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Writ of Certiorari.

Filed November 5, 1945.

New Jersey, ss:

The State of New Jersey to the
Municipal Council of the City of
Clifton,

(L. S.)

GREETING:

10

We being willing, for certain reasons, to be certified of a certain decision rendered on the 28 day of August 1945, by the Municipal Council of the City of Clifton, in relation to the application to said Municipal Council of the City of Clifton by Thomas F. Finn, and the rejection by the Municipal Council of the City of Clifton of an application to the said Municipal Council of the City of Clifton by the said Thomas F. Finn for a permit and license to conduct a gasoline station at the corner of Market Street and Allwood Road, Clifton, New Jersey, do command you that you certify and send under your seal, to our Justices of our Supreme Court of Judicature, at Trenton, on the 23 day of November 1945, the said decision of said Municipal Council of the City of Clifton above mentioned, together with all things touching and concerning the same, as fully and completely as they remain before you, together with this our writ, that we cause to be done thereupon what of right and justice and according to the laws of the State of New Jersey ought to be done.

20

30

WITNESS, THOMAS J. BROGAN, ESQUIRE, Chief Justice of our Supreme Court, at Trenton, this 7th day of November, 1945.

JAMES J. GAVIN,
Clerk.

40

AARON HELLER,
Attorney for Prosecutor.

Allocatur.

Filed November 5, 1945.

I allow the within writ. Let it be filed. November 3, 1945.

HARRY HEHER,
Justice of the
Supreme Court.

10

Petition for Writ.

Filed November 5, 1945.

NEW JERSEY SUPREME COURT

ON PETITION FOR WRIT OF CERTIORARI
AND ALTERNATIVE WRIT OF MANDAMUS.

20

THOMAS F. FINN,

Prosecutor,

vs.

MUNICIPAL COUNCIL OF THE CITY OF CLIFTON,
Respondent.

To the HONORABLE HARRY HEHER, one of the Justices of the New Jersey Supreme Court:

30 Your petitioner, Thomas F. Finn, residing in the City of Clifton, County of Passaic, and State of New Jersey, shows that:

1. Petroleum Holding Co., a corporation of the State of New Jersey, is the owner of premises located at the corner of Market Street and Allwood Road, Clifton, New Jersey; and your said petitioner is the holder of a lease upon said property.

40

Petition for Writ.

2. As the holder of the leasehold interest of said property said petitioner did on August 14, 1945, make application to the Municipal Council of the City of Clifton for a permit to operate part of said property as a gasoline station.

3. Petitioner shows that the said property is located in a business zone in accordance with the zoning act of the City of Clifton. Petitioner further shows that under the ordinance in effect in the City of Clifton property located in a business zone may be used for a gas station provided permission is obtained from the municipal council of the City of Clifton. 10

4. Petitioner further shows that under the ordinance regulating permission to be received for a gas station there is a specific provision that no permission shall be given by the municipal council unless the Chief Engineer of the Fire Department certifies that the use will not create a fire hazard and unless the Chief of the Police Department certifies that the use will not create a traffic or other hazzard, and the said ordinance then provides certain matters to be considered by the Engineer of the Fire Department and the Chief of the Police Department. 20

5. Petitioner further shows that application was made by him in writing in conformity with the ordinance for permission to use part of the property for a gas station, and that in conformity with the ordinance the Chief of the Fire Department and the Chief of the Police Department did certify that the use for which application was made, to wit, for a gas station for the particular premises located at the corner of Mar- 30

Petition for Writ.

ket Street and Allwood Road would not create a traffic, fire or other hazard.

10 6. Petitioner further shows that despite the recommendation of the Chiefs of the Fire and Police Departments, the City Council nevertheless held a meeting for the purpose of acting upon said application, and at that meeting did reject the application of said petitioner.

20 7. Petitioner further shows that under the ordinance there is no standard set up for the receiving of permission, which standard would be uniform to all persons owning property in a business zone, and that the ordinance does not sufficiently lay down rules and regulations for the obtaining of permission to operate a gasoline station business.

8. Petitioner charges that the ordinance is unconstitutional and unreasonable in that the Municipal Council does not have any power or authority, having zoned property in a business zone for a use as a gas station, to then leave it to the discretion of the Commission as to whether a license should be issued or not.

30 9. Petitioner further shows that the ordinance is unconstitutional in that the alleged discretionary powers have been designated to others rather than the Municipal Council itself.

10. Petitioner further shows that upon information and belief the Municipal Council of the City of Clifton can not legally reserve unto themselves discretion with respect to the granting or reversal of a license without stated rules and regulations, and consequently that part of the ordinance is unconstitutional and void.

Petition for Writ.

11. Petitioner further shows that in as much as the ordinance permits gas stations in a business district and in as much as the property is located in a business zone, petitioner is entitled to a license since the other part of the ordinance is unconstitutional and void.

11a. Petitioner further shows that petitioner proposes to erect upon the land for which application is made a modern gasoline station with the latest equipment and with all modern precautions against fire hazard and various safety features necessary to operate a safe gasoline station; that the said station after the erection thereof will not create a traffic hazard or any other hazard by reason of its occupation, in that the said station will have sufficient ingress and egress to the same and there will be no additional traffic hazard created upon the highway. 10 20

11b. As a matter of fact, petitioner avers that at the present time the particular corner is extremely dark at night and the property in its present status does not protect either pedestrians or automobiles on the highway by virtue of the fact that there is no lighting facilities at or near the property, but that if this petitioner erected a gasoline station there would be added protection for both traffic and pedestrians by reason of the contemplated equipment for illuminating the approaches and the entire area of the property. 30

11c. Petitioner further avers that the proposed station would in no way create any hazard but, on the contrary, would diminish any hazard which may be present.

12. Petitioner further shows that the property 40

Affidavit of Thomas F. Finn.

which is located at the corner of Market Street and Allwood Road, consists of a tract of approximately 106 feet on Market Street and approximately 62 feet on a vertex triangle and approximately 155 feet on Allwood Avenue.

- 10 Petitioner, therefore, prays for a writ of certiorari to review the action of the municipal council of the City of Clifton in refusing to issue the permit and for a writ of mandamus to compel the issuance of the said license.

THOMAS F. FINN.

Affidavit of Thomas F. Finn.

Filed November 5, 1945.

- 20 State of New Jersey, }
County of Passaic. } ss.:

THOMAS F. FINN, of full age, being duly sworn according to law upon his oath, deposes and says:

I am the petitioner in the foregoing petition and make the following statements:

- 30 1. Petroleum Holding Co., a corporation of the State of New Jersey, is the owner of premises located at the corner of Market Street and Allwood Road, Clifton, New Jersey; and I am the holder of a lease upon said property.

2. As the holder of the leasehold interest of said property, I did on August 14, 1945, make application to the Municipal Council of the City of Clifton for a permit to operate part of said property as a gasoline station.

- 40 3. I show that the said property is located in a business zone in accordance with the zoning act

Affidavit of Thomas F. Finn.

of the City of Clifton. I further show that I am informed that under the ordinance in effect in the City of Clifton, property located in a business zone may be used for a gas station provided permission is obtained from the municipal council of the City of Clifton.

4. I am informed that under the ordinance regulating permission to be received for a gas station there is a specific provision that no permission shall be given by the municipal council unless the Chief Engineer of the Fire Department certifies that the use will not create a fire hazard and unless the Chief of the Police Department certifies that the use will not create a traffic or other hazard, and the said ordinance, I am informed, then provides certain matters to be considered by the Engineer of the Fire Department and the Chief of the Police Department.

5. Application was made by me in writing in conformity with the ordinance for permission to use part of the property for a gas station, and that in conformity with the ordinance the Chief of the Fire Department and the Chief of the Police Department did certify that the use for which application was made, to wit, for a gas station for the particular premises located at the corner of Market Street and Allwood Road, would not create a traffic, fire or other hazard.

6. I am advised that despite the recommendation of the Chiefs of the Fire and Police Departments, the City Council nevertheless held a meeting for the purpose of acting upon said application, and at that meeting did reject the application of gasoline station, which I made.

Affidavit of Thomas F. Finn.

7. I am advised that under the ordinance there is no standard set up for the receiving of permission, which standard would be uniform to all persons owning property in a business zone, and that the ordinance does not sufficiently lay down rules and regulations for the obtaining of permission to operate a gasoline station business.

8. I am advised that the ordinance is unconstitutional and unreasonable in that the Municipal Council does not have any power or authority, having zoned property in a business zone for a use as a gas station, to then leave it to the discretion of the Commission as to whether a license should be issued or not.

9. I am further advised that the ordinance is unconstitutional in that the alleged discretionary powers have been designated to others rather than the Municipal Council itself.

9a. I further show that I propose to erect upon the land for which application is made a modern gasoline station with the latest equipment and with all modern precautions against fire hazard and various safety features necessary to operate a safe gasoline station; that the said station after the erection thereof will not create a traffic hazard or any other hazard by reason of its occupation, in that the said station will have sufficient ingress and egress to the same and there will be no additional traffic hazard created upon the highway.

9b. As a matter of fact, I aver that at the present time the particular corner is extremely dark at night and the property in its present status does not protect either pedestrians or automobiles on the highway by virtue of the fact that

Affidavit of Thomas F. Finn.

there is no lighting facilities at or near the property, but that if I erected a gas station there would be added protection for both traffic and pedestrians by reason of the contemplated equipment for illuminating the approaches and the entire area of the property.

9c. I further aver that the proposed station would in no way create any hazard, but on the contrary would diminish any hazard which may be present. 10

10. I am further advised upon information and belief that the Municipal Council of the City of Clifton can not legally reserve unto themselves discretion with respect to the granting or reversal of a license without stated rules and regulations, and consequently that part of the ordinance is unconstitutional and void. 20

11. I am advised that in as much as the ordinance permits gas stations in a business district and in as much as the property is located in a business zone, I am entitled to a license since the other part of the ordinance is unconstitutional and void.

12. I further show that the property which is located at the corner of Market Street and Allwood Road, consists of a tract approximately 106 feet on Market Street and approximately 62 feet on a vertex triangle and approximately 155 feet on Allwood Avenue. 30

THOMAS F. FINN.

Sworn to and subscribed before me
this 1st day of October, 1945.

Dolly Solnick,
Notary Public
of New Jersey. 40

Supplemental Affidavit of Thomas F. Finn.

Filed November 5, 1945.

NEW JERSEY SUPREME COURT

THOMAS F. FINN,

Prosecutor,

10

vs.

MUNICIPAL COUNCIL OF THE CITY OF CLIFTON,
Respondent.

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

THOMAS F. FINN, of full age, being duly sworn according to law, upon his oath deposes and says:

20 1. I have previously filed an affidavit in this matter.

2. Supplementing that affidavit I wish to call the Court's attention to the fact that after the filing of the application, I had a petition drawn which I took with me and interviewed owners of property within a radius of two hundred feet of the proposed station.

30 3. I have obtained upon that petition the signatures of approximately thirty-seven persons who are satisfied to have a gas station upon the particular location. As a matter of fact, a majority of those people who own property or who live within a radius of two hundred feet of the proposed station, actually consented in writing to such a station.

4. I do further state that that petition has been filed by me with the respondent and is now

Reasons.

in the record of the Clerk's office in connection
with this application.

THOMAS F. FINN.

Sworn to and subscribed before me
this 1st day of November, 1945.

Aaron Heller,
A Master in Chancery
of New Jersey.

10

Reasons.

Filed November 28, 1945.

NEW JERSEY SUPREME COURT

ON CERTIORARI.

20

THOMAS F. FINN,

Prosecutor,

vs.

MUNICIPAL COUNCIL OF THE CITY OF CLIFTON,
Respondent.

The prosecutor, by his attorney, comes and
prays that the action of the Municipal Council of
the City of Clifton may be set aside, reversed, and
for nothing holden, for the following reasons: 30

1. The ordinance of the City of Clifton, which
has been relied upon by the Municipal Council
of the City of Clifton in reversing to grant the
prosecutor a permit to erect a gasoline drive-in
station on a plot of ground at the corner of Mar-
ket Street and Allwood Road, in the City of Clif-
ton, is unconstitutional. 40

Return to Writ.

2. The ordinance under discussion is unconstitutional in that it delegates the power vested in the municipal body of the City of Clifton to others, contrary to the constitution of the State of New Jersey.

10 3. The prosecutor having complied with the ordinance, in every respect, the said Municipal Council of the City of Clifton arbitrarily and without just cause illegally refused to grant the permit to the prosecutor.

4. The ordinance relied upon is unconstitutional in that there are no uniform rules and regulations embodied in the ordinance.

AARON HELLER,
Attorney for Prosecutor.

20

Return to Writ.

Filed November 26, 1945.

NEW JERSEY SUPREME COURT

ON CERTIORARI.

30

THOMAS F. FINN,

Prosecutor,

vs.

MUNICIPAL COUNCIL OF THE CITY OF CLIFTON,
Respondent.

*To the Honorable, the Justices of the Supreme
Court of Judicature of New Jersey:*

40

In obedience to the command of the writ hereto annexed to the City of Clifton, I, William A. Mil-

Return to Writ.

ler, City Clerk of the City of Clifton, do hereby certify and send to the Honorable Justices of the Supreme Court of Judicature of New Jersey, the proceedings in relation to the application to the Municipal Council of the City of Clifton by Thomas F. Finn, requesting the approval of said Municipal Council for permission to install four (4) 550 gallon gasoline tanks and pumps for a drive-in station to be located at the southeast corner of Market Street and Allwood Road, Clifton, New Jersey, in accordance with certain plans and specifications filed with said application and the decision of the said Municipal Council upon said application rendered on September 4, 1945, together with all the records of the meetings and hearings of the Municipal Council of the City of Clifton and together with all things touching the same as fully as they remain in my office. 10 20

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 23rd day of November, 1945.

WILLIAM A. MILLER,
City Clerk.

I, WILLIAM A. MILLER, City Clerk of the City of Clifton, do hereby certify that the following is a true and correct copy of an ordinance entitled, "An Ordinance Supplementing 'An Ordinance Regulating and Restricting the Location of Trades and Industries, and the location of Buildings Designed for Specified uses'," passed March 20, 1928, as amended and published in accordance with law. 30

"THE CITY OF CLIFTON DOES HEREBY ORDAIN :

Section 1. In Residence 'A' Districts and Residence 'B' Districts no buildings or premises shall 40

Return to Writ.

be used and no building shall be erected which is arranged, intended or designed to be used as a Motor Vehicle Service Station.

10 Section 2. In business districts no building or premises shall be used and no building shall be erected which is arranged, intended or designed to be used as a Motor Vehicle Service Station, unless permission is first obtained from the Municipal Council of the City of Clifton.

20 Section 3. No such permission shall be granted unless the Chief Engineer of the Fire Department shall first certify in writing that such use will not create a fire hazard, and unless the Chief of the Police Department shall first certify in writing that such use will not create a traffic hazard or other hazard, and in arriving at such determination the Chief Engineer of the Fire Department and the Chief of the Police Department shall take into consideration the number and location of Motor Vehicle Service Stations then existing on the street or highway upon which such proposed Motor Vehicle Service Station is to be located, as well as the number and location of other Motor Vehicle Service Stations in the neighborhood of such proposed station, as well as
30 all other conditions which might tend to make such use hazardous.

40 Section 4. The number and location of Motor Vehicle Service Stations heretofore erected or in use or now being erected on Main Avenue between the Paterson City Line at Crooks Avenue and the Passaic City Line near Highland Avenue is such that it is hereby determined that the use of any other or further building or premises on said street between the aforesaid points as a motor vehicle service station will create conditions haz-

Return to Writ.

ardous to life and property and therefore no building or premises situate on Main Avenue between the Paterson City Line at Crooks Avenue and the Passaic City line near Highland Avenue shall be used and no building shall be erected on Main Avenue between the aforesaid points which is arranged, intended or designed to be used as a Motor Vehicle Service Station, other than those now being so used or now being erected to be so used. (As amended June 7, 1939) 10

Section 5. Any person or corporation violating any of the provisions of this ordinance shall be subject to a penalty of one hundred dollars for each offense and the Magistrate before whom conviction is had, may impose a penalty not exceeding the maximum of One Hundred Dollars herein fixed. 20

Section 6. All ordinances, or parts of ordinances, inconsistent with this ordinance, be and the same are hereby repealed, provided, however, that nothing in this ordinance contained shall be construed to amend, alter or repeal the provisions of 'An Ordinance Concerning Gasoline Tanks and Curblin Pumps,' and ordinances amendatory thereof or supplementary thereto, passed April 19, 1921. 30

Section 7. This ordinance shall take effect ten (10) days after publication and final passage.

Passed: January 3, 1935.

WILSON S. BROWER,
Chairman of the
Municipal Council.

Attest: WILLIAM A. MILLER,
City Clerk. 40

Return to Writ.

Approved: WILLIAM A. MILLER,
City Manager.

IN WITNESS WHEREOF, I have hereunto set my
hand and affixed the seal of the City of Clifton,
this 23rd day of November, 1945.

10

WILLIAM A. MILLER,
City Clerk.

CITY OF CLIFTON
NEW JERSEY

These premises are in the
BUSINESS Zone.

(Signed) W. JAUGSTETTER.

20

*Application for Permit to Install
Gasoline Tank and Pump*

To the Municipal Council:

The undersigned, hereby make application for
a permit to install four (4) 550 gallon gasoline
tank(s) and pump(s) in the City of Clifton, for
himself (owner) for a drive-in station to be lo-
cated at corner of Market St. & Allwood Rd.

30

If this application is approved, he agrees to
install the tank and pump in accordance with the
requirements of the City of Clifton, and will not
cover the tank over without the inspection and
approval of the Chief Engineer of the Fire De-
partment.

Fee \$64.00 enclosed (check-cash)

(Signed) THOMAS F. FINN
45 Burlington Road
Clifton, New Jersey

40

Date August 14, 1945

Return to Writ.

	<i>Tank Public</i>	<i>Tank Private</i>	<i>Line Curb</i>
Legal Fee			
Installation	\$15.00	\$5.00	—
Maintenance	1.00	1.00	\$5.00

AFFIDAVIT

10

State of New Jersey }
 City of Clifton } ss.
 County of Passaic }

THOMAS F. FINN of full age, being duly sworn upon his oath deposes and says:

(1) I reside at #45 Burlington Road, Clifton, New Jersey.

(2) I gave personal notice to all property owners within two hundred (200) feet of property affected by an application for a permit to install gasoline tank(s) and pump(s), for a drive-in station to be located at the corner of Market Street and Allwood Road, Clifton, New Jersey, at least five (5) days prior to the time appointed for hearing thereon by the Municipal Council of the City of Clifton. Such service was made in the manner following: 20

(A) By handing such notice, a copy of which is annexed hereto, to the following persons at the address and on the date set opposite each name: 30

<i>Name</i>	<i>Address</i>	<i>Date of Service</i>
Mrs. Margaret Smith,	2 Burlington Rd., Clifton	August 23rd, 1945
Mrs. Margaret Maguth Kievit,	655 Allwood Rd., Clifton,	August 17th, 1945
Mrs. Rose Cohen, <i>et al.</i> ,	3 Englewood Rd., Clifton,	August 17th, 1945 40

Return to Writ.

Joseph Davis, *et ux*, 7 Market Street, Clifton,
August 17th, 1945

Mrs. Ruth Braun, *et al.*, 114 Market Street, Clif-
ton, August 17th, 1945

E. Manley, *et ux.*, 4 Englewood Rd., Clifton, Aug-
ust 17th, 1945

- 10 (B) Giving such notice, a copy of which is
annexed, to the following property owners, by
leaving the same at the usual place of abode with
a person in charge thereof.

	<i>Name of Owner</i>	<i>Place of abode of owner</i>	<i>Date of Service</i>	<i>Person with whom notice is left</i>
	Leonard Evans, <i>et ux.</i> ,	8 Englewood Rd., Clifton	8/17/1945	Mrs. Evans
20	Tage Hendrikson, <i>et ux.</i> ,	3 Burlington Rd., Clif- ton	8/17/1945	Mrs. Hendrikson
	Charles F. Hahn, <i>et ux.</i> ,	7 Burlington Rd., Clif- ton	8/17/1945	Mrs. Hahn
	Earl Keller, <i>et ux.</i> ,	6 Burlington Rd., Clifton	8/17/45	Mrs. Keller
	Charles W. Stanley, <i>et ux.</i> ,	663 Allwood Rd., Clif- ton	8/1/1945	Mrs. Stanley

- 30 (C) Giving notice to the following owners
who are non-residents of the City of Clifton, by
sending a copy of annexed notice by registered
mail to the address set opposite the name of such
owners, which said address is the last known ad-
dress of such property owners as shown by the
most recent tax lists of the City of Clifton.

Name of Owner: Fidelity Union Title and Mort-
gage Company; Date of sending of registered
mail: August 17th, 1945; Address on Envel-
ope: 830 Broad Street, Newark, N. J.

Return to Writ.

Name of Owner: Brighton Mills; Date of sending
of registered mail: August 17th, 1945; Ad-
dress on Envelope: Shannon, Georgia.

Name of Owner: Robud Corp.; Date of sending
of registered mail: August 17th, 1945; Ad-
dress on Envelope: 21 Mt. Pleasant Avenue,
Livingston, N. J.

10

(D) Giving such notice, a copy of which is
annexed, to the following property owners, by
sending a copy of the annexed notice by regis-
tered mail, with postage prepaid, and return re-
ceipt requested, to the address set opposite the
name of such owners.

Name of Owners: Samuel A. Travers, *et ux.*;
Date of sending by registered mail: August
22nd, 1945; Address on envelope: Shorom
Mountain Road, Sharon, Conn.

20

(Signed) THOMAS F. FINN
(Thomas F. Finn)

Sworn to and subscribed before me
this 24th day of August, 1945.

(Signed) Mary D. Thorp
(Mary D. Thorp)

Notary Public
of N. J.

30

COPY OF NOTICE

To all property owners within 200 feet of prop-
erty known as Street, Clifton,
New Jersey.

Please take notice that the undersigned has
made application to the Municipal Council of the
City of Clifton for a permit to install four (4)
gasoline tank(s) and pump(s) in the City of

40

Return to Writ.

Clifton, to be located on property known as the corner of Market Street and Allwood Road, Clifton, New Jersey.

10 A public hearing on the said application will be heard by the Municipal Council, at the City Hall, Clifton, New Jersey, on the 4th day of September, 1945, at 8:00 P.M., at which hearing you may appear and be heard if you have any objections to said application.

Notices were signed by Thomas F. Finn.

COPY

NOTICE

20 To all property owners within 200 feet of property known as the corner of Market Street and Allwood Road, Clifton, New Jersey.

To—

30 PLEASE TAKE NOTICE, that the undersigned has made application to the Municipal Council of the City of Clifton for a permit to instal four (4) gasoline tanks and pumps in the City of Clifton, to be located on the property known as the corner of Market Street and Allwood Road, Clifton, New Jersey.

A public Hearing on the said application will be heard by the Municipal Council, at the City Hall, Clifton, New Jersey, on Tuesday, the 4th day of September, 1945 at 7:45 P.M., at which hearing you may appear and be heard if you have any objections to said application.

(Signed) THOMAS F. FINN
(Thomas F. Finn)

Return to Writ.

COPY

PUBLIC SAFETY DIVISION

August 27th, 1945

To Mr. William A. Miller
City Manager

Attached hereto please find a recommendation of approval for the installation of four (4) gasoline tanks and pumps for a drive-in station for the SE corner of Market Street and Alwood Road, City, from John Zanet, Ass't Chief, in charge of the Fire Department, in which I concur. 10

(Signed) PAUL DITTRICH
Actg. Chief of Police

COPY

FROM FIRE DEPARTMENT

August 27, 1945

To Mr. James N. Marsh:

In reference to the application of Thomas F. Finn, for a permit to install four (4) gasoline tanks and pumps, for a drive-in gasoline station on SE corner of Market Street & Allwood Road, Block #430 lots 58 to 62, Clifton, N. J. 30

Please be advised the application meets with my approval.

(Signed) JOHN ZANET
Asst. Chief.

Return to Writ.

COPY

6 Burlington Road
Clifton, N. J.
August 3, 1945

The Mayor and Councilmen
City of Clifton
Clifton, N. J.

10

Gentlemen:

20

Last evening a neighbor, Mr. Thomas F. Finn of 45 Burlington Road, called at my home and endeavored to secure my consent to placing a gas station on the triangular plot of ground formed by the intersection of Allwood Road and Market Street in the Allwood Section of Clifton. While Mr. Finn called the proposed building an "emporium" it is still a gas station to me. The architect's drawing of the proposed building looks very nice and the word "HOME" printed on the building leads me to believe that the Home Fuel Oil Company is the real builder. Mr. Finn did not deny my deduction but stated that he alone would operate the "emporium." Mr. Finn attempted to use the fact that he is a veteran of both World War I and II to influence me in approving his proposal but I am also a veteran of

30

World War I as well as being aware that I am too old to be of much use in our present conflict.

