L. K. GOOGER, ET AL.,	()	NO. A-97697
PLAINTIFFS	()	FULTON SUPERIOR COURT
-VS-	()	
CITY OF ATLANTA, ET AL.,	()	
DEFENDANTS		

ORDER AND JUDGMENT ON DEMURRERS AND MOTION TO DISMISS AND GRANTING INTERLOCUTORY INJUNCTION

THE CASE

This is a suit brought by plaintiffs against defendants in the Superior Court of Fulton County, Georgia, seeking to enjoin the defendants, jointly and severally, from continuing to impede and interfere with the flow of pedestrian and vehicular traffic along Peyton and Harlan Roads in the City of Atlanta, Georgia; from continuing to prevent and deny to plaintiffs the use of said Roads as public thoroughfares; from continuing to obstruct, impede and interfere with the movements of pedestrian and vehicular traffic along said Roads; from obstructing, closing, vacating or abandoning said Roads, and for the declaration and judgment that certain portions of Ordinances of the City of Atlanta are unconstitutional and, therefore, null and void.

This order and judgment relates to the hearing on the question of the grant of an interlocutory injunction and on demurrers and a motion to dismiss filed in said case, as hereinafter set forth.

THE PLEADINGS

The pleadings in the case are as follows:

1. Original petition of L. K. Googer and others against the City of Atlanta and others, filed on December 17, 1962, with

rule nisi thereon of said date returnable on December 18, 1962;

2. Amendment to petition filed December 18, 1962;

3. Supplemental amendment to petition filed December 21, 1962;

4. Demurrer of defendants filed December 21, 1962;

5. Amendment to supplemental amendment to petition filed December 31, 1962;

6. Defendants' renewed demurrers filed January 10, 1963;

7. Amendment of plaintiffs striking original petition and all amendments thereto and substituting rewritten petition and stipulation relating to renewed demurrers, filed January 14, 1963;

8. Defendants' renewed and additional demurrers to plaintiffs' amended and rewritten petition, filed January 16, 1963;

9. Motion to dismiss by individual defendants, other than defendant Cecil Turner, filed January 16, 1963;

10. Answer of defendants, other than defendant Cecil Turner, filed January 16, 1963;

11. Answer of defendant Cecil Turner, filed January 17, 1963;

12. Amendment of plaintiffs, filed January 21, 1963.

13. Defendants' renewed and additional demurrers to plaintiffs' amended and rewritten petition, as finally amended, filed February 4, 1963;

14. Application of Mrs. Sara C. Hall and Carl Thomas Kidd to intervene as plaintiffs, filed January 22, 1963;

15. Intervention of Mrs. Sara C. Hall and Carl Thomas Kidd, filed January 22, 1963.

RULINGS ON DEMURRERS

The demurrers to be passed on in this case are defendants' renewed and additional demurrers to plaintiffs' amended and rewritten petition, as finally amended, filed February 4, 1963. The rewritten petition was filed January 14, 1963 and the final amendment by plaintiffs was filed January 21, 1963.

By paragraph 1 of defendants' renewed and additional demurrers, filed February 4, 1963, the defendants renewed each and every one of their demurrers as originally filed and renewed, as therein stated; and by paragraphs 2 and 3 of said renewed and additional demurrers, as construed by the Court, all demurrers relate to and are directed against plaintiffs' rewritten petition as finally amended and the intervention of Mrs. Sara C. Hall and Carl Thomas Kidd filed January 22, 1963.

Plaintiffs' amendment filed January 21, 1963 was and is sufficient to meet the grounds of demurrer set forth in paragraphs 2 and 3 of defendants' renewed and additional demurrers to plaintiffs' amended and rewritten petition, filed January 16, 1963.

Sub-paragraph (d) of paragraph 12 (a) of plaintiffs' rewritten petition filed January 14, 1962 alleges that "said respective paragraphs of the respective ordinances are unconstitutional and inderogation of the same constitutional provisions recited above for the reason that said paragraph purports to abandon said respective portions of the particular roads for the benefit of private persons contrary to the law of this State." A similar allegation is set forth in sub-paragraph (d) of paragraph 16 of the intervention of Mrs. Sara C. Hall and Carl Thomas Kidd, filed January 22, 1963. No special demurrers have been filed to said sub-paragraphs (d).

Upon consideration of defendants' renewed and additional demurrers filed February 4, 1963, and all renewed demurrers as aforesaid, IT IS CONSIDERED, ORDERED AND ADJUDGED as follows:

(a) Paragraph 1 of demurrers of defendants filed December 21, 1962, as renewed, is sustained as to the individual defendants, and each of them, in their individual capacities, and plaintiffs' petition as rewritten and as amended is hereby dismissed as to said individuals and each of them, in their individual capacities.

(b) Paragraph 1 of said demurrers of defendants filed December 21, 1962 as renewed is overruled as to the individual defendants and each of them, in their official capacities as members of the Board of Aldermen of the City of Atlanta.

(c) All of the remaining demurrers of the defendants, consisting of defendants' renewed and additional demurrers filed February 4, 1963 and all renewed demurrers other than paragraph 1 of the demurrers of the defendants filed December 21, 1962 as renewed (which paragraph 1 is passed on by paragraphs numbered (a) and (b) immediately preceding this paragraph (c)), are each and all hereby overruled.

RULING ON MOTION TO DISMISS

On January 16, 1963 all of the individuals, and each of them , except defendant Cecil Turner, filed in this case their motion to dismiss the above captioned action on the following grounds and the following reasons:

"1. These defendants, and each of them, move the Court to dismiss plaintiffs' petition as to them on the grounds that said petition shows on its face that all acts of these defendants, which are complained of and set out in plaintiffs' petition, were acts performed in their official capacity as Mayor and Members of the Board of Aldermen of the City of Atlanta and that plaintiffs' petition shows on its face that plaintiffs are not entitled to proceed against these defendants in their individual capacities."

According to the Court's construction of the plaintiffs' rewritten petition Ivan Allen, Jr.was named as a defendant only in his official capacity as Mayor of the City of Atlanta. The

remaining individuals, including Cecil Turner, were named as defendants individually and in their official capacities as members of the Board of Aldermen of the City of Atlanta.

