

strength of the agreement, unless such excuse would be connected with notice before hand of the fact of a promise that was good and notice to the defendants that the promise was alive.

The promise or credit for "Wood and Hay" is not a continuing promise, and does not go to a future promise or a payment in lieu of interest, but in fact is only a past consideration for the making of a then present, indefinite statement of fact. Therefore it cannot, in anywise, be construed or considered a promise to pay these mortgages nor a license to assume that entry on the land for the like purpose existed and as a result, that the defendants, thereby had notice and the mortgagee or his assignee, has possession as a bar to the claim of the defendants as owners.

The Defendants respectfully request that the paragraphs referred to in this second motion be stricken out and the bill dismissed by reason of the rules and facts above submitted in support of said motion.

Third motion as per reasons (see page 16, State of Case).

This motion prevails with the consideration of the two previous motions as the same is so connected with the facts presented that it stands or falls with the decision on the above motion.

Fourth motion is for relief and costs upon dismissal of the Bill of Complaint on the above motions.

The decree rendered and in the form granted should be affirmed.

Respectfully submitted,

PAUL M. FISCHER,

Solicitor for and of Counsel  
with Complaintants Appellants

*Defendants Appellees*

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**Notice of Appeal.**

(Filed Feb. 10/27.)

**New Jersey Supreme Court**

KARKE REALTY ASSOCIATES, a corporation, Relator,  v. THE MAYOR AND ALDERMEN OF JERSEY CITY, <i>et als.</i> , Respondents.	} On Application for Mandamus.	10
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To	20
GROSS & GROSS, Attorneys for Relator.	

TAKE NOTICE that the respondents, The Mayor and Alderman of Jersey City; Frank Hague, John Saul, John J. Beggans, Michael I. Fagen, William B. Quinn, Board of Commissioners of the City of Jersey City; and John Saul, Superintendent of Buildings of Jersey City, appeal to the New Jersey Court of Errors and Appeals from the issuing of a peremptory writ of mandamus directed to the said respondents commanding them to forthwith issue to the relator a building permit for the erection and construction of buildings upon the lands situate at the northwest corner of Hudson County Boulevard and Fairmount Avenue, Jersey City, New Jersey, and from the whole of the judgment so entered in this cause.

THOMAS J. BROGAN,  
Attorney for Respondents. 40

Dated February 1, 1927.

**Grounds of Appeal.**

(Filed Feb. 24/27.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

10

KARKE REALTY ASSOCIATES,  
a corporation,  
Relator-Respondent,

v.

THE MAYOR AND ALDERMEN OF JERSEY CITY, FRANK HAGUE, JOHN SAUL, JOHN J. BEGGANS, MICHAEL I. FAGEN and WILLIAM B. QUINN, Board of Commissioners of the City of Jersey City; and JOHN SAUL, Superintendent of Buildings of Jersey City,  
Defendants-Appellants.

On Application for Writ of Mandamus.

On Appeal from the New Jersey Supreme Court.

20

And now come the defendants-appellants, The Mayor and Aldermen of Jersey City, Frank Hague, John Saul, John J. Beggans, Michael I. Fagen and William B. Quinn, Board of Commissioners of the City of Jersey City; and John Saul, Superintendent of Buildings of Jersey City, by their attorney, Thomas J. Brogan, and set down the following grounds of appeal from the issuing of a peremptory writ of mandamus directed to the said defendants in favor of the relator-respondent in the New Jersey Supreme Court in the above stated cause.

30

1. The Court erred in granting the peremptory writ upon the authority of the case of Ignaciunas

40

*Grounds of Appeal.*

*v. Risley*, 98 N. J. L. 712; affirmed 125 Atl. 121, and subsequent cases approving the same.

2. The case of *Ignaciunas v. Risley* is not *stare decisis* of the facts involved in the case *sub judice*, in that:

10

(a) The evidence discloses that the Zoning Ordinances of Jersey City were passed after findings of fact were made by the Commission of Jersey City, based upon surveys, reports and examinations of Jersey City and with the primary object of protecting the general health, safety and public welfare of the inhabitants of Jersey City.

(b) The evidence further discloses that the application *sub judice* was denied by the City Commission after it had investigated the facts and circumstances surrounding the particular application and did find, as a fact, that the erection of the apartment house with stores would result in the following:

20

1. It would increase the fire hazard in the locality.

2. It would increase the traffic burdens necessitating additional police protection.

30

3. It would increase the danger of personal injury to children passing and re-passing on this street to and from their way to Public School No. 17, located in the immediate vicinity, on Duncan Avenue.

4. It would increase insurance rates on the surrounding property because of the

40

*Grounds of Appeal.*

additional fire hazard due to the erection of stores.

10 5. That the general welfare of the people of the community in that neighborhood will be promoted by preventing the erection of said stores.

20 3. Aside from the Zoning Ordinances the City of Jersey City has a Fire-Hazard Building Ordinance which permits the City Commission, after investigation, to prohibit the erection of buildings for other than residential purposes; which ordinance has been sustained by the Supreme Court in the case of *Caldwell v. Jersey City* (not yet officially reported) decided January Term 1927, and the City Commission did find as a fact that the granting of the permit would increase the fire hazard and would otherwise be detrimental to the general welfare of the community and was therefore justified in refusing the permit.

4. Such granting of a peremptory writ directed to the defendants in divers other respects is illegal and should be reversed, set aside, and for nothing holden.

30 THOMAS J. BROGAN,  
Attorney for Defendants-Appellants.

40

**Substitution.**

NEW JERSEY COURT OF ERRORS AND APPEALS.

KARKE REALTY ASSOCIATION,  
a corporation,  
Relator-Appellee,

10

v.

THE MAYOR AND ALDERMEN OF JERSEY CITY, FRANK HAGUE, JOHN SAUL, JOHN J. BEGGANS, MICHAEL I. FAGEN and WILLIAM B. QUINN, Board of Commissioners of the City of Jersey City; and JOHN SAUL, Superintendent of Buildings of Jersey City,  
Defendants-Appellants.

On Application for Writ of Mandamus.

20

We do hereby consent that Louis A. Fast be and he is hereby substituted as attorney for Karke Realty Association, the relator in our place and stead.

GROSS & GROSS.

30

40

**Rule for Peremptory Writ.**

(Filed Jan. 20/1927.)

**NEW JERSEY SUPREME COURT.**

10	KARKE REALTY ASSOCIATES, a corporation, <div style="text-align: right; padding-right: 10px;">Relator,</div>	}	On Application for Mandamus.
	<div style="text-align: center; padding-bottom: 5px;"><i>v.</i></div> THE MAYOR AND ALDERMEN OF JERSEY CITY, <i>et als.</i> , <div style="text-align: right; padding-right: 10px;">Respondents.</div>		

20 This matter being opened to the Court by Gross & Gross, appearing by Isaac Gross, of counsel with the relator herein, in the presence of Charles Hershenstein, of counsel with the respondents; and the Court having read the depositions taken under the rule to show cause heretofore made in this cause, and having heard the arguments of the respective counsel, and duly considered the matter;

30 And it satisfactorily appearing to the Court that the relator herein was, on September 21, 1926, unjustly and unlawfully denied a building permit by the said respondents for the erection of an apartment house with eleven stores located on the ground or street floor thereof, pursuant to plans therefor prepared by the said relator in accordance with the building code of Jersey City, wherein the said building is proposed to be erected; it is, on this 18th day of January, 1927, on motion of Gross & Gross, attorneys of the relator:

40 ORDERED, that a peremptory writ of mandamus

*Rule for Peremptory Writ.*

do issue herein out of and under the seal of this Court, directed to the Mayor and Aldermen of Jersey City; John Saul, Superintendent of Buildings of the City of Jersey City; and Frank Hague, John Saul, John J. Beggans, Michael I. Fagen and William B. Quinn, Board of Commissioners of the City of Jersey City, commanding and directing them and each of them to issue to the relator a building permit authorizing the erection and construction of the building proposed by it to be erected upon its lands situated at the northwesterly corner of the Hudson County Boulevard and Fairmount Avenue, Jersey City, N. J., with said stores on the ground or street floor thereof, in accordance with the said plans prepared therefor and filed with the Superintendent of Buildings of Jersey City. And it is further

ORDERED, that the record herein be and the same is hereby so molded and considered as if an alternative writ of mandamus had heretofore been allowed herein, and judgment entered thereon in favor of said relator, so that the said respondents might, if they so desire, take an immediate appeal from the judgment herein to the Court of Errors and Appeals. And it is further

ORDERED, that the said peremptory writ of mandamus do forthwith issue, and that the relator do recover its costs to be taxed herein.

Rule allowed in open Court this 18th day of January, 1927.

Rule actually entered January 20, 1927.

On motion of

GROSS & GROSS,  
Attorneys of Relator.

Testimony Before Examiner.

NEW JERSEY SUPREME COURT.

KARKE REALTY ASSOCIATES,  
a corporation,  
Relator,

10

against

THE MAYOR AND ALDERMEN OF JERSEY CITY, FRANK HAGUE, JOHN SAUL, JOHN J. BEGGANS, MICHAEL R. FAGEN, WILLIAM B. QUINN, the Board of Commissioners of Jersey City, and JOHN SAUL, Superintendent of Buildings of Jersey City,

20

Respondents.

15 Exchange Place, Jersey City, N. J.

Thursday, December 9, 1926, 3 P. M.

Testimony taken in the above entitled action before me, George A. Wardell, a Supreme Court Examiner, at my office, No. 15 Exchange Place, Jersey City, New Jersey, this 9th day of December, 1926, at 3 o'clock in the afternoon, in pursuance of notice given therein and in the presence of:

30

ISAAC GROSS, Esq., of Gross & Gross, Esqs., Attorneys for the Relator.

CHARLES HERSHENSTEIN, Esq., appearing on behalf of the Respondents.

GEORGE A. WARDELL,  
Supreme Court Examiner.

40

Nathan Welitoff, direct.

NATHAN WELITOFF, a witness produced on behalf of the relator, having been first duly sworn by the Supreme Court Examiner, testified as follows:

Direct examination by Mr. Gross:

10

Q. Mr. Welitoff, you are a licensed architect in practicing your profession in the State of New Jersey? A. Yes.

Q. Where, in Jersey City? A. Jersey City.

Q. For how many years have you practiced your profession here? A. Sixteen years.

Q. Did you prepare plans and specifications for the erection of a building containing stores and apartments for the Karke Realty Associates, relator in this case at the northwesterly corner of Boulevard and Fairmount Avenue, Jersey City? A. Yes.

20

Q. And are those plans and specifications prepared in conformity with the Building Code of Jersey City? A. Yes.

Mr. Gross: I call on the other side to produce the plans.

(The counsel for the respondent produces plans in accordance with request of counsel for the relator.)

30

Q. Look at those plans and say whether those are the plans that you so prepared? A. Yes (looking at the plans).

Q. And did you file those plans with the application for the building permit with the Superintendent of Buildings of Jersey City? A. I don't think I filed them myself, somebody else filed them.

40

*Nathan Welitoff, direct.*

Mr. Gross: I offer the plans in evidence. (The plans referred to are received in evidence and marked R-1, December 9th, 1926.)

10 Mr. Gross: I would like to read into the record the stamp that appears on these plans, "Office of Superintendent of Buildings, City Hall, John Saul, Superintendent, call for plans July 8th, 1926. Owner, Karke Realty Associates of Jersey City, address at 2621 Boulevard, application No. 1057. Received 6/22/26. Five story brick, stores and dwelling. This plan received June 16, 1926 personally, Board of Tenement House Supervision."

20 Q. Were those plans approved by the Board of Tenement House Supervision, Jersey City, New Jersey? A. Yes.

Q. Is there anything on there to indicate when they were so approved? A. Yes, sir, that is the time of approval.

Q. What date? A. June 18th, 1926.

30 Q. Are you reading from the stamp of the Board of Tenement House Supervision of New Jersey? A. Yes.

40 Mr. Hershenstein: I object to any evidence as to the approval of these plans by the Tenement House Supervision of New Jersey because, under the laws of our city and according to the rules of the Tenement House Supervision of New Jersey, the approval by the Tenement House Supervision in Jersey does not, in anywise supersede any legal requirement, supplement, or supplementary to the Tenement House Law.

*Nathan Welitoff, cross.*

Q. Do these plans, R-1, call for the erection of a tenement house? A. Yes.

Mr. Gross: You may cross examine.

*Cross examination by Mr. Hershenstein:*

10 Q. Mr. Welitoff, all you did was to prepare these plans which are now produced? A. Yes.

Q. For the purpose of enabling the Karke Realty Associates to erect the sort of building they contemplate erecting on that corner? A. Yes.

Q. Did you personally have these plans approved by the Tenement House Supervision? A. Yes.

Q. Have you prepared specifications with these plans? A. Yes.

20 Q. Are they part of the plans? A. Yes.

Q. Did you personally leave these plans at the Building Department of Jersey City for approval? A. No.

Q. You did not know who brought them, or who took them to the office of the Building Department? A. No, I do not.

Q. You do not know whether or not the Building Department of Jersey City actually approved of these plans or not? A. I do not know.

30 Q. Do you know why the specifications were not submitted to the Building Department? A. Generally I do not file specifications, with the applications—no specifications are generally filed with the plans.

