INDEX

Notice of Application for Writ of Mandamus.

NOTICE.

New Jersey Supreme Court

MAX MARGOLIS, *Relator,* *vs.* TOWNSHIP OF MAPLEWOOD and REINHARDT O. OSTERMAN, Building Inspector of the Township of Maplewood, *Defendants.*	*Notice.*

To the Township of Maplewood and Reinhardt O. Osterman, Building Inspector of the Township of Maplewood:

TAKE NOTICE, that on Saturday, the 24th day of July, 1926, at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard, we shall apply to the New Jersey Supreme Court at the Court House, Newark, for an alternative writ of mandamus in the above-entitled cause requiring the Township of Maplewood to issue permit for the erection of a four-story brick apartment house containing thirty-two apartments, as set forth in the attached petition and affidavit.

HOWE & DAVIS,
Attorneys for Relator.

PETITION.

NEW JERSEY SUPREME COURT.

To the Honorable, the Judges of the Supreme Court of the State of New Jersey:

The petition of Max Margolis, of the City of East Orange, in the County of Essex and State of New Jersey, respectfully shows:

1. Your petitioner is the owner in fee simple of a certain tract of land and premises in the Township of Maplewood, County of Essex and State of New Jersey, and bounded and described as follows:

BEGINNING at a point in the Southerly line of Burnet Street distant Southwesterly as measured along the same Two Hundred thirty-three and thirty-four one-hundredths feet from the intersection thereof with the Southwesterly line of Maple Avenue; and from thence running along the aforesaid Southerly line of Burnet Street South sixty-two degrees fifty-four minutes thirty seconds West one hundred feet; thence South twenty-seven degrees five minutes thirty seconds East one hundred fifty feet; thence parallel with the aforesaid southerly line of Burnet Street north sixty-two degrees fifty-four minutes thirty seconds East one hundred fifty-five and four one-hundredths feet to line of land now or formerly belonging to Anna M. Bright; thence along same North forty-seven degrees fourteen minutes West one hundred fifty-nine and seventy-eight one-hundredths feet to the aforesaid southerly line of Burnet Street at the place of BEGINNING.

2. Petitioner is desirous of erecting upon said premises a four-story brick apartment house to contain thirty-two apartments, the said building to have a frontage on Burnet street of eighty-six feet and a depth of one hundred five feet, and is to be built to a height of fifty feet and to cost approximately one hundred thirty thousand dollars ($130,000.00).

3. On the 8th day of June, 1926, petitioner applied to Reinhardt O. Osterman, Building Inspector of the Township of Maplewood, for a permit for the erection of said four-story brick apartment house, by application in writing duly submitted to said Building Inspector, accompanied by plans and specifications in duplicate as provided by the building code of the Township of Maplewood, and also tendered to said Building Inspector the legal fees fixed by said building code.

4. After retaining said application, plans and specifications, the said Building Inspector notified petitioner that he would not issue the said permit giving as his reason therefore that an ordinance entitled "An ordinance to regulate and restrict the location of trades and industries and the location of buildings designed for specified uses; dividing the Township into districts for the purpose of such regulation and restriction; and providing penalties for the violation of the provisions of this ordinance," passed March 15, 1921, and the various ordinances amendatory and supplementary thereto, forbids the erection of said building upon the premises owned by petitioner.

5. Petitioner charges and insists that said ordinance in so far as it purports to prevent Max

Margolis from erecting and constructing the said building as contemplated is illegal in that the reservation of the district in which the petitioner's said property is located to the use prescribed by said ordinance is beyond the power of the Township of Maplewood under the provisions of the statute, and that the Township of Maplewood under the statute has no power to prevent the erection of the said apartment house in said district; and that the restriction is not designed to promote the public health, safety and general welfare; and that the effect of enforcing the provisions of said ordinance to prevent the said petitioner from erecting the apartment house which he seeks to erect would be to deprive the said petitioner of a right to possess and protect property in violation of the first clause of the Article I of the Constitution of the State of New Jersey; and would be a taking of the private property of the said petitioner for public use without just compensation in violation of the sixteenth paragraph of Article I of the Constitution of New Jersey; and would be in effect a taking of private property for private purposes in violation of the right secured to the said petitioner by the Constitution of the State of New Jersey, and would likewise be a violation of the rights secured to the said petitioner by the Fourteenth Amendment to the Constitution of the United States in that it would be a deprival of the petitioner of his property without due process of law and would be a denial to him of the equal protection of the law; and that the said ordinance is for other reasons illegal and invalid.

Petitioner therefore prays that a writ of mandamus may issue out of and under the seal of this Honorable Court directed to Inspector of

Buildings of the Township of Maplewood and to the Township of Maplewood commanding and enjoining them to issue the building permit granting permission to petitioner to erect the building of the type above mentioned upon the said lands and premises hereinbefore described according to the plans and specifications tendered by him to said Building Inspector pursuant to the statute in such case made and provided.

And your petitioner will ever pray, etc.

HOWE & DAVIS,
Attorneys for Relator.

AFFIDAVIT.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } *ss.*

MAX MARGOLIS, of full age, being duly sworn according to law, on his oath deposes and says:

1. I am the petitioner mentioned in the foregoing petition and the owner in fee simple of the premises described in paragraph 1 of said petition.

2. I desire to erect upon said premises a four-story brick apartment house to contain thirty-two apartments, the said building to have a frontage on Burnet Street of eighty-six feet and a depth of one hundred five feet, and is to be built to a height of fifty feet, and to cost approximately one hundred thirty thousand dollars ($130,000.00).

3. On the 8th day of June, 1926, I applied to Reinhardt O. Osterman, Building Inspector of the Township of Maplewood, for a permit for the

erection of said four-story brick apartment house, by application in writing duly submitted to said Building Inspector accompanied by plans and specifications in duplicate as provided by the building code of the Township of Maplewood, and also tendered to said Building Inspector the legal fees fixed by said building code.

4. After retaining said application, plans and specifications, the said Building Inspector notified me that he would not issue the said permit, giving as his reason therefore that an ordinance entitled "An ordinance to regulate and restrict the location of trades and industries and the location of buildings designed for specified uses; dividing the township into districts for the purpose of such regulation and restriction; and providing penalties for the violation of the provisions of this ordinance," passed March 15, 1921, and the various ordinances amendatory and supplementary thereto, forbids the erection of said building upon the premises which I own.