Upon consideration of said motion to dismiss, the same is hereby sustained and said action is hereby dismissed as to each and all of the individual defendants therein named, in their individual capacities.

PLEADINGS, ADMISSIONS AND STIPULATIONS

The pleadings as they presently exist and in respect of which hearing was had and this order and judgment are entered, are plaintiffs' rewritten petition filed January 14, 1963. The written petition consists of paragraphs numbered 1 through 12, both inclusive, together with paragraphs numbered 12(a), 13, 14, 14(a) and 15. By the answer of all defendants except defendant Cecil Turner, filed January 16, 1963, paragraphs 1 and 2 of the petition are admitted; defendants say paragraph 3 requires no answer and they deny paragraph 4 and paragraphs 6 through 14, both inclusive. As to paragraph 5 of the petition, the defendants in paragraph 4 of their answer allege: "Answering paragraph 5 of plaintiffs' petition, defendants admit that the ordinances referred to therein as Exhibits A and B were duly enacted by the Board of Aldermen of the City of Atlanta and signed by the Mayor, all of which was done in compliance with and in the manner prescribed by the Charter of the City of Atlanta. For further answer, defendants show that said ordinances speak for themselves as to their content." Thus defendants virtually admit all of paragraph 5.

In their answer defendants make no answer as to paragraphs 12(a), 14(a) and 15, although in their renewed and additional demurrers filed on January 16, 1963, the same date on which their answer was filed, they demurred specially, in paragraphs 2 and 3 thereof, to paragraph 14(a) of the plaintiffs' rewritten petition;

and also demurred therein to paragraph 15 of plaintiffs' original petition, thus being mindful of the fact that paragraph 14(a) was and is in plaintiffs' petition; and by defendants' renewed demurrer filed February 4, 1963, which was filed after plaintiffs' amendment of January 21, 1963, adding paragraph 16 to their petition, the defendants, by paragraph 1 of said demurrer of February 4, 1963, renewed "each and every one of their demurrers as originally filed and renewed herein." Paragraph 16 added to plaintiffs petition by said amendment of January 21, 1963 met paragraphs 2 and 3 of defendants' renewed demurrers filed January 16, 1963.

By paragraph 14(a) of plaintiffs' rewritten petition it is alleged: "Plaintiffs show that Section 1 of the respective ordinances and the implementing action on the part of the defendants in erecting the respective barriers referred to above, is further in derogation of the respective constitutional provisions set out above for the reason that said sections of the respective ordinances and the said implementing action was for the purpose of establishing a 'racial buffer' to control the place of residence of the negro plaintiffs herein, and others similarly situated." By the failure of defendants to answer said paragraph 14(a), the defendants admit said paragraph and certainly that portion thereof which alleges factually that Sections 1 of the respective ordinances and the implementing action on the part of defendants in erecting the respective barriers referred to "was for the purpose of establishing a 'racial buffer' to control the place of residence of the negro plaintiffs herein, and others similarly situated."

A similar observation in respect of the failure of defendants to answer paragraph 12(a) of plaintiffs' petition is not made in respect of that portion of sub-paragraph (d) of said paragraph 12(a) relating to the abandonment of the respective portions of the two roads "for the benefit of private persons," for the reason it cannot be said that the respective paragraphs of the

ordinances show upon their face that the closings were "for the benefit of private persons."

Section 1 of each of these ordinances shows that the portions of the roads are "abandoned for street purposes as no longer needed as such." The words "as such" are to be construed as meaning "for street purposes." It is significant, however, that the particular purpose or purposes for which the portions of the roads were abandoned are not indicated on the face of the ordinances, the ordinances being entirely silent in that respect. It is also significant that Section 2 of the ordinances reserves to the City of Atlanta "a general easement for all utilities, both public and private, now located in said street."

In respect of the effect of the failure of defendants to answer paragraphs 12(a) and particularly paragraph 14(a) of the plaintiffs' rewritten petition as dispensing with proof thereof, and that the allegations of such paragraphs not answered are to be taken as true, see Nations v. Lassiter, 94 Ga. App. 504, CITING Moss v. Youngblood, 187 Ga. 188 (2), and Evans v. Bredow, 95 Ga. App. 488, 489, 490. See also Georgia Code, Annotated, Section 81-103, Section 81-305, Section 81-306 and Section 81-308.

On the hearing there was offered by counsel for plaintiffs and admitted in evidence on behalf of plaintiffs, and identified as "P-3", affidavit of Mrs. Ruby L. Camp and others, to which there was attached as a part thereof marked Exhibit "A" a so-called photograph showing a barricade or barrier, and also a sketch or map showing location of barriers thereon identified by "X" marks. It was stipulated on the hearing by counsel for the parties that the barricades thus shown on the sketch on Peyton Road and Harlan Road, respectively, are of wooden structure supported by steel beams dug into the ground, which barricades run across the street from curb to curb, if there was in fact a curb, and that such barriers prevented vehicular travel at such points, and also pedestrian travel unless the pedestrian went over or around the same; and it was also stipulated by counsel for the parties on the hearing that said barriers were put up a short time after the

signing of the ordinances in question, and are substantial in nature.

EVIDENCE FOR PLAINTIFFS AND RULINGS ON OBJECTIONS THERETO.

The evidence offered on behalf of the plaintiffs consists of the following:

Plaintiffs' Exhibit No. 1, certified copy of ordinance in relation to abandonment of Peyton Road, S.W. (The certificate thereto attached relates to abandonment of a portion of Harlan Road, S.W., but this is regarded as immaterial);

Plaintiffs' Exhibit No. 2, certified copy of ordinance relating to abandonment of a portion of Harlan Road, S.W.;

Plaintiffs' Exhibit No. 3, affidavit of Mrs. Ruby L. Camp and others with Exhibit "A" attached;

Plaintiffs' Exhibit No. 4, affidavit of Ruby L. Camp and others;

Plaintiffs' Exhibit No. 5, affidavit of Mrs. Harold Johnson and others;

Plaintiffs' Exhibit No. 6, affidavit of D. L. Hollowell, with Exhibits "A", "B" and "C" attached;

Plaintiffs' Exhibit No. 7, certified copy of Map showing Peyton Road;

Plaintiffs' Exhibit No. 8, certified copy of Map showing Harlan Road, and a portion of Peyton Road;

Plaintiffs' Exhibit No. 10, affidavit of Joseph T. Bickers;

Plaintiffs' Exhibit No. 11, certified copies of six deeds.