In December-1937 I purchased the property at 6 Burlington Road as a residence and I live there. I thought the area would remain a residential zone. Twice in the past eight years we of this neighborhood have had to object to the establishing of a gas station on the same spot and our City Officials have successfully defended their denial

40

in the Courts.

Return to Writ.

Because I reside within two hundred feet of the proposed "emporium" I hereby file my objection to the proposal. This objection may be premature but I hope you will bear it in mind when the proposal comes before you for a decision.

Respectfully yours,

10

(Signed) E. L. KELLER.
E. L. Keller

COPY

ALLWOOD CIVIC LEAGUE
OF
CLIFTON, NEW JERSEY

August 5, 1945
48 Orchard Drive
Clifton, N. J.

20

City Manager Miller
City of Clifton
Clifton, N. J.

Dear Sir:

It has come to our attention that a petition is being circulated among the residents of Allwood concerning an application for a service station at Allwood Road and Market Street.

30

In view of the previous decision in this matter and the many objections which were raised at that time, we hope that your past ruling will be upheld. In the event that a formal application is made and that a hearing is necessary, we would appreciate notification of that hearing so that the

40

Return to Writ.

citizens of Allwood may have a voice in this important matter.

Very truly yours,

(Signed) FRANK W. INNISS, JR.

Frank W. Inniss, Jr., Secy
Allwood Civic League

10

FWI:JM

COPY

August 7, 1945

City Manager Miller
Clifton, N. J.

Dear Sir:

20 I wish to go on record as being opposed to the proposal of erecting a gas station at Allwood Road and Market Street.

I bought a home in this community thinking it would be restricted from things of this nature. I feel that it would have a decided effect in lowering the value of neighboring property.

I earnestly request that you turn down this proposal.

Very truly yours,

30

(Signed) TAGE E. HENDRICKSON

3 Burlington Road
Allwood, N. J.

40

Return to Writ.

COPY

6 Burlington Road

Clifton, N. J.

August 24, 1945

William A. Miller, Esq.

City Manager

City of Clifton

Clifton, N. J.

10

Dear Mr. Miller:

Thank you for your letter of August 8th acknowledging my letter of August 3rd wherein I registered my objection to the erection of a gas station at the corner of Allwood Road and Market Street in Clifton.

Enclosed, for the information of the City Governing Body, is a notice delivered at my home by Mr. Thomas F. Finn. The notice, of course, apprises me that Mr. Finn has applied for permission to install four gasoline tanks and pumps within two hundred feet of my home. I take this means of reiterating my objection to the proposed gas station. There are three gas stations within easy walking distance of the proposed site—these three stations have been in existence for several years and are outside of the residential area. The proposed site is now a regularly established bus stop and a gas station here would create a hazard for bus passengers as well as an additional hazard for the children of the neighborhood.

20

30

Because of illness, it is probable that I shall not appear at the hearing on September 4th, so I hope you will accept this letter in lieu of a personal appearance in opposition to the proposal.

Yours very truly,

40

(Signed) E. KELLER.

Return to Writ.

COPY

NOTICE

To all property owners within 200 feet of property known as the corner of Market Street and Allwood Road, Clifton, New Jersey:

- 10 To Earl Keller, *et ux.*,
#6 Burlington Road,
Clifton, New Jersey.

PLEASE TAKE NOTICE, that the undersigned has made application to the Municipal Council of the City of Clifton for a permit to install four (4) gasoline tanks and pumps in the City of Clifton, to be located on the property known as the corner of Market Street and Allwood Road, Clifton, New Jersey.

- 20 A public hearing on the said application will be heard by the Municipal Council, at the City Hall, Clifton, New Jersey, on Tuesday, the 4th day of September, 1945, at 7:45 P.M., at which hearing you may appear and be heard if you have any objections to said application.

(Signed) THOMAS F. FINN
(Thomas F. Finn)

30

COPY

September 4, 1945

City Council
Clifton, New Jersey.

As a resident and property owner in the City Clifton, within 200 feet of the proposed site of the gasoline station at Market St. and Allwood

40

Return to Writ.

Road, I wish to urge you not to grant a permit for the erection of such a project.

Besides being a traffic hazard for residents, it has a tendency to reduce the residential character of the community, thereby evaluating the property.

Very truly yours,

10

(Signed) ELLSWORTH MANLY,

4 Englewood Rd.,

Allwood.

—
COPY

LEONARD EVANS

8 Englewood Road

Allwood, New Jersey

20

City Council,
Clifton, New Jersey.

As a resident and property owner in the City of Clifton, within 200 feet of the proposed site of the gasoline station at Market St. and Allwood Road, I wish to urge you not to grant a permit for the erection of such a project.

Besides being a traffic hazard for residents, it has a tendency to reduce the residential character of the community, thereby evaluating the property.

30

Very truly yours,

(Signed) LEONARD EVANS.

40

Return to Writ.

COPY

July 30th, 1945

Mayor and Council,
Clifton, New Jersey.

Gentlemen:

- 10 The undersigned, resident taxpayers of the City of Clifton in the area of the triangular property located at the point of Market Street and Allwood Road upon which the erection of a gasoline service station is contemplated, do hereby voice our approval to the said project.

- 20 In our opinion, the need for such service in this rapidly growing community is quite evident and becoming more essential as the post war period approaches. The plans of the proposed building and a painting portraying its modern design is appealing and in our opinion would be in keeping with the development and general characteristics of the location.

All considered, we approve the project and recommend action favorable thereto by you.

Respectfully submitted,

- 30 (Signed) Joseph Davis (Joseph Davis)
(Signed) L. Lee Starke (L. Lee Starke)
(Signed) Robert G. Braun (Robt. G. Braun)
(Signed) Gregory Zanetti (Gregory Zanetti)
(Signed) J. E. Hoffmire, Jr. (J. E. Hoffmire, Jr.)
(Signed) W. T. Knapp (W. T. Knapp)
(Signed) T. W. Matchett (T. W. Matchett)
(Signed) Ben Cohen (Ben Cohen)
Rose Cohen (Rose Cohen)
(Signed) C. V. Piltz (C. V. Piltz)
40 (Signed) Margaret J. Reis (Margaret J. Reis)
Leo H. Reis, Attorney

Return to Writ.

(Signed) S. A. Travers (S. A. Travers)
 (Signed) Margaret Kievit (Margaret Kievit)
 (Signed) E. L. Norcross (E. L. Norcross)
 (Signed) F. Maurer (F. Maurer)
 (Signed) E. M. Roemle (E. M. Roemle)
 (Signed) E. Manly (E. Manly)
 (Signed) E. B. Zabriskie (E. B. Zabriskie) 10
 (Signed) L. R. LaFrance (L. R. LaFrance)
 (Signed) H. E. Forbes (H. E. Forbes)
 (Signed) Stanley A. Leeks (Stanley A. Leeks)
 (Signed) Robert J. Russell (Robert J. Russell)
 (Signed) J. Dan Daly (J. Dan Daly)
 (Signed) H. Handzo (J. Handzo)
 (Signed) M. Clark (M. Clark)
 (Signed) Jack Clark (Jack Clark)
 (Signed) Wm. T. McCann (Wm. T. McCann)
 (Signed) Clifford E. Finkle (Clifford E. Finkle) 20
 (Signed) Margaret E. Smith (Margaret E. Smith)
 (Signed) Wm. Leeinghe

RESOLVED: That the application of Thomas F. Finn of 45 Burlington Road, Clifton, N. J. for permission to install four (4) gasoline tanks 550 gallons each and pumps for a drive-in gasoline station, on the premises known as SE corner of Market Street & Allwood Road, block #430, lots 58 to 62, Clifton, N. J. (business zone), be and the same is hereby denied, and 30

BE IT FURTHER RESOLVED that a check be drawn to the order of Thomas F. Finn, 45 Burlington Road, in the sum of \$64.00, refund of deposit left with application.

Return to Writ.

Introduced by Wm. Dewey

WM. DEWEY,
Mayor.

Adopted September 4, 1945

Attest W. A. MILLER,
City Clerk.

*Extract from the Minutes of a Meeting of the
City Council, Held on September 4, 1945.*

* * * * *

Communication, dated August 24, 1945, from Earl Keller, objecting to the erection of a gas station at the corner of Allwood Road and Market Street in this City, was read by the Clerk and it was regularly moved and seconded that the communication be received and filed. Motion carried.

Communication, no date, from Leonard Evans, objecting to the erection of a gas station at the corner of Allwood Road and Market Street in this City, was read by the Clerk and it was regularly moved and seconded that the communication be received and filed. Motion carried.

30 Communication, dated September 4th, 1945, from Ellsworth Manly, objecting to the erection of a gas station at the corner of Allwood Road and Market Street in this City, was read by the Clerk and it was regularly moved and seconded that the communication be received and filed. Motion carried.

40 Petition, dated July 30th, 1945, signed by Joseph Davis and thirty-seven (37) others, favouring the erection of a gas station at the corner of

Return to Writ.

Allwood Road and Market Street, was read by the Clerk and it was regularly moved and seconded that the petition be received and filed. Motion carried.

* * * * *

The following resolutions were read by the Clerk and were adopted each upon separate motion regularly made, seconded and carried, by roll call vote Councilmen Birmingham, Hamil, Meyer, Prins, Rittenhouse, Shershin and Mayor Dewey voted aye, as to each of such resolutions: 10

* * * * *

By Councilman Dewey: RESOLVED: That the application of Thomas F. Finn of 45 Burlington Road, Clifton, N. J., for permission to install four (4) gasoline tanks (550 gallons each) and pumps for a drive-in gasoline station on the premises known as SE corner of Market Street and Allwood Road, block #430, lots 58 to 62, Clifton, N. J., (business zone), be and the same is hereby denied, and 20

BE IT FURTHER RESOLVED that a check be drawn to the order of Thomas F. Finn, 45 Burlington Road, in the sum of \$64.00, refund of deposit left with application.

* * * * *

I, WILLIAM A. MILLER, Clerk of the City of Clifton, do hereby certify that the foregoing is a true and correct extract from the minutes of a regular meeting of the City Council held on September 4th 1945. 30

Rule to Show Cause re: Mandamus.

IN WITNESS WHEREOF I have hereunto
set my hand and affixed the seal
of the City of Clifton, this twenty
first day of Nov., 1945.

(Signed) WILLIAM A. MILLER,
City Clerk.

10

Rule to Show Cause re: Mandamus.

Filed November 5, 1945.

NEW JERSEY SUPREME COURT

ON MANDAMUS.

THOMAS F. FINN,

20

Prosecutor,

vs.

MUNICIPAL COUNCIL OF THE CITY OF CLIFTON,
Respondent.

30 Upon reading the petition and affidavit filed in
the above entitled cause, it is on this 3rd day of
November 1945, ORDERED that the said Municipal
Council of the City of Clifton do show cause be-
fore this Honorable Court at the State House in
the City of Trenton, on the third Tuesday of Jan-
uary, the 15th day of January, 1946, at eleven
o'clock in the forenoon of that day, or as soon
thereafter as counsel can be heard, why a peremp-
tory or alternative writ of mandamus should not
issue out of and under the seal of this Honorable
Court commanding the Municipal Council of the
City of Clifton to permit the corner of Market
40 Street and Allwood Road, Clifton, New Jersey,

Stipulation to Argue Both Writs Together.

to be used as a gasoline station, and it is further ordered that both parties have leave to take depositions.

Let this rule be entered in the minutes.

HARRY HEHER,
Justice of Supreme Court. 10

Stipulation to Argue Both Writs Together.

Filed December 15, 1945.

NEW JERSEY SUPREME COURT

ON WRIT OF CERTIORARI.
ON RULE TO SHOW CAUSE FOR MANDAMUS.

THOMAS F. FINN,

Prosecutor,

vs.

MUNICIPAL COUNCIL OF THE CITY OF CLIFTON,
Respondent.

and

THOMAS F. FINN,

Relator, 30

vs.

MUNICIPAL COUNCIL OF THE CITY OF CLIFTON,
Respondent.

It is hereby agreed by and between the attorney for the prosecutor-relator and attorney for the respondent that the above entitled cases be

Order Permitting Stipulation of Facts.

argued together before the New Jersey Supreme Court.

AARON HELLER,
Attorney for
Prosecutor-Relator.

10

JOHN G. DLUHY,
Attorney for Respondent.

Order Permitting Stipulation of Facts.

Filed December , 1945.

NEW JERSEY SUPREME COURT

ON RULE TO SHOW CAUSE FOR MANDAMUS.
ON WRIT OF CERTIORARI.

20

THOMAS F. FINN,
Prosecutor-Relator,

VS.

MUNICIPAL COUNCIL OF THE CITY OF CLIFTON,
Respondent.

30 This matter being opened to the court by Aaron Heller, attorney for and of counsel with prosecutor-relator with the consent of John G. Dluhy, attorney for and of counsel with the respondent and application being made for the filing of a stipulation of facts in lieu of the taking of depositions;

It is on this day of December, 1945, ORDERED that the stipulation of facts entered into between counsel be incorporated as part of the

40

Stipulation of Facts.

record in the above matter in lieu of the taking
of depositions.

HARRY HEHER,
Justice of Supreme Court.

I hereby consent to the entry of the order.

JOHN G. DLUHY, 10
Attorney for and of Counsel
with Respondent.

AARON HELLER,
Attorney for and of Counsel
with Prosecutor-Relator.

Stipulation of Facts.

NEW JERSEY SUPREME COURT 20

ON RULE TO SHOW CAUSE FOR MANDAMUS.
ON WRIT OF CERTIORARI.

THOMAS F. FINN,
Prosecutor-Relator,
vs.

MUNICIPAL COUNCIL OF THE CITY OF CLIFTON, 30
Respondent.

It is agreed by and between the attorneys for
the respective parties that the following stipula-
tion of facts be incorporated as the record in this
case, which stipulation is made in lieu of depo-
sitions.

1. The particular property for which applica-
tion was made for a gasoline license is owned by 40
the Petroleum Holding Co., a corporation, the

Stipulation of Facts.

said company having acquired ownership of said property by deed from Birchwood, Inc., bearing date, March 28, 1944, which deed recites that the property is sold subject to restrictions of record and subject to zoning ordinances of the City of Clifton. The prosecutor-relator, Thomas F. Finn,
 10 is a resident of the City of Clifton, County of Passaic, and State of New Jersey, and is the owner of a leasehold interest affecting property located at the corner of Market Street and Allwood Road, Clifton, New Jersey, a copy of the lease being attached hereto.

2. The said property is located in a business zone in accordance with the zoning ordinance of the City of Clifton. Gasoline service stations are permitted in the business zone, subject, however,
 20 to the ordinances set up in paragraph three.

3. The ordinances affecting gasoline stations in effect at the time of the making of the application are as follows:

(a) Ordinance passed by the City of Clifton, reading as follows:

ORDINANCE No. 2040

“The City of Clifton does hereby Ordain:

30 “Section 1. In Residence ‘A’ Districts and Residence ‘B’ Districts no buildings or premises shall be used and no building shall be erected which is arranged, intended or designed to be used as a Motor Vehicle Service Station.

“Section 2. In business districts no building or premises shall be used and no building shall be erected which is arranged, intended or designed to be used as a Motor Vehicle Service Station,
 40 unless permission is first obtained from the Municipal Council of the City of Clifton.

Stipulation of Facts.

“Section 3. No such permission shall be granted unless the Chief Engineer of the Fire Department shall first certify in writing that such use will not create a fire hazard, and unless the Chief of the Police Department shall first certify in writing that such use will not create a traffic hazard or other hazard, and in arriving at such determination the Chief Engineer of the Fire Department and the Chief of the Police Department shall take into consideration the number and location of Motor Vehicle Service Stations then existing on the street or highway upon which such proposed Motor Vehicle Service Station is to be located, as well as the number and location of other Motor Vehicle Service Stations in the neighborhood of such proposed station, as well as all other conditions which might tend to make such use hazardous. 10 20

“Section 4. The number and location of Motor Vehicle Service Stations heretofore erected or in use or now being erected on Main Avenue between the Paterson City Line at Crooks Avenue and the Passaic City Line near Highland Avenue is such that it is hereby determined that the use of any other or further building or premises on said street between the aforesaid points as a motor vehicle service station will create conditions hazardous to life and property and therefore no building or premises situate on Main Avenue between the Paterson City Line at Crooks Avenue and the Passaic City Line near Highland Avenue shall be used and no building shall be erected on Main Avenue between the aforesaid points which is arranged, intended or designed to be used as a Motor Vehicle Service Station, other than those now being so used or now being erected to be so used. (As amended June 7, 1939) 30 40

Stipulation of Facts.

“Section 5. Any person or corporation violating any of the provisions of this ordinance shall be subject to a penalty of one hundred dollars for each offense and the Magistrate before whom conviction is had, may impose a penalty not exceeding the maximum of One Hundred Dollars herein fixed.

“Section 6. All ordinances, or parts of ordinances, inconsistent with this ordinance, be and the same are hereby repealed, provided, however, that nothing in this ordinance contained shall be construed to amend, alter or repeal the provisions of ‘An Ordinance Concerning Gasoline Tanks and Curblin Pumps,’ and ordinances amendatory thereof or supplementary thereto, passed April 19, 1921.

“Section 7. This ordinance shall take effect ten (10) days after publication and final passage. Passed: January 3, 1935.”

(b) Another ordinance is as follows:

“Notice is hereby given that the above ordinance was passed at a regular meeting of the City Council and approved by the Mayor, and will be in full force in the City of Clifton, on April 23, 1921”

WILLIAM A. MILLER,
City Clerk.

“AMENDMENT

“An Ordinance to amend an Ordinance entitled ‘An Ordinance Concerning Gasoline Tanks and Curb-Line Pumps,’ passed April 19, 1921. No. 657 passed October 19, 1926.

“The City of Clifton does hereby ordain (1)

Stipulation of Facts.

That section one of the amendment to which this is an amendment be amended as follows:

“1. No person, firm or corporation shall install any gas tank or pump upon private property in the City of Clifton to be used for the sale of gasoline for retail purposes without first obtaining a permit therefor. Application for such permit shall be made through the office of the City Clerk who shall bring it before the Police and Fire Committee for investigation, and if the application is approved by them, permission to install such tank or pump may be granted by the City Council. 10

“It shall be unlawful for any person, firm or corporation to operate any gasoline or oil pump between the property line and the curb line of the streets of the City. Hereafter no license shall be given to operate any such pump, provided, however, this shall not apply to pumps now licensed and being so operated. 20

“(2) That Section 4 of the above entitled ordinance be and the same is hereby amended to read as follows:

“(4) That no tank shall be covered over without the inspection and approval of the Chief Engineer of the Fire Department. All tanks must be equipped with fill pipes and vent pipes of galvanized standard full weight wrought iron or steel pipe entering the tank through proper openings located in the top of the tank above liquid level. All connections must be of standard approved types. Vent openings must be screened with 30 x 30 bias mesh or its equivalent and must provide sufficient area to allow the proper flow of liquids during the filling operation, and must be 40 30

Stipulation of Facts.

provided with weather proof hoods and must terminate at a point at least Twelve (12) feet above the top of the fill pipe and at no time within three (3) feet of any window or building opening. The laying of fill or vent pipes on blocks or sticks is forbidden. All tanks are to be buried underground with the tops of the tank not less than two (2) feet and six (6) inches below the surface of the ground and below the level of any piping. All vent pipes must be one (1) inch galvanized iron.

“(3) All ordinances or parts of ordinances inconsistent herewith be and the same are hereby repealed and this ordinance shall take effect immediately.”

THOMAS SPENCER,
Chairman of City Council.

Passed: October 19, 1926.

NOTE: The City of Clifton does not have a police and fire committee since the adoption of the municipal manager form of government in 1934. Since then, all powers are vested in the municipal council.

4. On August 14, 1945, Thomas F. Finn did make an application for a permit to install four 550 gallon gasoline tanks in the City of Clifton for the particular property mentioned, and did pay the required fee of \$64.00.

5. That on September 4, 1945, the application came before the Municipal Council of the City of Clifton, at which time a public hearing was had upon the application. At the hearing before the Council the prosecutor-relator offered the following proof:

Stipulation of Facts.

(a) A statement from the Chief of Police reading as follows:

August 27, 1945

To: Mr. William A. Miller
City Manager

“Attached hereto please find a recommendation of approval for the installation of four (4) gasoline tanks and pumps for a drive-in station for the south east corner of Market Street and Allwood Road, City, from John Zanet, Ass't Chief, in charge of the Fire Department in which I concur.” 10

(Signed) PAUL DITTRICH
Act'g. Chief of Police.

(b) Another letter is as follows: 20

August 27, 1945

To: Mr. James N. Marsh:

“In reference to the application of Thomas F. Finn for a permit to install four (4) gasoline tanks and pumps for a drive-in gasoline station on south east corner of Market Street and Allwood Road, Block #430, lots 58 to 62, Clifton, New Jersey.” 30

“Please be advised the application meets with my approval.”

(Signed) JOHN ZANET
Ass't. Chief of Fire Dep't.

(c) The applicant made demand before the Council for the license applied for and gave evidence that the particular property was located in a business zone and further pointed out that there were no restrictions in the zoning ordinance 40

Stipulation of Facts.

against gasoline stations in such a zone, except the ordinances mentioned above.

10 (d) The applicant further pointed out that the Ordinance was unconstitutional for the reason that there were no standard rules and regulations set forth in the Ordinance #2040 and further that it was unconstitutional because it attempted to delegate the alleged powers of the Municipal Body.

(e) The applicant asserted that he would comply with all the rules and regulations concerning the installation and management of the gasoline station.

20 (f) The applicant testified that he was a resident of the City of Clifton, and a veteran of World War I and World War II; that in his opinion (although not being an expert) the erection of the proposed gasoline station would in no way become a traffic or fire hazard or any other hazard; that the proposed station would be of the latest design, with all modern precautions against fire hazard and with other safety features.

30 (g) The applicant submitted a petition signed by approximately thirty-seven taxpayers, all residing within the vicinity of the proposed gasoline station, who approved and recommended that the municipal body issue a permit. (The petition is annexed to the return to the writ of certiorari.)

(h) At the hearing before the council about five of the persons who signed the petition approving stated that they wished to withdraw their signatures and join with the objectors.

40 6. Evidence was produced by about twenty-five resident taxpayers in the vicinity of the pro-

Stipulation of Facts.

posed gasoline station (none of them being experts) that they objected to the issuance of a license and they testified as follows:

(a) That the proposed use would create a traffic hazard.

(b) That there were sufficient gas stations to serve the need for the section. 10

(c) That a similar application had been made for the same property on two occasions and that the Municipal Council of the City of Clifton refused to issue the license and that the action of the City of Clifton was upheld by the Supreme Court. In the case of *Phillips Oil Co. v. City of Clifton*, 120 N. J. L. 13; 197 Atl. 730 (1938). Also in 1940, in an unreported decision in the case of *Birchwood v. City of Clifton*. The decision in the *Phillips*' case is reported as indicated above. 20
The decision in the *Birchwood* case is as follows:

NEW JERSEY SUPREME COURT

No. 258 MAY TERM, 1940

BIRCHWOOD, INC.,

Relator,

vs.

30

JACOB KULIK, Building Inspector of the City of
Clifton and CITY OF CLIFTON,
Respondents.

Submitted May 1940; decided 1940

Before BROGAN, Chief Justice, and Jus-
tices PARKER and PERSKIE.

40

Stipulation of Facts.

For Relator: Frank J. Davies.

For Respondents, John G. Dluhy.

Per Curiam. (Not to be printed in any report.)

10 This is a rule to show cause why a peremptory or alternative writ of mandamus should not be awarded, commanding the municipal authorities to issue a building permit for the erection of a 'motor vehicle service station' on the corner of several busy thoroughfares in the business district of the City. The facts for the most part are stipulated. The Building Inspector refused a permit. There being no Board of Adjustment in Clifton at the time, appeal was made to the Municipal Council of the City, which held a hearing, and in turn denied the application.

20 We do not think that relator has presented such a case as justifies procedure by mandamus. Our examination of the case discloses the existence of a zoning ordinance and as part thereof, brought in by amendment, a specification of certain condition precedent to be met in order to support the issuance of a permit in such cases as the present one: and that those conditions were not met. That fact of itself justified the refusal of the permit without reference to other points involved.

30

The rule to show cause will be discharged, with costs.

