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SUPREME COURT, U. S.  
WASHINGTON, D. C. 20543

In the

Supreme Court of the United States

LYNMARK ASSOCIATES, INC., and  
WILLIAM MELLMAN,

Petitioners,

v.

TOWNSHIP OF WILLINGBORD and  
GERALD DALY,

Respondents.

No. 76-357

March 2, 1977

Pages 1 thru 42

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GERALD DALY, :  
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Respondents. :  
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Washington, D. C.,

Wednesday, March 2, 1977.

The above-entitled matter came on for argument at  
10:46 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States.  
WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice  
HARRY A. BLACKMUN, Associate Justice  
LEWIS F. POWELL, JR., Associate Justice  
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

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New Jersey 08033; on behalf of the Petitioners.

MYRON H. GOTTLIEB, ESQ., Kessler, Tutek and Gottlieb,  
325 Farnsworth Avenue, Bordentown, New Jersey  
08505; on behalf of the Respondents.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-357, Linmark Associates against Township of Willingboro.

Mr. Hauch, I think you may proceed when you're ready.

ORAL ARGUMENT OF JOHN P. HAUCH, JR., ESQ.,

ON BEHALF OF THE PETITIONERS

MR. HAUCH: Mr. Chief Justice, and may it please the Court:

In this case, the petitioners are contending that a sign ordinance of the Township of Willingboro which prohibits "For Sale" signs on residential premises is unconstitutional.

Right now, if you live in Willingboro and you desire to sell your home, you may not post a "For Sale" sign on your property.

If you desire to engage a realtor to aid you in selling your home, neither you nor the realtor can post a "For Sale" sign on your property.

The justification offered by the Township is not that the "For Sale" signs are improper; the justification is that the Township Council has a fear that the residents of the community in the neighborhood will develop what is called a psychological fear; this being by seeing homes for sale in your neighborhood, you get the message that people are moving out, and, in turn, this might lead to an irrational reaction



on the part of the neighbors, and they might rush to put their homes on the market in a rush to leave the town.

Now, mixed in with this justification is the thought, on the part of some people, that some neighbors may feel that if this person moves out, a member of a racial minority may move in.

So the justification primarily is based on a train of apprehension and fear. Yet the ordinance bans all "For Sale" signs on residences in Willingboro.

We can see a number of examples where the ban would be totally irrational to accomplish the end of keeping fear from residents.

For example, a person that is transferred in their employment from Willingboro, for instance, in New Jersey to California, cannot put up a sign "Home for sale - Transfer". A black in the community that is selling may not put up a sign "House for Sale - black moving out". That certainly would not create the fear that the Township envisions is present in "For Sale" signs.

Similarly, a person moving from one side of town to the other -- and this is not a small town; it's a town of 11,000 houses -- couldn't put up a sign "House for sale - moving across town". Not out of town.

Now, the basis that the Township has established here, I think leads to the central issue in the case, and that is:

whether the Township can carry its heavy burden of sustaining that this ordinance is constitutional and does not abridge the freedom of speech of the First Amendment.

In getting to this posture of the case, the Court of Appeals, by a 2 to 1 decision, reversed the district court, the Court of Appeals holding that the ordinance was constitutional. At that time, in the history of the development of the protection afforded commercial speech, the Court of Appeals only had the initial case of 1942, of Valentine v. Chrestensen.

It had, subsequently, the Pittsburgh Press case, which upheld a prohibition on the advertising of an illegal activity, namely, the sex discrimination in employment where prohibited.

It also had this Court's decision in Bigelow v. Virginia, but did not think that the Bigelow decision extended far enough to prevent the Township from having such an ordinance banning signs.

In 1976, after the Court of Appeals decision, this Court handed down its opinion in the Virginia State Board of Pharmacy case. This was a notable announcement of protection afforded to commercial speech. Because, among other things, and probably primary as far as society is concerned, it was recognized that there is a great public interest in having the free flow of commercial information, it may be indispensable, and that people in their ordinary individual commercial trans-

actions should be able to make not only intelligent but well-informed decisions. They should not be kept ignorant of the facts, they should not be pushed by other means to get facts that are not more readily available by the message sought to be put.

The analogy with the Virginia State Board of Pharmacy case, I think, is extremely close to our case. There there was a private economic transaction, and it was a case that extended commercial advertising protection to a product. The first case of its kind. It is essential, obviously, that price, which was a consideration in the Virginia Pharmacy case, was something that had to be known by the purchaser.

In our case the supply of a product, or a house, the availability of it on the market is equally essential to the informed and intelligent choice of a buyer.

The Virginia Pharmacy case extended a protection of the First Amendment not only for the benefit of the advertiser but also for the benefit of the person receiving the advertisement, so that he could be informed and make intelligent decisions that affect his daily life. And the sale of a house is a vitally important thing to most homeowners, it may be their most important asset.

Now, the situation is not that we claim signs cannot be regulated of this nature. Obviously, there are clear areas for regulation; namely, signs cannot be false, they cannot be

deceptive, they cannot advertise an illegal activity, as indicated by the Pittsburgh Press case. There may be other areas of regulation, such as for safety and for health. None of these areas were involved in this case. The Township comes forth with no justification on any of those bases.