40 Q. But the Building Department before issuing the permit, examines not only the plans but specifications also in order to ascertain whether both the plans and specifications comply with the Building Code and other regulations of Jersey City? A. That is taken care of in the applications.

*Nathan Welitoff, redirect.*

Q. Now, whether or not you did actually present the specifications, you do not know? A. I do not know, no.

10 Q. Have you ascertained from the Building Department of Jersey City whether or not the plans that you have now submitted and which are now offered in evidence and marked R-1,—whether those plans have been actually approved by the Building Department of Jersey City? A. No.

Mr. Hershenstein: That is all.

*Redirect examination by Mr. Gross:*

20 Q. Mr. Welitoff, is it usual to file any specifications with any plans and application for a permit with the Building Department? A. I file plans and application; that is all.

Q. That is all? A. Yes.

Q. And that is what you did in this case? A. Yes.

Q. Is there any requirement that you know of to file specifications? A. They used to require detailed specifications, but I think they did away with this—now I file plans without specifications.

30 Q. How long have you been submitting plans without specifications?

Mr. Hershenstein: I object to the question on the ground that what Mr. Welitoff is in the habit of doing does not establish any custom by which Jersey City is bound.

Q. How long? A. Three or four years.

Q. Has there been any objection made to the submission of plans in that way? A. No.

40 Q. Do you know whether or not that is the general practice of architects, to submit plans without specifications?

*Nathan Welitoff, recross.*

Mr. Hershenstein: I object to that question on the ground that this witness is not qualified to answer that question.

Mr. Gross: What is the answer?

The Witness: Some do submit with specifications and some do not; not generally. 10

Q. Do they ever ask you to submit specifications when you submit plans with the application? A. Not lately.

Q. When you say "not lately," how long do you mean? A. About three or four years.

Mr. Gross: That is all.

*Recross examination by Mr. Hershenstein:*

20 Q. Of course you have no knowledge of this particular matter at all because, as I understand it, you did not even present the plans personally to the Building Department? A. Yes.

Q. That is correct? A. That is correct.

Q. Of course no demand or request was made of you by the Building Department? A. No.

Q. So far as you personally are concerned in this case you do not know whether the Building Department demanded specifications or not? A. No, I do not know. 30

Q. Now, when you say the Building Department has not required specifications in the last few years, you are merely speaking as to what they required of you personally? A. Yes.

Q. You do not intend to testify to as to what the custom now is in the City of Jersey City? A. I do not.

Q. You do not intend to testify as to any general custom now? A. No. 40

*Moses Glickman, direct.*

Mr. Hershenstein: That is all.

Mr. Gross: That is all that we want with you, Mr. Welitoff.

Mr. Hershenstein: For the present. I may want to call him as my witness.

10

MOSES GLICKMAN, a witness called on behalf of the Relator, having been first duly sworn by the Supreme Court Examiner, testified as follows:

Mr. Gross: I offer in evidence the deed of Benjamin S. Gorlin and wife and Benjamin Berkowitz to the Karke Realty Associates of New Jersey, covering the premises in question.

20

(The deed referred to is received in evidence and marked R-2, December 9th, 1926.)

*Direct examination by Mr. Gross:*

Q. Mr. Glickman, you are president of the Karke Realty Associates, the relator in this case? A. I am.

Q. And that is a corporation of New Jersey? A. Yes, sir.

30

Q. And is owner of the property upon which this proposed building is to be erected? A. Yes.

Q. And you employed Mr. Nathan Welitoff, architect, to draw plans and specifications for the erection of the building? A. I did.

Q. What sort of building is it to be? A. A five-story tenement house, with eleven stores.

Q. Stores on the ground floor? A. Stores on the ground floor.

Q. And apartments above, is that correct? A. Apartments above. That is correct.

40

Q. The counsel for the respondents has produced here, pursuant to subpoena, a plan from the

*Moses Glickman, direct.*

files of the City. I ask you if that is the plan of building that your company proposes to erect on this property? A. Yes, sir.

Q. It has been testified to that this plan has been approved by the Board of Tenement House Supervision of New Jersey, on June 18th, 1926? A. Yes.

10

Q. Now, after the approval of this plan by the Board of Tenement House Supervision of New Jersey, did you do anything with it? A. Yes, sir.

Q. What did you do with it? A. After these plans were brought to the office of Levison & Levison, where I had my office, the Karke Realty Associates, I took these plans down to the Superintendent of Buildings, Jersey City.

Q. You took them to the Superintendent of Buildings of Jersey City? A. I took them to the Superintendent of Buildings of Jersey City.

20

Q. And did you also then file an application for a building permit? A. I filed the building application that Mr. Levison gave me, Mr. Levison had it prepared for me.

Q. Did you file these plans with the application? A. I did.

Q. Was the paper looked at by the person in charge of the office when you handed it to him? A. He did.

30

Q. Do you remember what day it was that you filed your application for the permit in the office of the Superintendent of Buildings of Jersey City? A. I do not remember the exact day, but I think I have some memorandum here—I am not quite sure, but I think it ought to be about June 22nd.

Mr. Hershenstein: What date have you fixed?

The Witness: I think it was June 22nd.

40

*Moses Glickman, direct.*

Q. Did you thereafter call at the office of the Superintendent of Buildings, for the purpose of getting the permit? A. I did.

Q. And did you get it? A. No.

10 Q. What were you told? A. I was told that they would have to take it up with the City Commissioners.

Q. And was the matter subsequently brought before the Commissioners? A. It was.

Q. Do you remember when? A. Well, during the month of September—it was laid over once or twice, until we had a hearing on September 21st.

Q. Did you appear there before the City Commissioners? A. I did.

20 Q. Was anybody there with you representing your company? A. My partner—you mean as attorney? Mr. Isaac Gross.

Q. Mr. Isaac Gross, your counsel? A. Yes.

Q. What happened at that meeting of the Commissioners with your application? A. There were several people of the immediate neighborhood objecting to having stores and buildings there.

Q. And then what happened? A. Then the Commissioners refused to grant the permit.

30 Q. Your application for a permit was denied? A. Denied.

Q. Have you since received any permit for the erection of this building? A. No.

Q. Do you know what the reason given was for the refusal? A. No, except that they did not want stores.

40 Q. Mr. Glickman, will you look at that (indicating) and say whether that is the application that you handed the office of the Superintendent of Buildings with the plans? A. I am almost

*Moses Glickman, cross.*

sure it is. There is nothing there—my signature, it was with the plans.

Q. Is that the paper? A. I think it is. I believe it is.

Q. It is the paper which is produced by the attorney representing the respondents, with the plans? A. With the plans. It must be that paper. 10

Q. Was it a paper like that? A. Yes.

Mr. Gross: I offer this paper in evidence. (The paper referred to is received in evidence and marked R-3, December 9th, 1926.)

Mr. Gross: That is all. You may cross examine him.

*Cross examination by Mr. Hershenstein:*

20 Q. Mr. Glickman, have you got with you, sir, any of the former deeds by which title to the property contained in deed marked R-2, is described? A. No.

Q. Have you personally examined any of the former deeds which conveyed this title to the former owners? A. No.

Q. Do you know whether there was any restrictions upon this property preventing the erection of stores and tenement houses on that plot? A. I knew there was none. 30

Q. The plans which were prepared by your architect, Mr. Welitoff, were submitted to the Commission on Building Districts and Restrictions, or the so-called Zoning Commission. Do you know whether or not the plans of which your architect approved, and which plans are now produced here and which are marked R-1, were first presented to the Commission on Building Districts and Restrictions, which is commonly known as the 40

*Moses Glickman, cross.*

Zoning Commission? A. Whether they were first submitted to the Tenement House Supervision?

Q. Before you came to the City Commission of Jersey City to apply for a permit, were those plans submitted to the Zoning Commission? A. I do not know.

Q. Do you know whether or not the so-called Zoning Commission of Jersey City rejected those plans? A. After they were filed with the Tenement House Department?

Q. Whether after or before, but before you applied to the City Commission, were they disapproved by the Zoning Commission? A. This is the first time I have heard of the Zoning Commission.

Q. You do not know whether, as a matter of fact, these plans were rejected by the Zoning Commission on June 15th, 1926? A. I do not know that.

Q. Because they violate Section 2 of the Ordinance of Jersey City regulating and restricting the location of trades and industries, and so forth? A. I do not know.

Q. The Tenement House stamp which appears upon these plans is dated June the 8th, 1926, and evidently the Tenement House Commission must have received these plans after the plans were rejected by the Zoning Commission, the Zoning Commission stamp appearing to be dated June 15th, 1926. A. On these plans?

Q. They are not stamped on the plans, they are stamped on the application? A. I do not know.

Q. I hand you a copy of the application made by your architect, Nathan Welitoff, and ask you whether that is not a copy of the application which was made to the Zoning Commission for the approval or rejection of these plans? A. I think that is the first time that I have seen this.

*Moses Glickman, cross.*

Q. All right. Now, your plans contemplate the erection of a tenement house which will be five stories in height? A. They do.

Mr. Hershenstein: I ask that this paper be marked for identification.

(The paper referred to is marked D-1 for Identification, December 9th, 1926.)

Q. And eleven stores on the ground floor? A. Eleven stores on the ground floor.

Q. And the land is located on the corner of Boulevard and— A. (Interrupting.) Fairmont Avenue.

Q.—and Fairmont Avenue? A. And Fairmont Avenue.

Q. The block upon which your land is located is now used for what purpose? A. Practically for no purposes. There is a dwelling on it, but it is mostly vacant, 160 feet, I think it is.

Q. Your land is vacant? A. Yes.

Q. On your land there is now a private dwelling? A. A private dwelling.

Q. Which private dwelling house is vacant, but what is the character of the block on the boulevard where your land is located, is it used for private dwellings or for business? A. Private dwellings.

Q. And how many private dwellings are there on that block in addition to the dwelling which is vacant? A. I really did not observe, but I think one or two.

Q. Aren't there, as a matter of fact, two, the corner house, corner of Boulevard and Montgomery, is it Boulevard and Montgomery? A. That is right, Fairmont comes next; that is right—

Q. Being the house of Doctor Opdyke, the house

*Moses Glickman, cross.*

to the south being the Edwards house, and then your property? A. I said one or two, because I am not so familiar with it.

10 Q. Now, the two dwellings which I just described there, located on that same block as your property, wouldn't you call them very fine residences? A. Very fine? No.

Q. Well, how would you describe them? A. Fairly—

Q. As nice as there are in Jersey City? A. I am very little acquainted in Jersey City.

Q. You are really a Brooklyn man? A. A Brooklyn man.

20 Q. But, in your short trip to Jersey City, and the short space of time you have spent here, have you seen any better-class private dwellings than the two houses located there? A. I believe I have, but I would not know how to name them.

Q. And those two dwellings are detached from each other? A. I think so.

Q. Upon the entire frontage of the Boulevard, between Montgomery and Fairmont Avenue, there is erected only these three dwelling houses? A. Right.

30 Q. On of which you own, and the other is vacant? A. Right.

Q. The other two are occupied? A. Yes.

Q. What is immediately opposite that block? A. Opposite our block—I really don't remember.

Q. Private dwellings? A. Private dwellings?

Q. Two private dwellings? A. Yes.

40 Mr. Gross: This is really not cross examination, but in order to expedite the matter I am perfectly willing to let it go in without objection.

*Moses Glickman, cross.*

Q. And what is the character of the street or block between Fairmont and Duncan Avenue, on the other side of your street? A. At the corner it is occupied by a church, and next to the church, I think, is the Duncan apartments.

10 Q. A very fine, high-class apartment house? A. A Very fine, high-class apartment house.

Q. As a matter of fact you know, although you are not a resident of Jersey City, that it is one of our best and most exclusive apartment houses in Jersey City? A. I do not know that they are of the best, I know they are a fine property.

20 Q. Now, are there any stores, either on your block or across the street from you, or on the adjoining block? A. No, on the adjoining block, next to mine, there are stores between Jewett and Fairmont, or between Duncan and Jewett, I would say. I am not acquainted very well in Jersey City.

Q. That is two blocks away from your property? A. Yes, that is two blocks away from my property.

Mr. Gross: Is that right, Mr. Glickman, is that two blocks? It is one block.

The Witness: Well, it is the second block.

30 Mr. Hershenstein: There is Fairmont and Duncan Avenues.

Mr. Gross: You have got Fairmont and Duncan, and then this is between Duncan and Fair View, where there is a garage there; in other words, one full block the other side of the Duncan apartments.

Q. One block south? A. Yes, if I would build stores, I would be also one block the same.

40 Q. You would be one block north? A. North, and I would have much better stores than are there now, my stores would be a credit to the

*Moses Glickman, cross.*

Duncan apartments, and I believe that most of the tenants in the Duncan apartments would appreciate it.

10 Mr. Hershenstein: Will you please strike that off the record.

Q. Do you know whether your architect prepared specifications with those plans? A. I do not know.

Q. Have you seen them? A. I have seen specifications.

Q. You do not know whether these specifications are the specifications which go with these plans? A. No. I was advised it is immaterial.

20 Q. Then you did not order them to be prepared? A. I have specifications, see; they have prepared them for me.

Q. Which you will use in conjunction with this building? A. Which I will use in conjunction with this building.

Q. But you have had your architect, Mr. Weltoff, prepare specifications for these plans? A. I did not tell him what to do.