Filed: July 15, 1940.

Fred L. Bloodgood, Clerk.

(d) That the proposed gas station would create danger to school children who cross the highway at a point where the proposed gas station would be located.

40

Stipulation of Facts.

(e) That letters of objection were sent to the City Council by certain residents and taxpayers in the area (see return to writ), and that there was no need for additional gas stations in the neighborhood.

9. At the conclusion of the hearing, the City Council had before it all of the above evidence and the argument of counsel for relator that the Ordinance was unconstitutional but, nevertheless, took the following action, resolved: 10

“That the application of Thomas F. Finn of 45 Burlington Road, Clifton, N. J., for permission to install four (4) gasoline tanks (550 gallons each) and pumps for a drive-in gasoline station on the premises known as SE corner of Market Street and Allwood Road, block #430, lots 58 to 62, Clifton, N. J., (business zone), be and the same is hereby denied, and 20

“BE IT FURTHER RESOLVED that a check be drawn to the order of Thomas F. Finn, 45 Burlington Road, in the sum of \$64.00, refund of deposit left with application.”

10. There was also before the Council the filing of the necessary application, the payment of the required fee and notification of people within the vicinity. (See the return to Writ of Certiorari.) 30

11. Attached hereto is a copy of the briefs by the relator and the respondent which were submitted to the Supreme Court in the case of *Birchwood v. Clifton*. These briefs are incorporated as part of this stipulation with the understanding, however, that it is the contention of the attorney for the prosecutor that they are no part of this case and would be properly objected to 40

Stipulation of Facts.

before a commissioner if one were taking testimony, and is, therefore, submitted as part of the record with the understanding that it is for this court to rule as to whether it is a proper subject matter for the record.

10

AARON HELLER,
Attorney for Prosecutor-Relator.

JOHN G. DLUHY,
Attorney for Respondent.

**Lease from Petroleum Holding Company to
Thomas F. Finn.**

20 THIS AGREEMENT, Between Petroleum Holding Company as Landlord, and Thomas F. Finn as Tenant

30 WITNESSETH: That the said Landlord has let unto the said Tenant and the said Tenant has hired from the said Landlord, property located at the corner of Market Street and Allwood Road, Clifton, New Jersey, which property is now vacant and it is the intention of the parties that the landlord will erect upon the said property a gasoline service station and show rooms, for the term five years to commence as soon as the buildings contemplated are erected and ready for occupancy by the tenant to be used and occupied as a gasoline service station, show room and repair shop upon the conditions and covenants following:

1st: That the Tenant shall pay the rent of \$4500.00, per year, payable \$450.00 per month to commence as hereinafter stated and to run for a period of five years.

40

Stipulation of Facts.

2nd: That the Tenant shall take good care of the premises and shall at own cost and expense make all repairs and at the end or other expiration of the term, shall deliver up the demised premises in good order or condition, damages by the elements excepted. 10

3rd: That the Tenant shall promptly execute and comply with all statutes, ordinances, rules, orders, regulations and requirements of the Federal, State and City Government and of any and all their Departments and Bureaus applicable to said premises, for the correction, prevention, and abatement of nuisances, violations or other grievances, in, upon or connected with said premises during said term; and shall also promptly comply with and execute all rules, orders, and regulations of the Board of Fire Underwriters for the prevention of fires, at own cost and expense. 20

4th: That in case the Tenant shall fail or neglect to comply with the aforesaid statutes, ordinances, rules, orders, regulations and requirements or any of them, or in case the Tenant shall fail or neglect to make any necessary repairs, then the Landlord or Agents may enter said premises and make said repairs and comply with any and all of the said statutes, ordinances, rules, orders, regulations or requirements, at the cost and expense of the Tenant and in case of the Tenant's failure to pay therefor, the said cost and expense shall be added to the next month's rent and be due and payable as such, or the Landlord may deduct the same from the balance of any sum remaining in the Landlord's hands. This provision is in addition to the right of the 30 40

Stipulation of Facts.

Landlord to terminate this lease by reason of any default on the part of the Tenant.

10 5th: That the Tenant shall not assign this agreement, or underlet or underlease the premises, or any part thereof, or occupy, or permit or suffer the same to be occupied for any business or purpose deemed disreputable or extra-hazardous on account of fire, under penalty of damages and forfeiture.

6th: That no alterations, additions or improvements shall be made in or to the premises without the consent of the Landlord in writing, under penalty of damages and forfeiture, and all additions and improvements made by the Tenant shall belong to the Landlord.

20 7th: That the Tenant shall, in case of fire, give immediate notice thereof to the Landlord who shall thereupon cause the damage to be repaired forthwith; but if the premises be so damaged that the Landlord shall decide to rebuild, the term shall cease and the accrued rent be paid up to the time of the fire.

30 8th: That said Tenant agrees that the said Landlord and Agents, and other representatives, shall have the right to enter into and upon said premises, or any part thereof, at all reasonable hours for the purpose of examining the same, or making such repairs or alterations therein as may be necessary for the safety and preservation thereof.

40 9th: The Tenant also agrees to permit the Landlord or its Agents to show the premises to persons wishing to hire or purchase the same; and the Tenant further agrees that on and after next preceding the expiration of the

Stipulation of Facts.

term hereby granted, the Landlord or Agents shall have the right to place notices on the front of said premises, or any part thereof, offering the premises "To Let" or "For Sale," and the Tenant hereby agrees to permit the same to remain thereon without hindrance or molestation.

10th: That if the said premises, or any part thereof, shall become vacant during the said term, or should the Tenant be evicted by summary proceedings or otherwise, the Landlord or his representatives may re-enter the same, either by force or otherwise, without being liable to prosecution therefor; and re-let the said premises as the Agents of the said Tenant and receive the rent thereof; applying the same, first to the payment of such expenses as it may be put to in re-entering and then to the payment of the rent due by these presents; the balance (if any) to be paid over to the Tenant who shall remain liable for any deficiency. 10 20

11th: That in case of any damage or injury occurring to the glass in the premises or damage and injury to the said premises of any kind whatsoever, then the said Tenant shall cause the said damage or injury to be repaired as speedily as possible at his own cost and expense. 30

12th: That the Tenant shall neither encumber, nor obstruct the sidewalk in front of, entrance to or halls and stairs of said building, nor allow the same to be obstructed or encumbered in any manner.

13th: The Tenant shall neither place, nor cause, nor allow to be placed, any sign or signs of any kind whatsoever at, in or about the entrance to said premises nor any other part of 40

Stipulation of Facts.

same except in or at such place or places as may be indicated by the said Landlord and consented to by it in writing. And in case the Landlord or its representatives shall deem it necessary to remove any such sign or signs in order to paint the premises or make any other repairs, alterations
 10 or improvements in or upon said premises or any part thereof, they shall have the right to do so, providing they cause the same to be removed and replaced at its expense, whenever the said repairs, alterations or improvements shall have been completed.

14th: It is expressly agreed and understood by and between the parties to this agreement, that the Landlord shall not be liable for any damage or injury by water, which may be sustained by
 20 the said Tenant or other person or for any other damage or injury resulting from the carelessness, negligence, or improper conduct on the part of any other Tenant or Agents, or Employees, or by reason of the breakage, leakage, or obstruction of the water or soil pipes, or other leakage in or about the said building.

15th: That if default be made in any of the covenants herein contained; then it shall be lawful for the said Landlord to re-enter the said
 30 premises, and the same to have again, re-possess and enjoy.

16th: That this instrument shall not be a lien against said premises in respect to any mortgages that hereafter may be placed against said premises, which mortgages are not to exceed in the aggregate the sum of _____ Dollars,
 and that the recording of such mortgage or mortgages shall have preference and precedence and
 40 be superior and prior in lien of this lease, irre-

Stipulation of Facts.

spective of the date of recording and the Tenant agrees to execute any such instrument without cost, which may be deemed necessary or desirable to further effect the subordination of this lease to any such mortgage or mortgages, and a refusal to execute such instruments shall entitle the Landlord assigns and legal representatives to the option of cancelling this lease without incurring any expense or damage, and the term hereby granted is expressly limited accordingly. 10

17th: The Tenant has this day deposited with the Landlord the sum of Dollars as security for the full and faithful performance by the Tenant of all of the terms and conditions upon the Tenants' part to be performed, which said sum shall be returned to the Tenant after the time fixed as the expiration of the term herein, provided the Tenant has fully and faithfully carried out all of the terms, covenants and conditions on part to be performed. 20

18th: That the security deposited under this lease shall not be mortgaged, assigned or encumbered by the Tenant without the written consent of the Landlord.

19th: It is expressly understood and agreed that if for any reason it shall be impossible to obtain fire insurance on the buildings and improvements on the demised premises in an amount, and in the form, and in fire insurance companies acceptable to the Landlord the latter may, if it so elect, at any time thereafter terminate this lease and the term thereof, on giving to the Tenant three days' notice in writing of its intention so to do and upon the giving of such notice, this lease and the term thereof shall terminate and come to an end. 30 40

Stipulation of Facts.

- 20th: It is expressly understood and agreed that in case the demised premises shall be deserted or vacated, or if default be made in the payment of the rent or any part thereof as herein specified, or if, without the consent of the Landlord, the Tenant shall sell, assign, or mortgage
- 10 this lease or if default be made in the performance of any of the covenants and agreements in this lease contained on the part of the Tenant to be kept and performed, or if the Tenant shall fail to comply with any of the statutes, ordinances, rules, orders, regulations and requirements of the Federal, State and City Government or of any and all their Departments and Bureaus applicable to said premises, or hereafter established as herein provided, or if the Tenant shall
- 20 file a petition in bankruptcy or be adjudicated a bankrupt or make an assignment for the benefit of creditors to take advantage of any insolvency act, the Landlord may, if it so elect, at any time thereafter terminate this lease and the term thereof, upon giving to the Tenant five days' notice in writing of its intention so to do, and upon the giving of such notice, this lease and the term thereof shall terminate, expire and come to an end on the date fixed in such notice as if said date
- 30 were the date originally fixed in this lease for the termination or expiration thereof.

All notices required to be given to the Tenant may be given by mail addressed to the Tenant at the demised premises.

- 21st: The Tenant shall pay the regular annual rent or charge, and all meter charges, which is or may be assessed or imposed upon the demised premises for Water, when due during the term,
- 40 and if not so paid, the same shall be added to the month's rent next accruing.

Stipulation of Facts.

22nd: The failure of the Landlord to insist upon strict performance of any of the covenants or conditions of this lease or to exercise any option herein conferred in any one or more instances, shall not be construed as a waiver or relinquishment for the future of any such covenants, conditions or options, but the same shall be and remain in full force and effect. 10

23rd: If after default in payment of rent or violation of any other provision of this lease, or upon the expiration of this lease, the Tenant moves out or is dispossessed and fails to remove any trade fixtures or other property prior to such said default, removal, expiration of lease, or prior to the issuance of the final order or execution of the warrant, then and in that event, the said fixtures and property shall be deemed abandoned by the said Tenant and shall become the property of the Landlord. 20

24th: In the event that the relation of the Landlord and Tenant may cease or terminate by reason of the re-entry of the Landlord under the terms and covenants contained in this lease or by the ejectment of the Tenant by summary proceedings or otherwise, or after the abandonment of the premises by the Tenant, it is hereby agreed that the Tenant shall remain liable and shall pay in monthly payments the rent which accrues subsequent to the re-entry by the Landlord, and the Tenant expressly agrees to pay as damages for the breach of the covenants herein contained, the difference between the rent reserved and the rent collected and received, if any, by the Landlord, during the remainder of the unexpired term, such difference or deficiency between the rent herein reserved and the rent collected, if any, shall be 30 40

Stipulation of Facts.

come due and payable in monthly payments during the remainder of the unexpired term, as the amounts of such difference or deficiency shall from time to time be ascertained.

10 25th: This lease and the obligation of Tenant to pay rent hereunder and perform all of the other covenants and agreements hereunder on part of Tenant to be performed shall in nowise be affected, impaired or excused because Landlord is unable to supply or is delayed in supplying any service expressly or impliedly to be supplied or is unable to make, or is delayed in making any repairs, additions, alterations or decorations or is unable to supply or is delayed in supplying any equipment or fixtures if Landlord is prevented or delayed from so doing by reason of
20 governmental preemption in connection with the National Emergency declared by the President of the United States or in connection with any rule, order or regulation of any department or subdivision thereof of any governmental agency or by reason of the conditions of supply and demand which have been or are affected by the war.

30 26th: It is agreed between the parties that this lease is made subject to approval by the City of Clifton for the contemplated business.

40 27th: It is understood that the tenant shall have the right in his own behalf to make application to the City of Clifton for the necessary permits to engage in the gasoline station business, and in the event of a refusal by the City to grant a permit the said tenant shall have the right to take such action as he may deem advisable for the purpose of enforcing the allowance of such a permit.

Stipulation of Facts.

28th: It is understood that if permission is received then the said landlord will commence construction of the building in accordance with plans and specifications which have been approved by the parties hereto within two months from the time that the permit is issued.

29th: Attached hereto and made a part hereof is a sketch indicating the property and the proposed buildings subject to the provisions in this lease.

10

And the said Landlord does covenant that the said Tenant on paying the said yearly rent, and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid.

And it is further understood and agreed, that the covenants and agreements herein contained are binding on the parties hereto and their legal representatives.

20

IN WITNESS WHEREOF, the parties have interchangeably set their hands and seals or caused these presents to be signed by their proper corporate officers and caused their proper corporate seal to be hereto affixed, this day of August 1945.

PETROLEUM HOLDING COMPANY

By LAWRENCE MARON,
President.

THOMAS F. FINN L.S.

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Brief of Relator in Birchwood Case.

NEW JERSEY SUPREME COURT

ON MANDAMUS.

10 BIRCHWOOD, INC., a corporation of the
State of New Jersey,
Relator,

VS.

JACOB KULIK, Building Inspector of the City of
Clifton and CITY OF CLIFTON,
Respondents.

20 **Brief of Frank J. Davies,
Of Counsel with Relator.**

A rule to show cause was allowed in this matter on April 9, 1940, why a peremptory writ of mandamus should not issue out of this Court commanding Jacob Kulik, Building Inspector of the City of Clifton and the City of Clifton to issue a certain building permit to the Relator to erect a motor vehicle service station at the junction of the southeast corner of Market Street and All-
30 wood Road, Clifton, New Jersey (C., p. 9).

Facts.

The facts are these:

40 Relator is the owner of a tract of land at the junction of the southeast corner of Market Street and Allwood Road, Clifton, New Jersey, the dimensions thereof being 80 feet on Market Street,

Brief of Relator in Birchwood Case.

by 89 feet on Allwood Road, by 100 feet across the third dimension.

Relator desired to erect a motor vehicle station on this property, and having prepared plans filed the same on March 12, 1940, together with an application for a building permit for the said station with the defendant, Jacob Kulik, Building Inspector of the City of Clifton, at the same time tendering him the legal fees required. Said plans complied in all respects with the requirements of the Building Code of the City of Clifton (paragraph 3 of Stipulation, C., p. 11). 10

The said defendant, Jacob Kulik, Building Inspector, refused to grant the permit in question on the ground that application therefor must be made to the Municipal Council of the City of Clifton (paragraph 4 of Stipulation, C., p. 11). 20

By virtue of an ordinance of the City of Clifton entitled "An ordinance regulating and restricting the location of Trades and Industries and the location of buildings thereon designed for specific uses, passed March 20, 1928," Relator's property is located in a business zone (paragraph 5 of Stipulation, C., p. 11).

The said ordinance was amended on January 3, 1935 as follows:

"Section 2. In business districts no building or premises shall be used and no building shall be erected which is arranged, intended or designated to be used as a Motor Vehicle Service Station, unless permission is *first obtained from the Municipal Council* of the City of Clifton." 30

Section 3 of the said amendment reads that no such permission shall be granted unless the Chief Engineer of the Fire Department shall first cer- 40

Brief of Relator in Birchwood Case.

tify that such use will not create a fire hazard and unless the Chief of the Police Department shall first certify that such use will not create a traffic or other hazard.

10 Another ordinance pertaining to gasoline tanks and pumps was in effect at the time the application for said building permit was made, said ordinance being entitled "An ordinance to amend an Ordinance entitled 'An ordinance Concerning Gasoline Tanks and Curb-Line Pumps' passed April 19, 1921. No. 657 passed October 19, 1926," (C., p. 16, l. 15). It provides:

20 " (1) No person, firm, or corporation shall install any gas tank or pump upon private property in the City of Clifton to be used for the sale of gasoline for retail purposes without first obtaining a permit therefor. Application for such permit shall be made through the office of the City Clerk who shall bring it before the Police and Fire Committee for investigation, and if the application is approved by them, permission to install such tank or pump may be granted by the City Council."

30 It becoming necessary to procure the consent of the Municipal Council to the erection of the said service station and the installation of the pumps and tanks, Relator, on March 13, 1940, petitioned the said Municipal Council, through the City Clerk, for said permission (paragraph 7 of Stipulation, C., p. 14).

40 In said petition, Relator agreed to install the tanks and pumps in accordance with the requirements of the City of Clifton and with the approval of the Chief Engineer of the Fire Department, the blank form of petition being furnished by the Clifton City Clerk (C., p. 27).

Brief of Relator in Birchwood Case.

After notice to surrounding property owners of the application to said Municipal Council and after a hearing thereon, the application was denied (C., p. 18, l. 6), and the City Manager notified Relator of the action of the Governing Body, at the same time returning Relator's deposit (Exhibit Rel. 2, C., p. 28). 10

Relator thereupon obtained the present rule to show cause and claims here that:

1. The said ordinances are invalid because they reserve to the Municipal Council, in its administrative capacity, an absolute discretionary power to grant or refuse the permit in question without reference to any prescribed or duly enacted rules or regulations;
2. Because there is no legislative authority for the enactment of such ordinances; 20
3. Said ordinances are unconstitutional and violative of both the State and Federal Constitutions, in that they deprive the Relator of the right to possess and enjoy its property, and thereby violate:
 - (a) The first clause of Article I of the Constitution of the State of New Jersey;
 - (b) paragraph 16 of Article I of the Constitution of the State of New Jersey; 30
 - (c) the 14th amendment to the Constitution of the United States.

It is admitted by the Respondents that the Relator's plans complied in all respects with the requirements of the Building Code of the City of Clifton (C., p. 11, l. 27). It is also admitted that the Building Inspector refused to grant the per- 40

Brief of Relator in Birchwood Case.

mit in question on the ground that application therefor must be made to the Municipal Council of the City of Clifton. Such an application was made and the permission in question refused by the Municipal Council. The application blanks furnished by the Respondents contemplate the
 10 permission of the Municipal Council as to the service station, tanks and pumps and the consent also of the Fire Department. It was filed with the City Clerk with the necessary fees, which were returned by the City Manager (Exhibit Rel. 2, C., p. 28).

THE LAW.

POINT I.

20

The ordinances are invalid because they reserve to the governing body, in its administrative capacity, an absolute discretionary power to grant or refuse the permission in question without reference to any prescribed rules or regulations.

By a reading of the said ordinances, it will be seen that there is an absolute discretion lodged
 30 in the Governing Body to grant or refuse this permit. There are no rules or regulations in either ordinance specifying or laying down the manner in which the discretion of that Body should be exercised. Such an ordinance is invalid.

The point was raised in the following cases:

Lipkin v. Duffy, 119 N. J. L. 366 (and at pp. 367 and 369):

40

“The ordinance in question is also unreasonable and *invalid because of a reserva-*

Brief of Relator in Birchwood Case.

tion of discretionary power in the governing body to decline and revoke licenses for sufficient cause appearing to such body, without specifying uniform rules and regulations to apply to all applicants.

“The attack upon the ordinance in the Supreme Court and here is three-fold. Prosecutor-appellant claims it is invalid because (1) it reserves to the board of aldermen, in its administrative capacity, an absolute discretionary power to grant or refuse licenses to applicants without reference to any prescribed or duly enacted rules or regulations; (2) because there is no legislative authority for the enactment of such an ordinance; and (3) because it makes an unlawful and improper discrimination against persons not residents of Paterson, contrary to constitutional guarantees.

“Without determining whether prosecutor-appellant would be entitled to have his conviction set aside if the sole objection to the ordinance was the illegal discrimination against him as a non-resident of the City of Paterson, we hold that the ordinance is invalid in its material features because of the improper provision for granting or withholding a license, and for that reason, under the above cases, the conviction is invalid and may be attacked on certiorari.”

In the case of *Keavey v. Randall*, 1 N. J. Misc. 311 (at p. 312), which is identical with this case, we quote:

“He further testified that in all cases he was compelled to go before the town council. On February 22d, 1922, the town council voted to deny a garage permit to Mr. Keavey. Mr. Keavey had made no application to the town council for a garage permit. His application was for a building

Brief of Relator in Birchwood Case.

10 permit. The defendants seek to justify their refusal to pass upon the application of Mr. Keavey by an ordinance passed on May 5th, 1920, entitled 'An ordinance to regulate the request and use of garages or parts of other buildings which are used for the storage of automobiles or other motor-driven vehicles.' The seventh section of this ordinance provides as follows: 'No building or part of building shall be used as an automobile garage or shelter if the use of any such building or part of building shall materially increase the fire hazard of adjacent property, nor shall any such building be hereafter converted to such use *unless a permit therefor shall have been first obtained from the town council upon blanks provided therefor.*'

20 "If this section be so construed as to require the consent of the town council to the erection of a building, as appears to be the position taken by the defendants, then we think that the ordinance is illegal in that it is discriminatory and does not apply to all persons alike. *An ordinance which leaves it within the control of a municipal body to grant some permits and refuse others is invalid.* South Orange v. Heller, 92 N. J. Eq. 505; Yick Wo v. Hopkins, 118 U. S. 356; In Re Wo Lee, 26 Fed. Rep. 471."

30 Likewise *South Orange v. Heller*, 92 N. J. Eq. 505 (and at pp. 506 and 507) is in point:

"A village zoning ordinance is invalid under P. L. 1920, p. 455, where it does not apply to all persons alike throughout the zone, but provides for special permits to be granted by the board of trustees of the village after a hearing.

40 "The third section of the ordinance provides:

Brief of Relator in Birchwood Case.

‘Section 3. In the residential section, designated as No. 2, hereafter no building shall be erected, altered or used as a factory, chemical works, public garage, power plant, slaughter-house, abattoir, shop or store for the sale of merchandise of any kind, excepting only such buildings as may now be in actual use for any of the said purposes, without a special permit to be granted only upon resolution of the board of trustees, and after a hearing, notice of which shall be advertised in a newspaper published in the village of South Orange at least once ten days prior to the date fixed for such hearing.’ 10

“It is charged that the defendant is about to erect a public garage in the prohibited area and the bill is filed to restrain him.

“I do not find myself called upon to pass upon the constitutionality of the legislation, or the jurisdiction of this court to enforce a municipal ordinance, or the propriety of interfering by injunction *pendente lite* where the right of law is not clear, or the question of fact whether the proposed building is to be a public or private garage, for I find that the ordinance upon which the complainant’s right to maintain this suit is predicated is without legal sanction and void. The power delegated to municipalities by the legislature is to fix zones within which certain supposedly obnoxious businesses are not to be carried on and buildings intended for these purposes are not to be erected, and the restrictions imposed are to be uniform and obligatory upon all persons and property alike throughout the zone. The ordinance, the basis of this suit, forbids infringement except, to use the language of the ordinance, ‘without a special permit to be granted only upon resolution of the board of trustees and after a hear- 20 30 40

Brief of Relator in Birchwood Case.

ing.' *The discretionary powers reserved to the trustees to give to one and withhold from another the privilege of violating the ordinance is not conferred by the act and is without legal force, and upon certiorari it would be declared without legislative authority and void.*"

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In *Drive-To Department Stores v. Newark*, 115 N. J. Eq. 222 (at pp. 225, 226), the Court said:

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"It must be conceded that complainants have an undeniable right to engage in the business of a department store. The ordinance forbids their so doing except, to use its language, 'without first having obtained from the board of commissioners of the city of Newark a license so to do, and having first paid a fee of one dollar.' *The power thus sought to be exercised is without legal force since it is not conferred by the act of the legislature. The commissioners have reserved to themselves discretionary power to give to one and withhold from another the privilege of engaging in a business otherwise entirely lawful except upon license, which they may grant or refuse.*

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"It is clear that the commissioners in the instant case are not acting or assuming to act under the provisions of the ordinance in question, and for the purposes of this case it is entirely unnecessary to decide or consider the question raised as to the validity of the ordinance, for the ordinance does not provide for revocation of license, and what is still more important, does not attempt to classify the kinds of business to be licensed into such as may be regarded as conventional and ordinary kinds of business. The attempt to interfere with the business of the complainants therefore is unlawful and unwarranted and not predicated upon lawful authority."