There also is not an ordinance framed for maintaining in the community something for the purposes of safety, such as traffic congestion, or something that is obnoxious and blaring, that offends the senses, such as noise.

QUESTION: What would be your view if an ordinance prohibited placing any sign on the property at any time for any reason?

MR. HAUCH: I would say it is unconstitutional, if Your Honor please. And if I may give an example, I think the forbidding of political signs, for instance, no matter how small, could be regulated. I think it would be unconstitutional to prohibit a political sign on a private property.

QUESTION: What about a sign advertising cigarettes or whiskey or a typical billboard sign?

MR. HAUCH: I think the typical billboard sign, if it's not compatible with the area in which it is displayed, such as national beautification of highways, can be regulated.

QUESTION: Well, isn't that the fear that the time and place regulations can be made of some public display?

MR. HAUCH: Absolutely, Your Honor. I agree with that

wholeheartedly. And I would say this, we do not, in this case, have a time, manner and place restriction; we have a censorship of the message itself. It is prohibited. The time, the manner, the place is not significant. It is not a purpose of this ordinance. It is just a complete and total suppression of a message.

And I think that distinguishes it from all the cases, including the American Mini Theatres case, in which the time and manner may be reasonably regulated. We do not contend it can't be.

Prior to the passage of this repeal, I may say to the Court, the Township did have a regulatory scheme for signs. It embraced at least two facets. One facet was that the sign, the number of the signs, the square footage of the signs, the time after which they had to be removed was all provided by this ordinance; reasonable regulation. And this pertains particularly to house "For Sale" signs.

In addition, it is notable that in the ordinance, in Section 17-3, there is a requirement that anyone putting up a sign of this nature, or any other nature, must get a permit from the Building Inspector. There is no fee charged for the permit in connection with "House for sale" signs. That was the regulatory scheme.

And I think it provided adequate means for monitoring, in the event there was any thought of illegal activity in the



use of real estate signs, which is not on this record; but if there were, the registration certainly would provide adequate means for monitoring.

Moving on, the justification, upon analysis, cannot in any way come out to anything except a totally illogical approach to how to achieve the stated goal of the Township. The same message can be conveyed, "for sale", in a newspaper, it can be conveyed in a broker's office, in a multiple listing book, or even a church, by neighbors talking or a social function.

The message itself is what the Township wants to suppress, to achieve their goal. A person is going to, if you follow the Township's theory, have the same psychological fear -- if that is what some people have -- when the person receives the message "for sale"; because the message says people are moving out. Whether he gets that message through a sign on a property, a newspaper, or broker, or a neighbor, is not significant, it is the message that would create the fear.

In addition, I think there is a distinction between "For Sale" signs on property and other possible methods of advertising. A broker requires a contract in most cases to pay your fee, or the broker's commission. A newspaper cannot be as objective, because the purpose of the advertiser is to sell. He is certainly going to puff the property. We don't see real estate ads indicating that a house has holes in the roof or

things of that nature. So it is not strictly objective. It's hard to conceive of anything more objective than a person without outside influences driving around on a weekend in a suburban community and seeing a sign, and seeing the house. There is no other way that he is going to see these two things together in a completely objective setting as far as he is concerned. If he likes --

QUESTION: This ordinance applies to all property, doesn't it, not just residential property?

MR. HAUCH: If Your Honor please, the ordinance is designed to cover residential property as one area of sign regulation. There are also separate areas of regulation with respect to commercial areas and industrial areas. The design of the ordinance is exclusionary and only permits of exceptions.

QUESTION: Your client, Linmark Associates, Incorporated, according to the complaint, owns land and premises in Willingboro -- is that residential?

MR. HAUCH: Residential; 25 Sherwood Drive, if Your Honor please.

QUESTION: Does the corporation live in it or what?

MR. HAUCH: It is a corporation and the -- first, I would say, it is a corporation that owns this property, and the circumstances of ownership probably would seem odd in a housing setting. My understand is it's a real estate company that holds titles that come out of foreclosure until they can

be disposed of in a reasonable market. There is no charge that Linmark, or any evidence that Linmark engages in any way in any illegal blockbusting activities or any other legally offensive activities in this community. The --

QUESTION: No, I wasn't -- you answered my question to that.

MR. HAUCH: Yes, sir.

QUESTION: I was just wondering why a corporation should be owning a single-occupancy dwelling.

MR. HAUCH: My understanding is, if Your Honor please, that when there are foreclosures, rather than having a sale at a distressed price in a foreclosure proceeding, quite often the mortgagee, be it a bank, life insurance company, or what, will take title or put the title in a nominee name, if you will, until a reasonable price can be obtained at a sale.

I think that is the situation here, Your Honor.

QUESTION: What is the business of Linmark Associates, Incorporated?

MR. HAUCH: That is its business, is holding these titles, as I understand it, after acquiring them from foreclosure sales, until a reasonable price can be obtained and a sale made.

QUESTION: And William Mellman, the other plaintiff, is a real estate agent?

MR. HAUCH: He is a general real estate agent, Your

Honor, yes; who engages in business in this Township.

QUESTION: Mr. Hauch, we had a case up here not too long ago involving the banning of cigarette advertising on radio, and this was summarily affirmed, upholding the ban. There was a message that was banned; if we decide for you in this case, are we overruling that one?