30 Q. Do you know whether you have presented your specifications that you intend to use in conjunction with these plans—these specifications, I take it, were prepared for you for some other building—do you know whether these specifications were submitted to the Building Department? A. I really do not know, I took the package as it was given me, and I brought it to the Building Department.

40 Q. Now, do you know whether these plans which you now produce and which are marked R-1, have been approved structurally by our Building Department? A. By your Building Department?

*Moses Glickman, redirect.*

Q. Yes. A. No.

Q. You do not know that? A. They were.

Mr. Gross: Do you know whether they were approved structurally as to the building itself?

The Witness: I don't know. They were planned entirely— 10

Q. You do not know whether they have been approved or disapproved structurally? A. That is right, I do not know.

Mr. Hershenstein: That is all.

*Redirect examination by Mr. Gross:*

20 Q. Mr. Glickman, this proposed building is to be located on the corner of Fairmont Avenue and the Boulevard? A. Right.

Q. The street next south of Fairmont Avenue and running parallel with it? A. Duncan.

Q. Is Duncan Avenue? A. Is Duncan Avenue.

Q. And the street next south of that, and running parallel with it is what, Fair View? A. I think Fair View.

30 Q. Now, on the block on the Boulevard, between Duncan and Fair View Avenues, and on the westerly side of the street, what is there? A. There is a garage, and an automobile accessories store.

Q. Public or private garage? A. Public garage.

Q. Is it a large garage? A. A large garage, and an automobile accessories store, a frame building, stores, one story, and old-fashioned.

Q. Is that on the same side of the Boulevard as your property? A. That is on the same side of the Boulevard as my property.

40 Q. Now, going north of your property along the

*Moses Glickman, redirect.*

Boulevard, are there any stores? A. North, coming back this way.

Q. Toward the depot. A. They are two or three blocks from our property, from Fair View Avenue, and then comes Montgomery, and then—

10 Mr. Hershenstein: Then would come Glenwood and Highland.

The Witness: Glenwood and Highland, and DeKalb.

Mr. Gross: Four blocks.

The Witness: That would be three blocks because, I think, two or three blocks away on DeKalb Avenue there are stores.

20 Q. You mean on the Boulevard? A. I mean on the Boulevard.

Q. Running from DeKalb Avenue— A. Between DeKalb and Highland.

Q. On the westerly side of the street? A. On both sides of the street.

Q. What sort of stores are they? A. I think one is a drug store, and one is a stationery store and a grocery store,—I don't remember, I didn't observe—

30 Q. Is there a piano store? A. There is a piano store there.

Q. Is that in the frame building at the corner of DeKalb and the Boulevard? A. Yes.

Q. Now, what is the easterly side of that same block? A. On DeKalb?

40 Q. On the Boulevard, between DeKalb and Highland? A. There is a single story, frame taxpayer, with stores, that is what we call them in Brooklyn, a taxpayer, one story, and on the southerly side between Duncan and Fair View Avenues there are also stores on both side of the Boulevard.

*Moses Glickman, recross.*

*By Mr. Hershenstein:*

Q. Mr. Glickman, of course, you don't know whether any of the stores which you have now described, or whether that garage that you have described as being on the Boulevard, between— 10  
A. (Interrupting.) Duncan and Fair View—

Q. —Duncan and Fair View, I say you don't know whether any of these stores with this garage have been erected before our Zoning Ordinance was adopted in Jersey City? A. No, I am not familiar with that.

Q. This garage which you speak of on the Boulevard, between Duncan and Fair View is a building which is set in from the Boulevard building line? A. Yes. 20

Q. About how many feet from the Boulevard building line? A. Well, I should judge—

Q. (Interrupting.) The block line, rather. A. I should judge the building is set in about fifty feet.

Q. In other words, between the building proper and that garage, and the Boulevard block line, there is a plot of vacant land about fifty feet? A. They are selling gasoline there, and coming in with machines, and it is practically the continuation of the building. 30

Q. And on the corner of Duncan Avenue and Boulevard, and immediately adjacent to this garage, there is a small city park? A. Yes.

Mr. Hershenstein: That is all.

*By Mr. Gross:*

Q. The entrance to this garage is from the Boulevard? A. From the Boulevard.

40 Mr. Gross: I offer in evidence the paper

*Isaac Gross, direct.*

produced by the other side, and which is marked D-1 for identification, and which shows the rejection of this application for permit by the Commission on Building and District Restrictions, on the 15th of June, 1926.

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(The paper referred to is received in evidence and marked R-4, December 9th, 1926.)

Subscribed and sworn to before me }  
this day of December, 1926. }

ISAAC GROSS, a witness appearing on behalf of the relator, having been first duly sworn by the Supreme Court Examiner, testified as follows:

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Mr. Gross: I am the attorney for the Karke Realty Associates, representing them on their application for this building permit. I appeared at the office of the Superintendent of Buildings of Jersey City about two weeks before September 21, 1926, for the purpose of ascertaining what had become of the application for the building permit which is here in question, and was told by Mr. Dunn, who was in charge, that the application had been referred to the City Commission for action by it, and that the plans were still in the possession of the Superintendent of Buildings. The application came up on the 14th of September, before the City Commission, and was adjourned for a week in order that property owners in the vicinity might be notified to appear. On the 21st of September several property owners appeared and objected to

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*Isaac Gross, direct.*

the granting of a permit, solely because they did not want to have stores built in the neighborhood, and that as the property was zoned by the Zoning Ordinance of Jersey City for residential purposes, the permit should not be granted.

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For that reason the City Commission denied the permit on that day.

Mr. Gross: That is all, except that I might add, too, that the plans which have been marked in evidence, have at all times since they were filed, been in the possession of the Building Department, and have been produced today by it pursuant to a subpoena which I served on the Department.

(Adjourned to some time to be fixed by agreement of counsel.)

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Case.

NEW JERSEY SUPREME COURT.

10 KARKE REALTY ASSOCIATES,  
a corporation, Relator,  
v.  
THE MAYOR AND ALDERMEN OF JERSEY CITY, FRANK HAGUE, JOHN SAUL, JOHN J. BEGGANS, MICHAEL I. FAGEN and WILLIAM B. QUINN, Board of Commissioners of the City of Jersey City; and JOHN SAUL, Superintendent of Buildings of Jersey City,  
20 Respondents.

15 Exchange Place, Jersey City, N. J.  
Friday, December 17th, 1926, 11 A. M.

30 Testimony taken in the above entitled action before me, George A. Wardell, a Supreme Court Examiner, at the City Hall, Jersey City, New Jersey, this 17th day of December, 1926, on behalf of the respondents, at eleven o'clock in the forenoon, in pursuance of notice given therein and in the presence of:

Messrs. GROSS & GROSS, attorneys for the Relator.

CHARLES HERSHENSTEIN, Esq., appearing on behalf of the Respondents.

GEORGE A. WARDELL,  
Supreme Court Examiner.

Frank Hague, direct.

FRANK HAGUE, one of the respondents, having been first duly sworn by the Supreme Court Examiner, testified as follows:

Direct examination by Mr. Hershenstein:

Q. Mr. Hague, you are one of the commissioners of the Mayor and Aldermen of Jersey City? A. I am. 10

Q. And you have been designated as the Director of the Department of Public Affairs? A. Yes, sir.

Q. And as such director, you are the Mayor of the City and the presiding officer of the Commission? A. Yes.

Q. Prior to your designation as Director of Public Affairs, you had charge of the Department of Public Safety? A. Yes. 20

Q. And your designation was that of Director of Public Safety? A. Yes.

Q. And, as Director of Public Safety, you had entire and full charge of the police and fire departments of Jersey City? A. Yes.

Q. And you held that position for how long? A. Four years.

Q. As a matter of fact, you held public office in Jersey City in connection with the City government for almost twenty years? A. Yes. 30

Q. And during that time you have become intimately acquainted with every portion of Jersey City? A. Yes, sir.

Q. And it is necessary for you in your official duties to make inspections or surveys of conditions in Jersey City for the purpose of ascertaining fire hazards or with a view of adopting methods to decrease fire hazards in Jersey City? A. Very often I have made personal inspections and made 40

*Frank Hague, direct.*

recommendations which have always been carried out.

Q. You have often made personal inspections and recommendations which have been carried out? A. Yes.

10 Q. And now, as Director of Public Affairs, have you supervision of the Health Department of Jersey City? A. I have.

Q. For how many years have you been Director of Public Affairs in Jersey City? A. Twelve years and a half—twelve years in May.

Q. As Director of Public Affairs, and as Commissioner of Jersey City, have you personally made examinations and surveys of Jersey City for the purpose of adopting measures for the protection of the public health of the inhabitants of our city? A. I have.

Q. On many occasions? A. On many occasions.

Mr. Hershenstein: That is on page two.

Q. As a matter of fact, Mr. Mayor, all your time is spent in the interest of the people of this city and you are able to apply the knowledge you have thus procured in the solving of public questions, and those questions particularly which relate to the public health, welfare and safety of this community?

Mr. Gross: I object to the form of the question. In the first place, it is leading, and secondly it is irrelevant and immaterial.

A. Most of my time is spent in dealing with questions pertaining to our city, and I make personal investigations and examinations of all facts referring to any particular problem and from the facts I then endeavor to solve the situation which

*Frank Hague, direct.*

arises. I have, of course, stored up a great deal of knowledge concerning every nook and corner of Jersey City because of the position which I hold and because of the study which I have given to all matters pertaining to Jersey City.

Q. Your Commission has passed a Zoning Ordinance which I now show you, bearing date March 21st, 1922, which was amended March 31st, 1922, and further amended December 18th, 1923. A. Yes.

Mr. Hershenstein: I offer that Zoning Ordinance and amendments, which the City Clerk does hereby produce.

(Marked Exhibit "D-1.")

Q. By virtue of the Zoning Ordinance, Mr. Mayor, an appeal board was established under Section 12? A. Yes.

Q. And the Board of Commissioners of the Mayor and Aldermen of Jersey City constitute this appeal board? A. Yes.

Q. How many commissioners are there in Jersey City? A. Five.

Q. And all five commissioners sit as the board of appeal under the Zoning Ordinance? A. Yes.

Q. Your commission has not established an independent Board of Adjustment under the 1924 Statute? A. No, we have not. Our Board of Appeals under our Zoning Ordinance has all the powers which the Statute has conferred upon the Board of Adjustment and our Board of Appeals, therefore, acts as the Board of Adjustment, contemplated by the 1924 Statute.

Mr. Gross: I object to the last part of that answer and move that it be stricken out on the ground that, in the first place, it is

*Frank Hague, direct.*

not responsive, and, secondly, that it calls for the conclusion of the witness,—his conclusion as a matter of fact and also as a matter of law.

10 Q. You are familiar with the application of the Karke Realty Associates, the relator in this mandamus proceeding? A. Yes.

Q. You recall, Mr. Mayor, the application made by this relator before your Commission acting as a Board of Appeals on September 21st, 1926? A. Yes.

Q. Was a hearing given on this application? A. Yes.

20 Q. Who were present, Mr. Mayor? A. All the commissioners were present and there were a great many persons present who were interested in this application and who were heard. There were also present the officers of the relator and their attorney.

Q. Were the facts, in conjunction with this application, discussed and determined by your Commission? A. The matter was gone into very thoroughly. We heard everybody who had any interest in the matter. We examined all the facts in connection with this application.

30 Q. What were the facts and what were your findings? A. The Commissioner on Building Districts and Restrictions, which is commonly called the Zoning Commission, rejected the plans which were presented on the ground that the contemplated building would violate Section 2 of the Zoning Ordinance regulating and restricting the location of trades and industries. The land upon which the building was to be erected is in a locality which had been zoned as a residential district

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*Frank Hague, direct.*

in which district no business or store is permitted. This particular neighborhood is one of the few places in Jersey City remaining as a residential neighborhood. There is not a store on either side of the Boulevard from Highland Avenue to Duncan Avenue, a distance of about five blocks. Some of the finest residences in Jersey City are erected on the Boulevard between these streets. For example, the Young residence, the Smith residence opposite the Young estate, Doctor Opdyke's house; there is also erected a high-class apartment house which is the finest apartment house in Jersey City.

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Q. Housing how many families? A. Housing one hundred and six families; on that same block, on the other corner, is a church; on Duncan Avenue, between the Boulevard and West Side Avenue, School Number 17 which thousands of children attend morning and afternoon, and they must necessarily pass the land upon which the relator contemplates the erection of stores.

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From the facts stated to us and from our investigation, this Commission found that the Zoning Commission's decision should be sustained and that no modification should be made and that no permit should be granted for the erection of stores on this land which has been zoned for residential purposes. We found, as a fact, that the erection of stores on this particular land would increase the fire hazard in that neighborhood and that a refusal to permit would decrease the likelihood of injuries to these thousands of children and others who would have to pass this property every day going to and from their school.

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Mr. Gross: I object to the last part of the answer, in which the witness says: "We found, as a fact, that the erection of stores

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*Frank Hague, direct.*

upon this particular land would increase the fire hazard, and the refusal of a permit would promote—”

Mr. Hershenstein (interrupting): The question has not been answered entirely.