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Brief of Relator in Birchwood Case.

In *Peoples Trust Company of Bergen County v. Township of Teaneck*, recently decided and not reported, Mr. Justice BODINE said:

“That the Council recognized that their action was unreasonable is apparent, because the ordinance provides that the Council may issue permits for the construction of buildings in the affected area for the use of more than one family. *They cannot reserve to themselves any discretion. Such power voids the ordinance. When zoning ordinances cease to be universal the justification for their existence ceases.*” 10

“Justice DONGES said in *Lipkin v. Duffy*, 119 N. J. L. 366: ‘ * * * it is also well settled that the provisions vesting broad discretion in the board of aldermen to refuse a license whenever they deem it desirable likewise renders the ordinance invalid. This was settled in *South Orange v. Heller*, 92 N. J. Eq. 505, 113 A. 697, and in a number of cases in this state and other jurisdictions, including the Supreme Court of the United States. *Yick Wo v. Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220; *In Re Wo Lee*, C. C. 36 F. 471. In other words, the reservation of a discretionary power to grant or refuse is beyond the power of the municipal board. It may establish rules and regulations, but these must be uniform as to all persons.’ ” 20 30

In *Brandon v. Montclair*, 124 N. J. L. 135, there is some suggestion that before one attacks such an ordinance, there should be some evidence of a discrimination. But this does not appear to be the universal rule. However, in the present case there is, nevertheless, such a discrimination. From the only witness in the case, produced by the Respondents, it appears that such a use of 40

Brief of Relator in Birchwood Case.

one's property was permitted to others in the immediate neighborhood (C., p. 23, l. 20):

10 "Q. Now, so far as the facilities for gasoline supply for automobiles and motor vehicle service stations, are there, in your opinion, sufficient for that neighborhood which you are to build up? A. Yes, we have all we need in there. There is one, two, three, four, five—five that I can recall off-handed right in the immediate neighborhood there now.

"Q. That is up around the Nutley line? A. That is on both sides of my property.

"Q. When you say on both sides of your property, where are they located? A. There are two in Bloomfield right adjacent to my property on Bloomfield Avenue.

20 "Q. Yes? A. And there is one on the traffic circle, and there are two of them at the foot of Market Street.

"Q. Yes, but there are some up at the end of that tract? A. There are two there, yes."

Furthermore, it appears that the site in question is business property and is in the business center of the Allwood section of Clifton. The same witness testified at C., p. 25, l. 27:

30 "Q. Now, you know, I presume, that this is business property, this proposed site? A. Market Street, as I understand it, is business property.

"Q. And it is known, is it not, as the business center of Allwood? There is a collection of stores there? A. Yes, there are stores there.

"Q. Isn't it the local shopping center for Allwood residents? A. Yes, it is the shopping center."

40 It would therefore appear that the ordinances are invalid.

*Brief of Relator in Birchwood Case.***POINT II.****There is no legislative authority for the enactment of such ordinances.**

There is no legislative warrant whatsoever for the enactment of such an ordinance. In *Goldberg v. Mayor, &c., Jersey City*, 6 N. J. Misc. 564 (at p. 566), it was said: 10

“On behalf of the respondents it is argued that the relator’s remedy, if he has any, is properly, by certiorari, and not by mandamus, since the board of commissioners, to whom the application was made, upon the refusal of the permit by the superintendent, affirmed the action of the superintendent, by also refusing the permit. 20

“A complete answer to this contention seems to us to be, that since there is no board of adjustment of Jersey City, or a board analogous thereto in character, clothed with the judicial power of a board of adjustment, to review the granting or refusing of building permits by building inspectors or superintendents of buildings, and as the *board of commissioners of Jersey City is not clothed by legislative enactment with any judicial powers to review the action of the superintendent* or to relax or broaden the scope of the building ordinance, its refusal, therefore, to grant the relator’s application is subject to mandamus proceedings.” 30

In *N. J. Good Humor, Inc. v. Bradley Beach*, 124 N. J. L. 162 (at pp. 164 and 165), it was said (referring to the municipality):

“It has no inherent jurisdiction to make laws or adopt regulations of government; 40

Brief of Relator in Birchwood Case.

10 it is a government of enumerated powers, acting by a delegated authority. Any reasonable or fair doubt of the existence of the asserted power, or any ambiguity in the statute whence it springs, or those in *pari materia*, is to be resolved against the municipality, and the power is denied. Municipalities are to be confined within the limits that a strict construction of the grants of powers will assign to them. And the granted powers must be exercised in a reasonable manner. Carron v. Martin, 26 N. J. L. 594; Public Service Electric, &c., Co. v. Camden, 118 Id. 245, 255; Dartmouth College v. Woodward, 4 Wheat. 518, 578; 4 L. Ed. 629; Cooley Const. Lim (8th ed.) 391, 400."

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POINT III.**The ordinances are unconstitutional.**

The said ordinances deprive the Relator of the right to possess and enjoy its property, and violate thereby:

- (a) the first clause of Article I of the Constitution of the State of New Jersey;
- 30 (b) paragraph 16 of Article I of the Constitution of the State of New Jersey;
- (c) the 14th amendment to the Constitution of the United States.

Obviously, Relator is being deprived of the use of its property and without compensation therefor. There is no due process of law, since there are no valid laws whatsoever standing in its way. Relator is denied the equal protection of the laws

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Brief of Relator in Birchwood Case.

by being singled out as one who cannot enjoy privileges granted to others.

Relator has Exhausted the Remedies Provided.

Even though Relator's contention has that the ordinances in question are invalid and of no force whatsoever, Relator, nevertheless, exhausted the remedies that are provided by the Municipal Government of the City of Clifton to obtain its objective. It cannot be said that Relator has rushed into the Courts for relief when it was unnecessary. All the steps were taken, from the filing of the application for a building permit, the application to the City Clerk to obtain the approval of the Municipal Council for the building, tanks and pumps, and the final rejection of Relator's application by the Municipal Council. 10 20

The Previous Litigation Involved the Same Subject Matter.

It is only fair to state here that in the beginning of 1937 the owners of this property petitioned the Municipal Council of the City of Clifton for permission to erect a motor vehicle service station on the same property, as is here in litigation, which petition was denied; that on May 12, 1937 a writ of certiorari was obtained from the Supreme Court to review the action of the Municipal Council in refusing the permit in question, and that that litigation was resolved adversely to the owners of the property. 30

In that litigation there was no attack or challenge made upon the validity of the ordinances 40

Brief of Relator in Birchwood Case.

which are being here challenged. The case was confined to a review of the action of the Municipal Council in refusing the permission in question and the reasonableness of their action in so doing. There was no challenge to the legality of the ordinances. This is admitted by a stipulation entered into between counsel in this case (C., p. 18, l. 14). We anticipate that counsel for the Respondents will lean heavily upon the previous litigation. But we do not believe that there can be any waiver of an individual's constitutional rights, nor can it be said that by any act of omission can an invalid law be made valid.

The litigants in the previous litigation omitted to point out to the Court the legal infirmities in the ordinances which bar them from the enjoyment of their property. This is being done here. Relator has made no attempt to point out the reasonableness or unreasonableness of the action of the Municipal Council. It attacks here solely upon the legal struction under which the Municipal Council acted. Counsel for the Respondents, over objection, produced testimony as to the reasonableness of the Municipal Council's action, and over objection offered as an exhibit the State of the Case in the previous litigation.

We believe that that testimony and exhibit are not competent testimony in this case, since, as we have said, the question is merely one of the legality of the ordinances under which the Council acted.

*Brief of Relator in Birchwood Case.***Conclusion.**

In conclusion, we urge that the Council was without power to deny the application in question; that the power to so discriminate between citizens was not delegated by the legislature to the municipality, since it would permit the Council to exercise arbitrary discriminations; that the statute only delegates power to regulate and restrict the location of trades and buildings designed for specific uses in a designated area created and defined, but that all such regulations must be uniform in their application; that no one person can be given a privilege not enjoyed by all. In our opinion, the reservation in the ordinances of a discretionary power to be exercised for or against special owners of land upon the ground of public necessity, is not warranted by the statute providing for zoning districts, and is violative of Relator's constitutional rights. 10 20

We respectfully submit that the writ should issue.

Respectfully submitted,

DAVIES & DAVIES,
Attorneys of Relator.

FRANK J. DAVIES,
Of Counsel.

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Brief of Respondent in Birchwood Case.**NEW JERSEY SUPREME COURT**

ON RULE TO SHOW CAUSE WHY A WRIT OF
MANDAMUS SHOULD NOT ISSUE.

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BIRCHWOOD, INC., a corporation of the
State of New Jersey,

Relator,

vs.

JACOB KULIK, Building Inspector of the City of
Clifton and CITY OF CLIFTON,
Respondents.

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BRIEF OF RESPONDENTS.**Statement of Facts.**

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This matter is before the Court upon a rule to show cause why a peremptory Writ of Mandamus should not issue compelling the Building Inspector and the City of Clifton to issue a permit for the erection of a building to be used as a motor vehicle service station. The property for which such use is sought is located at the southeast corner of Market Street and Allwood Road, Clifton, N. J., and is in the business zone as shown upon the zoning map. The same site was the subject matter of an application to the City of Clifton in 1937, and the refusal of the Governing Body to issue a permit came before this Court on a Writ of Certiorari. (Present Case, pp. 29-32.) In that case wherein Relator was one of the prosecutors,

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this Court dismissed the Writ of Certiorari and

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held the action of the Governing Body proper. In its decision, this Court, speaking through Mr. Justice HEHER, pointed out that the Municipal Council had a discretion which it had not abused and that the following reasons given for refusal to grant the permit, were sufficient to sustain its action; to wit: that the site in question is located in the Allwood section of Clifton, being a recent development of one-family residences in accordance with a comprehensive plan for that section (Original Case, p. 54, lines 36-40, etc., and page 65, lines 35-40); that it is at a five-point intersection in the business center of this one-family residential district (Original Case, pg. 55, lines 26-30); that a public school located on Market Street serves the needs of residents north and south of Allwood Road, whose children must cross at this intersection to get to school (Original Case, pg. 53, lines 20-25) (Present Case, pg. 23, lines 1, etc.); that a policeman is stationed at such intersection during school hours; that Allwood Road is fairly heavily travelled; and that three hundred fifty (350) houses had been built prior to said matter being heard by the Court.

Evidence of the further development of that district shows that fifty-seven (57) new one-family residences have been built south of the site in question and west of Allwood Road, and that there is now in the process of development, the remainder of the tract now vacant, extending from the last mentioned new homes to the circle, thence along Bloomfield Avenue in a westerly direction, to the Nutley line. Upon completion of the last mentioned development, there will be added to this community, 500 more homes. (New case, pg. 22, lines 1-11). Children of persons residing in these new homes will have to cross Allwood Road at

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its point of intersection with Market Street, in order to attend the school on Market Street. (New Case, pg. 23, lines 1-20.)

10 Prior to February 4, 1930, the power to grant permits for use of property for motor vehicle service stations was vested in the Board of Adjustment, and required a permit from that Board. (New S. of C., pg. 12, lines 1-9.) On February 4, 1930, the Governing Body repealed that provision which required permits from the Board of Adjustment. (New S. of C., pg. 12, lines 8-10.)
 20 Between February 4, 1930 and January 3, 1935, the Governing Body of the City of Clifton exercised jurisdiction over granting of motor vehicle service stations in business zones. (New S. of C., pg. 12, lines 11-20.) On January 3, 1935, the zoning ordinance was amended so as to provide; that no motor vehicle service station would be permitted in any residence zone; that further gas stations on Main Avenue be prohibited; and that in business zones, permits must be obtained from the Municipal Council in accordance with the following provisions:

30 "SECTION 2. In business districts no building or premises shall be used and no building shall be erected which is arranged, intended or designated to be used as a Motor Vehicle Service Station, unless permission is first obtained from the Municipal Council of the City of Clifton.

40 SECTION 3. No such permission shall be granted unless the Chief Engineer of the Fire Department shall first certify in writing that such use will not create a fire hazard and unless the Chief of the Police Department shall first certify in writing that such use will not create a traffic hazard or other hazard, and in arriving at such deter-

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mination the Chief Engineer of the Fire Department and the Chief of the Police Department shall take into consideration the number and location of Motor Vehicle Service Stations then existing on the street or highway upon which such proposed Motor Vehicle Service Station is to be located, as well as the number and location of other Motor Vehicle Service Stations in the neighborhood of such proposed station, as well as all other conditions which might tend to make such use hazardous." 10

Application in this case was also made pursuant to provisions of an ordinance concerning gasoline tanks and pumps, pertinent parts of which are as follows:

"(1) No person, firm or corporation shall install any gas tank or pump upon private property in the City of Clifton to be used for the sale of gasoline for retail purposes without first obtaining a permit therefor. Application for such permit shall be made through the office of the City Clerk who shall bring it before the Police and Fire Committee for investigation, and if the application is approved by them, permission to install such tank or pump may be granted by the City Council." 20

"It shall be unlawful for any person, firm or corporation to operate any gasoline or oil pump between the property line and the curb line of the streets of the City. Hereafter no license shall be given to operate any such pump, provided, however, this shall not apply to pumps now licensed and being so operated." 30

"(4) That no tank shall be covered over without the inspection and approval of the Chief Engineer of the Fire Department. All tanks must be equipped with fill pipes and 40

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10 vent pipes of galvanized standard full weight wrought iron or steel pipe entering the tank through proper openings located in the top of the tank above liquid level. All connections must be of standard approved types Vent openings must be screened with 30 x 30 bias mesh or its equivalent and must provide sufficient area to allow the proper flow of liquids during the filling operation, and must be provided with weather-proof hoods and must terminate at a point at least twelve (12) feet above the top of the fill pipe and at no time within three (3) feet of any window or building opening. The laying of fill or vent pipes on blocks or sticks is forbidden. All tanks are to be buried underground with the tops of the tank not less than two (2) feet and six (6) inches below the surface of the ground and below the level of any piping. All vent pipes must be one (1) inch galvanized iron."

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Upon application made by relator, hearings were had before the Municipal Council, and after considering the same grounds and proofs as in the first case, together with additional proofs of the change in the district, the Municipal Council rejected the application. Under both ordinances, permission of the Municipal Council was required.

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*Brief of Respondent in Birchwood Case.***POINT I.**

Relator acquired the proposed site between 1928 and 1930, and having slept on its rights, cannot now attack the ordinance.

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Relator purchased the property in question some time in 1930 and as testified by Mr. Baldwin (Original Case, page 20, line 21) and admitted by Mr. Reis, the seller, it was sold for gasoline station purposes. (Original Case, page 91, line 9.) Relator delayed applying for a permit to use the property for a gas station until 1937. The record shows that the predecessor in title to relator had this property put in the business zone, (Original Case, pg. 87, lines 22-25) and when the City changed the requirements as to gas station permits, no attack was made until five years after its passage, even though relator bought the property for a gas station site. Since 1930, more than 350 one-family homes have been erected in the immediate vicinity of the proposed gas station site. (Original Case, pg. 85, lines 28-29.) Subsequent to its passage, a large number of one-family homes have been built in the immediate vicinity, and plans for the development of the remaining area for one-family residences are now being carried into effect. With homes built since this matter was heard in 1937 and those being built now, more than 550 residences will be added to this district, all in accordance with a comprehensive plan for its development.

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Certainly at such a late date, prosecutors should not be permitted to attack said ordinance. Relator stood by and said nothing when the Municipal Council passed the ordinance in question prohibit-

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ing in business districts as shown on the zoning map, the use of property for a motor vehicle station unless permitted by the Municipal Council.

10 Relator's predecessor in title, who constructed and sold more than 350 homes according to a comprehensive plan for a development of this district as a one-family residence community, with businesses to take care of family needs of the residents therein, took the profits from such sales without advising such purchasers of his intent to violate such plan of development. (Original Case, pg. 90, lines 13-30.) Having obtained such benefits by silence and inaction, relator should not now be permitted to assert his alleged property right against such a vast number of home owners, who have been lulled into the belief that no gas station would be erected on this site.

20 In addition thereto, relator, as one of the prosecutors in the certiorari proceeding brought before this Court at the October Term, 1937, made no attack upon the ordinance, and has permitted the belief that no further attempt would be made to use the property in question for gas station purposes. This is evidenced by the fact that this residential neighborhood has been further built up with one-family homes, and will, when completed to Bloomfield Avenue, have an additional 500
30 homes in the immediate vicinity of the proposed site. It may well be that plans for development of that district might have been substantially altered if relator had acted expeditiously. *No reason for such delay is advanced by the relator.*

The application by relator is addressed to the sound discretion of this Court, and it may refuse to grant a Writ of Mandamus if there has been an unreasonable delay in making the application,
40 especially if the delay has resulted prejudicially

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to the rights of respondent or others interested, or has brought about conditions that would make it almost impossible to do the acts which it is sought to compel. (30 C. J. 831.) Stated a different way, this rule permits the Court in the exercise of its discretion, to consider whether the delay in making the application is unreasonable or whether it has injured or changed the respondent's position or the public which it represents. *Clark v. Jersey City*, 42 N. J. L. 94. 10

In *Taylor v. Bayonne*, 57 N. J. L., page 376, the Court denied a writ of mandamus to compel the Governing Body of a municipality to try the relator before dismissal from the Police Department. Application in that case was made *three years* after the alleged dismissal. The Court on page 378 said: 20

“Taking all of these circumstances into consideration, this, in my judgment, is a proper case for the enforcement of the rule that the court will refuse a mandamus where there has been unreasonable delay in applying for it. Shortt Mand. 250; *Clark v. Jersey City*, 13 Vroom 94.

In determining what will constitute such unreasonable delay, regard should be had to circumstances which justify the delay, to the nature of the case and the relief demanded, and to the question whether the rights of the defendant or of other persons have been prejudiced by such delay. *People v. City Council of Syracuse*, 78 N. Y. 56; High Mand. 306. 30

Applying the rule thus stated, the present case will be found to be barren of any justification for delay, even assuming that this application had been made at the time the former writ was applied for in 1893, 40

17 MAY T. 1946

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OUR FILE:

May 23, 1946

NEW JERSEY COURT OF ERRORS AND APPEALS

Thomas F. Finn, :
Prosecutor-Relator-Appellant, :
-vs- : Case #17 - May Term
Municipal Council of the City :
of Clifton, :
Respondent-Appellee. :
:
:

In accordance with the permission granted by the Court upon oral argument, the prosecutor-relator-appellant submits the following cases for the court's consideration, to be included in the brief filed by the appellant.

1. Dorsey Motors, Inc. vs. Davis, 180 A. 396; 13 N.J.Misc. 620.
2. Phillips vs. East Paterson, decision rendered April 24, 1946, by Justice Bodine and which is reported in the New Jersey Law Journal issue of May 9, 1946, page 7.

ah/ds

Very respectfully yours,

Aaron Heller

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10 while, on the other hand, the nature of the action and the character of the relief sought are such that it could and should have been proceeded with promptly if at all. That the rights of the city must suffer, both in respect to the production of testimony and to the disarrangement of its public service from such a delay, is also self-evident. All of this is apart from the fact that relator confessedly merited his suspension by the mayor, and so pleaded, a circumstance that cannot, it is true, be used to excuse the board for not trying him, but can and does influence the court when asked, after a lapse of three years, to place him in *status quo* with respect to his right to a trial before the board."

See also:

20 *Drill v. Bowden*, 4 N. J. Misc. 326.

In *Glori v. Board of Police Commissioners*, 72 N. J. L. 131, the Court refused certiorari because application was made fifteen months later. In that case, even though the position of police officer had not been filed, the Court refused certiorari on the ground that sufficient excuse was not given for failure of prosecutor to apply for the writ sooner than fifteen months after the dismissal.

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In *Marjon v. Altman*, 120 N. J. L. 16, Mr. Justice HEHER, speaking for the Court, refused mandamus in a case involving dismissal of relator from a position to which he claimed tenure. The Court, on page 18 said:

40 "Relator is, it seems to us, indisputably guilty of laches. He instituted no proceeding for the enforcement of his asserted right until the filing of the petition herein on July

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22d, 1937. *While laches, in its legal signification, ordinarily connotes delay that works detriment to another, the public interest requires that the protection accorded by statutes of this class be invoked with reasonable promptitude. Inexcusable delay operates as an estoppel against the assertion of the right. It justifies the conclusion of acquiescence in the challenged action. This court has consistently frowned upon delays less glaring.*" (Italics ours.) 10

See also:

Neilley v. Passaic, 13 N. J. Misc. 283.

Jacoby v. Carteret, 12 N. J. Misc. 199.

McMichael v. South Amboy, 14 N. J. Misc. 183.

In *Belli, et al. v. Passaic*, 8 N. J. Misc. 641, the Court refused mandamus to several policemen who had been promoted on the eve of retirement of one commissioner whose successor would not recognize such promotions. In that case, there had expired three years before application for mandamus. The Court on page 642 said: 20

"The writs will be refused on the ground of laches alone, but we think the disturbance of the financial and administrative operations of the city naturally resulting from judicial intervention at this late date alike requires that the writs should not issue." 30

In the case at bar, relator has waited a period of five years from the time of passage of the ordinance herein questioned and such time it is charged, is unreasonable. As appears from the testimony, relator bought this property for gas station purposes. It did not question the ordinance when passed nor has it done so until this date. Since 40

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passage of the ordinance, the neighborhood has increased in the number of one-family dwelling homes, and will increase in the near future. It has been developed with a plan in mind to limit Market Street to use for business purposes in supplying the one-family residences. There is evidence
 10 of desire to use the tract of land immediately adjacent the proposed site to the south, for playground purposes, (Original Case, pg. 31, lines 32-35). It may well be assumed that the original plan of developing the Allwood section of Clifton has followed in rapid strides because it has been in compliance with the original plan and no structures or uses have been permitted which would increase congestion or affect the value of homes in the vicinity.

20 The above rule should especially be applied to relator because in 1937, he, as one of the parties to the Certiorari proceedings instituted in this Court, questioned the validity of the action of the Governing Body of Clifton in denying a permit but disregarded any alleged infirmity in the ordinance. In view of the presumption of validity which the law casts upon ordinances of municipalities, and the fact that relator did not attack the ordinance when it instituted such litigation,
 30 relator waived its right to do so and is now estopped. The property owners and public in the Allwood section have been lulled into a sense of security, and the section has progressed as a one-family residential neighborhood in the belief that this corner would not be a gas station nor would any other property be used for purposes beyond the original plan.

Granting relator a Writ of Mandamus at this time will prejudice the neighborhood scheme and
 40 the values of property in the Allwood section be-

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cause the erection of such a building and the use of this property for gas station will change the plan for development and preclude the use of the adjoining property for park and playground purposes.

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POINT II.**The matter is res adjudicata.**

At the time that relator, as one of the prosecutors, obtained a writ of certiorari claiming a right to a permit for the use of the premises in question for a gasoline service station, it was its duty to include in the Reasons for Reversal of the municipal action, all points involving questions of law and fact. The rule is so well settled that it needs no citation of authorities. Any point that the relator had should have been raised in the proceeding first brought in the year 1937. Having failed to claim an alleged invalidity of the ordinance, relator has waived such right and cannot do so now. It also follows that once having applied for a permit to the municipal authorities and having sought a review of the action of the Municipal Council, the matter concerning the right of relator for a permit to use its property for a drive-in gasoline service station is now *res adjudicata*. It cannot seek the process of this Court so as to bring before it one point and if it fails to win on that point, seek to do so on some other point which it could have raised in the first proceeding. The matter is now settled by judgment of this Court and should be a bar to any further proceedings of this nature relative to the right of relator in this property.

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POINT III.

10 **Relator does not question the validity of an ordinance regulating the installation of gasoline tanks and pumps and thereby admits the Council's right to refuse the application made by it.**

20 The application in question was made to the Municipal Council because of the amendatory zoning ordinance and the ordinance regulating gasoline tanks and curb-line pumps. (New S. of C., pgs. 14-17.) The application under the latter ordinance was necessary because a permit was requested for the installation of gas tanks and pumps, and the refusal of the Municipal Council was under both ordinances. The writ is not sought to compel the City to issue tank and pump permits, for neither the petition nor the rule itself request such relief. Both the petition and rule (Present Case, page 9) refers merely to the issuance of a building permit granting permission to relator to erect a certain structure to be used as a drive-in service station.

30 But even if a writ is sought to compel the issuance of such permit, relator is not entitled to the relief sought as the ordinance gives the Municipal Council a discretionary right to grant or reject such application.