Plaintiffs' Exhibits 1, 2 and 3 above set forth were offered and admitted in evidence without objection.

Paragraphs 4 of plaintiffs' Exhibits 4 and 5 were objected to on the ground that same constituted a mere conclusion, "there being no facts on which they previously testified to to substantiate it." Said objection is overruled. See Burton vs. O'Neill Mfg. Co., 126 Ga. 805.

Plaintiffs' Exhibit No. 6 Affidavit of D. L. Hollowell.

Objections of Defendants

Paragraph 1 of affidavit of D. L. Hollowell of date January 17, 1963 contains, among other things, the following:

"That on September 6, 1962, there appeared in The Atlanta Journal an article which reflected that the Mayor indicated that the road patterns in the Harlan and Peyton Roads area would be changed so as to effect a 'racial buffer.' A copy of said article is attached hereto, marked Exhibit A, and incorporated herein by reference." Attached to said affidavit is Exhibit "A."

Counsel for defendants objected to that portion of paragraph 1 of said affidavit above set forth and to the Exhibit thereto attached, on the grounds:

1. (a) That it is of hearsay, an article that is written by a newspaper reporter, and this one, incidentally, carries the by-line of Raleigh Bryans. It is obviously the words of that newspaper reporter and it is of hearsay; (b) that it is an opinion.

2. Counsel for defendants objected to the entire newspaper article, and to the affidavit of D. L. Hollowell "on the ground that the words used by the affiant, 'racial buffer,' are his own words, apparently."

3. Counsel for defendants objected to the portion of said affidavit "wherein the affiant describes the contents of the newspaper article on the ground that his description of it is his own personal opinion, which has no probative value. He can't testify as to his opinion from this newspaper article."

4. Counsel for defendants also objected to the article in its entirety on the ground that it is of hearsay.

5. Counsel for defendants further objected to that portion of the paragraph in the newspaper article which is attached as Exhibit A "on the ground that it is obviously an opinion of the writer of this newspaper article; that if it were otherwise admissible, which we

deny, it would still be objectionable on the ground that it is mere opinion of this newspaper writer, since, except for the quoted portions of it, it simply gives his resume of what he thinks happened at that time, and what conclusions he draws from it; and for that reason, we say it is inadmissible."

Paragraph 2 of affidavit of D. L. Hollowell, of date January 17, 1963, contains, among other things, the following:

"Affiant shows further that it is common knowledge that the abandonment of the portions of Harlan and Peyton Roads as reflected in the ordinances which are attached to the original petition in the instant case, marked Exhibits A and B, was for the purpose of establishing a 'racial buffer' zone between white and negro citizens of the City of Atlanta."

Counsel for the defendants objected to the portion of said paragraph 2 above set forth "on the ground that that is merely an opinion of the affiant; his opinion, of course, being it's common knowledge is not a statement of fact, but is merely a statement of opinion, and unless the Court undertakes the view that the Court can take judicial notice of this so-called common knowledge, then it is merely his opinion. There are no facts on which to substantiate it. * * * I think that the Court could not take judicial notice of anything that can be disproved. The only common knowledge that is before the Court at this time is what the newspaper says, and that doesn't make it common knowledge that your Honor can take judicial notice of. That makes it the knowledge of the newspaper."

Paragraph 2 of affidavit of D. L. Hollowell, of date January 17, 1963, contains, among other things, the following:

"That direct and indirect indications of this purpose have been reflected repeatedly in the metropolitan press as shown by Exhibits A and B and C, to this affidavit, all of which are incorporated herein by reference."

Counsel for defendants objected to the statement of the affiant "that the direct and indirect indications of this purpose have been reflected repeatedly in the metropolitan papers (press), for the reason that that is the opinion of the affiant. It recites no facts upon which to base the opinion and is purely a conclusion and opinion of his, and for that reason is not admissible."

Counsel for defendants also objected to the sentence in said portion of said paragraph 2 "wherein Exhibits A and B, and Exhibit C is some sort of a bulletin that was put out by some organization called the Southwest Citizens Association, on the ground that anything contained in Exhibits A, B and C would be * * * hearsay. It doesn't purport to be anything other than the statement of some third party, either a newspaper report or some other individual, and it would have no probative value in this Court; secondly, it would be clearly hearsay."

Paragraph 3 of affidavit of D. L. Hollowell, of date January 17, 1963, contains, among other things, the following:

"Affiant further shows that in at least two meetings since January 1, 1963, which meetings were attended by the affiant, the said Mayor has reiterated the fact that the roads were closed for the purpose of 'effecting stability in the Harlan-Peyton Road Area.'"

Counsel for defendants objected to said paragraph upon the following grounds: (1) "It is hearsay to say what the Mayor said; and (2) that even if the Mayor said it, it would not be heard in this Court to go behind the ordinance and tell us or the Court what his motives were in passing that ordinance, and, therefore, it is not admissible under either theory."

Paragraph 4 of affidavit of D. L. Hollowell, of date January 17, 1963, contains, among other things, the following:

"That the applicants for the abandoning of the said portions of Harland and Peyton Roads have publicly stated that their

reason for same was to 'stabilize' the area generally known as Cascade Heights, Utoy Creek and Peyton Forest."

Counsel for defendants objected to said portion of said paragraph on the ground "that this affiant cannot state what some other persons have stated simply because it is hearsay; that is particularly true since these applicants for the ordinance are not adverse parties; their statements would not bind anybody; it wouldn't be statements against their interest; it would simply be rank hearsay."

Paragraph 4 of affidavit of D. L. Hollowell, of date January 17, 1963, contains, among other things, the following:

"That by stabilizing is meant the maintenance of the present racial character of the general area, namely, Caucasian."

Counsel for defendants objected to that portion of said paragraph 4 on the ground "that it is a conclusion of the affiant. It has no probative value. For him to say what is meant by someone else's stating the word 'stabilizing' is a conclusion. He first says what the people said it was for, to stabilize the neighborhood. Then he states it in other words, by stabilizing is meant the maintenance of the present racial character of the general area, namely, Caucasian. In other words, he is telling you what stabilizing means and we say he is not competent to do that. It is his own conclusion. Certainly, as a lay witness, he can't testify to it."