10 Mr. Gross: And I object on the ground that it calls upon the witness for a conclusion on facts not disclosed.

The Witness (continuing): We also found, as a fact, that the stores in this neighborhood would add to the fire hazard and that a denial of this permit would minimize fire hazard.

Mr. Gross: I move that that be stricken out, for the same reason.

20 The Witness (continuing): We also found there is heavy traffic on the Boulevard, which is the main artery through Jersey City. No business vehicles are permitted except for loading and unloading. If stores are permitted to be erected, heavier traffic must be permitted at this particular location for the purpose of loading and unloading merchandise which would go into these stores.

30 The builders are contemplating erecting eleven stores. Of course the Commission is powerless to regulate the kind of business which would be carried on and these stores may be rented to business concerns which would be detrimental to the children who must pass there every day. We are also of the opinion that stores in this neighborhood would cause a congestion of population at that point and would deprive the people living in the private residences and in this

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*Frank Hague, direct.*

apartment house from having a quiet place to live. Of course we find as a fact that stores with persons going in and out merchandise being delivered from time to time adds considerably to the noise of the neighborhood.

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Mr. Gross: I object to the last part of the witness' answer on the ground that it calls for the conclusion of the witness.

A. (Continued.) We also find that danger of fire and risk of contagion would be lessened by preventing the erection of stores in this locality and that generally the safety and health of the community would be promoted by denying this application for a permit.

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Q. Now, Mr. Mayor, that has been the attitude of this Commission in all instances where a permit is requested for the building of stores in a residential neighborhood. A. Yes, we have uniformly denied permits for the erection of stores in residential neighborhoods because we have determined that a place of business in a residential neighborhood furnishes an excuse for inviting loiterers, and so forth, to congregate. Such places of congregation need additional police protection and, therefore, puts extra burden upon the city. Our courts in New Jersey have thus far overruled our decisions and have, by writ of mandamus proceedings, compelled us to issue permits, but we have stuck to our policy which we have adopted and have endeavored to carry it out by always declining to issue the permits. We have no control over the Courts and the only way builders erect stores in residential districts in our city is on a court order. And in spite of the view of this Commission, which has found as a fact that the zoning of residential

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*Frank Hague, direct.*

10 districts against stores increases the safety and security of our home life and greatly tends to prevent street accidents upon our thoroughfares and especially, as in this case, the stores being in close proximity to one of our large public schools, which would produce traffic and result in confusion in residential sections, the courts have permitted stores to be built and have set aside our judgment in the matter.

20 Q. Mr. Mayor, was your objection to this application, the exercise upon your part and upon that of your fellow commissioners of an honest effort to promote the general welfare, public health and safety of this community? A. Absolutely. The commissioners and I feel it would be a crime to permit that neighborhood to be infested with stores of every kind, when we are striving to preserve it as a residential district. As I said, there are only a very few spots left in Jersey City which we can call strictly residential districts and this is one of them, and it would be a shame to take this, which is one of the most prominent spots, away from us. Everybody is opposed to it—the whole neighborhood; in fact, the whole city.

30 Q. Mr. Mayor, do you know of your own knowledge whether your fellow commissioners share your view as you have expressed it here? A. I know that they do. They have repeatedly stated them at our public meetings where these zoning matters have come up and some of them have even stated them in more emphatic terms, especially Commissioner Fagen.

40 Q. Now, Mr. Mayor, what street or thoroughfare lies parallel to the Boulevard and north of the Boulevard, or, rather, west of the Boulevard? A. West Side Avenue.

*Frank Hague, cross.*

Q. West Side Avenue is zoned for business? A. Yes.

Q. And business of every nature is carried on on West Side Avenue? A. Yes.

Q. That is one block away from the Boulevard and runs parallel with it? A. Yes. 10

Q. One block south of the Boulevard is what street? A. Bergen Avenue.

Q. And is Bergen Avenue a location also zoned for business? A. Yes.

Q. And there are stores of every kind on that street? A. Yes, that is one of our leading business streets.

Q. Two blocks south of the Boulevard and parallel to it is Monticello Avenue? A. South—you mean east? 20

Q. Yes; and that is zoned for business? A. Yes.

Q. And that is a business thoroughfare? A. Yes.

Q. So that from your knowledge and from your findings of fact, are there sufficient streets right in the immediate neighborhood of these stores to take care of the wants of the public,—right in that neighborhood?

Mr. Gross: I object to that question.  
(Question withdrawn.) 30

*Cross examination by Mr. Gross:*

Q. Mr. Mayor, there has never been a Board of Adjustment appointed in Jersey City by resolution or otherwise, has there? A. No, sir, there never has been.

Q. And, as a matter of fact, there is no such body as a Board of Adjustment in Jersey City? A. No, sir, there is no such body.

Q. At the time that this permit to the relator was refused by the City Commission, several per- 40

*Frank Hague, cross.*

sons appeared and objected to the granting of the permit? A. They did.

10 Q. And the objections were based exclusively upon the ground that this was a residential district and that to permit stores to be built there would mar the general appearance of the best residential portion of Jersey City? That is the only objection they made? A. That is the only objection.

Q. And that is the only objection which your Commission considered, is it not? A. Yes.

Q. You have never seen, either before September 21st, the date when the permit was refused, or at any time since, the plans for this building, had you, Mr. Mayor? A. No.

20 Q. And you don't know whether they called for a fireproof building or not? A. I do not.

Q. So that you have no knowledge of whether the erection of that building with stores would increase the fire hazard in that particular neighborhood? A. Other than what has proven in the past, counsellor; naturally fire hazards are going to be increased by the erection of stores, no matter what business may be conducted, from papers and a lot of rubbish being stored in cellars and things like that; that naturally is going to increase the fire hazard,—that is my experience.

30 Q. Your idea is that regardless of the kind of store, and regardless of where it is located, and regardless of the character of the building in which it may be housed, the fire hazard is increased? A. It increases with the construction of stores over what it is with residences.

Mr. Gross: That is all.

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*Frank Hague, redirect.*

*Redirect examination by Mr. Hershenstein:*

Q. When the Zoning Ordinance was first passed, did you and your fellow commissioners have in mind that the public welfare and public health would be conserved and benefited by zoning our city under Section 2 and creating residential sections? 10

Mr. Gross: I object to that.

A. Yes.

Q. And the conclusions that you formed at that time were based upon facts—the findings of facts and an investigation? A. Yes.

Q. And an investigation which you made personally? A. Yes.

Q. And in which the various heads of departments aided you? A. Yes. 20

Q. And the Zoning Ordinance was the result of all this investigation and thought? A. Yes.

Q. It is a fact, is it not, that you and the Commissioners passed a Zoning Ordinance for the sole purpose of benefiting the welfare of this community? A. That is true.

*By Mr. Gross:*

Q. You have found it necessary in many instances, since the passing of this Zoning Ordinance, to make changes from residential to business districts? A. Yes, on numerous occasions we have revised the Zoning Ordinance to meet conditions. 30

*By Mr. Hershenstein:*

Q. Now, Mr. Mayor, is there one single fact produced by the relator in this case which would in any wise tend to change your judgment that this 40

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*Thomas J. Wolfe, direct.*

permit in this particular case should not be granted?

Mr. Gross: I object to that.

A. No.

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THOMAS J. WOLFE, being duly sworn, testified as follows:

*Examination by Mr. Hershenstein:*

Q. Inspector Wolfe, you are a member of the Police Department of Jersey City with the rank of Inspector? A. Yes, sir.

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Q. Inspector Wolfe, what particular division are you in charge of? A. I am in charge of the Traffic Division of the Police Department.

Q. And in charge of the Traffic Division, Inspector, you are entrusted with the Department which has charge of the traffic regulations in this City? A. Yes, sir.

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Q. Have you as head of the department made personal inspections of every portion of Jersey City to determine traffic conditions? A. I have not only made personal inspections, but have made a minute study of traffic conditions in Jersey City so as to be in a position to introduce traffic regulations throughout the City.

Q. Have you been requested by the City authorities to make a survey of Jersey City prior to the introduction of the Zoning Ordinance so that they may have the result of your investigation and knowledge in the framing of their zoning ordinance? A. Yes, sir.

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Q. Have you rendered such report prior to the introduction and passage of the Zoning Ordinance? A. I have.

*Thomas J. Wolfe, direct.*

Q. What have you found, Inspector, as a result of the erection of stores in a neighborhood with regard to traffic conditions? A. I have always found that the building of stores in a certain locality always increases the traffic conditions in that section.

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Q. And why is that true? A. Because stores bring a greater number of people together, a greater number of automobiles, a greater number of trucks to deliver merchandise, and always makes a street with stores on it a busy place.

Q. Does it increase to a marked degree the traffic in a neighborhood, as distinguished from a residential neighborhood? A. Certainly. In a residential neighborhood there are very few people on the streets and no traffic regulations are needed, whereas where there are stores a great many people passing and repassing would tend to increase the traffic conditions.

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Q. Inspector, have you made an inspection of the premises on the Boulevard and Fairmont Avenue in order to determine whether the erection of an apartment house with eleven stores will increase the traffic conditions? A. Yes, sir, I have made an inspection of that location and I find that that is a strictly residential section. Nothing but apartment houses and private houses of the best type are located there. To permit stores to be built in an apartment house on that corner would greatly increase the congestion and would necessitate new traffic regulations. The Boulevard is used for extensive automobile traffic, and stores at that point would choke up the Boulevard if trucks and automobiles would stop there to either take on or leave off passengers, or load and unload merchandise. It would also require a traf-

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*Thomas J. Wolfe, direct.*

fic policeman to be stationed at that point, and there is no traffic policeman there now.

I am also of the opinion that stores on that block would tend to increase accidents to children, because of increased traffic, for it is one and one-half blocks away from the school on Duncan Avenue known as Public School No. 17, to which thousands of little children go every day.

Q. Will you say, Inspector, that the erection of stores on that corner will increase the traffic and result in confusion in that section? A. Yes, sir, it certainly will.

Q. Have you so reported to the Commission before they acted upon the application of the relator for a permit for the erection of these stores? A. I have.

Q. Inspector, will you now say from your experience and knowledge of conditions in Jersey City that the refusal of a permit to erect these stores will increase the safety and security of home life, greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in this residential district? A. Yes, sir. There is no question about it.

Q. Have you also from your experience, Inspector, found whether stores add to the duties of the Police Department, and if so, why? A. I have always found that thieves generally go into neighborhoods where there are stores and therefore we always have the officers on the beat try all the stores at certain hours of the night to see whether things are all right. I have also found that stores are an excuse for idlers to get together, and, of course, wherever such idlers appear or crowds congregate, that neighborhood always needs additional police protection.

*Joseph Van Rosencrance, direct.*

Q. So that aside from the increased traffic conditions, the presence of stores also causes a greater burden upon the City by the need of additional police protection? A. Yes, sir.

*Cross examination by Mr. Gross:*

Q. You know, Inspector, that the Hudson County Boulevard in the neighborhood and along the premises of the relator, is thoroughly and efficiently policed by the members of the Jersey City Police Department. A. That is absolutely true.

Q. And in addition thereto it is adequately policed by the members of the Hudson County Boulevard Police. A. That is unquestionably so.

Q. The part of the Hudson County Boulevard in front of relator's premises, and for several miles on either side, has a roadway 80 feet in width, has it not? A. Yes, sir.

Q. And is the widest street or roadway in Jersey City? A. Yes, sir.

JOSEPH VAN ROSENCRANCE, being duly sworn according to law upon his oath, testified as follows:

*Examination by Mr. Hershenstein:*

Q. Mr. Van Rosencrance, you are connected with the Fire Department of Jersey City? A. Yes, sir.

Q. What is your position? A. I am the Inspector in the Bureau of Combustibles of the Jersey City Fire Department.

Q. What are your duties? A. My duties are to make periodical examinations in order to ascertain fire hazards in Jersey City.

Q. And your experience in that direction dates back a good many years? A. Yes, sir.

*Joseph Van Rosencrance, direct.*

Q. As a matter of fact, you are devoting your entire time in the Fire Department in order to determine fire hazards and to suggest methods of remedy? A. Yes, sir.

101 Q. Prior to the adoption by the City of Jersey City of the Zoning Ordinance, were you requested by the City authorities to make a survey of Jersey City for the purpose of rendering your report as to what conditions would or would not increase fire hazards in Jersey City? A. Yes, sir.

Q. And did you make such investigation and report? A. I did.

20 Q. From your experience and knowledge of conditions, will you please state whether the presence of stores in a residential section increases the fire hazard in that section? A. It does, absolutely.

Q. And you reported, prior to the passage of the Zoning Ordinance, that the presence of stores would increase the fire hazard in a residential district as contemplated to be zoned as such by the Zoning Ordinance? A. Yes, sir.

Q. Have you made an inspection of the location where relators contemplate erecting an apartment house with eleven stores? A. Yes, sir.

30 Q. Will you state from your examination whether the erection of stores on the corner of the Boulevard and Fairmount Avenue will or will not increase the fire hazard in that locality? A. The erection of eleven stores in an apartment house on that corner will most certainly increase the fire hazard in that neighborhood. That is strictly a residential section, free from stores, and the presence of stores undoubtedly would create a fire hazard in that section.

