No. 1319

In the Supreme Court of the United States

OCTOBER TERM, 1970

CITY OF LACKAWANNA, NEW YORK, ET AL.

v.

KENNEDY PARK HOMES ASSOCIATION INCORPORATED, COLORED PEOPLE'S CIVIC AND POLITICAL ORGANIZATION, INC., ET AL., AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
JERRIS LEONARD,
Assistant Attorney General,
FRANK E. SCHWELB,
ALEXANDER ROSS,
JOSEPH B. SCOTT,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17–30) is not yet reported. The opinion of the district court (Pet. App. 33–93) is reported at 318 F. Supp. 669.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1970. The petition for a writ of cer-

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tiorari was filed on February 6, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the finding below that the actions of the City of Lackawanna had the purpose and effect of promoting racial segregation in housing was clearly erroneous.

2. Whether the district court acted within its discretion in requiring the city affirmatively to remove all remaining obstacles to construction of the Kennedy Park Homes development.

STATEMENT

This case concerns the attempt by a group of black residents of the city of Lackawanna, New York, to construct a low-income housing development of single-family homes within a white area of the city.

Lackawanna is divided into three wards. The first ward is bounded on the west by a massive steel plant located on the shores of Lake Erie, and on the east by railroad tracks. A single bridge over these tracks provides the only connecting link with the rest of the city (Pet. App. 40–41). "Almost all of the Negro population of the City lives within the first ward, while the population of the second and third wards is almost completely white" (Pet. App. 59). As the district court found, "there is a sharp contrast between the first and the other two wards in the amount of pollution, housing problems, congestion, and other environmental factors" (Pet App. 42). Lackawanna's application for Model Cities assistance states that

"housing deterioration and overcrowding within [the first ward] are more than twice those of the city as a whole" (Pet. App. 43). Tuberculosis is twice as prevalent in the first ward, the infant mortality rate is high, and the county health department has classified this section of the city as a "high risk area" (Pet. App. 43). Of the limited amount of vacant land left in the city, most is located in the third ward (Pet. App. 46).

In light of these circumstances, a group of black first-ward residents sought to construct a group of single-family homes in the second or third ward with the help of federal housing subsidies (Pet. App. 64–68). Representatives of the group first contacted city officials about purchasing available city-owned land for the project (Pet. App. 21). However, a formal offer to purchase certain specified acreage in the second ward was tabled by the City Council and never acted upon (*id.*). Subsequently, the first-ward residents obtained from the Diocese of Buffalo a commitment of 30 acres of residentially zoned land in the third ward (*id.*). But when news of the proposed development later appeared in the local press, organized opposition from third-ward residents began (Pet. App. 22, 69). Meetings were held and petitions opposing the sale were circulated. One of these petitions, which urged the Bishop of the Diocese not to sell because of lack of schools and sewers, contained the names of the Mayor and the President of the City Council (*id.*). Before further steps to consummate the sale could be taken, the City Council called "a moratorium on all new subdivisions until

such time as the [city's] sewer problem was solved" (Pet. App. 23).[1] At the same time, the City Council passed a zoning ordinance which designated certain portions of the second and third wards "for open space and park areas" (Pet. App. 23). Included in the area was the site of the proposed housing development (*id.*).

Because the ordinances effectively blocked construction of the subdivision, a suit was filed on December 2, 1968. The United States was permitted to intervene as plaintiff on February 2, 1969. Shortly thereafter, on February 25, 1969, these ordinances were rescinded by the City Council (Pet. App. 81). Attempts to proceed with construction were frustrated, however, by the Mayor's refusal to permit the subdivision to tie into the city sewer system (Pet. App. 81–83).