5. I charge and insist that said ordinance in so far as it purports to prevent me from erecting and constructing the said building as contemplated is illegal in that the reservation of the district in which my said property is located to the use prescribed by said ordinance is beyond the power of the Township of Maplewood under the provisions of the statute, and that the Township of Maplewood under the statute has no power to prevent the erection of the said apartment house in said district; and that the restriction is not designed to promote the public health, safety and general welfare; and that the effect of enforcing the provisions of said ordinance to prevent me from erecting the apartment house

which I seek to erect would be to deprive me of a right to possess and protect property in violation of the first clause of the Article I of the Constitution of the State of New Jersey; and would be a taking of my private property for public use without just compensation in violation of the sixteenth paragraph of Article I of the Constitution of New Jersey; and would be in effect a taking of private property for private purposes in violation of the right secured to me by the Constitution of the State of New Jersey, and would likewise be a violation of the rights secured to me by the Fourteenth Amendment to the Constitution of the United States in that it would be a deprival of my property without due process of law and would be a denial to me of the equal protection of the law; and that the said ordinance is for other reasons illegal and invalid.

I therefore pray that a writ of mandamus may issue out of and under the seal of this Honorable Court directed to the Inspector of Buildings of the Township of Maplewood and to the Township of Maplewood commanding and enjoining them to issue the building permit granting permission to me to erect the building of the type above mentioned upon the said lands and premises hereinbefore described, according to the plans and specifications tendered by me to said Building Inspector pursuant to the statute in such case made and provided.

MAX MARGOLIS.

Subscribed and sworn to this 20th
day of July, 1926, before me.

THOMAS A. DAVIS, JR.,
A Notary Public of New Jersey.

ORDER TO SHOW CAUSE.

NEW JERSEY SUPREME COURT.

MAX MARGOLIS,
Relator,
vs.
TOWNSHIP OF MAPLEWOOD, *et al.*,
Defendants.

Order to Show Cause.

On reading the petition and affidavit filed in the above-entitled cause, it is on this 26th day of July, 1926, ORDERED, that the Township of Maplewood and Reinhardt O. Osterman, Inspector of Buildings of the Township of Maplewood, in the County of Essex, do show cause before this Honorable Court, at the State House in the City of Trenton, on Tuesday, the fifth day of October, 1926, at 11:00 o'clock in the forenoon of that day, why a peremptory or alternative writ of mandamus should not issue out of and under the seal of this Honorable Court commanding them and directing them, the said Township of Maplewood and Reinhart O. Osterman, Inspector of Buildings of the Township of Maplewood, to issue a permit to said Max Margolis for the erection of a four-story brick apartment house containing thirty-two apartments, on the property of said Max Margolis on the southerly side of Burnet street in said Township of Maplewood, and it is further ordered that both parties have leave to take depositions.

Let this rule be entered in the minutes.

WM. S. GUMMERE,
C. J.

Entered,

On motion of

HOWE & DAVIS,
Attorneys for Relator.

Service of a copy of the within is hereby acknowledged this 4th day of August, 1926.

SAMUEL D. WILLIAMS,
Township Counsel.

AGREED STATE OF FACTS.

NEW JERSEY SUPREME COURT.

MAX MARGOLIS,
Relator,
vs.
TOWNSHIP OF MAPLEWOOD, *et al.*,
Defendants.

Agreed State of Facts.

1. This action arose out of the refusal of the Building Inspector of the Township of Maplewood to grant a permit to the relator to construct a four-story brick apartment house containing thirty-two apartments on property owned by the relator on the southerly side of Burnet street, the said plot of land being two hundred thirty-three feet and thirty-four hundredths feet southwesterly from Maple avenue, and having a frontage on Burnet street of one hundred fifty feet, and a depth of one hundred fifty-nine feet more or less. An order to show cause, dated July 26, 1926, and returnable October 5, 1926, was issued by Chief Justice Gummere.

2. On June 8, 1926, relator applied to Reinhardt O. Osterman, Building Inspector of the Township of Maplewood, for a permit to erect said four-story brick apartment house in accordance with plans and specifications therewith submitted, which application was in writing, a copy of same with endorsements thereon being hereto attached and marked Exhibit A. The legal fee required by law to be paid for the issuance of said permit was thereupon tendered

to said Building Inspector, and was refused by the said Building Inspector.

3. The reason for the failure of the Building Inspector of the Township Committee to grant said application is on the ground that an ordinance entitled "An ordinance to regulate and restrict the location of trades and industries and the location of buildings designed for specified purpose; dividing the township into districts for the purpose of such regulations and restrictions; and providing penalties for the violation of the provisions of this ordinance," passed March 15, 1921, and the various ordinances amendatory and supplementary thereto forbids the erection of said four-story brick apartment house upon the premises owned by relator.

4. Attached hereto and marked Schedule B are such sections of the said ordinance as are pertinent to the matters in controversy.

5. By the terms of the said ordinance as in force at the time of the making of said application, said premises are located in what is known as "Single Family Residence District."

6. No Board of Adjustment is in existence in the Township of Maplewood. Any changes in the ordinance must be made by the Township Committee.

7. On August 18, 1926, relator applied to the municipal authorities of Maplewood for a change of zone under the ordinance and thereupon the Township Committee directed the preparation of an ordinance changing the zone in accordance with the petition, so that such ordinance might be introduced and a hearing upon it held. That ordinance has been prepared and will be intro-

Schedule A.

duced at a regular meeting of the committee to be held on October 5th next.

HOWE & DAVIS,
Attorneys for Relator.

SAMUEL D. WILLIAMS,
Attorney for Defendants.

SCHEDULE A.

DEPARTMENT OF BUILDINGS
Municipal Building

APPLICATION FOR NEW BUILDING

Maplewood, N. J., June 8, 1926.

To the Building Inspector:

I hereby make application for a permit to erect a building according to the following detailed statement and plans herewith submitted; all provisions of the Building Ordinance will be complied with in the erection of said building, if specified herein or not:

1. Owner, Max Margolis. Address, Main street, East Orange.
2. Is the building to be of frame or masonry construction? Brick. Material of exterior walls? Brick. Tile back.
3. Proposed use of building? Apartments.
4. Location? Plate No. 18, Lot No. 214-215 (as per Township Tax Map), or the correct distance from nearest street corner to lot line. What side of street? East. Size of lot? 100x150.

Schedule A.