40 Q. Why do you say that, Mr. Van Rosencrance? A. From my experience in that Department, and

*Arthur Swid, direct.*

from my knowledge of affairs, I know that a great majority of the fires have their beginning in stores or mercantile establishments, and a comparatively few fires have their origin in apartments, so that wherever there are stores, a fire hazard is immediately created. 10

Q. And is that true irrespective of the kind of business carried on in the stores? A. Yes, sir, because every store has waste; must pack and unpack merchandise; and always has a certain amount of inflammable material, which, of course, causes a fire hazard.

Q. And did you report those facts to the Commission prior to their acting upon the application of this relator for a permit? A. I did. 20

Q. From your experience, therefore, and knowledge, will you say that prohibiting the erection of stores in that neighborhood would tend to insure and secure the safety from fire hazard to the people of that neighborhood? A. To prevent the building of these stores will keep the fire hazard of that section at a minimum and will secure to the inhabitants of that section the least amount of fire hazard.

No Cross Examination. 30

ARTHUR SWID, being duly sworn, testified as follows:

*Examination by Mr. Hershenstein:*

Q. Mr. Swid, you are in the insurance business in Jersey City and have been for how many years? A. About eight years.

Q. Are you in business now for yourself? A. Yes, sir. 40

Arthur Swid, direct.

Q. Prior to going into business for yourself, were you employed by any insurance concern? A. Yes, sir, I was in the employ of the Rate Making Offices which cover the State of New Jersey.

Q. And what was your particular line of duty?

10 A. It was my duty to fix the rates on buildings in New Jersey.

Q. And have you fixed rates on buildings in Jersey City? A. A great, great many of them.

Q. You are therefore familiar with the rate making in the insurance business? A. Yes, sir.

Q. Will you tell us from your experience in rate making, and from your insurance experience in Jersey City, upon what important element does rate making depend? A. Upon the fire hazard.

20 Q. So that if a fire hazard is increased the insurance premiums are higher and if it is lessened, the premiums are lower? A. That is the situation in a nutshell.

Q. Will you please tell us whether the presence of stores in an apartment house increases or decreases, or makes any change at all in the rates of that apartment house? A. The best way to answer that question is this: If you have an apartment house without stores, say on the corner of the Boulevard and Fairmount Avenue, the rate would be lower than if you have an apartment house with stores in that same location.

30 Q. So that the mere presence of stores in a building of themselves increase the rates? A. Yes, sir.

Q. And why is that? A. Because the presence of stores increases the fire hazard.

Q. Does the presence of stores in an apartment house increase the rates upon adjoining property?

40 A. The presence of stores in a location not only increases the rates on the building which has the

Stipulation.

stores (and which, as I have said, would have a lower rate if there were no stores), but the said stores also increase the insurance rates or premiums on the adjacent buildings.

Q. And will you tell us why that is so? A. Because from our experience we have found that stores not only increase the fire hazard in the buildings in which the stores are located, but are also a fire hazard to the surrounding property. 10

No Cross Examination.

Stipulation.

NEW JERSEY SUPREME COURT.

KARKE REALTY ASSOCIATES,  
a corporation,  
Relator,

v.

THE MAYOR AND ALDERMEN OF JERSEY CITY, FRANK HAGUE, JOHN SAUL, JOHN J. BEGGANS, MICHAEL I. FAGEN and WILLIAM B. QUINN, Board of Commissioners of the City of Jersey City; and JOHN SAUL, Superintendent of Buildings of Jersey City,  
Respondents.

On Application for Mandamus.

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It is hereby stipulated and agreed between the attorneys of the relator and respondents, that the lands of the relator, involved in this matter, are zoned for residential purposes under the Zoning Ordinance of Jersey City, which is in evidence, and that the buildings on either side of relator's prop-

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*Stipulation.*

erty, are of brick construction and that the nearest point of any such building, to the line of the relator's property, is approximately 50 feet; that a traffic policeman is stationed by the Hudson County Boulevard Police Department, at the corner of Montgomery Street and Hudson County Boulevard, one block northerly from relator's premises, and that another traffic policeman is likewise stationed by said department at the corner of Duncan Avenue and Hudson County Boulevard, being one block southerly from the relator's lands, during the entire day and for a great part of the night on each day.

10

GROSS & GROSS,  
Attorneys of Relator.

20

THOMAS J. BROGAN,  
Attorney of Respondents.

30

40

**Stipulation.**

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

KARKE REALTY ASSOCIATES,  
a corporation,  
Relator-Respondent,

10

*v.*

THE MAYOR AND ALDERMEN OF JERSEY CITY, FRANK HAGUE, JOHN SAUL, JOHN J. BEGGANS, MICHAEL I. FAGEN and WILLIAM B. QUINN, Board of Commissioners of the City of Jersey City; and JOHN SAUL, Superintendent of Buildings of Jersey City,  
Defendants-Appellants.

On Application for Writ of Mandamus.

20

It is hereby stipulated and agreed between the parties hereto, that in view of the fact the Supreme Court has directed that the pleadings be moulded as if an alternative writ of mandamus was issued in the first instance in order to give the defendants an opportunity to take an appeal to the Court of Errors and Appeals.

30

Now, therefore, it is agreed that the testimony taken pursuant to the rule to show cause in the Supreme Court be and the same shall hereby be used upon this appeal with the same effect as if the same had been taken upon the return to an alternative writ of mandamus, and shall be considered with like effect, and

It is further agreed that the Zoning Ordinance

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*Exhibits.*

of Jersey City and the Fire Hazard Ordinance be and the same shall be considered as exhibits offered by the defendants in its testimony.

10

HERMAN L. FAST,  
Attorney for Relator-Respondent.

THOMAS J. BROGAN,  
Attorney for Defendants-Appellants.

**Exhibit R-3.**

NEW BUILDINGS

FORM No. 23 APPLICATION No. 2278

20

Application to erect one building where same are to be used or part of same are to be used for any other purpose than for living apartments

Jersey City, June 14th, 1926.

To the Board of Commissioners of Jersey City:

KARKE REALTY ASSOCIATES OF N. J. (Moses Glickman, Pres.) hereby applies for permission to erect five story brick building to contain 11 stores on first floor and apartments above

30

Street Address 2621 Hudson Boulevard Cor. Fairmont Ave. Lot No. 10A Block No. 1828½

STATE IN FULL DETAIL THE FOLLOWING:

What is building to be used for? stores and apartments

Will any part be used for living apartments? If so, state in full Yes, four upper floors

Will building comply with all now existing Buildings Laws and Regulations? Yes

40

*Exhibits.*

Give size and all dimensions of all buildings above referred to:

Length 97' & 37' Width 149' 11" Height 55'  
No. of stories 5

Is Building Frame or Brick? Brick

Fill out diagram on back showing location of proposed building or buildings and all adjacent buildings on all sides.

10

State of New Jersey, }  
County of Hudson, } ss.:

NATHAN WELITOFF, residing at 21 Gifford Ave., City of Jersey City, State of New Jersey, being duly sworn according to law, deposes and says that he is the person who signed the above application and that the matters and things set out in said application are true, and that the plans filed with this application show the true condition as they do and will exist on the above named premises.

20

NATHAN WELITOFF.

Sworn to and subscribed before me }  
this 14th day of June, A. D. 1926. }

(Seal) MARY E. McMAHON,  
Notary Public of N. J.

30

**Exhibit D-1.**

ZONING ORDINANCE WITH AMENDMENTS ANNEXED TO STIPULATION.

An ordinance to amend an Ordinance entitled "An Ordinance regulating and restricting the location of trades and industries, and the location of buildings designated for specific uses and regulat-

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*Exhibits.*

10 ing and limiting the height and bulk of buildings hereafter erected, and regulating and determining the area of yards, courts and other open spaces surrounding buildings, and establishing the boundaries of districts for the aforesaid purpose, and providing penalties for the violation of its provisions"; passed March 21, 1922.

The Board of Commissioners of the Mayor and Aldermen of Jersey City do ordain as follows:

1. That the "Use District Map," forming a part of the ordinance, to which this ordinance is an amendment, be and the same is hereby amended so as to include within the residential district all that section bounded and described as follows:

20 Beginning at a point in the center line of Yale Avenue, distant one hundred (100) feet northwesterly from the northwesterly line of Mallory Avenue; thence northwesterly to the intersection of the center lines of Yale Avenue and Water Street; thence northeasterly along the center line of Water Street to its intersection with the center line of Clarke Avenue; thence southeasterly along the center line of Clarke Avenue to its intersection with the center line of Bennett Street; thence northeasterly along the center line of Bennett Street and the center line of Bennett Street produced to a point one hundred (100) feet southwesterly from the southwesterly line of Communipaw Avenue; thence southeasterly along a line running one hundred (100) feet southwesterly and parallel to the southwesterly line of Communipaw Avenue to its intersection with a line running northeasterly one hundred (100) feet northwesterly and parallel to Mallory Avenue from the point of beginning to Clendenny Avenue, and then produced to a point  
30  
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*Exhibits.*

one hundred (100) feet southwesterly from Communipaw Avenue; thence southwesterly along a line running northeasterly one hundred (100) feet northwesterly and parallel to Mallory Avenue from the center line of Yale Avenue to Clendenny Avenue and produced to a point at the end of the last mentioned course, to the point or place of beginning. 10

2. This ordinance shall in no wise limit or restrict any other section of the ordinance with relation to the regulations concerning said district.

3. This ordinance shall take effect upon its final passage.

Passed December 18, 1923.

MICHAEL I. FAGEN  
A. HARRY MOORE  
WILLIAM B. QUINN  
JOHN SAUL  
FRANK HAGUE  
Commissioners. 20

Dated, City Clerk's Office,

Jersey City, Dec. 21, 1923.

EDWARD J. HOLLAND,  
City Clerk. 30

AN ORDINANCE TO AMEND AN ORDINANCE, entitled Ordinances regulating and restricting the location of trades and industries, and the location of buildings designed for specified uses, and regulating and limiting the height and bulk of buildings hereafter erected, and regulating and determining the area of yards, courts and other open spaces surrounding buildings, and establishing the boundaries of districts for the aforesaid purposes and 40

*Exhibits.*

providing penalties for the violation of its provisions," passed March 31st, 1922.

THE BOARD OF COMMISSIONERS OF THE MAYOR AND ALDERMEN OF JERSEY CITY DO ORDAIN AS FOLLOWS:

1. That "Section #2—Residential District" of the ordinance to which this ordinance is an amendment be and the same is hereby amended to read as follows:

"SECTION #2—RESIDENTIAL DISTRICT."

In a Residential District, as designated on the "Use District Map," no building shall hereafter be erected, constructed, altered or used which is intended or designed for, and no premises shall hereafter be used for:

1. Business, trade, commercial or industrial purposes, the manufacture or sale of any commodity.
2. Any use excluded by Sections 3, 4 and 5 of this ordinance.
3. Storing any automobile or automobiles within or under any dwelling house.
4. A group of private garages to accommodate more than two automobiles.
5. A public garage.
6. A private garage any part of which shall be erected within twenty (20) feet of the building or lot line bordering on the street.
7. A private garage, any part of which shall be nearer than ten (10) feet to any building used for living purposes.

*Exhibits.*

8. A private garage, unless same shall be built on the rear line of lot or plot paralleling the street on which it fronts.

9. A private garage accommodating more than two automobiles, the dimensions of which shall be greater than twenty-five (25) feet in width, twenty (20) feet in depth, and eleven (11) feet in height.

10. An addition or extension of any business building which addition or extension is to be devoted to business purposes, wherein there is constructed an entrance or exit to same fronting on a residential street.

11. An entrance or exit to or from any building devoted to business purposes wherein such entrance or exit fronts on a residential street.

12. "PRIVATE GARAGE" is hereby defined to mean a building not more than twenty-five (25) feet in width, not more than twenty (20) feet in depth, not more than eleven (11) feet in height; and to be erected on the rear line of the lot to store a pleasure automobile for the accommodation of the owner or tenant residing on said property.

13. "PUBLIC GARAGE" is hereby defined to mean a building or group of buildings used for storing business or commercial automobiles, or used for storing more than two pleasure cars.

2. That "Section #3, BUSINESS DISTRICT" of the ordinance to which this ordinance is an amendment be and the same hereby is amended to read as follows:

"SECTION #3, BUSINESS DISTRICT."

In a Business District as designated on the "Use

*Exhibits.*

District Map," no building shall hereafter be erected, constructed, altered or used which is arranged, intended or designed for, and no premises shall hereafter be used for any of the following specified trades, industries or uses:

- 10 1. Any kind of manufacturing, other than the manufacture of products, the major portions of which are to be sold at retail on the premises where manufactured to the ultimate consumer.
- 2. Blacksmith shop or horse-shoeing establishment.
- 3. A milk bottling or distributing station.
- 4. A carpet or bag cleaning establishment.
- 20 5. A coal yard or lumber yard, or mason's material yard.
- 6. Any trade, industry or use excluded by Section 4 of this ordinance.
- 7. A terminal shed for public conveyance, unless the Public Utilities Commission deems it necessary for the public convenience.
- 30 8. A garage for more than five automobile motor vehicles or a group of garages for more than five automobile motor vehicles, or a motor vehicle service station, if any part of such building or buildings, or the entrance or exit of same, lies within one hundred and fifty (150) feet as measured along the public street of, or in any case within any portion of a street between two intersecting streets in which portion exists:
  - (a) A public school.
  - 40 (b) A duly organized school, other than a public school, conducted for children under

*Exhibits.*

sixteen years of age and giving regular instruction at least five days a week for eight or more months a year.