Each and all of the objections to the affidavit of D. L. Hollowell and the exhibits thereto, and to portions of said affidavit, are hereby overruled. In this connection see the portions of this Order and Judgment, supra, at Pages 6 and 7 thereof in relation to failure of the defendants to answer paragraph 14(a) of plaintiffs' original petition. The Exhibits to said affidavit are matters of common knowledge of which judicial notice may be taken.

In respect of paragraph 3 of affidavit of D. L. Hollowell and defendants' objection thereto, as hereinabove set forth, and also in respect of the enactment of the city ordinances relating to the abandonment of portions of Peyton Road and Harlan Road, and their approval by the Mayor of the City of Atlanta, reference is had to the Charter and Related Laws and Code of General Ordinances of Atlanta, 1953, as set forth in Sections 13.1, 13.10 and 13.11 thereof, and to Georgia Laws 1939, pages 833 and 835, and to Georgia Laws 1874, pages 117 and 118. The Mayor of the City of Atlanta was evidently acting in his official capacity as such in the meetings referred to in paragraph 3 of the affidavit of D. L. Hollowell.

As to judicial notice, reference is made to that portion of this Order and Judgment, infra, dealing with that matter.

In respect of alleged hearsay evidence, see Moore vs.Atlanta Transit System, Inc., 105 Ga. 70, and particularly the history and background of the Hearsay Rule and its exceptions as set forth at length by Eberhardt, Judge, in his Opinion beginning at page 73. Reference is also had to the case of Dallas County vs. Commercial Union Assurance Company (United States Court of Appeals, Fifth Circuit), cited in the Moore case, wherein the views of Wigmore and other law writers on the Hearsay Rule are set forth in the Opinion and the footnotes thereto. In view of the fact that neither the Mayor nor any of the members of the Board of Aldermen of the City of Atlanta were used by the defendants as witnesses in the case at bar, either by way of affidavits or depositions, to testify as to the purpose or purposes or object or objects of the enactment of the ordinances under attack in this case, and in view of the further fact that the only defenses offered were of the invocation of the rule that their motive or motives in the enactment of the ordinances, and the approval thereof by the Mayor insofar as his approval was concerned, could not be inquired into, and the purported defense predicated upon affidavits as to the character of the use of Peyton Road and Harlan

Road (and the latter defense relating, if at all, to purpose or object), the Court does not regard the Hearsay Rule as inhibiting proof of the newspaper article and other publicity as history and background of the enactment of the ordinances and the purpose thereof. This is particularly the case in view of the admission by the defendants of the allegations of paragraph 14(a) of the plaintiffs' rewritten petition by their failure to answer said paragraph. The inference may be drawn that the defendants were content to abide the legal effect of their failure to answer that paragraph, wherein it was alleged that the ordinances and implementing action in erecting the barricades or barriers was for the purpose of establishing a "racial buffer." The Dallas case referred to in the Moore case, supra, is reported in 286 Fed. 2d. 388, and see particularly Divisions of Opinion 1-14 and 15 at Pages 396, 397, 398. See also that portion of this Order and Judgment, infra, dealing with the matter of judicial notice.

Plaintiffs' Exhibits 7 and 8, being certified copies of maps, were offered in evidence. Counsel for defendants objected thereto on the ground that said maps were immaterial, irrelevant and prejudicial "on the ground that they relate only to tax matters, and they are not admissible to show exact boundaries; they are not the highest and best evidence of boundaries; the deeds being the highest and best evidence of the boundaries." Said objection is hereby overruled.

On the hearing counsel for defendants proposed to read into the record in this case as evidence "certain portions of the testimony of witnesses in a prior case," bearing the certificate of the reporter who took that record (being transcript of a case that was tried in the Municipal Court of the City of Atlanta.) Counsel for defendants objected thereto on the ground "that the mere reduction of these witnesses' testimony and their statements in writing and having the court reporter put a certificate on it (said transcript) does not prevent it from being hearsay." Whereupon, the following took place:

"THE COURT: I don't think it would be admissible in any event because it is only admissible by way of impeachment. It is not admissible as independent proof because it is not the same case. This is in a different court.

"MR. HOLLOWELL: We submit that this evidence can constitute an affidavit relating to such matters.

"THE COURT: It's not an affidavit. It is merely a certificate of the Reporter that a certain person at a certain time and place testified as follows under oath.

"You can't use a transcript of one court in a different trial, and particularly, in a different court. Furthermore, it is not between the same parties. I can't conceive of it being admissible at all in that form.

"That record can't be used at all except for one purpose, I believe, and that is if the witness by affidavit or otherwise had testified to the contrary of what is reflected in this record, upon proper verification by way of impeachment. It is obviously not being offered for impeachment.

"MR. HOLLOWELL: I believe those are all of the affidavits that we have at this time. I would like, of course, to make an offer of proof as to what we would have put in.

"THE COURT: I don't think it is proper to do that. I would not consider as evidence any statement as to what you propose later to offer as evidence in the case.

"MR. HOLLOWELL: Very well, sir. Then that leaves us with the affidavits which we have already put in subject to the particular objections."

Paragraph 1 of affidavit of Joseph T. Pickers of date January 21, 1963 is as follows:

"That in the mid-fall of 1962, he, as President of the Empire Real Estate Board of this City, was invited, along with a delegation of four other members, to come to the office of Mayor Ivan Allen, Jr., for a conference with the said Mayor and a delegation from the Southwest Civic Association. That at said meeting, the said Mayor presented to the affiant and five of his members a plan for closing Peyton Road and Harlan Road and forming a cul de sac the base of which would be generally Tee Road and the legs of which

would be Harlan and Peyton Roads, respectively; that a similar cul de sac was proposed with a base being approximately 100 feet to the south of Tee Road and the leg of which would be generally Peyton Road and Harlan Road as they respectively extend to the south of said point; that a 100 foot 'no man's land' was proposed between the bases of the two said street layout. That the reason given for said proposal was to stabalize the Utoy Forrest-Peyton Forrest Areas which are located generally and more or less immediately to the south of the presently located barricades on Harlan and Peyton Roads."