5. Is there any other building on the lot? No. Any other building to be taken down to make room for this one? No.
6. Distance building is to be erected from side? 7′ 0″; front, 25′; rear lot line, 20′.
7. If within three feet of side lot line how fireproofed? Brick.
8. State estimated cost of building (exclusive of lot). $130,000. Time of commencement? .....
9. Size of building? Front, 86 feet; side, 105 feet; height from finished grade, 50 feet.
10. What is the height and thickness of walls of each story? Give below also size of beams, inches on centers, longest span, bridging:

Interior Height	Stories	Front Wall	Side Wall	Rear Wall	Party Wall	Size of Floor Beams	Centers	Span of Beams	Bridging	No. of Rows
8-6	Basement	16	16	16						
9-0	1st Story	12	12	12		2x10	16	14-0	2x2	4
9-0	2d Story	"	"	"		"	"	"	"	"
9-0	3d Story	"	"	"		"	"	"	"	"
9-0	4th Story	"	"	"		"	"	"	"	"
	5th Story									
	6th Story									

11. Interior supports. Piers or iron columns 61. Give size. See plan, 6″. Height, 4 stories.
12. What kind and size of girder? Steel. See plan. Distance between piers or columns? See plan.
13. Construction of floors? Wood beams. Safe load they will carry? 80 pounds.
14. How framed? ..... Will building be sheathed? .....
15. Size of outside studs? ..... Double around openings? ..... Sills? ..... Plates? ..... Posts? .....

Schedule A.

Rafters?.....or Centres? .....
Valley Rafters? ..... Hip Rafters?
.....

16. Hall or bearing partitions, how fireproofed? 4″ Tile.
17. Material that will cover roof? Slag. What material are Projections and Cornices? Brick. Skylights, how many? 6. Material? Metal. Glass? Wire.
18. What material will Dumwaiter and Shaft be? Brick.
19. Elevator, if any? ..... Fire Escapes, if any? Iron.
20. Any portion of Building used for a Store, etc.? No.
21. If so, how isolated from dwelling parts? .....
22. If electricity is used in this Building, give detailed wiring system, etc.: B X Cable.
23. How will this Building be heated? Steam. Any wood or metal ceiling? No.
24. The fire stops provided for as per code? Yes.

MASONRY

1. Give composition of mortar or concrete? 1 part cement, 3 part sand, — part lime. Details of iron and mixture of reinforced concrete may be required.
2. Will there be a cellar? Yes. Depth of foundation wall below finished grade? 3-6 feet. Thickness of same? 16′. Foundation wall will be built of? Brick.
3. Footings under same? Yes. Materials? Concrete. Depth? 12′. Width of same? 28″.

Schedule A.

4. Will cellar bottom be concrete? Yes. Will chimney be built on concrete footing and from ground up? Yes.
5. Will chimney have tile flue lining? Yes. Size of flue? 26′. How far from woodwork? 12′.
6. Will there be a fire-place? No. Thickness of back? ..... Of jamb? ..... Trimmer arch? .....
7. Construction of hearths? .....

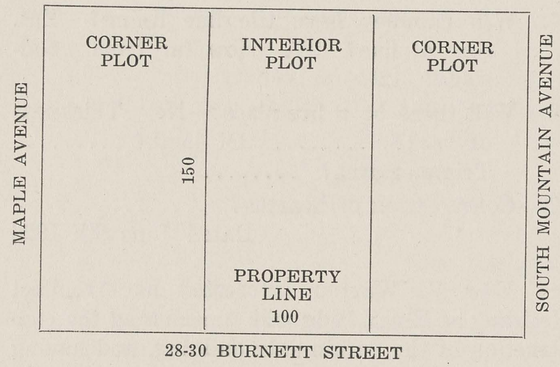
Dated June 8th 1926

I Edw V. Warren Interested as Architect Residing at Essex Bldg will superintend the construction of the within said building, and having the proper authority from the owner to apply for this permit, and make this application, Say: That the statements made in this application are true, and the proposed work will be done in accordance with the ordinances of the Township of Maplewood governing buildings.

Schedule A.

PLOT PLAN

REAR END OF LOTS



NOTICE TO APPLICANT:

Attention is directed to the provisions of the Ordinances of the Township providing a building or set-back line. Information respecting the established lines, as applied to each street, may be obtained from the Tax Maps of the Township, or from the Building Inspector.

The provisions of the Building Line Ordinance will be strictly enforced and much confusion and delay would be avoided if the applicant will familiarize himself with the lines as applied to his property before application is presented, and will show the location of the building with respect to the Building Line on the above sketch.

Applicants proceeding without correct knowledge as to the provisions of the Building Line, do so at their own peril, and such procedure may entail considerable expense, as well as much annoyance and delay.

Applicant will be required to present, at the time Permit is applied for, the recorded deed

Schedule A.

showing ownership, so that location of plot may be checked by the Building Inspector on the Township Tax Maps.

Permit No..... Fee Charged....

APPLICATION

To

Department of Buildings
Township of Maplewood

For

NEW BUILDING

Location 28-30 Burnett St
Owner Max Margolis
Contractors 564 Main St E O
Mason .....
Carpenter .....
Iron Worker .....
Plumber .....
Electrician .....
Architect E V Warren

OFFICE BUILDING INSPECTOR

Maplewood, N. J.,.....19....

I have this day received and examined the within Application and Plans and Detailed Specifications and find that they are in accordance with the Building Ordinance of the Township.

.....
Building Inspector.

Schedule B.

SCHEDULE B.

Section 1. *Establishment of Districts.* In order to regulate and restrict the location of trades and industries, and the location of buildings designed for specified uses, the Township of South Orange in the County of Essex, is hereby divided into six kinds of districts, to be known as follows:

1. Single-family residence districts.
2. Two-family residence districts.
3. General residence districts.
4. Business districts.
5. Commercial districts.
6. Industrial districts.

Section 2. *District Boundaries.* The boundaries of the districts shall be the boundary lines shown on the map accompanying this ordinance, as modified from time to time by the Township Committee, and the map is hereby made a part of this ordinance, with all the lines, designations, explanations and other things shown thereon, as if all these things were described in this ordinance. Where the boundary lines are shown on the map within street lines, the center lines of such streets shall be the boundaries of the districts. Where the boundary lines are shown approximately on the location of property lines, such property lines shall be the boundaries of the districts. Where the boundary lines are shown approximately one hundred feet from street lines and it appears that they are not intended to follow property lines, then the boundary lines shall be regarded as being located one hundred feet distant from the street lines. In cases not covered by these provisions, the location of boundary

Schedule B.

lines shall be determined by the distances in feet, if given, from other lines on the map, or by the scale of the map, if no distances in feet are given. Where any uncertainty exists as to the exact location of a boundary line, the location shall be determined by the Building Inspector subject to an appeal to the Building Committee by any owner affected by a decision.