- (c) A hospital maintained as a charitable institution. 10
- (d) A church.
- (e) A theatre containing at least three hundred seats.
- (f) A public library.
- 9. A garage or group of garages for automobiles or motor vehicles nearer than five feet to the rear line of a corner lot, which abuts on a residential district lot.

10. Any garage or group of garages with an entrance or exit fronting on a residential street or with an entrance or exit in the rear of such building. 20

This is to certify that the foregoing is a true copy of an ordinance passed by the Board of Commissioners of Jersey City at its meeting held May 31st, 1922.

ACTING CITY CLERK.

Zone Commission, 30  
City Hall.

This is to certify that the following is a true copy of a resolution passed by the Board of Commissioners of Jersey City at its meeting held March 21st, 1922:

AN ORDINANCE regulating and restricting the location of trades and industries, and the location of buildings designated for specified uses, and regulating and limiting the height and bulk of buildings hereafter erected and regulating and deter- 40

*Exhibits.*

mining the area of yards, courts and other open spaces surrounding buildings, and establishing the boundaries of districts for the aforesaid purposes and providing penalties for the violation of its provisions.

10 THE BOARD OF COMMISSIONERS OF THE MAYOR AND ALDERMEN OF JERSEY CITY DO ORDAIN as follows:

## SECTION 1—DISTRICTS.

For the purposes of regulating and restricting the location of trades and industries and the location of buildings designed, for specified uses, the City of Jersey City is hereby divided into four districts, to wit: RESIDENTIAL, BUSINESS, COMMERCIAL AND MANUFACTURING, and INDUSTRIAL, as shown on the "USE DISTRICT MAP," which map is hereby made part hereof.

20 "USE DISTRICT MAP" is hereby defined to mean the map prepared and adopted by the Commission on Building Districts and Restrictions for the purpose of showing the division of the City into districts.

30 "USE DISTRICT" is hereby defined to mean that area or territory of the City within the boundaries as shown on the "USE DISTRICT MAP."

## SECTION 2—RESIDENTIAL DISTRICTS.

In a Residential District, as designated on the "Use District Map," no building shall hereafter be erected, constructed, altered or used which is intended or designated for, and no premises shall hereafter be used for:

40 1. Business, trade, commercial or industrial purposes, the manufacture or sale of any commodity.

*Exhibits.*

2. Any use excluded by Sections 3, 4 and 5 of this ordinance.

3. Storing any automobile or automobiles within or under any dwelling house.

4. A private garage or group of private garages, the front wall of which shall be nearer than eighty (80) feet to the front line of the lot. 10

5. A group of private garages on a lot twenty-five (25) feet in width, to accommodate more than three automobiles.

"PRIVATE GARAGE" is hereby defined to mean a building not more than twelve and a half (12½) feet in width, not more than twenty (20) feet in depth, not more than eleven (11) feet in height, erected on the rear line of the lot, to store a pleasure automobile. 20

6. A public garage, or for storing business or commercial automobiles.

## SECTION 2 (a) AREAS AND HEIGHTS.

The requirements and limitations of the New Jersey Board of Tenement House Supervision and the Jersey City Building Code shall govern the findings of the Commission on Building Districts and Restrictions as to the height and bulk of buildings, the percentage of lot that may be occupied, the area of yards, courts and other open spaces. 30

## SECTION 3—BUSINESS DISTRICT.

In a Business District as designated on the "Use District Map," no building shall hereafter be erected, constructed, altered or used which is arranged, intended or designed for, and no premises 40

*Exhibits.*

shall hereafter be used for any of the following specified trades, industries or uses:

- 10 1. Any kind of manufacturing, other than the manufacture of products, the major portion of which are to be sold at retail on the premises where manufactured to the ultimate consumer.
- 2. Blacksmith shop or horse-shoeing establishment.
- 3. A milk bottling or distributing station.
- 4. A carpet or bag cleaning establishment.
- 5. A coal yard or lumber yard, or mason's material yard.
- 20 6. Any trade, industry or use excluded by Section 4 of this Ordinance.
- 7. A terminal shed for public conveyances, unless the Public Utilities Commission deems it necessary for the public convenience.
- 30 8. A garage for more than five automobile motor vehicles or a group of garages for more than five automobile motor vehicles, or a motor vehicle service station, if any part of the lot or plot in question is situated within a distance of one hundred and fifty (150) feet as measured along the public street of, or in any case within any portion of a street between two intersecting streets in which portion there exists.
  - (a) a public school.
  - (b) a duly organized school, other than a public school, conducted for children under sixteen years of age and giving regular instruction at least five days a week for eight or more months a year.
- 40

*Exhibits.*

- (c) a hospital maintained as a charitable institution.
- (d) a church.
- (e) a theatre containing at least three hundred seats.
- (f) a public library.

9. A garage or group of garages for automobiles or motor vehicles nearer than five feet to the rear line of a corner lot, nor nearer than five feet to the side street line of a corner lot the rear of which abuts on a residential district lot.

SECTION 3 (a)—AREAS.

The requirements of all State and Municipal Laws and ordinances shall govern as to the bulk of buildings, the percentage of lot that may be occupied, and the area of yards, courts and other open spaces.

SECTION 3 (b)—HEIGHTS.

No building shall hereafter be erected which is less than three stories in height on the following streets: West Side Avenue, Communipaw Avenue, Jackson Avenue, Ocean Avenue, Grand Street, Monticello Avenue, Bergen Avenue, Summit Avenue, Central Avenue, Sip Avenue, Montgomery Street, Grove Street, Coles Street, Pacific Avenue, Hudson Boulevard, Newark Avenue, Old Bergen Road, Danforth Avenue, or on any street or avenue within the following boundaries, which upon the "Use District Map" is zoned for business;..... North, the north side of West Newark Avenue from the west side of West Side Avenue to the Five Corners, continuing easterly along the north side

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*Exhibits.*

of Newark Avenue to the east side of Baldwin Avenue; South, the south side of Communipaw Avenue; West, the west side of West Side Avenue; East, the east side of Baldwin Avenue from the north side of Newark Avenue to Summit Avenue and the east side of Summit Avenue from the junction of Summit and Baldwin Avenues to the north side of Grand Street; nor on the north side of Grand Street; nor on the north side of Grand Street up to its junction with Communipaw Avenue, EXCEPT, garages where permissible.

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## SECTION 4—COMMERCIAL AND MANUFACTURING DISTRICT.

In a Commercial and Manufacturing District as designated on the "Use District Map," no building shall hereafter be erected, constructed, altered or used which is arranged, intended or designated for, and no premises shall hereafter be used for any of the following specified trades industries or uses:

20

1. Ammonia, bleaching powder or chlorine manufacture.

2. Asphalt manufacture or refining.

30

3. Brick, concrete products, terra cotta or tile manufacture.

4. Celluloid manufacture or treatment.

5. Cement, lime or plaster of paris manufacture.

6. Crematory, other than a crematory located in a cemetery.

7. Creosote treatment or manufacture.

40

8. Dye stuffs manufacture.

*Exhibits.*

9. Electric Central station power plant.

10. Fat rendering.

11. Fertilizer manufacture.

12. Gas manufacture or storage in excess of one thousand (1,000) cubic feet. 10

13. Grease, lard or tallow manufacture or refining.

14. Hydrochloric, nitric, sulphuric, sulphurous or other acid manufacture.

15. Incineration or reduction of garbage, offal, refuse or dead animals.

16. Junk or scrap iron storage. 20

17. Lamp black manufacture.

18. Linoleum or oil cloth manufacture.

19. Petroleum, refining or storage in excess of one thousand (1,000) gallons.

20. Planing mill or saw mill.

21. Pyroxylin pastic manufacture or articles therefrom.

22. Rags and scrap paper—storage or baling. 30

23. Railroad yards or roundhouses.

24. Rolling Mill.

25. Slaughtering of animals or fowl.

26. Stock yards.

27. Stone crushing.

28. Sugar Refining. 40

29. Tar distillation or manufacture.

*Exhibits.*

30. Any trade, industry or use that is noxious or offensive by reason of the emission of odor, dust, smoke, gas or noise.

31. Distillation of bones, coal or wood.

10 SECTION 4 (a)—AREAS AND HEIGHTS.

The requirements of all State and Municipal laws and ordinances shall govern as to the height and bulk of buildings, the percentage of lot that may be occupied, and the area of yards, courts and other open spaces.

SECTION 5—INDUSTRIAL DISTRICT.

20 In an Industrial District as designated on the "Use District Map," no building shall hereafter be erected, constructed, altered, arranged or designated in whole or in part for any of the following purposes:

- 1. Celluloid manufacture or treatment.
- 2. Cement, lime or plaster of paris manufacture.
- 3. Crematory, other than a crematory located in a cemetery.
- 30 4. Fat rendering.
- 5. Fertilizer manufacture.
- 6. Incineration or reduction of garbage, offal, refuse or dead animals.

SECTION 5 (a)—AREAS AND HEIGHTS.

40 The requirements of all State and Municipal Laws and ordinances shall govern as to the height and bulk of buildings, the percentage of lot that

*Exhibits.*

may be occupied, and the area of yards, courts and other open spaces.

SECTION 6—"USE DISTRICT" EXCEPTIONS.

Any non-conforming use existing at the time of the passage of this ordinance may be continued. 10

"NON-CONFORMING USE" is defined to mean a use which is excluded by the regulations and restrictions of the "Use District" in which it is located.

SECTION 7—DISTRICT BOUNDARIES.

Unless otherwise indicated, the boundary of a Business District is the building line of the street shown and a line drawn one hundred (100) feet from and parallel thereto. 20

When the majority of the lots fronting on a Business Street, in a Business District, are deeper than one hundred (100) feet, the Business District may extend to the full depth of the lots.

SECTION 8—PLANS AND STATEMENT.

Before the erection, construction or alteration of any building or any part thereof, the owner, lessee, agent, architect or builder actually engaged in the management or conversion shall submit to the Commission on Building Districts and Restrictions a complete copy of the plans of the proposed work and file a statement, duly subscribed by the owner or his agent on blank to be furnished by the said Commission, reciting the use intended to be made of the building, or structure designated in said plans. 30

SECTION 9—APPROVAL OF PLANS AND STATEMENT.

It shall be the duty of the Commission on Building Districts and Restrictions to approve the plans 40

*Exhibits.*

and statement within a reasonable time after filing of the same, and to mail its decision on the application to the applicant, provided, however, said plans and statement shall be approved by a majority of the members of said commission; and provided  
 10 further that the said approval of the said Commission shall be ratified by the governing body, of the city.

If, on any inspection by the Commission on Building Districts and Restrictions, the conditions of a building or premises or its use or occupancy are found not to conform to the requirements of this ordinance or the plans and statement as approved, the inspector shall at once issue written notice to the owner or his agent, specifying the  
 20 manner in which the building or premises or its use or occupancy fails to so conform, and directing said owner or his agent to comply with the provisions of the aforesaid written notice within five days from the date of the service thereof upon him.

SECTION 10—PENALTIES.

Any person or persons violating the provisions of this ordinance or taking part or assisting in any violation of this ordinance, or who maintains any  
 30 building or premises in which any violation of this ordinance shall exist, shall for each and every violation be imprisoned in the Hudson County Jail for a period not exceeding thirty days or be fined not exceeding Fifty Dollars, or both. Each day that a violation is permitted to exist shall constitute a separate offense.

SECTION 11—VALIDITY OF ORDINANCE.

40 In case for any reason, any section or portion of

*Exhibits.*

this ordinance shall be questioned in any court, and shall be held to be unconstitutional or invalid, the same shall not affect any section of this ordinance, except so far as the section so declared unconstitutional or invalid shall be inseparable from  
 10 the remainder or any portion thereof.

SECTION 12—APPEAL.

An Appeal Board is hereby established, which shall consist of the Board of Commissioners of The Mayor and Aldermen of Jersey City. Said Board of Commissioners, acting as such Appeal Board, many in a specific case, after a public hearing and subject to approximate conditions and safeguards determine and vary the application of the regulations herein established in harmony with the general purpose and intent, without changing the boundaries of the respective zones. Any citizen who is aggrieved by the decision of the Commission on Building Districts and Restrictions may appeal to the said Appeal Board within fifteen days.

SECTION 13—WHEN EFFECTIVE.

This ordinance is passed under and by the virtue of the authority conferred by Chapter 152 of the Laws of 1917, and the various supplements thereto and amendments thereof, and Chapter 239 of the Laws of 1920 and the various amendments thereof and supplements thereto, and this said ordinance  
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*Exhibits.*

shall take effect immediately upon its final passage.

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JOHN BENTLEY,  
MICHAEL I. FAGEN,  
JAMES F. GANNON, JR.,  
FRANK HAGUE,  
Commissioners.

Passed March 21st, 1922.

FRANK A. DOLAN,  
City Clerk.

20

IN TESTIMONY WHEREOF, I have hereunto set my hand and the Corporate Seal of The Mayor and Aldermen of Jersey City, this 6th day of April, A. D. 1922.