40 There is no question but that the City of Clifton is empowered under the Home Rule Act, Rev. Stat. 1937, 40:48-1 Sub. 15, to regulate the issuance of permits for installation of gas tanks and pumps. *Independent Pennsylvania Oil Co. v. Gloucester*, 102 N. J. L. 502; *Morgan v. Collingswood*, 104 N. J. L. 13, and cases therein cited.

The City of Clifton passed a regulation which re-

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quires a permit for such installation of gas tanks and pumps identical in language with that upon which an attack is now made, but relator does not raise any question as to its validity. A refusal to grant a permit under said ordinance was brought before this Court upon an application for a Writ of Mandamus, in *Bashlow v. City Council, City of Clifton*, 118 N. J. L., 390. The Court considered the reasons for refusal to grant such a permit and denied the application for a mandamus on the ground that the action of the Council was discretionary, and no fraud or abuse of discretion was shown. 10

Since no attack is made upon the ordinance regulating installation of gas tanks and pumps, and the Council had a right to reject relator's application thereunder, the right thereto is not clear and mandamus cannot therefore issue. *Uszkay v. Dill*, 92 N. J. L., 327; *Sylvester v. Princeton*, 104 N. J. L., 18. 20

POINT IV.

The amendatory zoning ordinance is valid as the governing body had the right to reserve unto itself the power to pass upon applications for gas stations. 30

The original zoning ordinance as passed in 1928 required a permit from the Board of Adjustment in applications for gas station permits in business zones. On February 4, 1930, the Governing Body repealed that provision which required a permit from the Zoning Board, there being no legislation on the subject until the amendatory 40

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zoning ordinance under attack was passed. During all this time the Municipal Council heard applications for gas stations and granted permits. The relator purchased its property about the year 1930, when this repealer was passed, and took no action even though it claims to have bought the property for use as a gas station. The ordinance in question must be considered as a whole as section 2 thereof, which relator points to, is not the whole ordinance. Reading of ordinance No. 2040 (Present Case, pgs. 12-14) clearly shows a definite policy of the Governing Body to regulate the location and use of gas stations. It provides a prohibition against such use in residential zones while in business zones, it requires permission from the Governing Body. Section 3 and 4, however, are part and parcel of Section 2 and should be read with it, as Section 3 begins with the words, "no such permission shall be granted." These words definitely refer to the permission set forth as a requirement in Section 2 and then provide for certification by the Chief of the Fire and Police Departments regarding fire, traffic and other hazards. Section 4 prohibits any further location and use of gas stations along Main Avenue because "it is hereby determined that the use of any other or further building or premises on said street as a motor vehicle service station will create conditions hazardous to life and property."

The Governing Body of the City of Clifton had the right to retain unto itself jurisdiction over granting of permits for gas station purposes, in the exercise of powers conferred upon it by the Home Rule Act, Rev. Stat. 1937, 40:48-1 Sub. 15. See also: *Independent Pennsylvania Co. v. Gloucester*, *supra*; *Morgan v. Collingswood*, *supra*. In the latter case, the Court on page 16 said:

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"It was lately pointed out in *A. G. Construction Co. v. Scott*, 136 Atl. Rep. 207, that the courts recognize the hazard connected with the storage and sale of gasoline at service stations and further recognize the right of the governing body of each municipality to reasonably regulate this class of construction and business and to prohibit it where necessary. See, also, *Hench v. City of East Orange*, 130 Id. 363; *Ninth Street Improvement Co. v. Ocean City*, 90 N. J. L. 106; affirmed, 91 Id. 703." 10

See also: *Capital Homes, Inc. v. Dandrow*, 15 N. J. Misc., 634. *This power also exists under the Zoning Act.*

In *Hirschorn v. Castles*, 113 N. J. L., 277, the Court granted a Writ of Mandamus, because the ordinance in that case did not require the assent of the municipal governing body. Mr. Justice HEHER, in his opinion said on page 279: 20

"We are not to be understood, by the citation of this line of cases, as challenging, by implication, the power of the municipal governing body to reserve, in the exercise of the authority conferred by the Zoning Act (Pamph. L. 1928, p. 696), control over the number and location of gasoline service stations in the zones in which they are not prohibited by the terms of the zoning ordinance. It may well be that, due to the traffic, fire and other hazards incident to the operation of such stations, this use is subject to special regulation. But there was no such reservation of control in the instant case, and we are not, therefore, required to pursue the matter further." 30

In *Meslar v. Township Committee of Denville*, 14 N. J. L., 497, application was made for a Writ 40

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of Mandamus to compel issuance of a permit for a gasoline station. The Court approved the above language of *Hirschorn v. Castles*, *supra*, in the following language on page 498:

10 “Nor is it here made to appear that there was any reservation of control by the municipal governing body over the number and location of gasoline service stations in the zones in which they are not prohibited by the zoning ordinance. In fine, the facts and issues involved in this case are strikingly similar to those in *Hirschorn v. Castles*, 113 N. J. L. 277; 174 Atl. Rep. 211. In that case we held that where premises to be erected in a municipality are suitable for the purpose for which it is designed, and the business to be so conducted is permissible under the terms of the zoning ordinance in the district in which the lands are located, and the zoning ordinance does not require the assent of the building inspector or the municipal body as a prerequisite to the right to conduct a business of the character proposed, the refusal of the requested permit was arbitrary, capricious and unreasonable.”

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30 In *Schnell v. Township Committee of Ocean*, 120 N. J. L., 194, Mr. Justice HEHER, in an opinion vacating proceedings upon application for a gas station permit, construed an ordinance of the Township of Ocean which provided that no permit therefor be issued except upon application first made to the Board of Adjustment which was empowered to recommend in writing to the Township Committee that a permit be granted if in its judgment it would not be detrimental to health, safety and general welfare, and was reasonably necessary for the convenience of the community, with a proviso that no such gas station

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be permitted in any residence zone. The question was whether this provision was a valid one, and the Court on page 196 said:

“Of necessity, the factor of safety in several of its aspects, as well as the public convenience, enters largely into the determination of the location and the physical characteristics of these service stations. Reasonable regulation as respects such land uses, guided by these considerations, is therefore embraced within the police power. See *Hirschorn v. Castles*, 113 N. J. L. 277; *Bashlow v. City Council of Clifton*, 118 Id. 390; *Meslar v. Township Committee of Denville*, 14 N. J. Mis. R. 497. As pointed out in *Phillips Oil Co. v. Municipal Council of Clifton*, 120 N. J. L. 13, section 5 of the Zoning Act, *supra*, directs that zoning regulations shall be designed, *inter alia*, to obviate unnecessary traffic hazards; to ‘secure safety from fire, panic and other dangers’; and to subserve the ‘general welfare.’”

In *Dickinson v. Plainfield*, 122 N. J. L. 63, the action of the Board of Adjustment in refusing an exception so as to *permit a gas station in a business zone* was reviewed by this Court. The ordinance under attack in that case is similar to the one in the case at bar, in that, the application affected a site in a business zone where no gas stations are permitted, but differs in that in the above case the Board of Adjustment may recommend to the governing body an exception, while in the case at bar, the governing body alone determines if an exception should be made. There the Board of Adjustment as in the case at bar denied the application because “such stations by their very nature and construction create traffic congestion, due to the creation of an entering and

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leaving flow of traffic which has to emerge with, or break out of, or cross the flow of through traffic."

Mr. Justice DONGES, in his opinion, held that neither the ordinance nor the action of the Board of Adjustment was unreasonable.

- 10 The ordinance in question is a valid exercise of power delegated to the City by the above statutes and it therefore becomes necessary to consider to what extent the City may go in either granting or rejecting a permit in each specific case.

POINT V.

- 20 **In reserving the power under the zoning ordinance to grant permits for gas stations, the Council's powers were limited to those enumerated in the Zoning Act.**

- 30 In the case at bar, the right to pass upon applications for gas station permits is not a discretionary one to either reject or grant a permit as the Council sees fit. That is not contended in this case nor do we think that such a contention would be valid. The right to grant or reject a permit under sections 2 and 3 of said amendatory zoning ordinance is limited to and must come within Section 5 of the Zoning Act of 1928, Rev. Stat. 1937-40:55-32. In that statute the Legislature delegated to the municipalities the right to restrict the use of property in accordance with the following purposes:

- 40 Such regulations shall be made in accordance with a comprehensive plan and designed for one or more of the following purposes: To lessen congestion in the streets; to secure safety from fire, panic and other

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dangers; to promote health, morals or the general welfare; to provide adequate light and air; to prevent the overcrowding of land or buildings; to avoid undue concentration of population. Such regulation shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view of conserving the value of property and encouraging the most appropriate use of land throughout such municipality. 10

It is contended by the Respondents, that the amendatory zoning ordinance comes within said statute and the doctrine above laid down in *Hirschorn v. Castles, supra*, and cases thereafter following it. In regulating the number and location of motor vehicle service stations, the Council has the right to reject an application for a gas station permit in a business zone, in accordance with sections 2 and 3 which require the Chief of the Fire and Police Departments to investigate the application and certify in writing whether such use will create a fire, traffic or other hazard, and directs that such officials shall take into consideration the number and location of service stations then existing upon the street upon which such use is sought, as well as other motor vehicle service stations in the neighborhood and other conditions which might tend to make such use hazardous. Upon the report of such officers, the Council then sits to hear the evidence in favor and against such application and decides whether such use would create a fire, traffic or other hazard. *Its action is a quasi-judicial one and since there is evidence in the case at bar upon which it can be sustained, this Court should not interfere therewith.* The ordinance in question 20 30 40

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- together with the action of the Council comes clearly within the Zoning Act, and the cases above cited. It acts under the said act just as would the Board of Adjustment. The Municipal Council heard the last application the same as it did before. It considered all the evidence and denied
- 10 the application for the same reasons as it denied it in the first instance. In dismissing the Writ of Certiorari the Court held in *Phillips Oil Co. v. Municipal Council of Clifton, supra*, that the Council had a discretionary right to grant or reject the application and that sufficient reason appeared therefore. Neither in the said application nor in the last one is there any evidence of fraud or abuse of discretion, and the Council's action should therefore be upheld in this case as
- 20 it was in the last. See also *Dubin v. Wich.*, 120 N. J. L. 469. The argument of relator regarding discriminatory action is also without merit because it is not claimed by respondents that it can indiscriminately grant or withhold a permit under said ordinance. If discrimination is claimed, it must be specifically shown. There can be none in the case at bar because the rejection of relator's application was based on action of the Council pursuant to the standards laid down by the
- 30 Zoning Act, *supra*.

- In *Gorieb v. Fox*, 274 U. S. 603 referred to by Mr. Justice HEHER in *Brandon v. Montclair, supra*, where an ordinance prescribed a set back line for property in various zones but reserved to the Council authority to make exceptions so as to permit buildings closer to the street, it was contended that the ordinance enabled "the council unfairly to discriminate between lot owners by fixing
- 40 unequal distances from the street for the erection of buildings of the same character under like cir-

Brief of Respondent in Birchwood Case.

cumstances." In dismissing this contention, Mr. Justice SUTHERLAND said:

"We cannot, of course, construe the ordinance as meaning that the power may be thus exerted; nor may we assume in advance that it will be exercised by the council capriciously, arbitrarily, or with inequality. It will be time enough to complain when, if ever, the power shall be thus abused. The proviso evidently proceeds upon the consideration that an inflexible application of the ordinance may under some circumstances result in unnecessary hardship. In laying down a general rule, such as the one with which we are here concerned, the practical impossibility of anticipating in advance and providing in specific terms for every exceptional case which may arise, is apparent. And yet the inclusion of such cases may well result in great and needless hardship, entirely disproportionate to the good which will result from a literal enforcement of the general rule. Hence the wisdom and necessity here of reserving the authority to determine whether, in specific cases of need, exceptions may be made without subverting the general purposes of the ordinance. We think it entirely plain that the reservation of authority in the present ordinance to deal in a special manner with such exceptional cases is unassailable upon constitutional grounds. * * * Yick Wo v. Hopkins, 118 U. S. 356; 30 L. Ed. 220; 6 Sup. Ct. Rep. 1064, upon which petitioner relies, is not to the contrary. The ordinance there involved vested uncontrolled discretion in the board of supervisors, and this discretion was actually exercised for the express purpose of depriving the petitioner in that case of a privilege that was extended to others. See *Crowley v. Christensen*, 137 U. S. 86; 34 L. Ed. 620; 11 Sup. Ct. Rep. 13." (Italics ours.)

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Brief of Respondent in Birchwood Case.

Certainly no discrimination has been shown by the relator nor has it shown that the ordinance is unreasonable. Hence there is no justification for the issuance of mandamus.

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POINT V.I.**Mandamus is an improper remedy to review discretionary powers of the City Council.**

As has heretofore been pointed out to this Court, the granting of a permit by the City Council was a discretionary matter. Our Courts have consistently held that a writ of mandamus will not issue where by so doing, it would usurp the power of the City Council and dictate how the discretion shall be exercised or to decide what conclusions of law or fact shall be reached.

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In the case of *Davison v. Patterson*, 94 N. J. L., 338, at page 340, the Supreme Court, in an opinion delivered by Justice PARKER, stated the following concerning a writ of mandamus:

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“The office of the writ, as directed to a public officer, is to compel him to do something that he is required by law to do and has failed or refused to do, rather than compel him to do in a different way what he has already done. If he is vested by law with discretionary power or with the jurisdiction to decide questions of law or to ascertain matters of fact, the court will not by proceedings by mandamus usurp the power to dictate how the discretion shall be exercised, or to decide what conclusions of law or to fact shall be reached.”

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Brief of Respondent in Birchwood Case.

In the case of *Romano v. Ridgewood*, 14 N. J. Misc., page 301, this Court, in a *per curiam* opinion, held that it was not satisfied that the ordinance in said matter was an unreasonable or an arbitrary exercise of the powers conferred or that the refusal of the local authorities was beyond their discretion, and accordingly dismissed the writ of certiorari. 10

In the case of *Reid v. Deal*, 5 N. J. Misc., 144, our Supreme Court stated the following:

“This seems to invest a discretion in the commissioners; if so, a mandamus never issues when the subject is one of discretion, citing *Uszkay v. Dill*, 92 N. J. L. 327.”

In view of the fact that the City Council afforded the relator a proper hearing, heard all the objectors and considered the various objections as are fully set forth in both the States of the Case, there is sufficient reason for the Court to deny the relator's application for a writ of mandamus. 20

As was stated in the case of *Uszkay v. Dill*, 92 N. J. L. 327, at page 329:

“To warrant the issuing of the writ in any case the right of the petitioner to it must be clear and the public duty sought to be enforced must be clear and specific. The writ is never granted in a doubtful case.” 30

See also

Sylvester v. Princeton, 104 N. J. L., 18.

Again we repeat that mandamus will not lie except in a case of clear and palpable violation of a legal duty, or of a palpable and unreasonable exercise of such duty. This was so held in the case of *Uszkay v. Dill*, *supra*. 40

Brief of Respondent in Birchwood Case.

In the case of *De Roos v. Chapman*, 106 N. J. L. 6, our Supreme Court in an opinion delivered by Mr. Justice TRENCHARD, held that where the municipal authorities had a discretionary power with regard to the granting of a permit under a local ordinance, a writ of mandamus would not issue to
 10 compel the granting of a permit, the Court stating the following:

“The allowance of a peremptory writ of mandamus rests in judicial discretion, and it is awarded only in cases when the act to be done is ministerial and the duty clear. *Sylvester v. Princeton*, 104 N. J. L. 18.”

20 “The relator contends that here the granting of the license desired was ministerial. Not so. The action of the municipal authorities upon an application for such a license is discretionary and not ministerial; and when such application is denied mandamus will not lie to compel the authorities to grant it, in the absence of fraud or abuse of such discretion. *Sylvester v. Princeton, supra.*”

In the case of *Reheis v. Newark*, 117 N. J. L. 593, it was held by our Supreme Court in an opinion delivered by Mr. Justice PARKER, that a writ of certiorari will not lie to review the denial by
 30 the Board of Commissioners of the City of Newark of a permit to the prosecutor therein after the Board of Commissioners had denied same; the court stating as follows:

40 “In the case now before me the city commission has taken the contrary view after a hearing very similar to that which was held in the *Essex Investment Company* case. I am unable on the evidence before me to say that they erred in thier determination. In fact, I think that they did not.”

Brief of Respondent in Birchwood Case.

It must also be borne in mind that the law creates a presumption when an application is denied, that such denial was based upon proper motives and valid reasons. This was so held in the case of *De Roos v. Chapman, supra*.

This presumption should certainly apply to the case at bar.

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POINT VII.

Points 1 to 5 refute all of relator's contentions but we shall now discuss briefly each of the points in the relator's brief.

1. In POINT I, relator argues that the Governing Body of the City of Clifton reserved an absolute discretion in its administrative capacity. That is not so because the discretion exercised by the Council is limited by the powers in the Zoning Act, *supra*, and Sections 2 and 3 of said ordinance, and that body when it sits in matters of this kind is a quasi-judicial body. The cases cited by relator are not in point. In *Lipkin v. Duffy*, 119 N. J. L., 366, the Court invalidated an ordinance which reserved a discretionary power to grant or reject a license to carry on the junk business. In that case the ordinance did not have provisions limiting the exercise of discretion as there is in the case at bar. The *Keavey v. Randall* case, 1 Misc., 311 was decided before the enactment of the Zoning Act and is not in point. There is the further fact that the plans in that case were filed before the adoption of the Zoning ordinance. The *South Orange v. Heller* case, 92 N. J. E., 505, is not in point because it also was decided prior to the enactment of the Zoning Act in 1928. In the *Drive-to Department Stores v.*

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Brief of Respondent in Birchwood Case.

Newark case, 115 N. J. E., 222, injunction proceedings were instituted to enjoin the City authorities from revoking a permit. Vice Chancellor STEIN did not pass on the validity of the ordinance but said that the power which the commissioners sought to exercise was not delegated to them by legislation and was discriminatory. That case is not in point because the ordinance in question affected the sale of merchandise and was not a case as the one at bar. In fact, on page 226, the Vice Chancellor held that it was unnecessary to decide the question as to validity of the ordinance and did not do so. In *Peoples Trust Company v. Township of Teaneck*, cited by relator's brief, it is apparent that the ordinance in that case did not affect the same subject-matter as in the case at bar nor did it have restrictions upon the discretion exercised by the Governing Body as in the case at bar.

All of these cases turn on the theory that ordinances which give a discretion to either grant or refuse a license, permit the municipality to discriminate between applicants. The ordinance in the case at bar contemplates the exercise of a discretion but that discretion is limited by the exercise of the so-called police powers. Relator has not shown that he has been discriminated against but in fact has been given all the opportunity to present his application and to have a full and complete hearing thereon. In the proceeding instituted in 1937, it was then claimed that the action of the Municipal Council in rejecting the first application was arbitrary, capricious, illegal, unjust, oppressive and an abuse of discretion. The Court then held in its opinion in *Phillips Oil Company v. City of Clifton*, *supra*, that such contention was not sound.

Brief of Respondent in Birchwood Case.

2. Neither the case of *Goldberg v. Mayor, et als., of Jersey City*, 6 N. J. Misc., 564 or *N. J. Good Humor, Inc. v. Bradley Beach*, 124 N. J. L. 162 cited by relator are authority for the statement that there is no legislative warrant for the enactment of an ordinance as in the case at bar.

3. Relator is not being deprived of a constitutional right, because his private right is subservient to that of the public, in the guise of the police powers of the State. 10

Conclusion.

In conclusion, we respectfully urge that the ordinance attacked in this proceedings is a valid exercise of powers granted by the Legislature under both the Zoning Act, *supra*, and the Home Rule Act, *supra*; that the ordinance does not discriminate against the relator in this matter and that the relator having made no attack upon the ordinance regulating the issuance of permits for pumps and gas tanks, its right to the relief sought is not clear and should therefore be denied. We also urge that by reason of the doctrine of *res adjudicata* and because of laches of relator, it is now estopped from asserting the alleged invalidity of the amendatory zoning ordinance. 20 30

It is respectfully urged that the Rule to Show Cause why a Peremptory Writ of Mandamus should not issue, should be dismissed.

Respectfully submitted,

JOHN G. DLUHY,
Attorney for and of Counsel
with Respondents. 40

Opinion of New Jersey Supreme Court.

NEW JERSEY SUPREME COURT

Nos. 220, 221 JANUARY TERM, 1946.

ON CERTIORARI.ON RULE TO SHOW CAUSE FOR MANDAMUS.

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THOMAS F. FINN,

Prosecutor,

vs.

MUNICIPAL COUNCIL OF THE CITY OF CLIFTON,
Respondent.

THOMAS F. FINN,

Relator,

vs.

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MUNICIPAL COUNCIL OF THE CITY OF CLIFTON,
Respondent.

Argued January 15, 1946: decided 1946.

Before—Justices PARKER and OLIPHANT.

For the Prosecutor-Relator, AARON HELLER.

For the Respondent, JOHN G. DLUHY.

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Per Curiam. For at least the third time, this court is asked to compel the issuance of a permit for a gasoline station, having twice refused so to do. *Phillips Oil Co. v. Clifton*, 120 N. J. Law, 13, *Birchwood, Inc. v. Kulik*, No. 258 May Term, 1940, not reported.

So far as we can discern, the present factual situation, except as to ownership, differs in no material respect from that of the previous cases.

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Notice and Grounds of Appeal.

Indeed, over one-half of the 100 page State of the Case consists of the opinion of this court and the briefs of counsel in the *Birchwood* case, and a copy of the lease to the present prosecutor. The ownership of the fee seems unchanged.

- 10 We find nothing in the present case to require a recall or modification of our previous decisions. The writ of certiorari will be dismissed; and the rule to show cause in mandamus will be discharged; with costs in both cases.

Notice and Grounds of Appeal.**NEW JERSEY SUPREME COURT**

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 ON CERTIORARI.

 ON MANDAMUS.

THOMAS F. FINN,
Prosecutor-Relator,
vs.

MUNICIPAL COUNCIL OF THE CITY OF CLIFTON,
Respondent.

- 30 To: JOHN G. DLUHY, Esq.,
Attorney for and of Counsel
with Respondent,
713 Main Avenue,
Clifton, New Jersey.

SIR:

- PLEASE TAKE NOTICE, that the prosecutor-relator appeals to the Court of Errors and Appeals from the whole of the judgment entered in the
40 above stated causes upon the following grounds:

Notice and Grounds of Appeal.

1. Because the Supreme Court erred in dismissing the writ of certiorari and the rule to show cause in mandamus for the following reasons:

(a) The Supreme Court did not pass upon the legal questions presented to it in this appeal.

(b) Because the ordinance which was the subject matter of attack was actually void and for that reason the prosecutor-relator was entitled to the permit sought. 10

(c) Because from the record below, it appears that the prosecutor-relator had complied with the ordinance and was, therefore, entitled to receive the permit requested.

AARON HELLER,
Attorney for and of Counsel
with Appellant. 20

Service of a copy of the within is hereby acknowledged this 6 day of April, 1946.

JOHN G. DLUHY,
Attorney for Respondents.

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Notes and Records of the

(1) Because the Respondent's statement in his
interrogation was not a statement and the rule is clear
that in such cases the following provisions apply:

- (a) The statement is not admissible in evidence.
- (b) The statement is not admissible in evidence.
- (c) Because the statement is not admissible in evidence, the statement is not admissible in evidence.
- (d) Because the statement is not admissible in evidence, the statement is not admissible in evidence.
- (e) Because the statement is not admissible in evidence, the statement is not admissible in evidence.

Attorney General

Attorney for and of General

with Appellate

Service of a copy of the within is hereby
acknowledged this 5 day of April, 1944

John D. Brown

Attorney for Respondent

Witness my hand and seal of office this 5 day of April, 1944

Attorney

1031

Witness my hand and seal of office this 5 day of April, 1944

Attorney

Witness my hand and seal of office this 5 day of April, 1944

Attorney

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17 MAY 1. 1940

New Jersey Court of Errors and Appeals

THOMAS F. FINN, Prosecutor-Relator- Appellant, vs. MUNICIPAL COUNCIL OF THE CITY OF CLIFTON, Respondent-Appellee.	}	On Appeal from New Jersey Supreme Court.
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BRIEF FOR PROSECUTOR-RELATOR, APPELLANT.

Foreword to Facts.

Thomas F. Finn is the holder of a lease affecting property located at the corner of Market Street and Allwood Road, Clifton, New Jersey, and under the terms of that lease was given the right by the owner to make the necessary application to the City of Clifton, for permits to engage in gasoline station business at that address (Case, p. 54, and 55, paragraphs 27 and 28 of the lease). His application was denied. Thereafter, on November 7, 1945, Mr. Justice HEHER allowed appellant a writ of certiorari and a rule to show cause why a peremptory writ of mandamus should not issue.