Counsel for defendants objected to said paragraph 1 of said affidavit "on the ground that it is hearsay; and second, on the ground that it is irrelevant, immaterial and highly prejudicial in that it illustrates no issue in this case and has no probative value in this case." Said objections are each and all hereby overruled. In this connection see reference to the charter powers of the Mayor of the City of Atlanta referred to at the top of page 13 of this Order and Judgment and what has been said above in respect of Hearsay Evidence Rule.

Paragraph 2 of affidavit of Joseph T. Bickers of date January 21, 1963 is as follows:

"That later in the Fall, the said Mayor requested the affiant to appoint two people to meet with two persons to be appointed by one Mr. Dupree Jordan, a newspaper man in the southwest area of Atlanta, to further discuss the matter. That on or about November 27, 1962, the affiant, along with two persons appointed by him, met the said Mr. Jordan, a Mr. Virgil Copeland, President of the Southwest Civic Association, and a Mr. Bullard of Bullard-Mitchell Realty Company, for further discussion. That at said discussion meeting, the said Mr. Jordan and associates made known to the affiant and his associates the fact that the former were desirous of having the latter to sell the Negro community on the idea of closing Harlan and Peyton Roads in the matter referred to above so as to prevent them from opposing the petition which had been filed with the City of Atlanta by the said Mr. Copeland and others for the purpose of

closing the above-mentioned streets. Further, the reasons given to the affiant and his associates were that the petition to close the roads was to prevent Negroes from buying and moving into the said Peyton Forrest-Utoy Forrest Area. It was reasoned by the delegation which was meeting with the affiant and his associates that if Negroes moved into the area, the white people presently living there would, among other things, 'panic' and sell their property at a loss. However, the affiant and his associates informed the other delegation that experience had proven the contrary to be true; that is, that with the advent of Negroes moving into a decent area, the sellers of the properties had normally been able to sell at a higher than normal market value rather than lower than normal market value. What upon the affiant and his associates having indicated their unwillingness to comply with the request of the other conferees, they, the other conferees, indicated that they would proceed on with their application to have the roads closed so as to prevent Negroes from buying land in the above-mentioned area."

Counsel for defendants objected to that portion of paragraph 2 beginning with the words "That at said discussion meeting," etc. and ending with the words "property at a loss." Counsel for defendants objected to said portion of said paragraph 2 of affidavit of Joseph T. Bickers "on the ground that it is hearsay. And Your Honor will note that the affiant is not telling us what he did and what he saw. He is telling us what someone else said to him; a third party, not a party to this litigation. * * * * And, Your Honor, I assume he is going to take it one step further, and further, therefore, the Mayor would have authority to bind these defendants by setting up such a conference. That is the only theory on which it could be admissible, Your Honor, as an admission against interest." The Court thereupon stated: "Incidentally, collaterally, maybe there is a reference there to a petition which has been filed, or would be filed by a Mr. Copeland. Is there any such record as that?" To this query counsel for defendants stated: "We would expect that we would probably introduce later on in the trial the petition filed by certain citizens of the city which was

acted on by the Mayor and Board of Aldermen. * * * It is a public record."

The first two sentences of said paragraph 2 of the affidavit of Joseph T. Bickers were not objected to. In the portion of said paragraph 2 beginning with the words "That at said discussion meeting," etc., there appears the statement in respect of opposing the petition which had been filed with the City of Atlanta by the said Mr. Copeland and others for the closing of Harlan and Peyton Roads. According to the affidavit of Bickers the meeting at which Bickers was present was held on or about November 27, 1962. It appears from the copy of notice of public hearing set forth on the certified copies of the two ordinances, that the notices bear date November 23, 1962; that the ordinances were introduced at the meeting of the Mayor and Board of Aldermen on November 19, 1962 with meeting of the Public Works Committee to be held on December 14, 1962, and the ordinances appear to have been adopted and approved December 17, 1962. Affidavit of Wyont B. Bean offered and admitted in evidence on behalf of defendants, and which is hereinafter referred to, has attached thereto signed petitions petitioning the Mayor and Board of Aldermen to close and abandon Peyton Road, S.W. for a distance of two hundred (200) feet. The reference in the affidavit of Bickers to the petition filed with the City of Atlanta for the purpose of closing the streets evidently had reference to the petitions referred to in the affidavit of Wyont.

The objection of counsel for the defendants to that portion of paragraph 2 of the affidavit of Bickers beginning with the words "That at said discussion meeting," etc., is hereby overruled.

Counsel for defendants also objected to that portion of said paragraph 2 of the affidavit of Bickers beginning with the word "However," and ending with the words "normal value," etc.,"on the ground that it is irrelevant, immaterial and highly prejudicial. It has no place in this law suit and this litigation; that the only conceivable purpose of inserting it in this affidavit is to prejudice this Court and these defendants by interjecting a racial issue into

this case that has no bearing on the law suit as filed, and we object to it on that ground." Said objection is hereby overruled.

Counsel for defendants objected to that portion of paragraph 2 of the Bickers affidavit beginning with the words "the other conferees," etc. and ending with the words "above-mentioned area," on the ground that it is hearsay and a conclusion and an opinion of the affiant. Said objections are hereby overruled.

Counsel for plaintiffs offered and there was admitted in evidence without objection six warranty deeds.

MOTION OF COUNSEL FOR DEFENDANTS FOR DENIAL OF INTERLOCUTORY INJUNCTION.

At the conclusion of the plaintiffs' evidence and before defendants offered any evidence, and upon announcement by counsel for plaintiffs that they rested, counsel for defendants made an oral motion that the Court deny an interlocutory injunction on behalf of the plaintiffs. The Court regarded such motion as in the nature of a nonsuit and denied said motion at such stage of the hearing. In this connection see Kight vs. Gilliard, 214 Ga. 445 (2).

EVIDENCE FOR DEFENDANTS AND RULINGS ON OBJECTIONS THERETO.

Defendants offered in evidence six affidavits of individuals relating to the nature and character of Peyton Road and traffic thereon, some of said affidavits referring to the use of Peyton Road and others to the use of both Peyton Road and Harlan Road; reference being made to the use of said Roads as a "drag strip" and "speedway" and "racing areas by teenagers." Only one affiant, James L. Buffington, appears to reside on Peyton Road, his residence being 590 Peyton Road, S.W. None of the other affiants appears to reside either on Peyton Road or Harlan Road.