MR. HAUCH: I don't believe so, sir. Cigarette advertising, to me, certainly is in the interest of public health, which is a --

QUESTION: Well, it isn't illegal to smoke cigarettes yet, maybe it ought to be, but it isn't yet.

MR. HAUCH: Well, I don't think you would be overruling your -- the decision in the television advertising case on cigarettes, sir, because I think the public interest which supports that would not be the same type of interest as Willingboro could show in this case.

QUESTION: There have been some distinctions at least, however refined, on the broadcasters that do not apply, for example, to newspapers, on the theory that the use of the public resource by a broadcaster gives the greater governmental power.

MR. HAUCH: Yes, sir, that would be true, Your Honor, and broadcasting, of course, the licensing situation, a private homeowner is not a licensing situation; so licensing activities certainly can be much more regulated, as would be the case with

realtors but not with the individual homeowner, on a "For Sale" sign.

QUESTION: Your client also wants to be able to put up "Sold" signs as well as "For Sale" signs; are you defending that practice, too?

MR. HAUCH: We are not defending it here, sir, because, specifically, it was not in issue as such. But I would say that the practice should be allowed under proper regulation, to indicate the information the property has been sold. And perhaps the sign should be removed within five days, or something.

But I do think it's proper information --

QUESTION: This is purely commercial, this aspect is purely commercial.

MR. HAUCH: Not entirely, if Your Honor please, because it's taking the property off of the market, which, I think, would be equally essential to somebody, a consumer, that's interested in buying a property in the area, that this property was sold.

It does have some element of informing the public on something that they should have the right to know, if they are interested in the housing market.

QUESTION: Well, isn't it a situation in which the real estate agent or agency is touting itself as having been responsible for the sale?



MR. HAUCH: There is an element of that in it, and it would not be denied, sir, that is a commercial element.

QUESTION: Isn't that the dominant one?

MR. HAUCH: In practice it would be, I would think, the dominant element because the seller no longer is concerned. It is a commercial element. But I wouldn't say, because it's a commercial element, that it could be completely prohibited.

Moving on, the --

QUESTION: But you apparently, in response to my brother Blackmun's question, do -- you do agree that there are some interests that warrant the discretion of advertising.

MR. HAUCH: Yes, if Your Honor please, --

QUESTION: You indicated public health, interest in public health warrants the suppression.

MR. HAUCH: Public health, public safety, the truth, no deceptive advertising, and --

QUESTION: So your argument is there are some interests, but this isn't one of them.

MR. HAUCH: This is not one of them, sir. I think it fails the test to be applied in a number of respects: one, I don't think this ordinance furthers any paramount or compelling governmental interest. I definitely don't perceive of anything that is incidental about the regulation suppression, the suppression of this speech to any valid immediate objectives. The sole objective is to suppress the message "for sale" so

that you suppress an apprehension or fear. And I don't know of any case that has held that it is proper just because of simple fear or apprehension to suppress free speech. And it would be horrible if it happened, because I think, just in times of controversy, such as are indicated by the Township here, the more speech, the more information about the problem, the more aid to society solving the problem.

Also, it is certainly not the least essential way of accomplishing this end. Because education will do it, suppression is not just a restriction.

I may indicate that our Fourteenth Amendment argument is primarily based on the finding by the District Court that there was an improper motive, a desire of the Township officials to freeze in past discrimination. We're relying on our brief for that argument.

I think the important thing in a free speech case today, that has commercial advertising, is to consider that our experience with government, our experience in society is that secrecy does not achieve desirable social ends. The more information made available in consumer transactions, in consumer credit, in disclosures with respect to equal opportunity, the better. We get better answers. And I think the law consistently supports that view.

There is no support in the Constitution for the notion that if people are kept ignorant they are going to be

better off, and social ends are going to be achieved.

Here I think it's irrational to believe that people will act irrationally if they are given the full facts and the truth. That seems to be the approach taken by the Township. I do not concede that it's supported by the law or will achieve the social end desired.

I'd like to reserve --

QUESTION: The equal protection clause argument, you have just explained to us that this ordinance is designed to have racial results. You don't make an argument under the equal protection clause that this ordinance prohibits the display of "For Sale" or "Sold" signs, but doesn't prohibit the display of signs containing other messages?

MR. HAUCH: The overbreadth argument was not, if Your Honor please, made a point in the Court of Appeals.

QUESTION: Well, that could be a significant argument.

MR. HAUCH: It could be a significant argument, and I think the realization of that came up in some very recent cases of this Court on overbreadth, and it may well be, although we have not urged it, because we did not urge it when we started this case, that there is an overbreadth problem in this case that's very serious.

QUESTION: Well, I'm directing myself to the equal protection clause, not the overbreadth, due process.

MR. HAUCH: I see.

QUESTION: Does Willingboro permit signs advertising other things, carrying messages?

MR. HAUCH: Willingboro permits signs advertising a use that is made on the property, such as a business that is on the property, and they advertise, if it's in a zone where it can carry on its business. It does not allow signs that advertise off-premises business.

QUESTION: But if there's a bakery or a dressmaker or a --

MR. HAUCH: He can advertise if he's in a commercial zone on his property, but not off his property, and he can't advertise if he's a branch of a bakery, as I understand it.

QUESTION: How about a residential zone, a woman who does dressmaking, for example?