WHEREAS, application was made by the Karke Realty Association of New Jersey to the City Commission for a permit to construct a building at 2621 Boulevard, Jersey City, containing eleven (11) stores with living apartments above; and

30

WHEREAS, this district is zoned solely for residential purposes, there being no business enterprises in this neighborhood; and

WHEREAS, the residents of said district have requested the City Commission to uphold the zoning regulations against business in this particular district; and

40

WHEREAS, the Director of Public Safety reports that the erection of eleven (11) stores in this particular neighborhood, with the attending businesses that will result will in his judgment in-

*Exhibits.*

crease the fire hazard and be an additional burden upon the surrounding property because of increased premium for insurance of this character, therefore for these reasons

10

BE IT RESOLVED that the permission sought by the Karke Realty Association be and the same is hereby denied.

BUILDING DEPT.:

This is to certify that the foregoing is a true copy of a resolution passed by the Board of Commissioners of Jersey City, N. J., at its meeting held October 5, 1926.

EDWARD J. HOLLAND,  
City Clerk.

20

**Exhibit D-2.**

AN ORDINANCE

ENTITLED

“An ordinance to regulate the erection and alteration of all buildings and structures to be used or designed to be used for any purpose other than as residences or for living apartments.”

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*The Board of Commissioners of the Mayor and Aldermen of Jersey City do ordain as follows:*

SECTION 1.—Before any person, firm or corporation shall begin work or obtain from the Building Department of Jersey City any permit for the erection of any building or structure to be used or designed to be used for any purpose other than as a residence or for living apartments, or before any person, firm or corporation shall begin work or obtain from the Building Department of Jersey

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*Exhibits.*

10 City any permit for the alteration of any building now used as a residence or for living apartments, if the same is to be used or altered to be used for any other purpose, they must first obtain from the Board of Commissioners permission so to do, said permission to be obtained in the manner herein-  
after prescribed.

20 SECTION 2.—All applications to do such work as mentioned in Section 1 of this ordinance shall be made in writing in duplicate on proper printed forms furnished by the Building Department, of which one copy shall be filed with the City Clerk for the Board of Commissioners, and one copy with the Building Department. All questions ap-  
pearing on such applications shall be answered in detail stating all the facts, and that the statements made and set forth are true, shall be duly acknowl-  
edged on the affidavit form appended to said ap-  
plication blanks, which shall also bear the date on which they are filed.

30 SECTION 3.—After the Board of Commissioners has inspected or has caused to be inspected the premises mentioned in the applications filed, and if the statements set forth in the applications are found to be true and the judgment of the majority of the Board of Commissioners is that if permis-  
sion is granted same will not jeopardize life, limb or public health and will not increase the fire haz-  
ard in the locality where the proposed erection or alteration is to be made, the Board shall have the power to direct the Building Department to issue all necessary building permits to perform such work as set out in the applications filed with the City Clerk for the Board of Commissioners and  
40 with the Building Department.

*Exhibits.*

SECTION 4.—All such buildings or structures as described in this ordinance to be erected, and all such to be altered, shall comply in every respect with all building laws and ordinances that may exist at the time the applications are filed.

SECTION 5.—No building permit shall be issued 10  
by the Building Department to erect or alter any such building as described in this ordinance to any person, firm or corporation unless the applicant has first complied with all the requirements of this ordinance.

## PENALTIES AND FINES.

SECTION 6.—Any person, firm or corporation vio-  
lating this ordinance or any part of same, upon 20  
being found guilty by any Police Court Judge of Jersey City, shall forfeit and pay a penalty of One Hundred Dollars (\$100.00) for each and every of-  
fense, and all work on any building or structure being done in violation of this ordinance or any part of same, shall be stopped by the police and remain stopped until this ordinance has been com-  
plied with in every respect.

SECTION 7.—This ordinance shall take effect im-  
mediately upon its final passage. 30

JOHN SAUL,  
MICHAEL I. FAGEN,  
WILLIAM B. QUINN,  
A. HARRY MOORE,  
FRANK HAGUE,  
Commissioners.

Passed June 3, 1924.

EDWARD J. HOLLAND,  
City Clerk. 40

74 MAY. 1. 1927

#74

New Jersey Court of Errors and Appeals

KARKE REALTY ASSOCIATES, a corporation, Relator-Appellee, v. THE MAYOR AND ALDERMEN OF JERSEY CITY, <i>et al.</i> , Respondents-Appellants.	}	On Appli- cation for Mandamus.
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**BRIEF FOR RESPONDENTS-APPELLANTS.**

The relator-appellee, who we will refer to in this brief as the relator, desiring to erect a five-story apartment house to contain eleven stores on a plot of ground situated on the corner of the Hudson County Boulevard and Fairmount Avenue, Jersey City, New Jersey, which *locus in quo* has been zoned under Section 2 of the Zoning Ordinances of Jersey City for residential purposes only, filed plans with the Zoning Commission who declined to approve the same because the contemplated erection of the stores would violate said Section 2 of the Zoning Ordinances.

Thereafter the relator made application to the City Commission for a permit. This application was in the nature of an appeal from the ruling of the Zoning Commission, for the Board of Commissioners of Jersey City under the Zoning Ordinance comprises the Board of Appeals; and the said application was also made pursuant to the so-called Fire Hazard Ordinance, which is marked Exhibit "D-2" (Case, pp. 69-71). This Fire Hazard

Ordinance regulates the construction or alteration of all non-residential buildings in Jersey City. Section 3 of that ordinance provides, in substance, that the Board of Commissioners, after inspection, or causing inspection to be made, shall issue a permit when the construction or alteration shall not jeopardize life, limb or public health and will not increase the fire hazard in the locality where proposed erection or alteration is to be made. The City Commissioners of Jersey City, after a full, fair and impartial hearing given to all of the parties concerned, and after it had received the reports of the various departments, found, as a fact, that the erection of these stores upon that location would create a fire hazard and increase the burden of additional insurance premiums upon neighboring property, and denied the application of the relator for the permit.

The relator then procured a rule to show cause from the Supreme Court why the City authorities should not grant this permit and both the relator and respondents proceeded to take depositions under the rule. The matter was then submitted to the Supreme Court who, after hearing argument, directed that a peremptory writ issue but because of the questions raised by the respondents, directed that the record be and the same was moulded and considered as if an alternative writ of mandamus had heretofore been allowed so that the relator may take an appeal from the judgment to this Honorable Court (Case, p. 7, lines 21-30).

By stipulation of counsel (Case, pp. 47-50) the testimony taken pursuant to the rule to show cause, is to be used upon this appeal with the same effect as if the same had been taken upon the return to an alternative writ of mandamus and shall be considered with like effect, together with the exhibits annexed to said depositions.

The depositions establish the fact that prior to the passage of the Zoning Ordinances in Jersey City, the City Commission made a thorough investigation and survey of the entire City of Jersey City in order to determine in what particular locality fire hazards would be decreased; where traffic congestion would be minimized; how the lives of the little children going to and from school would be best protected; and in what way the welfare of the community would be best served. As a result of the said investigation and study, the Zoning Ordinance was enacted, and the provisions concerning the zoning of the City into residential districts, in which districts the erection of stores were prohibited, was the result of a finding by the Commission as a fact that the zoning of residential districts against stores increases the safety and security of the people of Jersey City, and greatly tends to prevent street accidents upon its thoroughfares and especially in those neighborhoods where stores would be in close proximity to large public schools.

The depositions of the respondents also conclusively establish that the erection of the building containing eleven stores in this particular neighborhood would result in the following:

1. It would increase the fire hazard in that locality.
2. It would increase the traffic burdens in that particular locality, necessitating additional police protection.
3. It would increase the danger of personal injury to the children passing and repassing that street on their way to and from Public School No. 17, located on Duncan Avenue, which is in the immediate locality.
4. It will increase the insurance premium

rates upon the surrounding property because of an additional fire hazard by the erection of stores.

5. That the general welfare of the people of the community in that neighborhood will be promoted by preventing the erection of said stores.

We, therefore, respectfully submit that the facts in this case are distinguishable from the facts in the case of *Ignaciunas v. Risley*, 98 N. J. L. 712; affirmed 125 Atl. 121, and the subsequent cases approving the same, in that

1. The evidence discloses that the Zoning Ordinances of Jersey City were passed after findings of fact were made by the Commission of Jersey City, based upon surveys, reports and examinations of Jersey City and with the primary object of protecting the general health, safety and public welfare of the inhabitants of Jersey City.

2. The evidence further discloses that the application *sub judice* was denied by the City Commission after it had investigated the facts and circumstances surrounding the particular application and did find, as a fact, that the erection of the apartment house with stores would result in creating a fire hazard and would otherwise be detrimental to the general welfare of the community.

We further respectfully urge that aside from the Zoning Ordinances the City of Jersey City has a Fire Hazard Building Ordinance which permits the City Commission, after investigation, to prohibit the erection of buildings for other than residential purposes; which ordinance has been sustained by the Supreme Court in the case of *Caldwell v. Saul*, reported in No. 5 Misc. Rep., p. 165, decided January Term, 1927, and the City Commission did find as a fact that the granting of the permit would in-

crease the fire hazard and would otherwise be detrimental to the general welfare of the community and was, therefore, justified in refusing the permit.

#### POINT I.

**The evidence discloses that the Zoning Ordinances of Jersey City were passed after findings of fact were made by the Commission of Jersey City, based upon surveys, reports and examinations of Jersey City and with the primary object of protecting the general health, safety and public welfare of the inhabitants of Jersey City.**

A careful study of the opinion in the case of *State v. Nutley*, 99 N. J. L., p. 389, discloses that the Court of Errors and Appeals did not go as far as the Supreme Court did in deciding that same case. The Supreme Court, in its opinion (98 N. J. L. 712) declared the ordinance invalid because it was constitutionally bad in that it violated the rights of private property guaranteed to an owner of real estate by Federal and State Constitutions. The Court of Errors, however, refused to go that far, but held that the ordinance was invalid because it went beyond the limitations imposed by the statute, to wit, that such regulations must be "designed to promote the public health, safety and general welfare." The test is, therefore, does an ordinance tend to promote public health, safety and general welfare? If it does, peremptory writs are not granted. Each case must be determined solely upon the facts which are present in each instant case.

A reading of the depositions in the present case discloses the important fact that the Zoning Ordinance of Jersey City was passed with a primary

view and object of preserving the health, safety and general welfare of our community.

Mayor Hague testified as follows:

"Q. When the Zoning Ordinance was first passed, did you and your fellow commissioners have in mind that the public welfare and public health would be conserved and benefited by zoning our city under Section 2 and creating residential sections? A. Yes.

"Q. And the conclusions that you formed at that time were based upon facts—the findings of facts and an investigation? A. Yes.

"Q. And an investigation which you made personally? A. Yes.

"Q. And in which the various heads of departments aided you? A. Yes.

"Q. And the Zoning Ordinance was the result of all this investigation and thought? A. Yes.

"Q. It is a fact, is it not, that you and the Commissioners passed a Zoning Ordinance for the sole purpose of benefiting the welfare of this community? A. That is true" (Case, p. 39).

His testimony is corroborated by Inspector Wolfe (Case, pp. 40, lines 32-40), and Mr. Van Rosencrance (Case, p. 44, lines 9-16). None of this testimony is controverted. It must, therefore, be taken as an established fact that in Jersey City the Zoning Ordinance was passed after a thorough survey and study of conditions in Jersey City for the purpose of promoting the public health, safety and general welfare, and this fact being established the instant case is removed from the *Nutley* case and all the cases approving the *Nutley* case, because the very element which this Court has declared to be lacking in those cases exists in the case *sub judice*.

## POINT II.

**The City Commissioners, having made an investigation of the facts surrounding the present application, and made findings, based upon evidence submitted to them, their determination should not be disturbed.**

Irrespective of the fact that the Jersey City Zoning Ordinance was adopted after an investigation of the facts and findings by the City Commission and with a primary motive of protecting the health, safety and general welfare of the inhabitants of Jersey City, the evidence in this case further discloses the application was denied by the City Commission after it had investigated the facts surrounding this particular application.

Mayor Hague testified for the City Commission and his examination discloses that the City Commission examined all the facts in connection with this application, and he testified that these are the facts and findings of the Commission:

"Q. What were the facts and what were your findings? A. From the facts stated to us and from our investigation, this Commission found that the Zoning Commission's decision should be sustained and that no modification should be made and that no permit should be granted for the erection of stores upon this land which has been zoned for residential purposes. We found, as a fact, that the erection of stores upon this particular land would increase the fire hazard in that neighborhood and that a refusal of a permit would decrease the likelihood of injuries to these thousands of children and others who would have to pass this property every day going to and from their school. We also found as a fact, that the stores in this neighborhood would add to the fire hazard and that a denial of this permit would minimize fire hazard. We also

found there is heavy traffic on the Boulevard, which is the main artery through Jersey City. No business vehicles are permitted except for loading and unloading. If stores are permitted to be erected, heavier traffic must be permitted at this particular location for the purpose of loading and unloading merchandise which would go into these stores.

"The builders are contemplating erecting eleven stores. Of course, the Commission is powerless to regulate the kind of business which should be carried on there and these stores may be rented to business concerns which would be detrimental to the children who must pass there every day. We are also of the opinion that the stores in this neighborhood would cause a congestion of population at that point and would deprive the people living in the private residences and in this apartment house from having a quiet place to live. Of course, we find, as a fact, that stores with persons going in and out, and merchandise being delivered from time to time, add considerably to the noise of the neighborhood.