The remaining affidavit is by one Wyont B. Bean, Plant Engineer for the City of Atlanta, with petition attached directed to the Mayor and Board of Aldermen of the City and petitioning for the closing and abandonment of Peyton Road, S.W. for a distance of two hundred (200) feet east of the junction of the corners of Land Lots 204, 215, 212 and 213 (evidently intended as two hundred (200) feet west. In this connection see Map, Plaintiffs' Exhibit P-7..

Affidavit of James L. Buffington, identified as D-1, was objected to as to each and every paragraph thereof on the ground of hearsay, without probative value in this case; "none of these parties are plaintiff or defendants in the case; they are not parties, and there has been no allegation to the effect that they were the reasons that the road was closed. There is no evidence." This affidavit was also objected to by counsel for the plaintiffs on the ground that it was irrelevant and immaterial, and "incompetent for any proof that would be required in the case or any negativing of proof which has been made by the plaintiffs." Counsel for plaintiffs also stated "in addition to the objections which we have made dealing with the matters of hearsay, we also would state, Your Honor, that certainly if ownership is attempted to be proved by this instrument, itself, the only statement of the affiant to the effect that he owns the said property is not the highest and best evidence. All of the objections except that in relation to ownership are sustained. The objection in relation to statement of ownership is overruled. The affidavit is not regarded as evidence.

In respect of affidavit of Carlton J. Owens, identified as D-2, counsel for plaintiffs objected to each and every paragraph thereof on the ground "that it is completely immaterial, irrelevant, incompetent and a conclusion which, or the results which the affiant seeks to draw in the last paragraph are mere conclusions and therefore are not subject to being received as being admissible in this particular case." also on the ground that the affidavit has no probative value in the case. Said objections are hereby sustained.

In respect of affidavit of Leonard Lee, identified as D-3, counsel for plaintiffs objected to the affidavit on the same grounds urged to affidavit of James L. Buffington and Carlton J. Owens, as above set forth, and on the ground that it has no relationship to the issue before the Court and has no probative value. Said objections are hereby sustained.

In respect of affidavit of Mrs. C. A. Porter, identified as D-4, and affidavit f Mrs. Colleen Ramsey, identified as D-5, counsel for plaintiffs made the same objections thereto as to affidavit of Leonard Lee, D-3. Said objections are hereby sustained.

In respect of affidavit of Mrs. Alexander S. Kobus, identified as D-6, counsel for plaintiffs objected thereto on the same grounds that were made to affidavit of Leonard Lee, D-3, except as to portion of said affidavit of said Mrs. Alexander S. Kobus hereinafter referred to. Said objections, with said exception, are hereby sustained. Counsel for plaintiffs did not object to that portion of the affidavit of Mrs. Kobus which states: "My husband and I are retired and have lived in this neighborhood approximately three years. Up to the time that the City of Atlanta closed Peyton and Harlan Roads both of these streets were used by drivers as a cut-through to Marietta and other points in that direction."

Counsel for defendants offered and there was admitted in evidence without objection affidavit of Wyont B. Bean, with petitions for closure of portion of Peyton Road attached.

JUDICIAL NOTICE

At the conclusion of the evidence, both for plaintiffs and defendants, counsel for plaintiffs asked the Court to take judicial notice of certain matters, stating, among other things, as follows: "There has for many months been in the general southwest area contentions relative to the expansion of Negroes into that area.

This has been so openly and notoriously publicized by every routine and common communicative media or communication media that it is of such notoriety that it falls within the scope of that which we mentioned in American Jurisprudence twenty forty nine (evidently referring to Volume 40 American Jurisprudence, on the subject to Evidence, page 49, dealing with "matters of common knowledge.") I think that in light of the knowledge or the facts that have come into existence there we are then in a position to take judicial knowledge of what, if anything, has been done in an effort to either restrict or to expand this attempt one side to move in, and the attempt on the other side to keep them out."

Section 38-112 of the Code of Georgia, Annotated, provides that among other matters specifically mentioned therein "all similar matters of public knowledge shall be judicially recognized without the introduction of proof."

In Southern Railway Company v. Covenia, 100 Ga. 46, the Supreme Court quoted approvingly from cases in the Supreme Court of the United States as follows: "In the case of Minnesota v. Barber, 136 U.S. 321, Mr. Justice Harlan said: 'If a fact alleged to exist, upon which the rights of parties depend, is within common experience and knowledge, it is one of which the courts will take judicial notice.' In Ah Kow v. Nunan, 5 Sawyer, 560, Mr. Justice Field said: 'We cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men.'"

See also Wolfe v. Georgia Railway and Electric Company, 2 Ga. App. 499 (3-c), 504;

Mutual Life Insurance Company vs. Davis, 79 Ga. App. 336;

State Highway Department v. Hendrix, 215 Ga. 821, 823;

Hunt v. Arnold, 172 Fed.Supp. 847;

Ohio Bell Telephone Company v. Public Utilities Commission of Ohio, 201 U.S. 292. And see 31 C.J. Sec. (Evidence), Sections 9, 11, 12 and 13.

In the case at bar the Court takes judicial notice as a matter of common knowledge throughout the community of which the Court has territorial jurisdiction that enactment by the City of Atlanta of the two ordinances under attack in this case, and their implementation by the erection of the barricades the maintenance of which is sought to be enjoined, was for the purpose of establishing a racial buffer, barrier or zone, with the view of stabilizing or effecting stability for white race ownership and occupancy, in undefined area referred to as the Harlan-Peyton Road area or Utoy-Forrest and Peyton Forrest areas lying south of said barricades, and preventing or attempting to prevent property ownership and occupancy of said area or areas by members of the negro race.

The Court does not take judicial notice of the physical nature and character of Peyton Road and Harlan Road and of the traffic thereon and the use of same as speedways as indicated in the proffered affidavits of James L. Buffington and others, hereinabove mentioned, as matters of common knowledge. Moreover, the use of such roads, if any, in violation of traffic laws and regulations were and are matters of law enforcement and not an excuse for closing or abandoning portions of roads, and particularly portions merely of two hundred (200) feet in length.