After an extensive evidentiary hearing, the district court held that the city's conduct violated the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. 1983, and the Fair Housing Act of 1968 (42 U.S.C. 3601 *et seq.*). Noting the existence of a sewer problem (Pet. App. 53–57), the court pointed out that no action to improve the situation had been taken prior to announcement of this housing project (Pet. App. 55–57, 86) and, moreover, that the city had failed to explore alternative ways of ameliorating the difficulties (Pet. App. 88). The court also found that

[1] The city has been aware of its sewer deficiencies for many years (Pet. App. 22). This, however, has not stopped the city from allowing "at least nine subdivisions with some 450 houses in the Third Ward to tie into its sewer system" (Pet. App. 29, 59–60).

the claim that the project site was needed for parkland was a disingenuous departure from prior plans, and was essentially a device to forestall integration (Pet. App. 51–52, 86–88, 27–28). Accordingly, the district court found that the purpose and effect of the city's actions were racially discriminatory and entered a decree prohibiting further interference with construction of the project and requiring the city to take certain steps to facilitate the construction (Pet. App. 91–93). On December 7, 1970, the court of appeals affirmed, and on January 26, 1971, Mr. Justice Harlan denied the city's application for a stay.

ARGUMENT

1. The courts below correctly held that petitioners' conduct—including the Mayor's refusal to approve the sewer application—denied plaintiffs the equal protection of the laws and violated 42 U.S.C. 1983 and the Fair Housing Act of 1968, 42 U.S.C. 3601 *et seq.*[2]

In housing, as in other areas, the state may not, without showing a compelling justification, take action which has the purpose or effect of racial discrimination. See, *e.g.*, *Hunter* v. *Erickson*, 393 U.S. 385; *Reitman* v. *Mulkey*, 387 U.S. 369. And, of course, what the state cannot overtly do in this area "cannot be done by indirection." *Anderson* v. *Martin*, 375 U.S. 399, 404. Thus, the state may not use ostensibly neutral devices, such as zoning ordinances, to "fenc[e] Negro citizens out of" certain areas and, thereby, foster or perpetuate racial segregation. *Gomillion* v. *Lightfoot*,

[2] The pertinent provisions of both statutes are set forth at pp. 14–16 of the petition.

364 U.S. 339, 349 (Mr. Justice Whittaker, concurring). See, also, *Dailey* v. *City of Lawton,* 425 F. 2d 1037 (C.A. 10); *Southern Alameda Spanish Speaking Organization* v. *City of Union City,* 424 F. 2d 291, 295–296 (C.A. 9).

Here, after an extensive evidentiary hearing, the district court found that petitioners' actions discriminated against the plaintiffs and not only had the effect of perpetuating segregation by race, but were deliberately designed to do so (Pet. App. 85). The court of appeals correctly held that this finding was amply supported by the evidence and, therefore, would not be set aside (Pet. App. 26). See *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 100, 123.[3] In view of the settled nature of the legal principles applied by the courts below, there is no reason for further review by this Court.

2. The district court also acted well within its discretion in ordering petitioners to take certain affirmative steps to remove the remaining barriers to construction of this housing development. Once the court found that petitioners unconstitutionally interfered with the construction of the development, it was obliged to render a decree that not only would prohibit further interference, but also would overcome the deleterious effects of the city's past actions. See *Louisiana* v. *United States,* 380 U.S. 145, 154.[3] This is what the

[3] Cf. *Hawkins* v. *Town of Shaw, Mississippi,* No. 29,013 (C.A. 5, Jan. 28, 1971); *Southern Alameda Spanish Speaking Organization* v. *City of Union City,* 424 F.2d 291, 295–296 (C.A. 9), and the subsequent decree of the district court in the same case, C.A. 51590 (N.D. Cal., July 31, 1970).

court did in the six operative paragraphs of its decree (Pet. App. 91–92).[4] Insofar as petitioners are unable to comply fully with those provisions, they should, as the court of appeals noted, apply "for modification to the trial judge" (Pet. App. 19). Such anticipated practical difficulties as may be encountered provide no basis, however, for review by this Court of the present decision.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
JERRIS LEONARD,
Assistant Attorney General.
FRANK E. SCHWELB,
ALEXANDER ROSS,
JOSEPH B. SCOTT,
Attorneys.

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[4] Among other things, the court "enjoined [the city] from issuing building permits for any construction in the second and third wards which will contribute additional sanitary sewage to the municipal system until Kennedy Park Subdivision has been granted permission to tap into the sewer system by the appropriate authority" (Pet. App. 92). There is no apparent non-discriminatory reason why petitioners object to this provision of the decree, and yet at the same time defend the Mayor's action on the ground that the sewer system cannot accommodate any additional tie-ins (Pet. 7).

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