MR. HAUCH: Dressmaking would not be permitted, however, --

QUESTION: In her own home. In her own home, with her own needle and thread.

MR. HAUCH: Well, not under the way the ordinance is drafted, because it's not an exception.

I may point out, there are exceptions for private enterprise. You might have a stable.

QUESTION: How about an apartment building putting up a "For Rent" sign, one, two, three-room apartments?

MR. HAUCH: "For Rent" signs, if Your Honor please,

fall in the same repealer clause as the "For Sale" signs.

QUESTION: So they are not permitted now in Willingboro?

MR. HAUCH: No, sir. Because the exclusion was both "For Rent" as well as "For Sale".

QUESTION: I see.

MR. HAUCH: But we have not stressed the "For Rent" point, because they are in exactly the same category.

QUESTION: Are there apartments in Willingboro? Apartment structures?

MR. HAUCH: I don't believe there are, of any significance, if any, sir.

QUESTION: Where is it?

MR. HAUCH: Willingboro is midway between Philadelphia and Trenton. It is --

QUESTION: It's not my end of the State. I was just up there.

MR. HAUCH: No, it's -- and it is a very large area, I may say, geographically.

The answer that there may be alternative means, I think, is no argument against what we contend. There's no recognized principle that because you want to give a message in one way, and a speaker can get the message in another way, that you have answered the suppression that violates free speech.



I really don't think that the Township thus far in this case has come forward and met our free speech argument head-on in its briefs.

Mr. Chief Justice, I would like to reserve my remaining time.

MR. CHIEF JUSTICE BURGER: Very well.

QUESTION: May I ask just one question? What is your response to the argument that an ordinance of this character preserves property values in the interest of the city for tax purposes, and also in the interest of the property owners themselves?

MR. HAUCH: I think, looking at the record in this case, during a period up until and through 1973, when signs were permitted, the evidence is -- and no one contests it -- that property values actually increased. There is no --

QUESTION: Did the District Court make a finding to that effect?

MR. HAUCH: The District Court made a finding they did not decrease during the period. In the record, the -- even at trial, the members of the Township Council testified that property values had steadily increased. They had not decreased in Willingboro.

I think it would be difficult to assume that property values would decrease because of the presence of signs. I think the competition that was shown in Willingboro for homes

would keep the price up, and obviously part of that is there are homes for sale, it is a message.

QUESTION: But whatever may have happened in your community, it is common knowledge, I think, that where white flight has occurred significantly, that property values have suffered, resulting in diminution of tax revenues for the community.

MR. HAUCH: I would agree that's true, sir. And --

QUESTION: But it hasn't happened in this community?

MR. HAUCH: No, it has not. There's no evidence whatsoever in the record that it has.

QUESTION: The purpose of this ordinance was preventive, I suppose.

MR. HAUCH: Is to prevent --

QUESTION: To prevent rather than to repair.

MR. HAUCH: Well, it definitely is, I suppose, to prevent rather than to repair, if Your Honor please; and the means to prevent are illogical.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Gottlieb.

ORAL ARGUMENT OF MYRON H. GOTTLIEB, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. GOTTLIEB: Mr. Chief Justice, and may it please the Court:

I disagree with counsel, as might be expected or

anticipated. I think that what the Court has before it is an ordinance to prohibit or ban a device which has been or was being utilized to manipulate Willingboro from an integrated community to a resegregated one, and that, as such, it does not run afoul of the equal protection clause.

And, secondly, whether an ordinance which furthers this legitimate government interest fails the First Amendment or is contradicted by the First Amendment.

QUESTION: Would you think that would be equally -- what would you think if the ordinance included in its prohibition advertising in newspapers?

MR. GOTTLIEB: I don't believe that should be sustained. I don't believe that newspapers, first of all, in discussing this, it's quite evidence that Township Council took the narrowest means it could take. Newspaper advertisement is not affected. Other means of advertisement are not affected. And the record reflects, as shown by plaintiffs' testimony, that over, or approximately 70 percent of all real estate inquiries for the purchase of the homes come from methods other than "For Sale" signs.

We're not trying to get into other areas. What we are trying to do is merely hit the closest or the narrowest way we can approach the problem. This is borne out by the fact, further, Your Honor, that in Willingboro -- and again disagreeing with counsel -- the fact of advertisement of homes for sale

did not cause panic. The only thing that caused panic was the fact of advertisement for homes for sale through one particular mode or method, and that was the forest of "For Sale" signs on the lawns of all the homes in the residential area. That was what was being attacked.

If we went at anything else, it wouldn't be reasonably related to trying to solve the problem. This, in fact, is borne out by the fact that it did solve the problem. The insecurities and tensions and problems existing in Willingboro prior to the ban of "For Sale" and "Sold" signs were diminished strongly. They weren't entirely eradicated, but they were diminished to quite an extent. And that evidence is absolutely uncontradicted in the record.

It's quite clear that this nation has a national policy as to housing as to housing, and perhaps --

QUESTION: Mr. Gottlieb, could you tell me one thing about the change that the ordinance brought about: does the evidence tell us whether there's been a change in the actual number of houses being offered for sale?

MR. GOTTLIEB: No, sir; it does not. It does show that the number of homes which were indeed sold prior to the enactment of the ordinance is about the same. There's been no diminution of sales. One realtor testified he was selling the same; one said more. So at least we've got to assume it was the same.

