in and whites are moving out, and that this condition must be ended if panic selling and resegregation are to be avoided.

Gary's ordinance applies both to real estate agents and to homeowners, and a distinction might be suggested as between the two categories of plaintiffs, since the activities of the former are more obviously commercial in character than those of the latter. But even a homeowner who posts a "for sale" sign does no more than "propose a commercial transaction," Pittsburgh Press, supra. The commercial conduct of private individuals is subject to regulation. Nebbia v. New York, 291 U.S. 502, 523-28 (1934). Moreover, Gary might reasonably conclude that the purposes of the ordinance would

be defeated if homeowners, but not real estate agents, were permitted to post such signs.*/

It is noteworthy that in United States v. Hunter, supra, the court upheld the constitutionality of 42 U.S.C. 3604(c), which prohibits discriminatory advertising, after holding that the statute applies to anyone, including landlords, brokers and media alike. In Hunter, a newspaper advertisement of a room available in a "white home" had been placed by an individual homeowner whose property was immune from the prohibitions in the Fair Housing Act against discrimination in rentals under the "Mrs. Murphy" exemption for small owner-occupied premises. 42 U.S.C. 3603(b). The Court nevertheless held that Congress was authorized to prohibit discriminatory advertising even by a landlord whose rental practices were not subject to the Act. 459 F. 2d 213-215. The prohibition in the Gary ordinance against conduct by a homeowner which might contribute to panic selling is comparable to that sustained in Hunter.

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*/ See the decision below, 354 F. Supp. at 136.

II

GARY ORDINANCE 4685 IS A RATIONALLY SUPPORTABLE MEANS OF ACHIEVING A PERMISSIBLE END, AND DOES NOT DENY PLAINTIFFS LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW

Premising their argument on the proposition that Ordinance No. 4685 impairs their fundamental rights of freedom of speech, freedom of travel, and freedom to dispose of one's property, plaintiffs contend that the ordinance must fall unless the City demonstrates the existence of a "compelling state interest." We think, however, that their argument rests on a spacious premise. As we have shown, pp.8-13, supra, the expression regulated by the ordinance is commercial in character. As the district court forcefully demonstrated, plaintiffs have failed to show that the ordinance lacks a permissible objective or imposes substantial hardship, and they must show both to demonstrate an unconstitutional infringement of the right to travel. 354 F. Supp. at 133. We also agree with the district court that advertising for the purpose of disposing of one's property more rapidly is traditionally subject to legislative regulation, and is entitled to no special protection as a "fundamental" right. United States v. Hunter, supra.

Under these circumstances we think that the district court correctly held that the due process clause is satisfied so long as the end to be attained shall not be "unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." Nebbia v State of New York, 291 U.S. 502, 525 (1934).

Plaintiffs attack both the legitimacy of the purposes of the ordinance and the reasonableness of the means to secure those purposes. With respect to the former, the City contended, and the district court found, that the ordinance was directed against

> first, widespread conditions of segregated housing, and second, the social and economic breakdown which accompanies rapid racial transformation of an entire neighborhood or area of the city. 354 F. Supp. at 134.

Plaintiffs claim, however, that these are not legitimate goals, and allude to Judge Parker's dictum in Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D. S.C. 1955) that

> The Constitution . . . does not require integration. It merely forbids discrimination.

We believe plaintiffs' reliance on Briggs to be misplaced. In the first place, that dictum and its progeny have been effectively

overruled*/ and are no longer good law even in the context in which they arise. But even if a school district were not required to take affirmative steps to integrate, that would be a far cry from saying that it may not do so. As the Court observed in Warner v. County School Board of Arlington County, Va., 357 F. 2d 452, 455 (4th Cir. 1966), it would be stultifying to hold that a school board may not take racially conscious positive action to eliminate the effects of past discrimination. Indeed, school authorities generally have a positive obligation to do so. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); Keyes v. Denver School District, ____ U.S. ____, 41 L.W. 5002 (1973). Persons acting under color of law have an affirmative obligation to exercise their responsibilities so as to avoid segregation or resegregation. Shannon v. HUD, supra; Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907 (N.D. Ill. 1969), related order aff'd, 436 F. 2d 306 (7th Cir. 1970), cert. den. 402 U.S. 922 (1971). In the light of these authorities, Gary may surely legislate to avoid resegregation

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*/ See United States v. Jefferson County Board of Education, 380 F. 2d 385, 389 (5th Cir. 1968) (en banc), aff'g 372 F. 2d 836, and authorities cited at 862-866, cert. den. 389 U.S. 890 (1967); Kemp v. Beasley, 389 F. 2d 178, 182 (8th Cir. 1968); cf. Green v. County School Board, 391 U.S. 430 (1968).

in conformity with its responsibility to protect the health, safety and welfare of the community.