ORDINANCES VOID FOR WANT OF SUFFICIENT DESCRIPTION

The ordinance in relation to Peyton Road, S.W. provides: "That portion of Peyton Road, S.W. beginning at the northeast corner of Land Lot 213, 14 District of Fulton County, and running west approximately 200 feet as located in Land Lots 212 and 213, 14th District of Fulton County, be and the same is hereby abandoned for street purposes as no longer needed as such."

The separate similar ordinance in relation to Harland Road, S.W. provides: "That portion of Harland Road, S.W. from Tee Road

south approximately 200 feet, as located in Land Lot 212 of the 14th District of Fulton County, be and the same is hereby abandoned for street purposes as no longer needed as such."

In the separate advertisements of Notice of Public Hearing in respect of each Road, it was stated that the ordinance was introduced providing for the closing and or abandonment of the following as a street or public thoroughfare "being no longer useful or necessary for the public use and convenience."

The authority thus sought to be exercised was evidently not under the ordinance of the City of Atlanta set forth in the Code of the City of Atlanta, Charter and Related Laws, as Section 24.9 of Code of Atlanta of 1953, but rather under the Act of the General Assembly of Georgia, approved March 3, 1962 (Georgia Laws 1962, Volume 2, Page 2743, et seq.), which expressly repealed said Section 24.9. The Act of 1962 is substantially the same as Section 24.9 so repealed. This Act, among other things, provides: "The Mayor and Board of Aldermen of the City of Atlanta are authorized and empowered by resolution or ordinance to vacate and abandon any street or portion of street which in their judgment is no longer useful or necessary for the public use and convenience." It also provides that if the Mayor and Board of Aldermen decide to vacate or abandon a street, "same shall thereafter cease to be a street for any purpose whatever." The Act also provides that "the City is authorized in such cases to accept a consideration for the vacation of a street."

It will be noted that the ordinances give the length of the portions of the Roads, respectively, as approximately 200 feet. The exact distance is not stated, nor does the 200 feet run to a fixed point.

In Little vs. Baskin, 135 Ga. 851 (2), it was held that an application for the establishment of a new road under state law contained an insufficient description of the road proposed to be established and was, therefore, subject to be dismissed on the ground of insufficient description.

In Green v. Road Board of Bibb County, 126 Ga. 693, it was held that an order establishing the road involved in that case was void for uncertainty of description of initial and terminal points.

Particular attention is called to the case of Smith vs. Georgia Industrial Realty Company, 215 Ga. 431, involving a suit for specific performance of an alleged contract for the sale of certain real property, wherein it was held that in metes and bounds description, call of a certain number of feet, more or less, to a point, without a specific description of the point, rendered the description so indefinite and uncertain as to render the contract void and incapable of specific performance. In the case at bar the length of the proposed closed portions of Peyton Road and Harlan Road is stated "approximately."

THE ORDINANCES ARE UNREASONABLE, ARBITRARY AND CAPRICIOUS

Aside from the racial issue hereinafter discussed, the ordinances under attack are regarded by the Court as unreasonable, arbitrary and capricious, and are, therefore, illegal and void. Assuming the descriptions of the closures are legally sufficient, their length is only approximately two hundred (200) feet. The distance of Peyton Road from the barrier on that Road south to its junction with Harlan Road is approximately twelve hundred sixty (1260) feet. The distance from the junction south to Sewell Road shown on the sketch attached to affidavit of Ruby L.Camp and others, P-3, does not show any east and west cross-over streets, and there is no evidence that such cross-over streets exist. That affidavit shows inconvenience of use in the particulars therein set forth and the impeding of normal traffic as the result of the barricades. The reservation in the ordinances of general easements for all utilities, both public and private, lends support to the view that the ordinances are arbitrary and capricious. The charter provision (see page 24 of this Order and Judgment) provides that upon vacation or abandonment of a street, "same shall thereafter cease to be a street for any purpose whatever." In this connection, see also Gable vs. City of Cedar Rapids (Supreme Court of Iowa), 129 Northwestern, 737 (8), 739.

RE: RACIAL BUFFER OR BARRIER

By the amendment of plaintiffs filed January 21, 1963 it appears that the following plaintiffs are negroes: L. K. Googer, Mrs. Marion Googer, Mrs.Carrie Andrews, Harold Johnson, Mrs. Ernestine Johnson and Theodore Wyatt, and that the other plaintiffs are white persons. The intervenors Mrs.Sara C. Hall and Carl Thomas Kidd do not raise any racial issue in their intervention and are assumed to be white persons. None of the negroes reside on Peyton Road.

It does not appear that any of the negroes who are parties plaintiff own or occupy or contemplate becoming owners or occupants of any real property lying south of the barricades erected in Peyton Road or in Harlan Road, or in the area designated as the Utoy-Forrest or the Peyton Forrest areas. It appears that the negroes reside at the following locations or house numbers on Harlan Road: L. K. Googer and Mrs. Marion Googer, 40 Harlan Road; Harold Johnson and Mrs. Ernestine Johnson, 70 Harlan Road; Theodore Wyatt, 80 Harlan Road, and Mrs. Carrie Andrews, 140 Harlan Road. All of these persons reside north of the barrier which has been erected in Harlan Road. The plaintiffs who are white persons all reside on Peyton Road except Carl Thomas Kidd, one of the intervenors,who resides at 241 Harlan Road, which appears to be approximately four hundred (400) feet south of the barrier on Harlan Road. There is, therefore, no issue in the case at bar in respect of present ownership or use of property south of the respective barriers or in respect of such ownership or use of property in the Utoy-Forrest or Peyton Forrest areas. The question insofar as any racial issue is concerned is in respect of the legality and constitutionality of the ordinances and the implementation thereof by the erection of the barriers for the purpose of establishing a racial buffer, barrier or zone with the view of stabilizing or effecting stability for white race ownership and occupancy in an undefined area,referred to as the Harlan Peyton Road area or Utoy-Forrest and Peyton Road areas lying south of said barriers and preventing or attempting to prevent property ownership and occupancy

of said area or areas by members of the negro race, as hereinabove stated, and thereby preventing the use of Peyton Road and Harlan Road as public streets by the plaintiffs and intervenors as complained of in this case. That purpose of the ordinances and their implementation by the erection of the barriers is in the view of the Court supported both by the exercise of judicial notice and by the evidence in the case.