In pursuing the practice of obtaining both writs, prosecutor has pursued the practice followed in the cases of *Pfister v. City of Clifton*, 133 N. J. L. 148, 43 A. (2) 275; *Resciniti v. Commissioners of Belleville*, 117 N. J. L. 1, 186 A. 439; and *Gabrielson v. Borough of Glen Ridge*, 13 N. J. Misc. 142, 176 A. 676.

These writs were argued together before the Supreme Court and, that court, in a *per curiam* decision by Justices PARKER and OLIPHANT, dismissed the writs. The dismissal was not grounded upon the merits of the questions argued, but rather because that court felt that there was nothing in the case to require a recall or modification of its previous decisions (Case, p. 101 and 102).

The Supreme Court had reference to the fact that upon two prior occasions different owners of the same land had reviewed the action of the City in refusing to grant a similar license but without success. Once, in 1938, in *Phillips Oil Co. v. Clifton*, 120 N. J. L. 13; 1937 A. 730 (where no attack was made upon the ordinance), the review was grounded upon the sole argument that the action of the City of Clifton in refusing the permit was unreasonable, capricious and arbitrary from the facts produced at the hearing before the Council. The other occasion in 1940, in the unreported case of *Birchwood v. Clifton* (Case pp. 33 and 34) where the Supreme Court held that the prosecutor did not comply with certain conditions precedent and did not rule on the constitutionality of the ordinance.

It will be noted that in the case at bar the attack is grounded upon two theories, neither of which were disposed of by the Supreme Court in any of the prior cases; it will be observed that although the prosecutor in the case at bar attacks the constitutionality of the ordinance and also claims the right to the permit upon the ground of compliance with all conditions precedent, yet the Supreme Court did not rule upon the questions argued.

This appellant insists that this court, as the final tribunal in appeals, ought to review the meritorious questions presented in this case.

When application was originally made for the writs before Justice HEHER, the respondent here resisted the application and urged in support of its argument that the Supreme Court had ruled upon the same subject matter in two prior cases, and the decision in both of these cases were handed up to the court for review. Justice HEHER read the cases and in fact in one of them, to wit, *Phillips Oil v. Clifton*, cited *supra*, he wrote the opinion, and yet after reading both cases Justice HEHER allowed the present writs to the prosecutor. It was urged then and is being urged now that the particular reasons relied upon by the present prosecutor were in fact never decided by the Supreme Court. It is only fair to assume, therefore, that when Justice HEHER allowed the writs, he too was under the impression that there should be a determination of the meritorious question.

The prosecutor here has urged the following reasons in support of his claim.

- (a) That the ordinance is unconstitutional.
- (b) That the prosecutor has complied with conditions precedent in the ordinance.

These are the questions which the prosecutor has submitted to the Supreme Court, and which that court has not decided. It is respectfully charged that the Supreme Court erred in dismissing the writs.

If the ordinance is in fact unconstitutional, the fact that predecessors in title did not see fit to raise the question before the Supreme Court,

ought not to bar a decision upon the constitutionality of the ordinance. Both the City and the public are certainly entitled to know whether legislation which it enforces is effective.

The Facts.

The record indicates that Thomas F. Finn is the leasehold owner of a strip of land located on the southeasterly corner of Allwood Road and Market Street in the Allwood section of the City of Clifton (Case, p. 36). The City of Clifton by its zoning ordinance placed this particular property in a business district (Case, p. 36). Gasoline service stations are permitted in said district subject to the receipt of permission from the governing body by an applicant for the proposed use (Ordinance, Case, p. 36-38).

The relator-prosecutor applied for such a permit and the respondent refused its permission, apparently basing its right to the refusal upon the ground that it was discretionary with them to grant or refuse.

Under the zoning ordinance in effect in the City of Clifton, there are no restrictions against a gasoline service station in a business zone, except the requirement for permission as set forth in Ordinance #2040 (Case, p. 36).

A reference to the Ordinance #2040 discloses the following:

SECTION ONE: Motor vehicle service stations are barred in resident "A" and resident "B" districts;

SECTION TWO: This type of business cannot be carried on in "business districts" without permission from the municipal council;

SECTION THREE: No such permission shall be granted unless the Chief Engineer of the Fire Department shall first certify that the use will not create a fire hazard and unless the Chief of the Police Department shall certify that the use will not create a traffic or any other hazard and then further prescribes that they shall take into consideration certain elements in arriving at their conclusion;

SECTION FOUR: Applies to Main Avenue and is, therefore, not applicable to the case at bar;

SECTION FIVE: Penalty feature;

SECTION SIX: Relates to the repeal of other ordinances;

SECTION SEVEN: Concerns the effective date.

The record indicates that the prosecutor made application in accordance with the ordinance and received an approval from the Acting Chief of Police (Case, p. 41, ll. 10-20) and an approval from the Assistant Chief of the Fire Department (Case, p. 41, ll. 20-33), and that the applicant was willing to comply with all rules and regulations concerning the installation and management of the gasoline station (Case, p. 42, ll. 13-16); that the proposed gasoline station, in the opinion of the applicant, did not create a traffic or fire hazard and that the said proposed station would be of the latest design with all modern precautions against fire hazards and with other safety features (Case, p. 42, p. F). That about thirty-two taxpayers in the vicinity approved and recommended that the municipal body issue the permit (Case, p. 42, par. G & H) and that about twenty-five taxpayers in the vicinity objected to the issuance of the license. The prosecutor felt that no traffic hazard would be created and the objectors felt that a traffic hazard would be created.

In this state of facts, we now approach the points for discussion on behalf of the prosecutor.

POINT I.

The ordinance is void since it does not establish uniform rules and regulations.

It is well settled that a municipality may ordain concerning a lawful business but in so doing, it must establish rules and regulations, uniform as to all persons. The rule is amply demonstrated in the following cases:

In the case of *Lipkin v. Duffy*, 119 N. J. L. 366, 1936 A. 434 (E. & A.—1938) the court held that a provision in an ordinance vesting discretionary power in board of aldermen to decline and revoke licenses to operate junk yards for sufficient cause appearing to board, without specifying uniform rules and regulations to apply to all applicants for license was unreasonable and rendered the ordinance invalid. Specifically the court stated:

“It is unquestionably well established that the clause discriminating against non-residents renders that provision invalid, and we concur in the holding of the Supreme Court to that effect. *But it is also well settled that the provision vesting broad discretion in the board of aldermen to refuse a license whenever they deem it desirable likewise renders the ordinance invalid.* This was settled in *South Orange v. Heller*, 92 N. J. Eq. 505, 113 A. 697, and in a number of cases in this State and other jurisdictions, including the Supreme Court of the United States. *Yick Wo v. Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220; *in re Wo Lee*, C. C., 26 F. 471. In other

words, the reservation of a discretionary power to grant or refuse is beyond the power of the municipal board. It may establish rules and regulations, but these must be uniform as to all persons."

In the case of *South Orange v. Heller*, 92 N. J. E. 505, 113 A. 697 (Court of Chancery) the Court said (involving a permit for a public garage):

"The ordinance, the basis of this suit, forbids infringement except, to use the language of the ordinance, 'without special permit to be granted only upon resolution of the board of trustees and after a hearing.' The discretionary powers reserved to the trustees to give to one and withhold from another the privilege of violating the ordinance is not conferred by the act and is without legal force, and upon certiorari it would be declared without legislative authority and void."

Librizzi v. Plunkett, et als., 126 N. J. L. 17, 16 A. (2) 280 (Supreme Court-1940) is a case where Justice HEHER speaking for the Court said (in a case involving an auto wrecker's license):

"It is elementary that an ordinance which vests in local administrative officers an uncontrolled discretionary authority to grant such business license—it is not of the class of businesses that may be forbidden altogether—to one and to refuse it to another under like circumstances contravenes fundamental law. Such is violative of the plainest principles of justice. It is a power that the municipal governing body itself does not possess. Vide *Keavey v. Randall*, 122 A. 379, 1 N. J. Misc. 311; *South Orange v. Heller*, 92 N. J. Eq. 505, 113 A. 697. It is requisite that the regulation establish the terms and conditions upon which the right to the license is made to depend,

and thus set down a general rule of action or standard of conduct governing the administrative tribunal. Unless the administrative officer be restrained by a definite, uniform rule of action, the regulations falls as a grant of arbitrary power in violation of the Fourteenth Amendment of the Federal Constitution. If not thus circumscribed, it lends itself to invidious distinctions, and so is arbitrary as depending upon mere will rather than the exercise of a legal discretion in the sense that the delegated authority is confined within certain limits designed to effectuate the indicated legislative policy. This confinement must be such as to preclude oppression and insure impartial execution. This is of the very essence of that equal protection of the laws guaranteed by the Fourteenth Amendment. *Yick Wo v. Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220."

In the case of *Drive-to Department Stores v. City of Newark*, 115 N. J. Eq. 222, 170 A., page 29, (Court of Chancery) the Court said:

"It must be conceded that complainants have an undeniable right to engage in the business of a department store. The ordinance forbids their so doing except, to use its language, 'without first having obtained from the Board of Commissioners of the City of Newark a license so to do, and having first paid a fee of One Dollar.' The power thus sought to be exercised is without legal force, since it is not conferred by the act of the Legislature. The commissioners have reserved to themselves discretionary power to give to one and withhold from another the privilege of engaging in a business otherwise entirely lawful except upon license, which they may grant or refuse. *Village of South Orange v. Heller*, 92 N. J. Eq. 505, 113 A. 697."

Applying the well settled rules of law to the Ordinance now subject to attack, it is readily observed that the Ordinance under review does not set up any standard regulations or rules for the securing of a permit by an applicant. A mere reading of the ordinance makes the conclusion inevitable that it is not in accordance with the powers given by the Legislature, and it is, therefore void.

In contrast to the ordinance under review, it may be appropriate to compare other cases in our courts to indicate the various types of rules and regulations which are permissible. In *Bauer v. Paterson*, 102 N. J. L. 235; 132 A. 515 an ordinance was upheld as legal where it restricted the use of a gasoline service station near a church, a school, a hospital, a theatre and a library.

In *Savitz-Denbigh Co. v. Bigelow*, 134 A. 557 and 137 A. 439; 4 N. J. Misc. 819, the ordinance likewise restricted the use within 200 feet of a church, school, hospital, theatre and library. This likewise was a reasonable regulation under the police powers. In *Independent Pennsylvania Oil v. Gloucester*, 102 N. J. L. 502; 134 A. 554, an ordinance which restricted the storage of explosives within one thousand feet of a building, etc., was a uniform, reasonable regulation. In *Morgan v. Collingswood*, 104 N. J. L. 13; 139 A. 718, an ordinance which restricted the use within five hundred feet of a dwelling house was a uniform, reasonable regulation.

It will thus be observed that other municipalities have recognized the rule that an ordinance, in order to be constitutional, must contain rules and regulations in order to properly restrict the inherent use of a landowner's property.

It will be observed that the rule is a reasonable one. Originally, a landowner had the right to the unrestricted use to his property. The zoning act then permitted a constitutional restriction against the use in certain areas. In this way, a municipality could legally restrict the use of various types of business in various areas. Then came the right of municipalities to regulate, and it is only reasonable that where a use is permitted in a certain area that a discretionary regulation ought not to be permitted to destroy the use.

In the case at bar, the City of Clifton had the right to pass a zoning ordinance and in that ordinance fixed the areas in which gas stations would be permitted. The prosecutor's land is within the area where gas stations are permitted. In an attempt to regulate this business the City has failed to adopt standard rules and regulations.

It was under a duty not only to regulate, but, as noted, to regulate reasonably. It had the power, subject to reasonable rules and regulations, to restrict and prohibit in certain details, but it could not prohibit entirely. This Court settled that question in *Gulf Oil v. Newark* and *First Church of Christ v. Newark*, 26 A. (2) 246; 128 N. J. L. 376, where it said:

“A zoning ordinance prohibiting certain structures and uses, such as gasoline stations, throughout a municipality is an invalid exercise of municipal authority to legislate under New Jersey Constitution, Article IV, Section 6, par. 5, N. J. S. A., P. L. 1928, c. 274, N. J. S. A. 40:55-30.”

In the case at bar, the best that could be said is that Sec. 3 which prescribes that the applica-

tion must receive approval from the Fire and Police Departments prescribes the lawful rules and regulations. If that is so, the present prosecutor did receive this permission. But, can it be argued that a municipality that does not have this right, may delegate it to subordinates? It is submitted that not alone do they not possess this right, but they have no right to delegate at all.

POINT II.

The ordinance is void since it delegates the powers of the municipality.

It has already been observed that SECTION TWO of the ordinance prescribes that permission must be received from the Municipal Council.

Under SECTION THREE of the Ordinance, the Municipality makes a condition precedent to their own power to grant permission. They specifically provide that they will not give permission unless the Chief Engineer of the Fire Department and the Chief of the Police Department certify to them in writing concerning the fact that the premises will not create certain hazards. They, in effect, delegate to the departments mentioned that question of ascertaining whether hazards exist, although under the law such questions could only be properly passed upon by the Council itself subject to definite rules and regulations.

Under the statutes, the Municipality is permitted, to regulate buildings within its sphere (R. S. 40:55-30). It is the *Municipality* that was granted the right by the Legislature to regulate and limit the use of buildings to be erected. And, it is equally well settled that such power can not be delegated by ordinance of the Municipality.

In the case of *Levy v. Mravalg, Mayor of the City of Elizabeth, et al.*, 96 N. J. L. 367, 115 A. 350, the Supreme Court held that where the power to regulate the erection of buildings is conferred upon the governing body, a subsidiary body does not, without express legislative authority, have power by ordinance to provide for such regulation, and such subsidiary body cannot, by ordinance, delegate the power of regulation to, or confer upon, any limited body of citizens the determination of the uniformity of the regulation.

Specifically, the Court stated:

“ * * * The power thus granted to the governing body of each municipality does not authorize the delegation of that power to any body of citizens to determine uniformity of regulations to be applied.”

In the case of *Public Welfare Pictures Corporation v. Brennan*, 100 N. J. E. 132, 134 A. 868 (Court of Chancery), the Court in concluding that the governing body of a municipal corporation, intrusted with police power, cannot delegate its functions to any other body or officer, discusses the principal upon which this rule has been found, as follows:

“ * * * In the 28 Cyc. 705, the subject of general welfare clauses is discussed and it is stated, citing numerous authorities:

‘Municipalities are not general guardians of the public morals and therefore may not unduly interfere with the liberty of the citizen by ordinances forbidding acts not unlawful or harmful *per se*. Even express authority for such ordinances must be strictly construed in passing upon their validity.’

“There is another principle of law which should be here considered. It is ‘Potestas delegata non est delegari.’

“In 28 Cyc. at 694, it is stated:

‘This is a general maxim applicable with peculiar force to any form of sovereign power and operates to prevent the governing body of a municipal corporation, intrusted by the state with the police power, from delegating its high functions to any other body or officer, even to the mayor or other members of the body; the trust is official and personal and may be discharged only by those to whom the state commits it.’”

In the case of *Librizzi v. Plunkett*, ante, Justice HEHER speaking for the Supreme Court reaffirms the rule that a municipal body may not delegate its law-making powers, by stating:

“The municipal governing body may not delegate its lawmaking power to the administrative officer; it can do no more than vest in him the authority to execute its expressed legislative will. Potestas delegari non potest delegari. Compare *Levy v. Mravlag*, 96 N. J. L. 367, 115 A. 350. While the lawmaking body may confer upon the administrative authority a measure of discretion, it is essential that the function be so limited as to constitute the mere execution of the law rather than the exercise by the administrative officer of power in essence legislative. If the enactment embody a formula satisfying this basic requirement, it answers the test of constitutional sufficiency; and there cannot be judicial interference with the proper exercise of the discretion. In such circumstances, the law-making body has declared the law, and the exclusive role of the administrative tribunal is its execution. *State Board of Milk Control v. Newark Milk Co.*, 118 N. J. Eq. 504, 520, 179 A. 116.”

In view of the above cited cases, the ordinance now under review is void since it delegates to the Chief Engineer of the Fire Department and Chief of the Police Department powers belonging to the municipality.

POINT III.

Irrespective of the constitutionality, the prosecutor has complied with the ordinance.

The prosecutor as the owner of the leasehold interest, with the consent of the landlord, as shown by the lease (Case, p. 54, par. 27) was a proper person to make the application. His right to make the application was not challenged upon the allowance of the writ of certiorari and the rule to show cause for mandamus. This right was not challenged in the return made by the respondent to the writ of certiorari. The refusal by the City to grant the application was not grounded upon the lack of interest of the prosecutor in the application. In the light of these circumstances, the prosecutor is a proper applicant and besides, the respondent cannot now ground its refusal upon an alleged attempt of non-interest. In the case of *Hirschorn v. Castles*, 113 N. J. L. 270; 174 A. 211, the last paragraph of that decision reads as follows:

“Respondents urged for the first time on the argument that relator’s interest in the lands in question is not such as to entitle him to the permit sought. The denial of the permit was not rested upon this ground, and it is not set up by way of justification, or otherwise, in the return. In the circumstances, respondents are not entitled to have it considered here. Compare *Reimer*

v. Dalls, *supra*. Such a rule is a primary requisite to orderly and just procedure."

Reference to the ordinance (Case, p. 36-38) will indicate that the prosecutor herein has complied in every detail with the conditions necessary to obtain the permit. The only features of the ordinance which are applicable to the prosecutor are contained in SECTIONS 2 and 3. The prosecutor's lands are not in Resident A or Resident B Districts and under SECTION ONE these are the only districts in which gasoline service stations are prohibited. SECTION 2 and 3 provide that the permit would not be issued without permission and apparently such permission is grounded upon the section that certificates must be secured by the applicant from the Chief Engineer of the Fire Department and the Chief of the Police Department certifying that there would not be created a traffic, fire or other hazard.

It is undisputed in this case that the permission as required in SECTION 3 was received by the prosecutor from the Acting Chief of Police and the Assistant Chief of the Fire Department (Case, p. 41, ll. 10-30). If these SECTIONS of the ordinance are valid then the prosecutor has complied with them, and consequently under the terms of the ordinance if the same is valid, the City would have no right to refuse permission. Not alone does the prosecutor contend that he has complied with all of the conditions of the ordinance but there is likewise tacit approval of this statement since there is nothing in the record to indicate that the prosecutor has failed to comply with any condition imposed by any rule of the City.

In this situation, there is no justification upon the part of the respondent in denying the application for the permit.

Neither can it be argued in opposition to the position of the prosecutor that the City was justified in withholding the permit upon the ground that the proposed use would create a danger to school children or that it would create a traffic hazard. First, because the ordinance if valid, has placed this matter of determination with the Police Department who have certified to the contrary, and secondly, because the mere statement by some of the objectors that in their opinion a traffic hazard would be created is not evidence of the fact. It is merely a conclusion of their opinion.

Neither can it be argued that a municipality, under its police power, may prohibit a lawful business. In *Mesler v. Township Committee of Denville*, 14 N. J. Misc. 497; 186 A. 55, it is said:

“It is well settled that filling stations do not involve such an increase in the fire hazard or such danger to the public safety as to justify the refusal of a permit for their erection. *Ingersoll v. South Orange*, 128 A. 393, 3 N. J. Misc. 335 affirmed 102 N. J. Law, 218 (2), 130 A. 721 (1); *Williams v. Gage*, 130 A. 721 (2), 3 N. J. Misc. 1095; *Mangiello v. Jersey City*, 142 A. 179, 6 N. J. Misc. 536.”

In *Resciniti v. Belleville*, 117 N. J. L. 1, 186 A. 439 at page 440, it is said:

“The prosecutor cannot be deprived of his constitutional rights by an improper and arbitrary exercise of power. *Reimer v. Dallas* (N. J. Sup.) 129 A. 390. The refusal must be based on a regulation which must ‘be designed to promote the public health, safety and general welfare.’ *Gabrielson v. Borough of Glen Ridge*, 176 A. 676, 678, 13 N. J. Misc. 142.

“Under the proofs in the last cited case it was held by this court that gas stations do not constitute a fire hazard and their prohibition would not promote health, morals, or general welfare.”

POINT IV.

The municipality could not under the guise of police power retain discretionary powers to grant or refuse a permit.

It may be argued that under the general police power, the respondent had a right to grant or refuse an applicant subject to a review by them of the particular facts in a given case. It has already been argued here that a municipality would have no such discretionary right except the right to create zones and to promulgate reasonable rules and regulations. It is conceded that under the zoning act R. S. 1937, 40:55-30, and 40:55-36 and 40:55-39 an Adjustment Board has certain judicial powers in ruling upon exceptions to the zoning act, but this is not the situation here. The municipality did designate zones for the type of business known as gasoline service stations, and inasmuch as this particular business is not affected with a public interest nor clothed with a public use the City was powerless to impose unreasonable regulations and was likewise powerless to keep unto themselves the discretionary power to grant or refuse.

In the case of *Resciniti v. Commissioners of Belleville*, cited *supra*, there was an application for a junk shop under an ordinance which provided that the Town would issue the permit only to the satisfaction of a majority of the Board of

Commissioners. The respondent urged in support of its denial a certain line of cases, which were reviewed by the Supreme Court, but that Court nevertheless determined that the action of the Town of Belleville in refusing the permit was erroneous. In that case which is reported in 117 N. J. L. 1; 186 A. 439, Mr. Justice PERSKIE, speaking for the Supreme Court said:

"The following cases are urged in support of respondent's discretionary right of refusal; *Hudson Royal Restaurant v. Mayor, etc., of Jersey City*, 160 A. 218, 10 N. J. Misc. 629 (mandamus denied to grant license for dancing and music in a Chinese restaurant); *De Roos v. Chapman*, 106 N. J. Law, 6, 147 A. 570 (mandamus denied to compel issuance of restaurant license to a nonresident without proof, as required, of applicant's character, reputation, and fitness); *Reid v. Borough of Deal*, 135 A. 683; 5 N. J. Misc. 144 (mandamus denied to license hotel on grounds that facts were not clear); *Doben v. Board of Health of City of Paterson*, 127 A. 38, 3 N. J. Misc. 38 (mandamus denied to compel issuance of permit to engage in business of slaughtering poultry).

"While it is, of course, true that the allowance of a peremptory writ of mandamus rests in judicial discretion and it is awarded only in cases when the act to be done is ministerial and the duty clear (*Silvester v. Mayor, etc., of Princeton*, 104 N. J. Law, 18, 139 A. 517; *De Roos v. Chapman, supra*, 106 N. J. Law, 6, at page 8, 147 A. 570), nevertheless, a careful reading of the cited cases will disclose that the exercise of the challenged discretion in each case has a reasonable relation to the promotion of either public health, safety, or general welfare. It seems to us that it is clearly beyond the power of a municipality, by a provision in an ordinance making the granting of a li-

cense discretionary, to interfere with private business 'not affected with a public interest' nor 'clothed with a public use,' or impose unreasonable and unnecessary restrictions upon them. In either event, the regulation must not be arbitrary, capricious, or discriminatory. Compare *Sheffield Farms Co., Inc., v. Sheaman*, 114 N. J. Law, 455, 177 A. 372."

Since the operation of a gasoline station is not such a business as is affected with a public interest and since the prohibition of such a business does not promote public health, safety and general welfare, an attempt by the municipality to grant or refuse permission subject to its discretion is not available to them, inasmuch as it does not fall in the category of cases as described in the opinion of the court in the case cited above.

POINT V.

This review is properly before this court.

The prosecutor has a right to appeal directly to this court from the dismissal of the writ of certiorari by the Supreme Court. There may be some question as to the right of the relator to appeal directly to this court upon the dismissal of the rule to show cause why a peremptory writ of mandamus should not issue.

As a practical matter, both the rule to show cause and the writ were originally applied for in order that the litigation might be disposed of if the prosecutor were successful upon its application. It is claimed that the prosecutor-relator has the right of review in this court on both applications. In *Mannino v. Moffett*, 108 N. J. L.

545; 158 A. 434, this court was dealing with the question as to whether there is a right to appeal to this court from the Supreme Court's refusal to allow a rule to show cause why a writ of mandamus should not issue. This court said:

"No question was raised in the Supreme Court concerning the constitutionality of any statute or ordinance and the instant case does not, therefore, come within the provision of the mandamus act."

In *Intrastate Oil Co. v. Orange*, 111 N. J. L. 354, 168 A. 269, this court dealing with the same question said:

"Since the constitutionality of a statute is not involved, the Supreme Court's refusal of mandamus is not reviewable in this court. *Matlack v. Lloyd*, 82 N. J. Law, 739, 83 A. 371; *Camden v. Public Service Rwy. Co.*, 84 N. J. Law, 309, 86 A. 397."