QUESTION: No change in the rate of sale nor in the rate of putting houses on the market?

MR. GOTTLIEB: I don't know whether there was a change --

QUESTION: Well, what does the ordinance accomplish is what I'm --

MR. GOTTLIEB: Pardon?

QUESTION: What does the ordinance accomplish, then?

MR. GOTTLIEB: The ordinance is merely to prohibit "For Sale" signs in order to reduce the --

QUESTION: The fear.

MR. GOTTLIEB: -- people who are residing in the community, who are selling based solely on fear, and it's addressed solely to this one issue of stability.

QUESTION: But doesn't the evidence tend to indicate, if the rates have remained constant, that there are just as many people who sold on account of fear before the ordinance as there were after?

MR. GOTTLIEB: No, sir. Quite to the contrary. The evidence, although as many people were selling as before, it does not show why they were selling now; it does show that of those who were selling -- and again the evidence is uncontradicted here -- there was less vocalization, if I may, by people who had sold their homes or were in the process of selling their homes, or had decided to sell their homes, as



that in fact they were selling or had decided to sell because of a fear of being left there, the non-stable community, a fear of being left there, the last -- the neighborhood's changing, that type of concept.

QUESTION: You know, there's another way of doing it, that's been done in some towns, of putting a different sign up: "This house is not for sale". It worked very well.

MR. GOTTLIEB: That may in fact be the case, sir. Willingboro did not choose -- the legislative judgment of the Township Council was that this was the most appropriate course based upon the recommendation of the Human Relations Commission and the various public hearings that were held.

QUESTION: A sign saying "This house is not for sale" would also violate -- would also be impermissible under the --

MR. GOTTLIEB: It would now be impermissible, yes, sir.

QUESTION: Right. Because no sign is permitted.

MR. GOTTLIEB: Well, there are certain signs which are permitted.

QUESTION: Professional?

MR. GOTTLIEB: Professional nameplates, if you would, for a physician or an attorney or someone of a permitted professional use in a residential area is permitted.

With that exception, no other -- and I'm not sure how much of an exception that is -- no other commercial advertisement is allowed in a residential district.

QUESTION: Right.

MR. GOTTLIEB: The State of New Jersey, through its courts, has determined that a municipality may not prohibit political signs, so that we do not try to regulate that.

We accept the State court law that in fact political signs may not be regulated, at least to the extent of being prohibited. I would assume that they could be kept back from the roadway, in the interest of traffic safety, or something entirely not raised here.

QUESTION: Mr. Gottlieb, let me ask one other question that maybe you will reach.

On this 30 percent factor, that 30 percent of the sales, only 30 percent were generated by the "For Sale" sign. Supposing the evidence had been the converse, that 30 percent had been generated by local newspaper ads, and 70 percent by "For Sale" signs, could the Township have banned the newspaper ads?

MR. GOTTLIEB: No, no. We -- I don't think we can approach newspaper advertisements, and we're not trying to approach newspaper advertisements.

QUESTION: Well, what's the difference?

MR. GOTTLIEB: Factual findings in this particular case were that newspaper advertisements did not "stir up" the residents. Office inquiries or a listing in the multiple listing service booklet or pamphlet did not "stir up" people.

The sole thing that stirred up people were the abundance of "For Sale" signs, the signs that when people would walk to and from their home, to take a walk in their neighborhood, or to drive to and from work, or to go to the store, or take your child, to walk him or her to school, that was what did it. The dominating presence.

QUESTION: Well, this "forest of signs", does the record tell us what percentage of homes were for sale at any given point in time?

MR. GOTTLIEB: It does not. There is a mention, quite candidly, where, at the two public hearings held on this, a realtor at one of the hearings, and I believe it was the first hearing, stood up and indicated that: "According to our monthly review, at the previous month there were 230 or 200 'For Sale' signs up", Willingboro having a community of 11,000.

I have no idea how many other homes were up for sale through -- not utilizing signs. The indication further may be refined by two other factors. The indication of the witness, if I recall correctly, was that this was other realtors' signs, it did not take into account, I believe, me trying to sell my own home.

Finally, this survey was taken in the month of January. One would tend to suspect, through experience, that January "For Sale" signs on the front lawn are much less than May, June, this time of the year when most of the real estate

business goes on.

QUESTION: Well, is the difference between the "For Sale" signs and the newspaper ads, then, that the practice in the real estate business is to list sample examples of houses for sale, never list all 230 in the same ad, or anything like that? So that you don't get the feeling of how many are actually on the market at any one time.

MR. GOTTLIEB: I just can't indicate what --

QUESTION: I mean, if that's not it, I am trying to understand why you draw a distinction between my example of 30 percent -- well, I say your difference is based on the fact that there is evidence in the hearings that relate to signs, and there is no evidence in the hearings relating to newspaper ads; is that it?

MR. GOTTLIEB: That's quite correct. Indeed, everybody indicated, in testifying, that there was no other mode of advertisement which caused this panic among the residents of Willingboro, other than the forest of "For Sale" signs. Ubiquitous signs that are all over the place.

And that was it, that was what Willingboro approached; they did not attempt to regulate in any other area, because any other area wasn't causing the problem.