With respect to the rationality of the means selected, we think the District Court correctly found that

> . . . the prohibition of for sale signs [is] no less rationally related to [panic peddling], or to the ultimate objective of integration and social and economic stability than the prohibition of blockbusting activities. 354 F. Supp. at 135-36.

See United States v. Bob Lawrence Realty Co., 474 F. 2d 115 (5th Cir. 1973); United States v. Mintzes, 304 F. Supp. 1305 (D. Md. 1969).

Expert testimony adduced at the trial indicated that the proliferation of "for sale" signs in racially transitional areas was one factor in causing panic selling by white homeowners and that elimination of the signs would be one way to reduce their apprehension. The testimony of the Director of Housing of the City's Human Relations Commission provided a rational basis for the view that the prohibition against blockbusting, standing alone, would not be sufficient to deal with the problem. Accordingly, there was a substantial basis for the district court's finding that

> the means employed by this ordinance to reduce panic selling are narrowly tailored to that objective.

> The potential public benefit from the ordinance far outweighs the harm to realtors and homeowners who wish to use for sale signs. The additional expense or delay which might result from having to use alternative means of advertising is minimal. To the extent that a real estate firm suffers a loss of business due to a drop-off in panic selling conditions, it has no legitimate complaint. 354 F. Supp. at 136. */

Plaintiffs urge that the prohibition of "for sale" signs will have little effect upon white flight from Gary, because the extensive use of "for sale" signs is not a substantial cause of such flight. This conclusion is unsupported by the evidence, and is inconsistent with the expressed concerns of Miller residents and the personal experience of Mr. Pierre DeVise, an expert witness for the City (A. p. 138). The district court's finding to the contrary is supported by evidence and is in no sense "clearly erroneous." Even if what plaintiffs said were true, however, their argument would be insufficient to establish that the ordinance is unconstitutional. In areas of economics and social welfare, a municipality does not violate the Equal Protection Clause merely because its legislative classifications are imperfect, Dandridge v. Williams, 397 U.S. 471 (1970), reh. den., 398 U.S. 914 (1970), or

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*/ See also United States v. Hunter, supra, 459 F. 2d at 215; Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955); and Breard v. Alexandria, 341 U.S. 622, 631-632, 641-643 (1951).

because it might have gone further to eradicate the problem, or because the classifications may not succeed in bringing about the intended result. Joseph E. Seagram & Sons, Inc. v. Hostelter, 384 U.S. 35 (1966), reh. den., 384 U.S. 967 (1966). The City is not required to be able to guarantee that the ordinance will affect the rate of panic selling; if any set of facts are sufficient to sustain a finding that the ordinance might deter panic selling, it must stand. McGowan v. Maryland, 366 U.S. 420 (1961); Day-Brite Lighting v. State of Missouri, 342 U.S. 421 (1952); Capital Broadcasting Co. v. Acting Attorney General, 333 F. Supp. 582, 586 (D. D.C. 1971), aff'd 405 U.S. 1000 (1972). We think that the evidence adduced by plaintiffs falls far short of what is required to overturn the ordinance under such a test.

THE ORDINANCE IS NOT OVERBROAD

Plaintiffs argue (Brief, pp. 22-24) that the ordinance is overbroad because it reaches the use of signs which do not convey the message that the resident is leaving the community.*/ They cite the use of a "for sale" sign on a new home, and the use of a "for sale" or "sold" sign on vacant property,**/ as examples of such

*/ Plaintiffs' contention that the ordinance is overbroad because it reaches "protected speech" and because it applies to homeowners as well as brokers, are discussed at pp. 8-12 , supra.

**/ Contrary to plaintiffs' contention (Brief, pp. 11, 23), the federal Fair Housing Act applies to vacant land designed for residential purposes. 42 U.S.C. 3602(b).

overbreadth. In addition, the inclusion of the words "built by" in the ordinance could conveniently subject the builder of a new home to prosecution if he posted such a sign to sell his product. Indeed, we are constrained to agree that the ordinance might conceivably have been drawn as to exclude coverage of those signs unrelated to white flight.

The Supreme Court has held, however, that in the area of economic legislation, it is not the function of courts to determine the wisdom, or lack of it, or to reject legislative schemes which might be said by some to exact a "wasteful requirement." Williamson v. Lee Optical Co., 348 U.S. 483, 487 (1955); and see the decisions cited at pp. 488-489, supra. Moreover, since other signs are also banned, and since other means of advertising remain open to the builder, the inconvenience occasioned by the ordinance is of a relatively minor character. Under these circumstances, we believe that the City's failure to carve out specific exceptions from its ordinance for new homes or other categories is defensible in terms of avoiding complexity and does not give rise to a constitutional violation.

CONCLUSION

For the reasons stated, the United States respectfully prays that the judgment of the district court be affirmed.

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