Apparently, the constructions were made under R. S. 1937, 2:83-15.

While the cases hold that a review is not permissible where no question of a constitutionality of a statute was involved, yet it will be observed that in the case of *Mannino v. Moffett* the court, in the dicta, uses the word "ordinance" as well as "statute."

It is the impression of the relator that where the constitutionality of an ordinance as well as a statute is involved, a right of review is given by this court.

If this is true interpretation of the cases, then the prosecutor-relator definitely has the right of review inasmuch as one of the points raised in the Supreme Court and in this Court is that the ordinance is unconstitutional.

However, if the appellant here has improperly construed the decisions, and does not have a right to review on the dismissal of the rule to show cause for mandamus, then he unquestionably has the right to review the dismissal of the writ of certiorari.

Conclusion.

It is respectfully submitted that (a) the ordinance under which the City of Clifton has attempted to deprive the prosecutor of his constitutional right to the use of his property is void, and consequently the action of the City in denying the application should be set aside. (b) That inasmuch as the right of the prosecutor is clear that a peremptory writ of mandamus should issue to compel the issuance of the license.

It is also respectfully submitted that irrespective of the validity of the ordinance, the prosecutor has complied with all of the conditions therein stated and consequently has established a clear right to the permit requested.

It is accordingly submitted that in either case the refusal of the City to issue the permit should be set aside and that a peremptory writ of mandamus issue to compel the issuance of the permit sought.

Respectfully submitted,

AARON HELLER,
Attorney for and of Counsel with
Relator-Prosecutor, Appellant.

To be argued orally by
AARON HELLER.

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New Jersey Court of Errors and Appeals

THOMAS F. FINN, Prosecutor-Relator- Appellant,	} On Appeal from New Jersey Supreme Court.
vs.	
MUNICIPAL COUNCIL OF THE CITY OF CLIFTON, Respondent-Appellee.	

BRIEF OF RESPONDENT-APPELLEE.

Statement.

The property for which a gas station permit was sought from respondent-appellee was the subject-matter of consideration by the Supreme Court on two previous occasions. The instant case was before the Supreme Court upon certiorari (the writ appearing on page 1 of State of Case), and upon the return of an order to show cause why a peremptory or alternative writ of mandamus should not issue commanding respondent to permit the property in question to be used as a gasoline station. The Supreme Court dismissed the Writ of Certiorari and discharged the Order to Show Cause for a Writ of Mandamus.

In the first case, namely, *Phillips Oil Co. v. Municipal Council of Clifton*, 120 N. J. L. 13, a predecessor in title of this prosecutor challenged the action of the governing body in denying a permit on the ground that such action was unreasonable, capricious and arbitrary. *The Supreme Court upheld the denial of the permit because of the*

traffic hazard to the public, particularly the school children, and on the further ground that there were adequate gas station facilities and that such use of the property would interfere with the general neighborhood scheme for development of that area.

Subsequently, this property changed hands and Birchwood, Inc., obtained an order to show cause why a Writ of Mandamus should not issue to compel the permit, *it being argued that the ordinance now under review was unconstitutional because it did not set up any rules or regulations, as a guide for the governing body in the exercise of its discretion* (Page 60, etc., State of Case). The matter was submitted to the Supreme Court at the May Term, 1940 and in a Per Curiam decision, that Court discharged the rule to show cause. (State of Case, pages 43 and 44.) *No appeal was taken from either decision.*

Facts.

We borrow from the language of Mr. Justice HEHER, in *Phillips Oil Co. v. Municipal Council, &c., Clifton, supra*, a statement of the facts as they then existed in 1938:

“The Allwood section of Clifton is a recent development of one-family residences. The premises are located at a five point intersection that seems to be the business center of the community. Allwood Road at this point is a main highway of concrete construction, one hundred feet wide, with a parkway in the center. Market Street has a width of eighty feet. Allwood Road, when completed, will lead to the new Hudson River tunnel at Weehawken; and its traffic burdens, now considerable, will shortly be

immeasurably increased. A public school, located on Market Street, serves the needs of residents north and south of Allwood Road. Three hundred and fifty houses have been built in the last five or six years; and many more are in the course of erection and in prospect for the immediate future."

As pointed out in the *Birchwood* case, (See Respondent-Appellee's brief, State of Case, page 73), the development of Allwood had proceeded with the further erection of new homes between 1938 and 1940 and a new development was then in the process of completion which would add another 500 homes. These facts are pointed out to indicate that the hazards to pedestrians and school children have increased considerably since the above adjudication because of the greater number of persons who cross at the intersection in question.

The stipulation of facts herein shows that a considerable number of persons objected at the hearing before the Council upon the ground that, (1) the proposed use would create a traffic hazard; (2) there were sufficient gas stations to serve the need for the section. (State of Case, page 25, ll. 27-34 and page 43, ll. 6 to 11), that (3) the proposed station would create danger to school children crossing the highway at the point where the gas station would be located. (State of Case, page 44, ll. 37-40.)

The appellant seeks to review two judgments of the Supreme Court, the first being a dismissal of the Writ of Certiorari under which that Court reviewed the decision of the respondent-appellee in denying a permit to conduct a gasoline station and the second, the judgment of the Supreme Court discharging an order to show cause why an

alternative or Peremptory Writ of Mandamus should not issue. The State of Case does not disclose an order permitting the molding of pleadings in the Mandamus proceeding.

Ordinances.

The pertinent provisions of the ordinances sought to be attacked are:

Zoning Ordinance.

SECTION 2: In business districts no building or premises shall be used and no building shall be erected which is arranged, intended or designated to be used as a Motor Vehicle Service Station, unless permission is first obtained from the Municipal Council of the City of Clifton.

SECTION 3: No such permission shall be granted unless the Chief Engineer of the Fire Department shall first certify in writing that such use will not create a fire hazard and unless the Chief of the Police Department shall first certify in writing that such use will not create a traffic hazard or other hazard, and in arriving at such determination the Chief Engineer of the Fire Department and the Chief of the Police Department shall take into consideration the number and location of Motor Vehicle Service Stations then existing on the street or highway upon which such proposed Motor Vehicle Service Station is to be located, as well as the number and location of other Motor Vehicle Service Stations in the neighborhood of such proposed station, as well as all other conditions which might tend to make such use hazardous.

*Ordinance Concerning Gasoline
Tanks and Pumps.*

“(1) No person, firm or corporation shall install any gas tank or pump upon private property in the City of Clifton to be used for the sale of gasoline for retail purposes without first obtaining a permit therefor. Application for such permit shall be made through the office of the City Clerk who shall bring it before the Police and Fire Committee for investigation, and if the application is approved by them, permission to install such tank or pump may be granted by the City Council.”

“It shall be unlawful for any person, firm or corporation to operate any gasoline or oil pump between the property line and the curb line of the streets of the City. Hereafter no license shall be given to operate any such pump, provided, however, this shall not apply to pumps now licensed and being so operated.”

“(4) That no tank shall be covered over without the inspection and approval of the Chief Engineer of the Fire Department. All tanks must be equipped with fill pipes and vent pipes of galvanized standard full weight wrought iron or steel pipe entering the tank through proper openings located in the top of the tank above liquid level. All connections must be of standard approved types. Vent openings must be screened with 30 x 30 bias mesh or its equivalent and must provide area to allow the proper flow of liquids during the filling operation, and must be provided with weatherproof hoods and must terminate at a point at least Twelve (12) feet above the top of the fill pipe and at no time within three (3) feet of any window or building opening. The laying of fill or vent pipes on blocks or sticks is forbidden. All tanks

are to be buried underground with the tops of the tank not less than two (2) feet and six (6) inches below the surface of the ground and below the level of any piping. All vent pipes must be one (1) inch galvanized iron."

NOTE: There is no Police and Fire Committee, since the adoption of the Municipal Manager form of government. The Municipal Council as the governing body acts on all applications.

PRELIMINARY POINT.

The Writ of Certiorari was properly dismissed as having been improvidently issued.

The application before the Municipal Council was made by prosecutor-appellant as the owner of the property in question (Page 16, State of Case). It later developed after the denial of the permit, that at the time of the application, the Petroleum Holding Co. was the owner by deed dated March 28, 1944. (Page 35, ll. 37-40, and page 36, ll. 1-10). There was no other application made by the Petroleum Holding Co., nor did the owner consent to prosecutor-appellant's application at the hearing before the City's governing body. Upon application for the Writ, prosecutor-appellant's right thereto was challenged, and we now urge that the Writ was properly dismissed as having been improvidently issued.

The Municipal Council would have been justified in denying prosecutor-appellant's application if it appeared that he was not the owner, unless he showed a present right to erect upon and use

the land owned by the Petroleum Holding Co. as a gas station. See: *Krieger v. Scott*, 4 N. J. Misc. 942; *Malone v. Jersey City*, 7 N. J. Misc. 955; *Adams v. Jersey City*, 107 N. J. L. 149 (Court of Errors and Appeals). The application for the permit was required to be made either by the owner of the land, or with the owner's consent. *Slamowitz v. Jelleme*, 3 N. J. Misc. 1169.

This point was not raised, nor prosecutor-appellant's right challenged at the hearing before the Council because *reliance was placed upon the truth of prosecutor-appellant's application which said he was the owner of the land in question*. A challenge was made upon argument of the application for the Writ when prosecutor-appellant declared that he had a lease which allegedly contained the owner's consent but which he did not then prove by affidavit or produce in Court. Mr. Justice HEHER granted the Writ upon this representation.

However, the lease, which was made part of the record before the Supreme Court, does not contain the owner's consent to make the application in question. It makes prosecutor-appellant's possession subject to approval by the City of the contemplated business, (State of Case, page 54, ll. 26-30) of operating a gas station, showroom and repair shop. It also (Page 54, ll. 32-40, State of Case), gives prosecutor *the right in his own behalf* to make application for the necessary permits to engage in the gasoline station business, *but does not authorize this proceeding in its name*, nor does the Petroleum Holding Co. give any consent or authority to apply for permits for the construction of the building upon the lands owned by it and which are the subject-matter of this litigation.

It also is to be noted from the lease (State of Case, page 46, ll. 26-36), that the Petroleum Holding Co. as the owner, agreed to erect *a gas station and showroom and repair shop*. Normally, the owner is required to obtain the permits for such buildings, and prosecutor-appellant has not shown the owner's consent to his application for all such permits.

We urge that the operation of a showroom and repair shop is a business separate and distinct from a gas station, and that under Section 26 of the lease, (State of Case, page 54, ll. 27-30), the approval of the City is required therefor before the prosecutor-appellant has any interest in the premises. Prosecutor-appellant has not shown nor does he claim that he has applied for and obtained the approval of the City to operate a showroom and repair shop on the premises for which a permit to operate a gas station is sought.

We respectfully urge that the Supreme Court found that prosecutor-appellant had not shown such interest as entitled him to attack the action of the Municipal Council of the City in denying him a permit to install four gasoline tanks and pumps upon property owned not by him but by the Petroleum Holding Co. which is not a party to this proceeding.

We submit that the dismissal of the Writ was proper, in view of the lack of interest of the prosecutor-appellant.

POINT I.

The Zoning Ordinance is a valid, regulatory provision.

The action of the City in denying the permit sought, is predicated upon the supplement to the zoning ordinance (Ordinance No. 2040, State of Case, pages 36, 37 and 38).

Under the police power delegated to municipalities, they may regulate the business of storing and selling gasoline and define where and how gasoline service stations may be constructed and operated, and may forbid their erection in certain places. *Independent Penna. Oil Co. v. Gloucester*, 102 N. J. L. 502; *Morgan v. Collingswood*, 104 N. J. L. 13. Our Courts have recognized the hazard incident to the storage and sale of gasoline at service stations and the right of a municipality to reasonably regulate this class of construction and business and to prohibit it where necessary. *A. G. Construction Co. v. Scott*, 5 N. J. Misc. 251; *Bauer v. Paterson, etc.*, 102 N. J. L. 235; *Long v. Scott*, 4 N. J. Misc. 586; *Hench v. City of East Orange*, 2 N. J. Misc. 510; *Ninth Street Improvement Co. v. Ocean City*, 90 N. J. L. 106, aff. 91 id. 703; *Savitz-Denbigh Co. v. Bigelow*, 134 Atl. Rep. 557; *Wittkop v. Garner*, 132 Atl. Rep. 339; *Schait v. Senior*, 97 N. J. L. 390.

In dealing with the regulation of gas stations, it is apparent that such stations do not constitute the ordinary use of property because, in addition to the hazards of fire and explosion, they generally have at least two driveways across the entire length of the sidewalk which creates an un-

due amount of danger to pedestrian and vehicular traffic. Consideration of traffic conditions and the safety and general welfare of the community requires that no more gas stations be permitted upon heavily traveled roads than are necessary for the purpose, and that they be so located that they will not create extra hazardous conditions.

In 1935, the governing body of the City of Clifton considered it important to control the number and location of gas stations in the City and enacted Ordinance No. 2040 which was sought to be reviewed. This the Council had the right to do under the zoning act as was said by Mr. Justice HEHER in *Hirschhorn v. Castles*, 113 N. J. L. at page 279:

“We are not to be understood, by the citation of this line of cases, as challenging, by implication, the power of the municipal governing body to reserve, in the exercise of the authority conferred by the Zoning Act (Pamph. L. 1928, p. 696), control over the number and location of gasoline service stations in the zones in which they are not prohibited by the terms of the zoning ordinance. It may well be that, due to the traffic, fire and other hazards incident to the operation of such stations, this use is subject to special regulation. But there was no such reservation of control in the instant case, and we are not, therefore, required to pursue the matter further.”

This power was further recognized in the following cases: *Meslar v. Township Committee, Denville*, 14 N. J. Misc. 497; *Schnell v. Township Committee of Ocean*, 120 N. J. L. 194; *Bashloul v. City Council of Clifton*, 118 N. J. L. 390; *Phillips Oil Co. v. Municipal Council &c. Clifton*, 120 N. J. L. 13.

Such power is conferred by Chapter 274 P. L. 1928, Section 5, Revised Statutes 1937, 40:55-32, which reads as follows:

“Purposes of Zoning: Essential Considerations.

Such regulations shall be in accordance with a comprehensive plan and designed for one or more of the following purposes: to lessen congestion in the streets; secure safety from fire, panic and other dangers; promote health, morals or the general welfare; provide adequate light and air; prevent the overcrowding of land and buildings; avoid undue concentration of population. Such regulations shall be made with reasonable consideration, among other things to the character of the district and its peculiar suitability for particular uses, and with a view of conserving the value of property and encouraging the most appropriate use of land throughout such municipality.”

Pursuant to such power, the City adopted Ordinance No. 2040, the pertinent sections of which read as follows:

SECTION 2. In business districts no building or premises shall be used and no building shall be erected which is arranged, intended or designated to be used as a motor Vehicle Service Station, unless permission is first obtained from the Municipal Council of the City of Clifton.

SECTION 3. No such permission shall be granted unless the Chief Engineer of the Fire Department shall first certify in writing that such use will not create a fire hazard and unless the Chief of the Police Department shall first certify in writing that such use will not create a traffic hazard or other hazard, and in arriving at such deter-

mination the Chief Engineer of the Fire Department and the Chief of the Police Department shall take into consideration the number and location of Motor Vehicle Service Stations then existing on the street or highway upon which such proposed Motor Vehicle Service Station is to be located, as well as the number and location of other Motor Vehicle Service Stations in the neighborhood of such proposed station, as well as all other conditions which might tend to make such use hazardous."

A reading of the whole ordinance clearly shows a definite policy of the governing body to regulate the location and number of gas stations in accordance with such power. It decided that there was need for a comprehensive plan regulating gas stations so as to lessen congestion in the streets, secure safety from fire, panic and other dangers, and to promote general welfare. The governing body found that in order to carry out this plan, it would have to preclude the use of any further land for gas station purposes in residential zones, and retain control over gas stations in business zones by requiring permits. As to Main Avenue, it found that there was no further need for gas stations to serve the immediate community; and that because of the fast development of the Main Avenue business section, extra hazards were being created to life and property by the increase in pedestrian and vehicular traffic. It therefore determined that the use of any other lands or buildings along Main Avenue between the Paterson and Passaic lines for motor vehicle service stations "will create conditions hazardous to life and property," and that in order to promote public safety and welfare of the community, no more stations should be permitted than were then in use.

The Supreme Court passed upon the validity of a denial of a permit under an ordinance, the scheme of which was similar to that in the case at bar, in *Schnell v. Township Committee of Ocean*, 120 N. J. L. 194. Mr. Justice HEHER on page 197 said:

“Of necessity, the factor of safety in several of its aspects, as well as the public convenience enters largely into the determination of the location and the physical characteristics of these service stations. Reasonable regulation as respects such land uses, guided by these considerations is therefore embraced within the police power. See *Hirschorn v. Castles*, 113 N. J. L. 277; *Bashlow v. City Council of Clifton*, 118 Id. 390; *Meslar v. Township Committee of Den-ville*, 14 N. J. Mis. R. 497. As pointed out in *Phillips Oil Co. v. Municipal Council of Clifton*, 120 N. J. L. 12, Section 5 of the zoning act, *supra*, directs that zoning regulations shall be designed, *inter alia*, to obviate unnecessary traffic hazards; to ‘secure safety from fire, panic and other dangers’; and to subserve the ‘general welfare.’”

In *Dickinson v. Plainfield*, 122 N. J. L. 63, the action of the Board of Adjustment in refusing an exception to permit a gas station in a business zone was reviewed by our Supreme Court. The ordinance under attack in that case was similar to the one in the case at bar, in that, the application affected a site in a business zone where no gas stations were permitted, but differs in that in the above case the Board of Adjustment had power to recommend to the governing body an exception, while in the case at bar, the governing body alone determines if an exception should be made. There the Board of Adjustment denied the application because “such stations by their

very nature and construction create traffic congestion, due to the creation of an entering and leaving flow of traffic which has to emerge with, or break out of, or cross the flow of through traffic." Mr. Justice DONGES, in his opinion, held that neither the ordinance nor the action of the Board of Adjustment was unreasonable.

In the case at bar, the zoning ordinance should be considered as a whole as Section 2 which prosecutor seeks to challenge is not the whole regulatory provision concerning business areas. Section 3 is part and parcel of Section 2 and should be read with the latter in order to determine the legislative scheme. Section 2 vests a discretion, but the right to grant or deny an application is subject to the limitations in Section 3.

Respondent urges that such power is circumscribed by the provisions of the zoning act which express the police power and that its denial of a permit must be in furtherance of health, safety and the general welfare of the City. Sections 2 and 3 of the zoning ordinance limit the exercise of such discretion to the police powers as expressed in Section 5 of the Zoning Act of 1928, Rev. Stat. 1937-40:55-32. Under the ordinance, the Council has the right to reject an application for a gas station permit in a business zone, in accordance with Sections 2 and 3 which require the Chief of the Fire and Police Departments to investigate the application and certify in writing whether such use will create a fire, traffic or other hazard, and directs that such officials shall take into consideration the number and location of service stations then existing upon the street upon which such use is sought, as well as other motor vehicle service stations in the neighborhood and other conditions which might tend to make

such use hazardous. Upon the report of such officers, the Council then sits to hear the evidence in favor and against such application and decides whether such use would create a fire, traffic or other hazard.

As pointed out before, the storage and sale of gasoline is a highly hazardous business because of the inflammable nature thereof. *It being a class of business which may, under certain conditions, be prohibited altogether, the ordinance requiring a permit for the location of a gas station in a business zone need not contain any standard of rules and regulations under which an application may be denied.* The following are illustrative of the classes of business which are regulated by ordinances giving a broad discretion to grant or deny a license:

Loben v. Board of Health, 3 N. J. Misc. 38, where a permit to engage in the business of slaughtering was denied under an ordinance which provided no standards or rules and where this Court held, on Mandamus, that the Board had a discretion in the matter.

Hudson Royal Restaurant v. Jersey City, 10 N. J. Misc. 629 where a license for music and dancing in a Chinese Restaurant was denied under an ordinance which prohibited dancing or playing of music in public places where food and drink are consumed on the premises, unless specially licensed.

De Roos v. Chapman, 106 N. J. L. 6, where a license to conduct a restaurant was denied under an ordinance which required a license and gave the municipal body discretion in granting the same. There the ordinance was challenged and this Court held that the provisions thereof were

“plainly a valid exercise of the police power in the interest of public health, safety and welfare.”

Reid v. Deal, 5 N. J. Misc. 144, where a permit to operate a hotel was denied under an ordinance which made it discretionary to grant or deny the same, but without any standards or rules set forth in the ordinance.

We strongly urge that the regulation in the case at bar falls within that class of cases which, because of the peculiar and unusual characteristics of the structures and uses may have a particular bearing upon the public safety and general welfare if not located with due consideration to conditions, surroundings, necessities and conveniences, and may be regulated by the requirement of a permit therefor. We also urge that the case at bar falls within that class mentioned because of traffic hazards and the danger of fire and explosion in the handling of gasoline, and that the municipal body could exercise its discretion within the statutory bounds without providing in the ordinance any uniform rule of action governing the exercise of such discretion.

There is a distinction between the regulation of this class of businesses and others, and that distinction is aptly expressed in Sec. 598 of *Dillon on Municipal Corporations* (5th Ed.) in the following language:

“Ordinances prohibiting certain acts without the consent or permit of the Common Council or the mayor or other executive officer, have in some cases been held to be unreasonable and void, because they submit the rights of individuals to the unrestrained discretion of the council or official. It has been said of ordinances of this nature that they remove the rights of the

individual from the domain of law and subject them to the exercise of arbitrary discretion on the part of the council or officer upon whom the dispensing power is conferred; that it is unreasonable to reserve, the right to grant or withhold the privilege as it may suit the pleasure of the council or officer and that to be valid an ordinance of this nature must lay down a uniform rule of action governing the exercise of the dispensing power.

* * * * *

It is, however, to be observed that in the great majority, if not in all, of the cases cited, the ordinance was prohibitory in its nature, and in the view of the Courts, the acts sought to be prohibited were not of themselves harmful or of such a nature as to justify prohibition. * * * *But whilst the principles so laid down are supported by a respectable body of authority, it is believed that they are contrary to the weight of the decisions.* Many cases are to be found sustaining ordinances prohibiting acts or even the following of trades or occupations without procuring permits which may be issued at the discretion of the council, mayor or some other city officer or department, and the fact that the dispensing power was apparently conferred without restraint or qualification has been regarded as arising merely from the difficulty of defining in advance upon what conditions the permit shall be given or the dispensing power exercised. It has also been said that it is not to be assumed that the council or officer in exercising the dispensing power, will act arbitrarily or otherwise than in the exercise of a sound discretion." (Italics ours.)

Still further, with reference to discretionary powers, the author says in the same section:

"In these cases it appears to be assumed that if the trade or calling is properly of a nature which may be regulated or controlled by virtue of the police power such regulation or control may be exercised by a prohibition unless a permit is obtained." (Italics ours.)

In other states, this principle has been followed where the municipality acted under a delegation of the police power.

In *Storer v. Downey*, 215 Mass. 273, 102 N. E. 321, the refusal of a permit to erect a garage was sustained and in doing so, the Court said:

"An ordinance of the City of Cambridge (passed under the authority of R. L. C. 104 sec. 1) provides that 'no building shall be erected for or converted to use as a garage unless such use is previously authorized by the Board of Aldermen.' This is a valid exercise of the police power. The disagreeable incidents of a garage are well known. They have been adverted to frequently in recent decisions of the Court (citing cases). Oil and gasoline, almost inevitably stored and used in them are so highly inflammable and explosive that they may increase the danger of fire, no matter how carefully the building be constructed nor how non-combustible its materials. Although lawful and necessary buildings, they are of such character that regulation of the place of their erection and use is well within settled principles as to the police power. The ordinance in its terms differ in no essential particular from many others which have been sustained (citing cases). Here the public board itself is empowered to deal with a subject which may endanger the safety of persons and property and the ordinance does not exceed the scope of the statute."