As early as forty-eight years ago the Supreme Court of Georgia, in Carey v. City of Atlanta, 143 Ga. 192, held that an ordinance of the City of Atlanta prohibiting white persons and colored persons from residing in the same block denied the inherent right of a person to acquire, enjoy and dispose of property, and for that reason were violative of the due process clause of the Federal and State Constitutions. This ordinance expressly recited that it was enacted "for preserving peace, conflict and ill feeling between the white and colored race, and promoting the general welfare of the City." This case was decided February 12, 1915.

In 1918 in the case of Glover vs. City of Atlanta, 148 Ga. 285, an ordinance of the City of Atlanta which prohibited colored persons from occupying as a residence any house upon any block upon which a greater number of houses were occupied as residences by white people, and vice versa, was held to be unconstitutional. The Glover case followed the case of Buchanan vs. Warley, 245 U.S. 60, involving the validity of a similar ordinance of the City of Louisville, Kentucky, and expressly overruled the case of Harden v. City of Atlanta, 147 Ga. 248.

See also Bowen vs. City of Atlanta, 159 Ga. 145, decided in 1924, in which a zoning ordinance of the City of Atlanta undertaking to zone certain residential districts as white districts and certain residential districts as colored districts was involved, and in which the Supreme Court held that the decision in Glover v. City of Atlanta, 148 Ga. 285, was controlling.

It being unlawful and unconstitutional to legislate in respect

of ownership or occupancy of real property on the basis of race or color, the legal conclusion is inescapable and incontrovertible, and the Court so holds, that it is illegal and unconstitutional to legislate in respect of use of public streets or portions thereof for the purpose of effecting on the basis of race or color the ownership and occupancy of real property and the acquisition or disposition or the market value thereof.

Ever since the State Constitution of 1868, and carried forward in the State Constitutions of 1877 and 1945, it has been the fundamental law of this state that: "The social status of the citizens shall never be the subject of legislation."

In the case of Scott vs. The State, 39 Ga. 321, decided at the December Term, 1869 of the Supreme Court of Georgia, in Opinion by Joseph E. Brown, Chief Justice, it was said: "That Section of the Constitution forever prohibits legislation of any character regulating or interferring with the social status. It leaves social rights and status where it finds them."

In Wolfe vs. Georgia Railway & Electric Company, 2 Ga. App. 499, the Court, speaking through Richard Brevard Russell, Judge, said: "To recognize inequality as to the civil or political rights belonging to any citizen or class of citizens, or to attempt to fix the social status of any citizen either by legislation or by judicial decision is repugnant to every principle underlying our form of government."

The voluntary principle still remains with the individual in respect of all such matters.

"Neither the Fifth nor Fourteenth Amendment positively commands integration of the races but only negatively forbids governmentally enforced segregation.

Cohen vs. Public Housing Administration (U.S. Court of Appeals, Fifth Circuit), 257 Fed. 2d. 73.

"Unauthorized deprivation of constitutional rights cannot be justified as being the exercise of police power of a state."

Anderson v. Courson (U.S. District Court, Middle District of Georgia), 203 Fed. Suppl. 806, citing Carey v. City of Atlanta, 143 Ga. 192, 201.

Desirable as it is to promote the public peace by preventing race conflicts, and important as is the preservation of t he public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.

Anderson v. Courson, supra.

"The vindication of rights guaranteed by the Constitution can not be conditioned upon the absence of practical difficulties."

Aaron v. Cooper (U.S. Court of Appeals, Eighth Circuit), 257 Fed. 2d. 33, and cases cited;

Wittkamper vs. Harvey (U.S. District Court, Middle District of Georgia), 1844 Fed. Supp. 715;

Anderson v. Courson, supra.

GRANT OF INTERLOCUTORY INJUNCTION

Under the facts and circumstances of this case as disclosed by the evidence and also by taking judicial notice of matters of common knowledge as have been above set forth, it is the view and opinion of the Court that an interlocutory injunction should be granted in favor of the plaintiffs and against the defendant City of Atlanta and against the individual defendants in their official capacity only as Mayor and Members of the Board of Aldermen, as hereinafter set forth. The Court regards the following cases as controlling in the matter of such injunctive relief.

Dunlap v. Tift, 209 Ga. 201, 208, 209, and cases cited;
Coker v. Atlanta, Etc. Railway Co., 123 Ga. 483;
Rider v. Porter, 147 Ga. 760 (2);
Town of Rentz v. Roach, 154 Ga. 491 (5);
City of Blue Ridge v. Kiker, 189 Ga. 717;
City of Blue Ridge v. Kiker, 190 Ga. 206;
Maddox v. Willis, 205 Ga. 596, 597 (6).
See also Barham v. Grant, 185 Ga. 601, 605.

While the Googer case, supra, related to vacation of street for private purposes, and while the rewritten petition in the case at bar, among other things, referred in paragraph 12(a) to the closure of the respective portions of Peyton Road and Harlan Road "for the benefit of

private persons," there is in the Court's opinion no distinction between the closing of a street or portion of a street illegally or in violation of constitutional rights, from that of such closure for the benefit of private individual or individuals.

In respect of the question of inquiring into the motives of the members of a governing body, see Minnesota v. Barber, 136 U.S. 313, and cases cited, and particularly the case of Mugler v. Kansas, 123 U.S. 663, 661.

IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED that an interlocutory injunction be and the same is hereby granted restraining and enjoining the defendant City of Atlanta and the individual defendants, in their official capacity only as Mayor and Members of the Board of Aldermen of the City of Atlanta, respectively, from continuing to maintain the barricades which have been erected in Peyton Road, S.W. and Harlan Road, S.W. pursuant to the ordinances of the City of Atlanta adopted and approved December 17, 1962, and also from continuing by said barricades or by other means to impede or interfere with the usual flow of pedestrian and vehicular traffic along said Peyton and Harlan Roads, and from continuing to prevent plaintiffs from the use of said Roads as public thoroughfares by said barricades, or otherwise.

IT IS FURTHER ORDERED AND ADJUDGED that said defendants remove or cause to be removed said barricades and each of them on or before five o'clock P.M. on Monday, March 4, 1963.

This March 1, 1963.

JUDGE, SUPERIOR COURT, ATLANTA
JUDICIAL CIRCUIT.