Section 3. *Single Residence Districts.* In the single residence districts, no buildings, structure or premises shall be used, and no building or structure or alteration, enlargement or extension of the same shall be constructed, unless designed, arranged or intended to be used exclusively for one or more of the following purposes:

1. A residence for a single family.
2. A church.
3. A library, public school or public museum.
4. A club (excepting clubs the chief activity of which is a service customarily carried on as a business).
5. A place of meeting or assembly.
6. A public park or playground.
7. Such accessories as are customarily incident to the foregoing uses, and are not injurious to any district as a place of residence. Such accessories shall not include a business or manufacturing, but may include:

a. An office of a physician or dentist, authorized by law to practice a profession and living on the premises;

b. A private garage with provision for not more than three motor vehicles;

c. A private stable with provision for not more than three horses;

Schedule B.

d. A home industry or other accessory not injurious to a district as a place of residence.

e. Accessories shall not be deemed to include billboards or other advertising signs; except that there shall be permitted (1) on a residence, signs bearing the name and designation of any occupation lawfully carried on in such residence by any person residing therein; any such sign not to exceed one square foot in area; (2) real estate signs advertising as for sale or for rent the property upon which they are displaced; (3) on other buildings, signs customarily and necessarily incident to use to which the buildings are lawfully put.

Section 12. *Amendments and Repeals.* This ordinance shall not be amended or repealed except after due public notice of a proposed amendment or repeal and a public hearing. The ordinance shall not be amended except by a three-fifths vote of the entire membership of the Township Committee, and shall not be repealed except by a four-fifths vote of such membership.

Section 13. *Permission of Township Committee.* Whenever, under the provisions of this ordinance, the permission of the Township Committee must be obtained for any act, such permission shall be granted only at a public hearing of which a reasonable public notice shall have been given. Such permission shall be granted only upon such conditions as are necessary to safeguard the character of the district, with relation to which the permission is sought. A failure to observe any condition so imposed shall be deemed to be a violation of this ordinance.

Supplemental Agreed State of Facts.

SUPPLEMENTAL AGREED STATE OF FACTS.

NEW JERSEY SUPREME COURT.

MAX MARGOLIS, *Relator,* *vs.* THE TOWNSHIP OF MAPLEWOOD, *et als.,* *Defendants.*	*Supplemental Agreed State of Facts.*

It is hereby stipulated and agreed by and between Howe & Davis, attorneys for the relator, and Samuel D. Williams, attorney for the defendants, that the relator's property, for which the permit is herein sought, is encumbered by private restrictions, as follows:

1. A deed by Suburban Realty Co. to Joseph E. Snell, dated February 21, 1907, for the property in question contains the following restrictions:

> "It being expressly understood, stipulated and agreed by and between the parties to these presents that no saloon, hotel or factory shall be erected upon said premises above described, that no dwelling house shall be erected thereon at a less distance than 25 feet from the street line, that no barn or outbuilding required for the use of the occupants of the dwelling house shall be erected on said premises at a less distance than 75 feet from the adjacent street line, that no dwelling costing less than $3,000 shall be erected on said premises."

2. The restriction is reiterated in corrective deed dated October 16, 1907, and in subsequent deeds.

3. In deed of Edward T. Johnson and Hattie L., his wife, to Marlyn Realty Company, dated April 8, 1926, there is the following clause:

"Subject to existing restrictions if effective and statutory and municipal requirements relating to land and buildings."

4. In purchase money mortgage of even date Marlyn Realty Company to Edward T. Johnson and Hattie L., his wife, is the following clause:

"Subject to existing restrictions if effective and statutory and municipal requirements relating to land and buildings."

5. Deed of Marlyn Realty Company to Max Margolis, dated May 27, 1926, contains no restrictions.

6. It is agreed that the permit sought would not violate conditions of the restriction in the deed of Suburban Realty Co. to Joseph E. Snell, as to set-back line and cost of building. The street is a single residence district and conforms to section 3 of Schedule B recited on page 19, line 11, of State of Case.

HOWE & DAVIS,
Attorneys for the Relator.

SAMUEL D. WILLIAMS,
Attorney for the Defendants.

PEREMPTORY WRIT OF MANDAMUS.

NEW JERSEY, *ss.*

(SEAL) The State of New Jersey to the Township of Maplewood and Reinhart O. Osterman, Building Inspector of the Township of Maplewood, GREETING:

WHEREAS in our Supreme Court of Judicature lately held before the Justices thereof at Trenton upon the relation of Max Margolis we have been given to understand that the said Max Margolis has applied to the said Reinhart O. Osterman, Inspector of Buildings of the Township of Maplewood, for a permit to erect a four-story brick apartment house containing thirty-two apartments, to be constructed upon the premises of said Max Margolis on the southerly side of Burnett street, in the Township of Maplewood, New Jersey, the said plot of land having a frontage on Burnett street of one hundred fifty feet, and a depth of one hundred fifty-nine feet more or less; and whereas the said Building Inspector of the Township of Maplewood refused to issue said permit upon the sole ground that under an ordinance adopted by the Township of Maplewood, approved March 15th, 1921, and entitled "An ordinance to regulate and restrict the location of trades and industries and the location of buildings designed for specified uses; dividing the township into districts for the purpose of such regulation and restriction and providing penalties for the violation of the provisions of this ordinance," and the various ordinances amendatory and supplementary thereof, said buildings could not be erected because the said ordinance forbids its erection in what is called

New Jersey State Library

a "Single Family Residence District," the said property being located in a "Single Family Residence District"; and whereas it is charged and insisted before us that said ordinance insofar as it purports to prevent the said Max Margolis from erecting and constructing the said building as contemplated, is illegal in that the reservation of the district in which the relator's said property is located, to the use prescribed by said ordinance is beyond the power of the Township of Maplewood under the provisions of the statute, and that the Township of Maplewood under the statute has no power to prevent the erection of said building in said district, and that the restriction is not designed to promote the public health, safety and general welfare; and whereas it has also been represented to us that the effect of enforcing the provisions of said ordinance to prevent the said Max Margolis from erecting and building which he seeks to erect would be to deprive the said Max Margolis of a right to possess and protect property in violation of the first clause of the Article 1 of the Constitution of the State of New Jersey, and would be a taking of the private property of the said Max Margolis for public use without just compensation, in violation of the 16th paragraph of Article 1 of the Constitution of New Jersey and would be in effect a taking of private property for private purposes in violation of the right secured to the said Max Margolis by the Constitution of the State of New Jersey and would likewise be a violation of the rights secured to the said Max Margolis by the 14th Amendment to the Constitution of the United States in that it would be a deprival of Max Margolis of his property without due process

of law and would be a denial to him of the equal protection of the law; all as by the complaint of the said Max Margolis having heretofore besought us in our Supreme Court before the Justices thereof to award it our writ of mandamus in this behalf directed to you commanding you to issue the said Max Margolis the said building permit above particularly referred to; and our Supreme Court aforesaid held at Trenton before the Justices aforesaid by the judgment of the same Court considered, adjudged and ordered that a peremptory writ of mandamus should issue directed to you and each of you commanding you and each of you to issue to the said Max Margolis the building permit aforesaid, and to permit him to proceed with the erection and construction of the said brick building upon the premises aforesaid, all of which appears to us of record;

We, therefore, do command you, the said Township of Maplewood and Reinhart O. Osterman, Building Inspector of the Township of Maplewood, and each of you, that you do forthwith issue to the said Max Margolis a building permit to erect the building aforesaid and to permit him to proceed with the erection and construction of the said brick building on the premises aforesaid in the Township of Maplewood, in the County of Essex and State of New Jersey.