QUESTION: Mr. Gotlieb, see if -- perhaps you have already answered this, but does your ordinance touch upon political advertising at all?

MR. GOTTLIEB: It doesn't speak one way or the other. I can indicate to Your Honor that the law, as determined by the State courts of New Jersey, is that a municipality may not prohibit signs of a political nature. So that --

QUESTION: Well, then, if you're in the midst of a campaign, I can conceive of some political signs that would accomplish just exactly what you are afraid these "For Sale" signs would accomplish: something that this neighborhood is becoming all black, elect Joe Segregationist; or something like this.

MR. GOTTLIEB: Yes. I can only relate to Your Honor that in my mind that's a policy decision made by the First Amendment, that in fact if it's a political or philosophical or social and economical exposition of a thought or an idea, that the First Amendment says we can't regulate that.

However, here we have a situation where we have signs which have a direct definable impact on the present residents of Willingboro, which is resulting in transforming a community, which is, I can say quite proudly, probably a model in this nation for compliance with the Fair Housing Act, if not THE model, transforming that community into a resegregated one.

Now, I can't accept the assertion or the connotation that the commercial speech in this context, which is clearly against the public welfare, clearly against the public policy, because of its impact, which is truly deceptive in that nature,



because of its impact, is entitled to an elevated position under the First Amendment. I don't believe that the Court or the First Amendment has ever made that policy decision.

I think that the Court, indeed, has gone so far, in many of the cases I've cited in my brief, to the other extreme; that where the public health, safety and welfare of a community are concerned, and where, here, you've got a national welfare interest concerned, as set forth in the Title VIII of the Fair Housing Act, that the Court can't just put blinders to its eyes. No court can.

In fact, I would have condemned Willingboro Township Council if it had put blinders to its eyes and not acted in this particular situation.

I would again indicate to the Court, contrary to the statement by fellow counsel, that we have a fear psychology, a panic, and it's not a panic in the sense that everybody is moving, it's an incipency, a beginning in Willingboro, which was not conjectural. There is no indication that because it may have occurred, the record is filled with instances where in fact it was occurring, where in fact there was a communication by many of the residents that, indeed, "I'm uptight, and I'm worried and I'm frustrated and I'm fearful", and that was what Willingboro's ordinance tried to get at.

QUESTION: Mr. Gottlieb, how widespread was the use of these signs?

MR. GOTTLIEB: The signs appeared in every -- Willingboro has -- was created by Levitt, to the extent that we have various parks, Somerset Park, Pennypacker Park, with, give or take, an average of 1,000 homes in each park. They were in every park. It was --

QUESTION: In large numbers, or diffused, or what?

MR. GOTTLIEB: Well, Willingboro has various types of homes. Willingboro has single-family residences. Willingboro has a section or an area of townhouses, with cul-de-sacs or short little streets. In a cul-de-sac with 20 homes, or townhouses fronting onto it, which is perhaps 100 feet, 150 feet long on both sides, like almost a U-shape, to say that eight signs or six signs is less significant there than six signs or eight signs on a street which is perhaps a quarter of a mile long, I think that two factors have to be determined here.

No. 1, the physical characteristic of the street that it's on or of the homes bordering that street; and also the number. But there were all over. There's no question that signs were in every park, or displayed in every park. They weren't singling out one or two or three.

QUESTION: Mr. Gottlieb, on that point, you mentioned 11,000 earlier; is that 11,000 population or 11,000 houses?

MR. GOTTLIEB: No, 11,000 residences. Willingboro has approximately 45,000 people, which would be --

QUESTION: Well, 230 signs out of 11,000, that's one

out of every 45 or 50.

MR. GOTTLIEB: If, in fact, the --

QUESTION: Even if it was twice that many, it'd be -- you know, one out of every 25 houses. Is that a "forest"?

MR. GOTTLIEB: Pardon?

QUESTION: Even if there are twice as many as the 230, that would be about one out of every 25 houses.

MR. GOTTLIEB: Well, let's assume that the statement made, not subject to cross-examination -- this is based on a public hearing -- were accurate, and again the statements made are at taking a survey in January.

QUESTION: Right.

MR. GOTTLIEB: But let's assume that they are accurate, if, in fact, and it's quite clear that the various residents of the community stood up and protested about the "forest of 'For Sale' signs", who am I to say that eight is a forest on my street and two is not, or is six a forest and eleven, or just what? I can't say that they were uniformly distributed, where a home had perhaps -- or a street had perhaps 50 residences along it, and it hit precisely every 20th home, or if, at this end of the street, we had six among these ten homes; but none along the balance of the street or maybe one --

QUESTION: Mr. Gottlieb, these figures came from the people who were supporting the ordinance, right?

MR. GOTTLIEB: That is wrong. These figures came

from a realtor who stood up and opposed the ordinance at the first public hearing, and said, "My firm took a survey, and these are the results of that survey."

QUESTION: Are you talking about the number of signs?

MR. GOTTLIEB: That is correct, sir.

QUESTION: Well, do you have any to contradict that?

MR. GOTTLIEB: I can only indicate to Your Honor --

QUESTION: Do you have any figures in the record to contradict that?

MR. GOTTLIEB: There is nothing in the record, other than when one of the councilmen who was testifying was questioned about it, he said, "We had figures which we considered in making our determination, or arriving at our judgment. I do not recall the figures, nor do I have them available here in court." And this is at the trial level.