In *Brown v. Stubbs*, 128 Md., 129 Atl. 227, the refusal to issue a permit to erect a moving picture theater in the City of Baltimore was sustained. An ordinance of the City provided that a permit should not be issued for the construction of such a building until the application for a permit was first assented to by the mayor and City Council by ordinance to be passed upon giving notice by newspaper publication 15 days prior to the introducing of such ordinance. It was claimed that the ordinance was invalid and unreasonable, in that it commits to the mayor and city council unlimited discretion in granting or refusing * * * permits and does not undertake to provide any general rules and regulations limiting the exercise of said discretion. Attention is called in the case to a decision of the Maryland Court, *State v. Loden*, 117 Md. 373, 83 Atl. 564, 40 L. R. A. (N. S.) 193, Ann. Case 1913 E, 1300, wherein it was said:

“The danger to life and property incidental to the use of moving picture machines, when operated by incompetent persons, is known to all. The films used in connection with the machine are highly explosive and dangerous in their character and if not properly managed and cared for are liable to explode.” And continuing, the Court said: “At some locations they may be safer than at others and there is less danger to adjoining properties in some parts of the City than in others. It would be very difficult if not impossible to draw a general ordinance which would accomplish all that is proper, without doing injustice to some, and we can see no reason why an applicant for a license should not be required to first get a permit from the mayor and City Council * * * .”

In *Fischer v. St. Louis*, 194 U. S. 361, 24 Sup. Ct. 673, 48 L. Ed. 10-18, an ordinance of St. Louis prohibited the erection of any dairy or cow stable without permission of the municipal assembly. In upholding the ordinance the U. S. Supreme Court said:

“The power of the Legislature to authorize its municipalities to regulate and suppress all such places or occupations as in its judgment are likely to be injurious to the health of its inhabitants or to disturb people living in the immediate neighborhood by loud noises or offensive odors, is so clearly within the police power as to be no longer open to question. The keeping of swine and cattle within the city or designated limits of the City has been declared in a number of cases to be within the police power.”

In *Lieberman v. Van De Carr*, 199 U. S. 552, 26 Sup. Ct. 144, 50 L. Ed. 305, a section of the New York sanitary code provided that no milk shall be sold, kept or delivered without a permit from the Board of Health. In holding that the subject-matter was within the police power, the United States Supreme Court said:

“These cases leave in no doubt the proposition that the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the police power of the State is not violative of the rights secured by the Fourteenth Amendment. There is no presumption that the power will be arbitrarily exercised and when it is shown to be thus exercised against the individual, under sanction of state authority, this court has not hesitated to interfere for his protection, when the case has come be-

fore it in such manner as to authorize the interference of a federal court. *Yeck Wo v. Hopkins*, 118 U. S. 356."

In *State ex rel Lane v. Fleming*, 225 Pac. 647, the Supreme Court of Washington upheld the denial of a gas station permit under an ordinance which read as follows:

"SECTION 2: Whenever a permit for the erection of a gasoline service station outside of the fire limits is filed with the City Council, the Council shall set a date for a hearing * * *. At such hearing the City Council may grant the permit or may deny the same if it finds that it would be against public interest to allow the installation of a service station in the location specified."

There the Court held that the case came within the Massachusetts, Maryland and United States cases above cited and said on page 650:

"SECTION 2 of the ordinance in question is made applicable generally to all territory in the City outside of the fire limits, manifestly to lessen the danger by fire to persons and property. It is fair in its plan providing as it does for a public hearing before the whole council, whose discretion, under all authority and presumptions, will be exercised fairly according to the peculiar and individual circumstances of each case, in the interest of, and on a subject relating to, the general welfare and safety of the persons and property of the community."

The Supreme Court of Washington followed the *State v. Fleming* case, *supra*, in *Chief Petroleum Corp. v. City of Walla Walla*, 116 Pac. (2d) 560.

In *Kramer v. Mayor, etc. of Baltimore*, 171 Atl. 70, the Maryland Court of Appeals upheld an ordinance of Baltimore which was part of the zoning ordinance and provided that "a filling station for the sale of inflammable liquids may be permitted only by authority of an ordinance of the mayor and city council even in a district where such a use of property is not prohibited by the use regulations under the zoning law." The site in that case was in a zone which did not exclude gas stations.

The claim was that such ordinance was void in that it violated the provision of uniformity and comprehensiveness in Chapter 705 of the Acts of 1927 of the General Assembly enabling Baltimore and certain other municipalities to enact zoning ordinances for their respective governmental areas. The Court said on pages 71 and 72:

"In utilizing the zoning power conferred by the Enabling Act of the General Assembly, the mayor and council expressly reserved authority to control by their own direct legislative action the location of filling stations in any part of the City from which they were not excluded by the provisions of the zoning ordinance. It was competent for the municipal government to make such a reservation. The Enabling Act of 1927 (Sec. 1) provided that all zoning regulations, shall be uniform for each class or kind of buildings throughout each district, but need not be the same for all districts, and shall be made in accordance with a comprehensive plan. Those requirements of uniformity and comprehensiveness for the regulations which the zoning ordinance might prescribe were not incompatible with the retention by the mayor and city council of the power to legislate separately with respect to the issuance of per-

mits for filling stations in areas where, by the zoning ordinance they are not definitely prohibited. *The nature of that class of uses is such as to make them a proper subject* of special municipal regulation. In residential districts they are wholly forbidden by the zoning ordinance, but the only right to restrict their location in other districts is that which is reserved to the mayor and city council. The alternatives to that policy would have been to leave unrestricted the right to erect filling stations in non-residential districts, or to delegate to administrative officials the power and duty to determine, in conformity with duly prescribed standards, whether applications to conduct such enterprises in particular locations should be granted or refused. In reserving that function for its legislative action, the City government could not be held to have exceeded its authority. The considerations affecting the comprehensive solution of such a municipal problem are clearly appropriate for the exercise of the City's legislative judgment." (Italics ours.)

The instant case falls squarely within the reasoning of the Court in the *Kramer* case, *supra*. There the ordinance, predicated upon the zoning statute of the State of Maryland, contained the same provision as in the case at bar, except as to the method of exercise of the dispensing power.

Our case differs from the *Kramer* case only in one particular, namely, that in the *Kramer* case the permit is granted by ordinance whereas here the method by which a permit may be granted or withheld, is not expressly provided.

In our own courts, the basic principle of the *Kramer* case, is stated in *Hirschorn v. Castles*, *Meslar v. Township Com. of Denville*, and *Schnell v. Township Com. of Ocean*, *supra*.

In *Phillips Oil Co. v. Clifton*, *supra*, the first case affecting the property in this proceeding, prosecutor-appellant's predecessor in title brought up for review the action of the City in denying the permit sought. No attack was made upon the zoning ordinance and Mr. Justice HEHER, declared the limitation upon the exercise of the discretion reposed in the City by the ordinance, to be the statutory consideration in Section 5 of the Zoning statute. Such is the precise position of the City in this case and for the reasons expressed in the *Phillips Oil Co.* case, the governing body in the exercise of its discretion, denied the permit sought by prosecutor.

We respectfully urge that the ordinance sought to be reviewed is a valid exercise of municipal power and is sustainable under the zoning statute and the regulatory and police powers of the State.

POINT II.

Only the action of the governing body denying the permit was before the Supreme Court for review.

The writ in this matter brings up *only the decision of the Municipal Council in denying the application of the permit for the gas station* (State of Case, page 1). It does not bring up for review the ordinances under which the action of the governing body is predicated.

Prosecutor-appellant in his brief on page 6 contends that the ordinances are unconstitutional, firstly, because of the absolute discretion in the Council without regard to any standard of rules

and regulations and, secondly, because of the alleged delegation of its powers to subordinate officers. *Neither of these grounds were properly before the Supreme Court and therefore cannot be considered on this appeal.*

Assuming but not admitting that the ordinances are before the Court, we nevertheless urge that the authorities cited by prosecutor are not applicable to the ordinances in question.

In *South Orange v. Heller*, 92 N. J. E. 505, our Court of Chancery, in an opinion by Vice Chancellor BACKES, dismissed a bill seeking to restrain defendants from erecting a public garage in violation of an ordinance which prohibited in *residential zones*, any factories, chemical works, public garages, power plants, slaughterhouses, abattoirs, *shops or stores for the sale of merchandise of any kind*, without a special permit to be granted only upon resolution of the Board of Trustees, and after a hearing.

That case was decided before the zoning constitutional amendment and the enabling act and must be limited to the facts and law then in effect. We have no quarrel with the result reached in that case but urge that the decision is predicated upon the Court's construction of the statutory authority in P. L. 1920, page 455, a statute different from the present enabling act, and which authorized and limited municipal bodies to regulate and restrict only the location of trades and industries. It is also discernible from the opinion that the application was for an injunction *pendente lite*, so that the Court did not go into the facts nor decide whether factually the proposed public garage was so located as to create a hazard to life and property because of the dan-

ger from fire and explosion of inflammables stored and used in the building. There the ordinance differed from the ordinance in the case at bar because it prohibited even lawful and inoffensive shops and stores for the sale of merchandise, without a special permit. *In the instant case, the ordinance gives a discretion, within the bounds of the zoning act and the police powers, to grant or deny a permit for the location of only one type of business, namely a gas station which handles, stores and dispenses a highly inflammable and dangerous product.*

The *South Orange v. Heller* case was never affirmed by the Court of Errors and Appeals, although it was cited by that Court in the case of *Lipkin v. Duffy*, 119 N. J. L. 366, at 368. In the latter case, the Court of Errors and Appeals set aside a conviction for violating an ordinance prohibiting the operation of a junk yard, without a license. That decision is not applicable to the instant case because, the ordinance there was not predicated upon the zoning law and further because in the *Lipkin* case the ordinance was a licensing ordinance under R. S. 40:52-1(c). That case must also be limited in its scope because there the ordinance improperly vested a discretionary power to deny "any application" for a license to conduct a junk yard, a private business not affected with a public interest, nor clothed with a public use, nor one the location of which may have a particular bearing upon the public safety and general welfare if not located with due consideration of conditions, surroundings, necessity and convenience. That case merely held that the ordinance which provided that "any application for a license may be declined" * * * improperly vested a "broad discretion in the board

of aldermen *to refuse a license whenever they deem it desirable * * **.” We have no quarrel with the holding in the *Lipkin* case as applied to the facts of that case, but urge that it has no application to the instant case because, as argued under another point, the location of a gas station is the proper subject of discretion, as exercised by the ordinance which was the basis for the denial herein.

The case of *Librizzi v. Plunket*, 126 N. J. L. 17, cited in prosecutor-appellant’s brief is not in point because the error complained of was the arbitrary denial of a license to conduct an auto wrecking business and the court did not set aside the ordinance, but remanded the matter back to the City to re-examine the application there made. We urge that the matter there before the Supreme Court was whether the action in denying the license was proper, and if the language quoted in prosecutor-appellant’s brief was necessary in reaching the conclusion that the Commissioners’ action be set aside, it should be limited in its application to the opinion, which states that an ordinance vesting in an administrative official an uncontrolled discretionary authority to deny a license for a business of the class that may not be altogether forbidden, contravenes fundamental law.

The case of *Drive-to Department Stores v. Newark*, 115 N. J. E. 222, cited by prosecutor-appellant does not pass on the validity of the ordinance in that case, and therefore has no binding force herein.

In the instant case the discretionary power is retained and exercised by the legislative body itself over a business, the location of which may

be controlled or prohibited because its operation may have a particular bearing upon the public safety and general welfare if not located with due consideration to conditions, surroundings, necessity and convenience.

We urge that if the ordinance was properly before the Supreme Court, it sustained it under the Zoning Act and the police powers of the State, which give respondent-appellee the right, within its sound discretion to grant or deny a permit, within the limits of such statutory power.

POINT III.

The issue before the Supreme Court was res adjudicata.

In the light of evidence supporting the City's action in the preceding cases, *Phillips Oil Co. v. Clifton*, *supra*, and *Birchwood, Inc. v. Kulik*, and similar proofs in the instant case of a traffic hazard and danger to school children, the Supreme Court correctly sustained the Municipal Council's action, in this the third case before that Court.

The denial of the permit was in the exercise of a sound discretion. It was predicated upon the provisions of the Zoning Ordinance and sustainable thereunder (*Phillips Oil Co. v. Clifton*, *supra*), or upon an ordinance set forth in the return to the Writ and entitled "An Ordinance Concerning Gasoline Tanks and Pumps." (Pg. 5, State of Case). The latter is the same ordinance under which the Supreme Court sustained a denial of a gas station permit, in *Bashlow v. City Council*, *City of Clifton*, 118 N. J. L. 390.

We urge that the factual situation is no different than in the two previous cases, except for ownership of the property and the possession thereof. Nevertheless, we submit that the prosecutor-appellant's right to possession is no greater than that of his lessor who acquired this property subject to the Supreme Court's edict that it could not be used for a gas station.

In the two previous cases we made the point that the delay of prosecutor-appellant's predecessors in title, in challenging the zoning ordinance was unreasonable and that because of the laches involved, no relief should be given (State of Case, pages 77, 78, 79, 80, 81 and 82). In the *Phillips Oil Co.* case, in 1938, the then owner chose not to attack the ordinance but was satisfied to test the action of respondent-appellee in refusing the permit. The Allwood section, wherein the proposed site is located, was then in the process of being developed as a one-family residential community in accordance with a neighborhood scheme. When Birchwood, Inc. acquired the property in 1940, it sought a permit through Mandamus proceedings and failed. In 1944, Petroleum Holding Co. acquired this property, with a provision in its deed that it took title from Birchwood, Inc., subject to zoning ordinances of the City of Clifton.

We therefore urge that Petroleum Holding Co., the owner of this property is bound by the previous decisions of the Supreme Court and took subject to them. Similarly, the prosecutor-appellant acquired no greater right.

We also urged in the *Birchwood* case and do so now that prosecutor-appellant is bound by his predecessors' waiver of the right, if one existed,

to attack the ordinance. Since 1935, the neighborhood in which the proposed gas station site is located has increased in the number of one-family homes. It may well be assumed that the development of the Allwood section has followed in rapid strides because it has been in compliance with the original plan that no structures or uses be permitted which would increase congestion or affect the value of homes in that vicinity. For many years the property owners and public in the Allwood section have been lulled into a sense of security and that area has progressed as a one-family residential community in the belief that the proposed site would be used only for stores supplying the needs of the residents. Granting prosecutor-appellant the relief sought will prejudice the neighborhood scheme and the values of property in the Allwood section.

We further urged before the Supreme Court and do so now that the denial of Mandamus in the *Birchwood* case is *res adjudicata*. In that case, the owner of the property made an attack upon the ordinance, as in the instant case. *No appeal was taken from the judgment* entered in the *Birchwood* case, discharging the rule to show cause why a Writ of Mandamus should not issue. More than six years have elapsed since entry of said judgment, but irrespective of the time element, no appeal could be taken to this Court because no question of the constitutionality of a statute was involved. (R. S. 2:83-15) See *Roberts v. Hetrick*, 125 N. J. L. 633; *Trinkle v. Donnelly*, 98 N. J. L. 298 and *Advance Development Corp. v. Jersey City*, 105 N. J. L. 234.

We strongly urge that the issue here raised is *res adjudicata*, and that the institution of this proceeding before the Supreme Court was an attempt to re-argue the same issues already adversely decided against prosecutor-appellant's predecessor in title, in the *Birchwood* case. *Roberts v. Hetrick, supra*.

POINT I V.

The ordinance does not delegate the Municipal Council's discretionary powers.

Prosecutor-appellant's other challenge upon the zoning ordinance is based upon the claim that Section 3 thereof delegates certain duties to respondent-appellee's Fire and Police Chiefs. In the first place, prosecutor-appellant cannot be heard to make this attack upon that ordinance because he admits that both the Fire and Police chiefs approved his application for the gas station (State of Case, page 41, ll. 1-34). *He does not contend that respondent denied this application because the Fire and Police Chiefs, pursuant to the authority in Section 3, failed to approve the proposed gas station.* It is incumbent upon prosecutor-appellant to urge and prove such claim before he should be heard to make this point. His claim is *moot* because the Municipal Council rested its denial squarely upon the objections of residents that the proposed gas station would increase the traffic hazard and the danger to school children crossing at this intersection, and not because of any refusal of its subordinate officers to make the desired certification.

Prosecutor-appellant does not deny that the discretion reserved in the Municipal Council *was actually and in fact exercised* by that body and not by any subordinate officer or board.

The governing body of respondent-appellee exercised its discretion in the matter after notice to all persons within 200 feet and after affording a full and complete hearing. This practice was followed in this case and in the previous cases of *Phillips Oil Co. v. Clifton*, *supra*, and *Birchwood, Inc. v. Kulik*, (Brief of respondent-appellee, State of Case, page 76, ll. 24-30). The instant case is factually different from and not controlled by *Levy v. Mravalg, etc.*, 96 N. J. L. 367 and *Public Welfare Pictures Corp. v. Brennan*, 100 N. J. E. 132, cited by prosecutor-appellant. In the *Levy* case, the building code provision there before the court required the written consent of all property owners within 500 feet of the proposed building, while in the *Public Welfare Pictures Corp.* case, the Director of Public Safety of Newark, without the authority of an ordinance created a voluntary board of censors which disapproved the showing of a film in a public theatre. The cited cases are not factually similar to the case at bar, and we have no quarrel with the results reached in those decisions. The case of *Librizzi v. Plunkett*, 126 N. J. L. 17, likewise is different from the case at bar and not controlling because in that case there was a delegation of authority by the legislative body to an administrative official without any rules or regulations governing the exercise of the discretion reposed in him to grant or deny the permit sought.

In the instant case we urge that even if it be claimed that Section 3 of the Zoning Ordinance was a delegation of authority to the Chiefs of the

Fire and Police Departments, the ordinance is not subject to the same objections as in the cited cases because here we have the alleged powers in these officials circumscribed and limited by the edict that they shall certify to the fire, traffic or other hazards and that in arriving at their opinion they shall take into consideration the number and location of motor vehicle service stations then existing on the street where the permit is sought, as well as the number and location of other motor vehicle service stations in the neighborhood of such proposed stations, as well as other conditions which might tend to make such use hazardous. *These officials were not empowered to grant or deny the permit.*

We further urge that Sections 2 and 3 of the zoning ordinance must be read together in order to make out the legislative intent of the regulation as it affects areas in business zones. This is necessary because Section 3 standing alone would not make sense. If prosecutor-appellant's attack be upon the claim that Section 3 is a delegation of the Municipal Council's authority such argument fails for two reasons, namely, that Section 3 standing alone, does not by its language, provide for the issuance or rejection of the permit by designated officials, upon the filing of the certificates of the Chiefs of the Fire and Police Departments, and secondly, because the words "no such permission," at the beginning of Section 3 refers to the permission required by Section 2. *Under Section 2 of the Zoning Ordinance, the Municipal Council is the only body authorized to grant the permission.*

We therefore urge that when Sections 2 and 3 of the Zoning Ordinance are read together, they spell out a procedural scheme which calls for an

advisory opinion from the Fire and Police Chiefs, based upon their experienced judgment, before the Municipal Council, in whose hands is left the power to grant or deny the permit, should act upon the application therefor.

We therefore urge that there was no delegation of the discretion reposed in the Municipal Council and prosecutor-appellant's point is not well taken.

POINT V.

This appeal is improperly before this Court.

The statutory right of appeal in Mandamus cases is set forth in R. S. 2:83-11 which provides:

“When a final judgment in mandamus shall be given upon an issue of fact or law, any party to the record who shall think himself aggrieved thereby may appeal therefrom as in judgments in personal actions.”

This statute was construed in *Trinkle v. Donnelly*, 98 N. J. L. 298, where this Court dismissed an appeal from a judgment of the Supreme Court granting a peremptory Writ of Mandamus. In a Per Curiam opinion, this Court said on Page 299:

“These appeals must be dismissed. Where the Supreme Court on the return of a rule to show cause awards or refuses a writ of peremptory mandamus without the prior award of an alternative writ, the rule is firmly settled that to that action a writ of error, or, under present practice, an appeal, will not lie, except by virtue of a statute in cases of denial of the writ,

where a constitutional question is involved, a condition which does not exist here. Comp. Stat., p. 3216, pp. 6; Layton v. State, 28 N. J. L. 575; American Transportation Co. v. New York, Susquehanna and Western Railroad Co., 59 Id. 156; Paterson v. Shields, Id. 426; Kenny v. Hudspeth, Id. 504, 527; Morris & Cummings Dredging Co., v. Bayonne, 76 Id. 573; Matlack v. Lloyd, 82 Id. 739; Browne v. King, 91 Id. 317.

Where an issue is made up on a record of alternative writ, return thereto, &c., followed by a judgment, error will lie. The practice is outlined in Silverthorne v. Warren Railroad Co., 33 N. J. L. 178, and later cases."

In *Reed v. Board of County Canvassers*, 119 N. J. L. 115, Mr. Justice HEHER, speaking for this Court said, on page 116:

"It is the settled rule in this state grounded in the ancient common law, that an appeal will not lie to the award or refusal of a peremptory mandamus by the Supreme Court, upon the return of a mere rule to show cause, as distinguished from an alternative mandamus, except where the refusal necessarily involves the constitutionality of a statute. *Trinkle v. Donnelly*, 98 N. J. L. 298; *Mannino v. Moffett*, 108 Id. 545."

Admittedly, prosecutor-appellant has not followed the practice outlined in the above cases of applying to the Supreme Court for an order to mold the pleadings. He has not established his right to appeal to this Court and erroneously contends that his appeal to this Court is a matter of right. Prosecutor-appellant points to no case which upholds this view, but places great reliance upon a reference of this Court in the case of

Mannino v. Moffett, 108 N. J. L. 545, where this Court dismissed an appeal from a judgment discharging a rule to show cause why a Writ of Mandamus should not issue to compel the issuance of a building permit for a garage. That case did not require, nor was the Supreme Court called upon to decide the question of constitutionality of an ordinance. The statement of this Court pointed to by prosecutor-appellant, is obviously *dicta*, as there was no constitutional issue raised and the use of the word "ordinance," in the language used, was not necessary for its decision. This seems conclusive because of Mr. Justice HEHER's use of language taken from the case of *School District of Neptune Township v. Mannion*, 73 N. J. L. 816, where it was said:

"The refusal by the Supreme Court of a mandamus and its discharging a rule to show cause why a mandamus should not issue, is not reviewable on error (*Layton v. State*, 4 Dutch. 575; *American Transportation Co. v. New York, Susquehanna and Western Railroad Co.*, 30 Vr. 156; *Pater-son v. Shields* Ibid. 426), *except in cases covered by the amendment to the Mandamus act which is to be found in its original form in 2 Gen. Stat., p. 2002, pp. 13, and which is produced in a condensed form in section 6 of the Mandamus act of 1903. Pamph. L. 1903, p. 381. Those cases in which a review by writ of error is granted are limited by the terms of the amendment to cases decided in the Supreme Court upon the constitutionality of a statute.*" (Italics ours.)

Section 6 of the Mandamus Act referred to in that case is now R. S. 2:83-15 and reads as follows:

“2:83-15. APPEAL TO REMOVE PROCEEDINGS
INTO COURT OF ERRORS AND APPEALS.

Where a writ of alternative or peremptory mandamus is denied, or *where a rule to show cause why the writ should not be issued is discharged as the legal consequence necessarily resulting from a determination by the court as to the constitutionality of any statute*, and this is the main issue brought before the court and the principal ground of the litigation, *the relator may*, at any time within one year after the entry of the rule denying the writ or discharging the rule to show cause, *take an appeal to remove the proceedings into the Court of Errors and Appeals*. The court shall hear and determine the cause as speedily as possible without the postponement of other business of such term.” (Italics ours.)

The Statute and the cited cases leave no doubt but that no appeal lies where the Supreme Court discharges a rule to show cause in Mandamus, except where the constitutionality of a *statute alone*, is involved. This rule has not been enlarged by statute or any adjudicated cases to include questions regarding the validity of ordinances.

We submit that there is no appeal from the judgment of the Supreme Court in the mandamus proceeding and urge that such appeal be dismissed.

Conclusion.

We respectfully urge that the judgments dismissing the Writ of Certiorari and discharging the Rule to Show Cause why a peremptory or alternative Writ of Mandamus should not issue, were proper for the reasons discussed.

We further contend that even if the Zoning Ordinance was properly before the Supreme Court upon the Writ of Certiorari, the "ordinance concerning gasoline tanks and pumps," is not, nor is the latter ordinance the subject of any attack by the prosecutor-appellant. The "ordinance concerning gasoline tanks and pumps," (State of Case, beginning with line 35, page 38 and ending at line 20, page 40) is predicated upon R. S. 40: 48-1, Subdivision 15, which empowers the municipality to regulate the issuance of permits for the installation of gas tanks and pumps and is therefore valid. *Independent Penn. Oil Co. v. Gloucester*, 102 N. J. L. 502; *Morgan v. Collingswood*, 104 N. J. L. 13. Consequently, respondent-appellee's action is also sustainable under such ordinance. See *Bashlow v. City Council, City of Clifton*, 118 N. J. L. 390.

Respectfully submitted,

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To be argued orally by
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