WITNESS, his Honor William S. Gummere, Chief Justice of the said Supreme Court at Trenton, the 2nd day of February, 1927.

EDWARD J. KELLEHER,
Clerk.

HOWE & DAVIS,
Attorneys.

OPINION OF SUPREME COURT.

Filed January 18, 1927.

NEW JERSEY SUPREME COURT.

No. 248, October Term, 1926.

MAX MARGOLIS,
Relator,
vs.
TOWNSHIP OF MAPLEWOOD, *et al.,*
Respondents.

On Rule for Mandamus.

Before Justices Parker, Black and Campbell.

For relator, Edward L. Davis.

For respondents, Samuel D. Williams.

Per Curiam:

Relator on June 8, 1926, applied to the Building Inspector for a permit to erect a four-story apartment house for thirty-two families, on property owned by him and situate on the southerly side of Burnett street, in Maplewood. The permit was refused because under the Zoning Ordinance of the Township, relator's lands are in a district restricted to single family dwellings. The rule to show cause is dated July 26, 1926, and was returnable October 5, 1926.

The respondents contend that as the Zoning Ordinance by section 12 provides for amending and repealing its provisions upon public notice of such proposed action, relator should have applied to the Township Committee to amend the ordinance so as to relieve his property from the prohibition now contained therein against it

before applying for or having the benefit of a writ of mandamus.

On August 18, 1926, after the present rule was applied for and allowed, relator did apply to the Township Committee for a modification of the ordinance and an ordinance having that purpose in view was prepared and introduced on October 5, 1926, the return date of this rule to show cause.

The Township Zoning Ordinance does not provide for a Board of Adjustment but relator urges that the foregoing referred to provision for amendment contained in the Ordinance places the Township Committee in the same position as a Board of Adjustment.

We conclude to the contrary. Whether the ordinance should or should not be modified was a pure matter of judgment and discretion not required to be based upon proofs, nor was the Township Committee compelled to act nor could they be. Until P. L. 1926, p. 526, and Chancellor Development Corporation *v.* Senior, 4 Adv. Rep. 655, it was held that Boards of Adjustment were without jurisdiction in this direction. It is true that this Court did hold to the contrary in Eaton *v.* Newark, 3 Miscel. Rep. 363, but that holding was subsequently overruled in the Court of Errors and Appeals in Krumgold *v.* Jersey City, 3 Adv. Rep. 1546, and Lutz *v.* Kaltenbach, 4 Adv. Rep. 341.

After the argument upon this rule application was made to amend the proofs by the addition of certain restrictive covenants affecting relator's lands and other and also a specific reservation or restriction contained in the deed to relator. All parties consenting, this was permitted. Application was also made to bring in as parties

to this proceeding owners of property adjacent and in the neighborhood of relator's property as being parties in interest. This latter application was held for consideration and by permission of this Court Mr. A. P. Bachman was given leave to file a brief for such parties, *Amicus Curiae,* which he has done.

The application of these property owners as parties to this proceeding must be and is denied as no authority exists for their admission as such.

The question of restrictive covenants has been settled in this Court in Pumo *v.* Fort Lee, 4 Miscel. Rep. 663.

The peremptory writ of mandamus applied for will, therefore, be allowed.

RULE TO MOULD PLEADINGS.

NEW JERSEY SUPREME COURT.

MAX MARGOLIS, *Relator,* *vs.* THE TOWNSHIP OF MAPLEWOOD, *et al.,* *Respondents.*	*On Mandamus.* *Rule to Mould Pleadings.*

The Court having awarded a peremptory writ of mandamus in this cause, and it now appearing that the respondents desire to appeal to the Court of Errors and Appeals,

IT IS, on motion of Samuel D. Williams, Esq., attorney for the Township of Maplewood,

ORDERED, that the pleadings be so moulded as to exhibit an alternative writ of mandamus, returnable forthwith, a return to said writ, a demurrer to said return and a reply thereto, and that judgment final be entered on said pleadings moulded as herein directed.

Let this rule be entered in the minutes.

WM. S. GUMMERE,
Chief Justice.

Dated, February 15, 1927.

ALTERNATIVE WRIT OF MANDAMUS.

NEW JERSEY, *ss.*

The State of New Jersey to the Township of Maplewood and Reinhart O. Osterman, Building Inspector of the Township of Maplewood,

(L. S.)

GREETING:

WHEREAS Max Margolis applied to the Building Inspector of the Township of Maplewood for a permit to erect an apartment house in accordance with certain plans and specifications, which accompanied the said application, on a plot of ground located in the Township of Maplewood, Essex County, New Jersey, described as follows:

BEGINNING at a point in the southerly line of Burnet street distant southwesterly as measured along same two hundred thirty-three feet and thirty-four one-hundredths of a foot (233.34) from the intersection thereof with the southwesterly line of Maple avenue and from thence running along the aforesaid southerly line of Burnet street south 62 degrees 54 minutes 30 seconds west one hundred (100) feet; thence southerly 27 degrees 5 minutes 30 seconds east one hundred fifty (150) feet; thence parallel with the aforesaid southerly line of Burnet street northerly 62 degrees 54 minutes 30 seconds east one hundred fifty-five and four one-hundredths (155.04) feet to a line of land now or formerly belonging to Anna M. Bright; thence along the same northerly 47 degrees 14 minutes west one hundred fifty-nine and seventy-eight one-hundredths (159.78) feet to the aforesaid southerly line of Burnet street at the place of BEGINNING.