QUESTION: Well, the only figures we have are 200-and-some, in this record.

MR. GOTTLIEB: That is correct, sir.

QUESTION: So that that's the "forest". That is the "forest".

MR. GOTTLIEB: The "forest" is the impression of signs by the residents of Willingboro, how the public itself perceived the "For Sale" signs, yes, sir. Whether or not we had -- how many signs, I don't know. The only indication as to number of signs, however, clearly came from the realtor who

stood up in opposition.

QUESTION: Well, since November, around this area we have had a whole lot of signs up, too.

[Laughter.]

QUESTION: Should we panic?

MR. GOTTLIEB: I -- perhaps I'm missing an inside joke. I --

[Laughter.]

QUESTION: Well, since the change of Administration.

MR. GOTTLIEB: Yes, sir.

QUESTION: There have been a lot of "for sale" signs in every neighborhood in this town.

MR. GOTTLIEB: Yes, sir.

QUESTION: And we haven't panicked. We're not uptight about it.

[Laughter.]

QUESTION: I hope!

MR. GOTTLIEB: I don't know the community conditions in the District of Columbia. But here is a legislative decision made as to what they want or what they don't want.

But if in fact it were to appear to the -- those people in authority, able to make that decision, that in fact there were a widespread panic-selling atmosphere in the District of Columbia, and if in fact the authorities, whomever they may be, were to determine that it is appropriate to



respond to that in order to maintain the stability in the community -- and I use "stability" solely in the sense that one does not want to leave Willingboro or the District of Columbia solely out of fear -- and that's the way I believe it was used in the context of this case. That in those situations, in that situation it would present the identical issue posed to the Court in this case, that in fact we do have, because of the way the public perceives it, a situation which is inimical to the public health and welfare.

The argument of counsel that indeed the ordinance has been utilized to discriminate against minorities is clearly erroneous. Counsel have suggested in their brief that because we are prohibiting "For Sale" signs, that itself means that we're trying to keep minorities or anyone out; but the absence of signs, in and of themselves, don't control who moves in, because of the absolutely effective alternate means of communication.

Couple that with the fact that the testimony even of Mr. Mellman, the plaintiff in this case, or the petitioner here, was to the effect that even though we have signs prohibited --

QUESTION: Let me question your "absolutely effective alternate means of communication" statement. Now, you're suggesting that from the point of view of a seller he can communicate his willingness to sell by advertising and listing. But what about the prospective buyer who drives into

a neighborhood and says, "I may move into this block; I'm curious to know how many people are selling. Is it a stable community or one that's changing?" How does he get the message that he would get if there were signs out front?

MR. GOTTLIEB: That person spends 15 cents, buys a newspaper, scans the "Homes for Sale" column in the newspaper, that person --

QUESTION: But is it -- does the record --

MR. GOTTLIEB: -- may go to a realtor and look at the multiple listing service booklet, which lists every home for sale in Willingboro, by park and by style of home, Colonial or --

QUESTION: And by block, he could get all the homes on a given block?

MR. GOTTLIEB: He -- well, I don't know if it breaks it down to a particular block, but I do know it breaks it down to a park. And in Willingboro, its park system is such that if you live in Pennypacker, all the streets in that park begin with the letter P. If you live in another one, and so on.

So that one could find out, if not that particular street, without going through the entirety of Pennypacker's listing, one could easily find out at least the neighborhood, at a two minutes' glance.

QUESTION: Is it as easy as driving down the street

in a car on a Sunday afternoon?

MR. GOTTLIEB: I would assume it's much easier to spend five minutes sitting at a desk than to drive through an entire community of 45,000 people. Yes, sir.

QUESTION: What I'm talking about, you have a block that you're interested in, you want to know how many houses are for sale, you go to -- I see, you go to the real estate agent and ask, is basically what you're saying.

MR. GOTTLIEB: You can do that, or look at a classified section in the newspaper, under the "Homes for Sale" column.

QUESTION: Well, but you don't suggest that all homes for sale are always listed in every edition of the newspaper?

MR. GOTTLIEB: No, but --

QUESTION: It would be pretty expensive.

MR. GOTTLIEB: -- perhaps that might give one an indication. If one were to see that --

QUESTION: What you're suggesting is incomplete information is perhaps just as good as complete information, then?

MR. GOTTLIEB: Pardon me?

QUESTION: Well, I'll withdraw that.

MR. GOTTLIEB: It's ironic, in response to your question perhaps, that there is no home seeker who is a plaintiff in this particular case, that we don't have a complaint

from someone who wants to move into town. We have a complaint from a realtor whose livelihood is the earning of commissions from the sale of realty, and a corporation whose income is attributed to the turnover of real estate. That's all we have here.

QUESTION: But the challenge, I suppose, is that there are different people buying homes who might buy them were it not for this ordinance.

That's the whole purpose of the ordinance, isn't it, to hope that there will be more sales to whites than there will be to blacks?

MR. GOTTLIEB: No, sir. No, sir. The entire purpose of the ordinance --

QUESTION: Or at least that there won't be a disproportionate number to blacks, would be a more accurate way to put it.