"We also find that danger of fire and risk of contagion would be lessened by preventing the erection of stores in this locality and that generally the safety and health of the community would be promoted by denying this application for a permit" (Case, pp. 32-35).

The finding of these facts by the Commission upon this application was based not only upon their own personal knowledge and experience in Jersey City, but upon the reports of the heads of various departments and special investigators within their line of duty, whose depositions were also taken.

Inspector Wolfe, head of the Traffic Department of Jersey City, stated that from his investigation and experience the erection of the contemplated stores would increase the traffic congestion at that point and necessitate additional police protection

on that corner, and would tend to increase the danger of injury to children passing and repassing the *locus in quo* on their way to and from the school located on Duncan Avenue, one block and a half away. His testimony upon these important matters was as follows:

"Q. Inspector, have you made an inspection of the premises on the Boulevard and Fairmount Avenue in order to determine whether the erection of an apartment house with eleven stores will increase the traffic conditions? A. Yes, sir, I have made an inspection of that location and I find that that is a strictly residential section. Nothing but apartment houses and private houses of the best type are located there. To permit stores to be built in an apartment house on that corner would greatly increase the congestion and would necessitate new traffic regulations. The Boulevard is used for extensive automobile traffic and stores at that point would choke up the Boulevard if trucks and automobiles would stop there to either take on or leave off passengers, or load and unload merchandise. It would also require a traffic policeman to be stationed at that point, and there is no traffic policeman there now.

"I am also of the opinion that stores on that block would tend to increase accidents to children, because of increased traffic, for it is one and one-half blocks away from the school on Duncan Avenue known as Public School No. 17, to which thousands of little children go every day.

"Q. Will you say, Inspector, that the erection of stores on that corner will increase the traffic and result in confusion in that section? A. Yes, sir, it certainly will.

"Q. Have you so reported to the Commission before they acted upon the application of the relator for a permit for the erection of these stores? A. I have.

"Q. Inspector, will you now say from your

experience and knowledge of conditions in Jersey City that the refusal of a permit to erect these stores will increase the safety and security of home life, greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in this residential district? A. Yes, sir. There is no question about it" (Case, pp. 41-42).

Joseph Van Rosencrance, Inspector in the Bureau of Combustibles, charged with the duty of ascertaining fire hazards in Jersey City, testified that from his examination of the facts the erection of stores in that neighborhood would increase the fire hazard to the people in that community. His testimony upon that point is as follows:

"Q. Will you state from your examination whether the erection of stores on the corner of the Boulevard and Fairmount Avenue will or will not increase the fire hazard in that locality? A. The erection of eleven stores in an apartment house on that corner will most certainly increase the fire hazard in that neighborhood. That is strictly a residential section, free from stores, and the presence of stores undoubtedly would create a fire hazard in that section.

"Q. Why do you say that, Mr. Van Rosencrance? A. From my experience in that Department, and from my knowledge of affairs, I know that a great majority of the fires have their beginning in stores or mercantile establishments, and a comparatively few fires have their origin in apartments, so that wherever there are stores, a fire hazard is immediately created.

"Q. And is that true irrespective of the kind of business carried on in the stores? A. Yes, sir, because every store has waste; must pack and unpack merchandise; and always has a certain amount of inflammable material, which, of course, causes a fire hazard.

"Q. And did you report those facts to the

Commission prior to their acting upon the application of this relator for a permit? A. I did.

"Q. From your experience, therefore, and knowledge will you say that prohibiting the erection of stores in that neighborhood would tend to insure and secure the safety from fire hazard to the people of that neighborhood? A. To prevent the building of these stores will keep the fire hazard of that section at a minimum and will secure to the inhabitants of that section the least amount of fire hazard" (Case, pp. 44-45).

Arthur Swid, an insurance expert, who for many years was in the rate-making department of fire insurance companies for the State of New Jersey, testified that the presence of stores *ipso facto* raised the insurance premiums, not only in the building where the stores are located, but in the surrounding buildings, due to the fact that stores increase fire hazard in a locality where they are located. His testimony upon that point is as follows:

"Q. Will you please tell us whether the presence of stores in an apartment house increases or decreases, or makes any change at all in the rates of that apartment house? A. The best way to answer that question is this: If you have an apartment house without stores, say on the corner of the Boulevard and Fairmount Avenue, the rate would be lower than if you have an apartment house with stores in that same location.

"Q. So that the mere presence of stores in a building of themselves increases the rates? A. Yes, sir.

"Q. And why is that? A. Because the presence of stores increases the fire hazard.

"Q. Does the presence of stores in an apartment house increase the rates upon adjoining property? A. The presence of stores in a location not only increases the rates on the

building which has the stores (and which, as I have said, would have a low rate if there were no stores), but the said stores also increase the insurance rates or premiums on the adjacent buildings.

"Q. And will you tell us why that is so?

A. Because from our experience we have found that stores not only increase the fire hazard in the buildings in which the stores are located, but are also a fire hazard to the surrounding property" (Case, pp. 46-47).

It is to be noted that none of this testimony is in anywise controverted or disproved, and the testimony must therefore be taken as accepted by the relator, and subject to no modification.

The testimony therefore establishes, for the purpose of this case, that the erection of the contemplated stores will increase the fire hazard; will add a burden to the City by increasing police protection; will tend to add to the likelihood of injury to the thousands of children who pass the *locus in quo* daily to and from their school on Duncan Avenue; and what is of great importance, that a denial of the permit for the erection of these stores would promote the public health, safety and general welfare of the community. This latter finding was expressly made by the Commission according to Mayor Hague's testimony. His testimony is as follows:

"\* \* \* and that generally the safety and health of the community would be promoted by denying this application for a permit" (Case, p. 35, lines 17-20).

The Commission, therefore, having found these facts which are uncontroverted, this Court should not disturb them.

In the recent case of *Contras v. The Mayor and Aldermen of Jersey City*, No. 5, Misc. Rep., page 59, the Supreme Court held:

"Assuming as we must in the present state of the pleadings, that the erection of the contemplated building would tend to increase the fire hazard to the detriment of the community, we think that the refusal to grant the permit under such circumstances is within the police power of the municipality, and conclude that a peremptory writ of mandamus should be refused."

In the same case in the opinion reported in 4 Misc. Rep., page 680 the Supreme Court also declined to issue a peremptory writ on the ground that the prohibition in question was within the police power of Jersey City in conserving the health, safety and general welfare of the community. We therefore allege that the Supreme Court has in the *Contras* opinion definitely determined that where a City Commission refuses a permit upon the ground that it has found as a fact that a certain building will increase the fire hazard to the detriment of the community, such refusal is within the police power of the municipality. Aside from all other considerations, upon that authority alone, a peremptory writ in this case must be denied.

Our Supreme Court has also definitely decided that it will not disturb the findings of the Board of Adjustment created under the Zoning Acts where there is evidence to sustain it. *Chancellor Development Corp. v. Senior*, 4 Misc. 6-33. It is true that in that case the Court dealt with a finding of a Board of Adjustment, but the Board of Appeals, under the Jersey City Ordinance, acts as a Board of Adjustment and possesses all the powers which a Board of Adjustment has. Jersey City, prior to the 1924 Zoning Statute, had already promulgated its Zoning Law, under the authority of the 1921 and 1922 Statutes, which were repealed by the 1924 law. It already had a Zoning Com-

mission but under Section 6 of the 1924 Statute, all Zoning Laws and Zoning Commissions were legalized and considered to have been adopted under the 1924 Act. Section 7 of the 1924 Act provides for the establishment of a Board of Adjustment which acts as a Board of Appeals. The Jersey City Zoning Ordinance, under Section 12, provides for a Board of Appeals which possesses powers similar to those which the Legislature, under Section 7 of the 1924 Statute, vested in the Board of Adjustment (Case, p. 67). The City Commission constitutes the Board of Appeals and, by virtue of our Zoning Ordinance, possesses all of the powers conferred on the Board of Adjustment. Jersey City did not appoint a separate and distinct Board of Adjustment but still retains its Board of Appeals.

Section 6 of the 1924 Act, Chapter 146, provides:

"That wherever any municipality shall have adopted an ordinance, or ordinances, for any of the purposes covered by this Act, such ordinance or ordinances, shall be deemed to have been adopted under the provisions of this Act \* \* \*."

The Board of Appeals, therefore, as is now constituted under the Jersey City Zoning Law possesses all the powers which have been conferred by the 1924 Statute upon the Board of Adjustment. In 1926, Chapter 315, the Legislature passed an Act, approved March 31, 1926, which provides as follows:

"Whenever in any municipality there shall be established a board of adjustment as authorized by the act to which this act is a supplement, such board of adjustment in addition to the powers now vested in it shall have power to determine, on appeal to it, whether any ordinance adopted by such municipality pursuant to the provisions of said act, so far as

such ordinance affects the use of any property in relation to which such appeal is taken, tends to promote the public morals, health, safety or welfare; and if such board of adjustment shall determine on any such appeal that such ordinance does not, in such instance, so tend, such board of adjustment may modify or vary any requirement of said ordinance so far as it affects the user of the property in relation to which said appeal is taken."

This Act expressly gives to the Board of Adjustment the right to determine as a fact whether an ordinance "tends to promote the public health, safety and welfare."

Chief Justice GUMMERE has construed this Act in *Chancellor Development Corp. v. Senior, supra*, as vesting in the Board of Adjustment "a tribunal of review" the power to determine on appeal whether a particular building, located in a particular place, is a public menace to health, welfare or safety of the community. This decision, therefore, expressly gives the right of this Appeal Board, which, in the case of Jersey City is a Board of Appeals under our Zoning Ordinance, to determine, as a fact, whether in any given case a public menace is created.

The depositions in this case conclusively prove that there is evidence to sustain the findings of fact of the City Commission and, therefore, in the language of the Chief Justice, "it would be the end of relator's alleged right to a permit."

## POINT III.

**Under Ordinance, Exhibit "D-2" (pp. 69-71), which we will refer to in this brief as the Fire Hazard Ordinance, the Board of Commissioners have the power to determine whether a fire hazard exists and, if so, can reject an application for the erection of a five-story apartment containing eleven stories.**

The relator is seeking to erect a five-story apartment house which is to contain eleven stores on the ground floor.

The City Commission, pursuant to the Fire Hazard Ordinance, Exhibit "D-2" (Case, pp. 69-71), caused an investigation to be made of all the facts concerning this application. The matter was thoroughly investigated by Thomas J. Wolfe, Inspector of Police, Joseph Van Rosencrance, Inspector of the Bureau of Combustibles and Arthur Swid, an insurance expert, and they did report the result of their investigation to the City Commission before the relator's application was finally determined.

The testimony of these witnesses has been fully discussed under Point II, and we need not here repeat the same. Suffice it to point out they did report the result of their examinations to the City Commission before action was taken. Thomas J. Wolfe testified:

"Q. Have you so reported to the Commission before they acted upon the application of the relator for a permit for the erection of these stores? A. I have" (Case, p. 42, lines 16-20).

Joseph Van Rosencrance testified as follows:

"Q. And did you report those facts to the Commission prior to their acting upon the ap-

plication of this relator for a permit? A. I did" (Case, p. 45, lines 16-20).

The Fire Hazard Ordinance has already been passed upon by the Supreme Court in the case of *Caldwell v. Saul*, reported in No. 5 Misc. Rep. page 165, decided January 25, 1927, in which the Court said:

"Another good reason for refusing the permit is the fire hazard ordinance. This is attacked as invalid. In the case of buildings other than residential it gives power to the board of commissioners to refuse a building permit unless, in the judgment of the board, the proposed structure will not increase the fire hazard in the locality.

"It is claimed that this vests an arbitrary power in the board. But to this we do not agree. They are to act judicially; and the words 'may direct permit to issue' are doubtless mandatory as to cases where no extra hazard is found to exist. It is also claimed that this ordinance is invalid under the decision in *Ingersoll v. South Orange*, 3 N. J. Adv. R. 1407. But that case is very far from holding that owners may create any amount of fire hazard and the city must keep a fire department adequate to cope with it. The power to regulate building so as to minimize fire hazard is well settled. *Neumann v. Hoboken*, 82 N. J. L. 275; *Independent Penna Oil Co. v. Gloucester*, 4 N. J. Adv. R. 1532. As always, the question is whether the regulation is reasonable. In the case at bar, we have a garage with one thousand gallons of gasoline stored at the front door. It is reasonable for the commissioners to adjudge that there should be side access in case of fire. If side egress from a theater is essential and proper, why not access to or egress from a blazing garage? We think the ordinance not unreasonable as applied to this case, and for this reason also, as well as for that first stated, conclude that the rule to show cause should be discharged."

We, therefore, respectfully submit that the Fire Hazard Ordinance having been declared valid by the Supreme Court and the City Commission having caused an inspection to be made by the heads of the various departments, and the reports of these departments having been received by the City Commission before the application was acted upon, and after considering all of the facts the City Commission having determined the building of this apartment house with these numerous stores in that locality will create a fire hazard, the determination of the City Commission should not be set aside.

Respectfully submitted,

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CHARLES HERSHENSTEIN,  
Of Counsel for Respondents-Appellants.