AND WHEREAS it is represented to us that the said Building Inspector of the Township of

Maplewood refused to issue said permit upon the sole ground that under an ordinance adopted by the Township of Maplewood, and approved March 15, 1921, and entitled "An Ordinance to regulate and restrict the location of trades and industries and the location of buildings designed for specific uses," dividing the township into districts for the purpose of such regulation and restriction and providing penalties for the violation of the provisions of this Ordinance," and the various ordinances amendatory and supplementary thereof, said building could not be erected because the said Ordinance forbids its erection in what is called a "Single Family Residence District," the said property being located in a "Single Family Residence District";

AND WHEREAS, it is charged and insisted before us, that the said Ordinance insofar as it operated to prevent the said Max Margolis from erecting the said proposed structure is illegal in that it is beyond the power of the Township of Maplewood to create or designate any zone in which structures for use as apartment houses may be erected, and in said restriction is not designed to promote the public health, safety and general welfare; and

WHEREAS, it hath also been represented to us that the effect of enforcing the provisions of said ordinance so as to prevent the said Max Margolis from erecting said building would be to deprive the said Max Margolis of a right to possess and protect property, which deprivation is violative of the first clause of Article I of the Constitution of the State of New Jersey, and would be a taking of the private property of Max Margolis for public use without just compensation in violation of the sixteenth paragraph of Article I of the

Constitution of New Jersey, and would in effect be a taking of private property for public purposes in violation of the right secured to the said Max Margolis by the Constitution of the State of New Jersey, and would likewise be a violation of the rights secured to the said Max Margolis by the Fourteenth Amendment of the Constitution of the United States, in that it would deprive Max Margolis of his property without due process of law; and would be a denial to Max Margolis for the equal protection of the law; all as by the complaint of the said Max Margolis we have understood;

We, therfore, being willing that due and speedy justice should be done in this behalf, command and strictly enjoin you, that immediately after the receipt of this writ, you do issue to the said Max Margolis a permit to erect the building aforesaid upon the lands aforesaid, or cause to us to the contrary thereof signify, lest in your default complaint should come to us repeated; and how you shall execute this, or command, certify to our Justices of our Supreme Court of Judicature, at Trenton, forthwith, together with this, our writ, and this in nowise omit at your peril.

WITNESS, the Honorable William S. Gummere, Chief Justice of our Supreme Court at Trenton, this 30th day of March, 1927.

EDWARD J. KELLEHER,
Clerk.

Upon motion of

HOWE & DAVIS,
Attorneys of Relator.

RETURN TO ALTERNATIVE WRIT.

NEW JERSEY SUPREME COURT.

MAX MARGOLIS, *Relator,* *vs.* THE TOWNSHIP OF MAPLEWOOD, *et al.,* *Respondents.*	*On Mandamus.* *Return.*

To the Honorable Justices of the Supreme Court of the State of New Jersey:

I, Reinhart O. Osterman, Building Inspector of the Township of Maplewood, Essex County, New Jersey, to whom the said writ is directed, do herewith make return thereto to your Honors, and assert and certify that all the statements set forth in said writ are not true; that it is true that Max Margolis did apply to the Building Inspector of the Township of Maplewood for a permit to construct an apartment house upon the premises described in the alternative writ of mandamus issued in this cause.

On March 15, 1921, the Township of Maplewood adopted an ordinance entitled "An Ordinance to regulate and restrict the location of trades and industries and the location of buildings designed for specific uses, dividing the Township into districts for the purpose of such regulations and restrictions and providing penalties for the violation of the provisions of this Ordinance" and the various ordinances amendatory and supplementary thereof.

The district in which it is proposed by the relator to erect said building is placed by Section of the said Ordinance in a district in which the construction of apartment houses is prohibited. The district being known and called "a Single Family Residence District."

Said structure would not comply with the requirements of the zoning ordinance of the Township of Maplewood.

To permit the erection of said building in said location be inimical to the health, safety, morals and general welfare of the community.

Defendant therefore prays that said writ may be dismissed and that he be relieved from obeying the command therein given.

Dated March 31, 1927.

SAMUEL D. WILLIAMS,
Attorney for Defendants.

DEMURRER TO RETURN.

NEW JERSEY SUPREME COURT.

MAX MARGOLIS, *Relator,* *vs.* THE TOWNSHIP OF MAPLEWOOD, *et al.,* *Respondents.*	*On Mandamus.* *Demurrer.*

Max Margolis, the relator, by Howe & Davis, his attorneys, comes and says that the said writ should not be dismissed for that;

The return to said writ by the said respondents and the matters set forth therein, are as the same set forth, not sufficient in law, and wherefore he prays that a peremptory writ do issue to said Township of Maplewood and Reinhardt O. Osterman, Building Inspector of the Township of Maplewood, in conformity with the terms of the alternative writ, heretofore issued.

HOWE & DAVIS,
Attorneys of Relator.

JOINDER IN DEMURRER.

NEW JERSEY SUPREME COURT.

MAX MARGOLIS, *Relator,* vs. THE TOWNSHIP OF MAPLEWOOD, *et al.,* *Respondents.*	*On Mandamus.* *Joinder in Demurrer.*

And the respondents, the Township of Maplewood and Reinhardt O. Osterman, Building Inspector of the Township of Maplewood say that:

The return to said writ and the matters therein contained, in the manner and form as stated therein, are sufficient in law, and that they are thereby entitled to be relieved of the command made therein, and the said Township of Maplewood and Reinhardt O. Osterman, Building Inspector of the Township of Maplewood are ready to verify and prove the same as the Court shall direct, and pray judgment thereupon.

SAMUEL D. WILLIAMS,
Attorney of Respondents.

RULE FOR JUDGMENT.

NEW JERSEY SUPREME COURT.

MAX MARGOLIS, *Relator,* vs. THE TOWNSHIP OF MAPLEWOOD and REINHARDT O. OSTERMAN, Building Inspector of the Township of Maplewood, *Defendants.*	*On Mandamus.* *Rule for Judgment.*

The Court having made a rule to mould pleadings herein and it now appearing that said pleadings have been duly moulded in accordance with said rule so as to exhibit an alternative writ of mandamus, a return to said writ and a demurrer to said return and a reply thereto, it is thereupon on this 2nd day of April, 1927, on motion of Howe & Davis, Esquires, attorneys for the relator,

ORDERED that judgment final be entered on said pleadings so moulded as aforesaid in favor of the relator and against the respondents.

Entered April 2, 1927.

On motion of

HOWE & DAVIS,
Attorneys for Relator.

NOTICE AND GROUNDS OF APPEAL.

NEW JERSEY SUPREME COURT.

MAX MARGOLIS, *Relator, Appellee,* *vs.* THE TOWNSHIP OF MAPLEWOOD, *et al.,* *Respondents, Appellants.*	*On Mandamus.* *Notice of Appeal.*

TAKE NOTICE, that the respondents appeal from the whole of the judgment entered in this cause to the Court of Errors and Appeals on the following ground:

The Supreme Court of the State of New Jersey erred in granting a peremptory writ of mandamus to the appellee instead of dismissing the application therefor.

Dated April 4, 1927.

Respectfully,

SAMUEL D. WILLIAMS,
Attorney of Appellants.

114MAY.1.1927

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

MAX MARGOLIS, *Relator-Respondent,* *vs.* TOWNSHIP OF MAPLEWOOD, *et al., Defendants-Appellants.*	*On Application for Writ of Mandamus.*

BRIEF FOR DEFENDANTS-APPELLANTS.

Facts.

This is an appeal from the New Jersey Supreme Court on judgment entered pursuant to a direction by that Court for peremptory writ of mandamus.