MR. GOTTLIEB: No, sir. Willingboro does not want to say who can move into town. The testimony of the witnesses is clear to that, uncontradicted. The history of Willingboro has been to recount --

QUESTION : Well, what were they so afraid of, then? What's all this fear?

MR. GOTTLIEB: The fear is among the present residents of Willingboro, who are moving not because they have been transferred to Walla Walla, or because of the change in

their family size, or financial considerations, or other things like that. Their mere moving because they have got this bug that says "I got to get out before it's too late".

QUESTION: Too late in what sense?

MR. GOTTLIEB: They're afraid that in fact they will be left in a community which has changed. And by reacting to that, they are encouraging that.

QUESTION: You mean the value of their property will substantially decrease?

MR. GOTTLIEB: They may -- I can't distinguish between the value -- it's entirely an irrational process; but I can't distinguish between a person wanting to get out out of fear and say how much of that he attributes to a decrease in value, how much of it he does it because he doesn't like to live in an integrated community, how much of it he attributes because he dislikes minorities.

QUESTION: Well, Willingboro is an integrated community, I understand.

MR. GOTTLIEB: Willingboro is an absolutely integrated community, block by block.

QUESTION: And therefore, presumably, the people who live there are, if they don't like it, they are at least quite willing to live in one, aren't they? You didn't mean an integrated community, you meant an all-one-race community.

MR. GOTTLIEB: They may be fearful that they, the



residents, may be left with a situation that in fact a community might be all of --

QUESTION: Or predominantly one race.

MR. GOTTLIEB: -- predominantly of one race. And I can't, by the way, say that this fear is exclusively confined to whites, the majority. This fear is -- it's a part of being human, and we are all human.

QUESTION: I notice you're from Bordentown, where is this place? Is it near Bordentown?

MR. GOTTLIEB: It's about a 15-minute drive. I live in Willingboro. My office is in Bordentown, and it's about a 15-minute drive on the Interstate Highway.

QUESTION: Well, I have been there, I know Bordentown --

MR. GOTTLIEB: Pardon?

QUESTION: I thought I knew that area, but I never heard of --

MR. GOTTLIEB: Willingboro is rather --

QUESTION: Just 15 minutes, you say?

MR. GOTTLIEB: Yes, approximately.

QUESTION: Well, I went through it!

MR. GOTTLIEB: Perhaps, sir.

I just want to make it absolutely clear, however, that in fact that action of Willingboro was not to affect prospective -- as shown by the statistics, because it didn't have that

impact,-- but present residents of the community.

As to the First Amendment argument, obviously petitioners contend there is a violation. It is Willingboro's response that there must be, although commercial speech is not wholly outside of the protection of the First Amendment, there must be afforded a lesser degree of protection, and that is based on the Court's recognition, I believe I'm quoting from Virginia Pharmacy, of the common-sense differences between commercial speech and philosophical or economic or political speech, or newspapers, or anything like that.

And, indeed, the Court itself has long recognized the obvious distinction in a billboard situation, and I need only refer back to Packer vs. Utah, which I believe is a case out of the early 1930's. The Court has continued to recognize that, and I might refer to the concepts developed in Lehman vs. Shaker Heights, where the community is, in Willingboro's situation, having this "thrust upon" concept, "forest of signs".

If, in fact, you as a judge may not believe that 200-and-some signs is sufficient to create a "forest", I would submit that if, in fact, because of the way the public perceives it, if in fact they believed there to be a "forest of signs", if in fact they reacted out of fear, if they were dominated by this fear, they are the determining guidelines, as to determine whether or not the signs had this impact.

With respect to the First Amendment, it clearly shows

there was a deceptive impact. The signs were the catalyst for a process of resegregation.

MR. CHIEF JUSTICE BURGER: Your time has expired, Mr. Gottlieb.

MR. GOTTLIEB: I thank the Court, then.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Hauch?

REBUTTAL ARGUMENT OF JOHN P. HAUCH, JR., ESQ.,

ON BEHALF OF THE PETITIONERS

MR. HAUCH: Mr. Chief Justice, I'd just like to, in response to Mr. Justice Stewart's inquiry with respect to the record on the ordinance, clarify one point.

There are, in a residential zone, permitted specific recreational activities of a private nature. I'm referring to A14, if Your Honor please, of the Appendix, which contains the ordinance.

On page A14, in Section 6.4, we see that there are permitted signs advertising a golf course, country club, private swimming club, -- I suppose that would include "Swim for a dollar a day" -- marina, meaning a slip, I suppose that would include for a boat, tennis court, "two dollars an hour" or "five dollars an hour" to play. That would be permitted. And also equestrian trails, advertising a private stable, I suppose you could advertise a stable for rent.

So the permission is granted to some private

activities. I wanted to clarify the record on that point.

Also of a commercial nature.

QUESTION: And under compulsion of a Supreme Court of a State, regardless of what the ordinance may say, it's clear that political advertising is --

MR. HAUCH: It wasn't the Supreme Court, Your Honor, it was a trial court, but a very well-reasoned opinion, and it was in New Jersey.

QUESTION: And Millingboro, as I understand it, has deferred to that decision and followed it?

MR. HAUCH: The ordinance doesn't say so, but they have, sir, in fact.

QUESTION: Yes.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:44 o'clock, a.m., the case in the above-entitled matter was submitted.]

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