The relator-respondent, Max Margolis, is the owner of land in the Township of Maplewood. He was denied a permit by the Township building inspector for the erection of a thirty-two family apartment house. The land in question lies in a zone classed by the Township Ordinance as "single family residence district."

The property is encumbered by the following restriction:

> "Subject to existing restrictions, if effective, and statutory and municipal requirements relating to land and buildings."

This restriction was contained in a deed for the property dated April 8, 1926, and was restated in a deed dated May 27, 1926, given by predecessors of the relator in the title. The Township Ordinance was passed March 15, 1921, and was in effect at the time the conveyances were made.

The Township of Maplewood has no Board of Adjustment. Its Ordinance contains a proviso permitting a change upon application by a property owner. An application for a change of Ordinance was made by relator but the writ was sought before the Township Committee had acted upon the application.

LAW.

Relator is not clearly entitled to a writ because his land is encumbered by restrictions.

Counsel has argued that the validity of these restrictions can not be tested in this action, that equity alone affords relief. On this point we agree. But it is relator who must find relief in equity. The existence of the restrictions is sufficient to cloud his title. He has something less than a fee title in the land. The very nature of the restrictions—"subject to * * * municipal requirements relating to land and buildings" holds in the grantors and his predecessors in the title a right that until expunged bars him from relief here.

In the case of *Krieger, et al.* v. *Scott, Building Inspector, et al.,* 134 Atl. 901, (not yet officially reported) the Supreme Court refused a writ because the record did not show that the relator owned the property. The Court in a *per curiam* opinion said:

> "It is hardly necessary to say that, unless they were the owners of the property, or had such an interest therein as would entitle them to erect the proposed building thereon the inspector was justified in refusing to issue a permit * * * "

Here the relator although the owner of the land has not the interest therein that would entitle him to erect the proposed buildings. There is an outstanding interest in his land just as compelling as if he were but one of the owners of the fee. If restrictions were personal obligations, relator's contention that the words "subject to" do not bind him might avail. He likens the situation to that of a grantee who takes subject to a mortgage and thereby does not agree and assume to pay. But his land is subject to the mortgage as here the land is subject to the restrictions.

The situation here is analogous to one where of several owners to land only one applies for a writ—he is not clearly entitled thereto and his application would not prevail.

Relator must show that he is clearly entitled to the writ. Where his right is doubtful the writ should be denied.

City of Paterson v. *Barnett,* 46 N. J. L. 62;

State v. *Jacobus,* 26 N. J. L. 125;

State v. *Mayer, etc. Newark,* 35 N. J. L. 396;

O'Hare v. *Fagan,* 56 N. J. L. 299.

The application for the writ was premature and improper.

While no Board of Adjustment exists in Maplewood, the Ordinance creates what is in effect such a board. Property owners may apply to the Township Committee for a change of zone and are entitled to a public hearing on such application. (Secs. 12 and 13 of Ordinances, Schedule B, page 20, State of Case.) Relator made such an application but before determination was reached by the Committee he applied for a writ of mandamus. His application was premature because he had not exhausted his

means of relief in seeking an adjustment with the Township Committee. His application was improper in that having applied for a change of zone he elected to have his demand considered by the Board and his relief thereafter was by certiorari rather than by mandamus.

The writ should have been denied on the ground of public welfare.

In the recently decided and not yet reported case of *Zahn* v. *The City of Los Angeles,* California, the United States Supreme Court held:

> "The Common Council of the city * * * concluded that the public welfare would be promoted by constituting the area, including the property of the plaintiffs in error, a Zone B district; and it is impossible for us to say that their conclusion in that respect was clearly arbitrary and unreasonable. The most that can be said is that whether that determination was an unreasonable, arbitrary or unequal exercise of power is fairly debatable. In such circumstances the settled rule of this court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question."

This Court in the recent case of *Oxford Construction Company* v. *The City of Orange,* N. J. Advance Reports Vol. 5, No. 21, pg. 729, reviewed the U. S. Supreme Court case of *Village of Euclid* v. *Ambler Realty Co.* (47 Sup. Ct. Rep. 114) and distinguished the issues raised. It is true as Chief Justice Gummere said in that opinion there has been nothing inconsistent in the decisions of this Court and those of the United States Supreme Court. While there was a prophecy in the *obiter* of the Euclid case of what the Court might do (and now has done in the

Los Angeles case) if forced to meet this issue squarely, no precedent had been established that warranted our Courts in changing the stand taken in *State, etc.* v. *Nutley,* 99 N. J. L. 389.

With the Los Angeles case however as a precedent the path is open for our courts to take. Sound public policy would suggest that our States uniformly follow the United States Supreme Court on questions involving constitutional rights. The much stretched police power is again called on to meet the exigency. It is logical however to consider that municipal governing bodies can well enact zoning ordinances as reasonably as they can health ordinances. As the police power broadened at the instance of medical doctors and sanitation experts to promote health and sanitation laws so now it must again be stretched at the instance of traffic experts, fire hazard specialists, playground advocates, architects, engineers and other students of municipal planning to render enforceable laws for the segregation of building types.

It can not be said that municipalities have rushed foolhardedly into zoning. In the City of Newark, a City Plan Commission composed of the best minds in the community started fifteen years ago to collect data and seek expert advice for the City's future. Its findings were turned into the City before the zoning ordinance was enacted. In other municipalities, the defendant here in particular, similar measures were taken. Men skilled in city planning were consulted. What the doctors gave to our health laws—these engineers and municipal planners did for zoning laws, with the same object in view, the welfare of the whole municipality. As the cistern disappeared from the back yard and the pump from the front yard, the municipality reached

out for further perfection in trying to plan places where it could locate not only its parks, public buildings, fire houses, police stations and other public adjuncts to best advantage, but also to insure the future by segregation of building types and neighborhood classes. The removal of the pump and the cistern counted its toll of rights invaded and zoning takes from the one that all may benefit. Was the testimony of the prophetic sanitation experts more generally accepted than is now that of the City planners?

It is respectfully submitted that for the reasons herein the judgment of the Supreme Court should be reversed.

SAMUEL D. WILLIAMS,
Attorney for Defendants-Appellants.

J. HARRY HENEGAN,
Of Counsel.

14MAY.1.1927

The Chronicle Press, Printers, Orange, N. J.

New Jersey Court of Errors and Appeals

MAX MARGOLIS, *Relator-Respondent,* *vs.* TOWNSHIP OF MAPLEWOOD, *et al.,* *Defendants-Appellants.*	*On Application for Writ of Mandamus.*

BRIEF FOR RELATOR-RESPONDENT.

Facts.

This is an appeal from the decision of the New Jersey Supreme Court granting a peremptory writ of mandamus to the relator.

The relator, Max Margolis, is the owner of a tract of land on the southerly side of Burnet street, in the Township of Maplewood, being two hundred thirty-three feet and thirty-four hundredths feet southwesterly from Maple avenue, and having a frontage on Burnet street of one hundred fifty feet and a depth of one hundred fifty-nine feet, more or less.

The relator desires to erect upon this lot a four-story brick apartment house to contain thirty-two apartments, at a cost of approximately $130,000.

On June 8, 1926, application was made for a permit for the erection of said building, which application was accompanied by plans and specifications and a tender was made of the legal fee. Said plans and specifications complied with the Building Code of the Township of Maplewood and have been approved by the Tenement House Commission of New Jersey.

The legal question therefore presented is whether such a restriction on the use of the property by the relator imposed upon him by the terms of the ordinance, without making any compensation to them, is valid at all, and if valid under some circumstances, if it is a reasonable restriction under the circumstances of this case.

THE LAW.

So far as the right of a municipality to forbid the erection of retail stores in any section of a community is concerned, the question seems to have been settled by the case of *Ignaciunas* v. *Risley* (Nutley case), 98 N. J. L. 712, and also in the case of *Oxford Construction Co.* v. *The City of Orange,* in which the Court of Errors followed the Nutley case.

The apartment house *per se* cannot be legitimately prohibited by ordinance. That was decided by the case of *Jersey Land Co.* v. *Scott,* 2 N. J. Adv. Repts., p. 1411. We will, therefore, not discuss that feature of the case.

The only additional fact of importance interjected into this case by the supplemental state of facts is the presence in the deed to Marlyn Realty Company, relator's grantor, of the following clause:

> "Subject to existing restrictions, if effective, and statutory and municipal requirements relating to land and buildings."

It is admitted that so far as the restrictions referred to in paragraph 1 of the supplemental state of facts is concerned, there would be no violation. The distance from the street line comes within the provisions of those restrictions. It is, therefore, unimportant to consider whether or not the restrictions exist and if they are

effective. What is of importance, because the question is raised, is the matter as to whether a conveyance "subject to " statutory and municipal requirements relating to land and buildings imposes upon property, as restrictions, the terms of those statutory and municipal requirements.

Are restrictions imposed by a conveyance "subject to statutory and municipal requirements relating to land and buildings?"

We are unable to find any local authorities bearing directly on this point. We do find, however, that an almost identical situation was disposed of in the case of *Van Duyn* v. *H. S. Chase & Co.,* 128 N. W. 300, 301, 149 Iowa, 222. In that case the deed to a lot contained the restrictions that the front of any residence built thereon should not be less than forty feet west of the east line of the lot, and that no other building except a residence should be built on the front half of the lot; but the deed contained no restrictions as to the back half of the lot. Subsequently defendant came into possession of part of the back half of the lot by a deed providing that the conveyance should be "subject to" the restrictions in the former deed. Held, that such restrictions not originally referring to the back half of the original lot, were not made applicable thereto by defendant's deed; the phrase "subject to" meaning under the control, power, or dominion of, or subordinate to, and, not being words of contract, imposing upon defendant no contractual obligations.

The nearest analogy to the situation that we can find is that of a conveyance of property subject to a mortgage. The distinction appears to be that when a purchaser takes property

subject to a mortgage, he enters upon no personal liability beyond that which is attached to the land but that where in addition to taking property subject to the mortgage he assumes or agrees to pay the mortgage, he makes himself personally liable. Decision appears to hold uniformly that a purchaser who does not expressly agree to pay the mortgage debt is not personally liable therefor by reason of his deed being subject to the mortgage. Metropolitan Nat. Bank *v.* St. Louis Dispatch Co. (1892) 149 U. S. 436, 37 L. Ed. 799, 13 Sup. Ct. Rep. 944; Shepherd *v.* May (1885) 115 U. S. 505, 29 L. Ed. 456, 6 Sup. Ct. Rep. 119; Elliott *v.* Sackett (1882) 108 U. S. 132, 27 L. Ed. 678, 2 Sup. Ct. Rep. 375; Allentown Nat. Bank's Appeal (1884) 18 Rep. (Fed.) 641; Mott *v.* American Trust Co. (1916) 124 Ark. 70, 186 S. W. 631; J. H. Magill Lumber Co. *v.* Lane-White Lumber Co. (1909) 90 Ark. 436, 119 S. W. 822; Patton *v.* Adkins (1883) 42 Ark. 197; McArthur *v.* Goodwin (1916) Cal—160 Pac. 679; Hibernia Sav. & L. Soc., 5 Dickinson (Cal.) *supra;* Capitol Nat. Bank *v.* Holmes (1908) 43 Colo. 154, 16 L. R. A. (N. S.) 470, 127 Am. St. Rep. 108, 95 Pac. 314; Lippitt *v.* Thames Loan & T. Co. (1914) 88 Conn. 185, 90 Atl. 369; Burbridge *v.* Guinter (1915) 69 Fla. 49, 67 So. 571; Crawford *v.* Nimmons (1899) 180 Ill. 143, 54 N. E. 209; Robinson Bank *v.* Miller (1894) 153 Ill. 244, 27 L. R. A. 449, 46 Am. St. Rep. 883, 38 N. E. 1078; Rapp *v.* Stoner (1882) 104 Ill. 618; Fowler *v.* Fay (1872) 62 Ill. 375; Dunn *v.* Rodgers (1867) 43 Ill. 260; Comstock *v.* Hitt (1865) 37 Ill. 542; Nicholson *v.* Nicholson Coal Co. (1914) 190 Ill. App. 607; Macfarland *v.* Utz (1912) 175 Ill. App. 525; Lane *v.* Davis (1910) 158 Ill. App. 563; Townsend *v.* Wilson (1910) 155 Ill. App. 303; Elser *v.* Williams (1902) 104 Ill. App. 238; Rourke *v.* Coulton (1879) 4

Ill. App. 257; Hancock *v.* Fleming (1885) 103 Ind. 533, 3 N. E. 254; Hewitt *v.* Powers (1882) 84 Ind. 295; Gregory *v.* Arms (1911) 48 Ind. App. 562, 96 N. E. 196; Springer *v.* Foster (1901) 27 Ind. App. 15, 60 N. E. 720; Lamka *v.* Donnelly (1913) 163 Iowa 255, 143 N. W. 869; Moore *v.* Olive (1901) 114 Iowa 650, 87 N. W. 720; Lewis *v.* Day (1880) 53 Iowa 575, 5 N. W. 753; Hull *v.* Alexander (1869) 26 Iowa 569; Aufricht *v.* Northrup (1865) 20 Iowa 61; Holcomb *v.* Thompson (1893) 50 Kan. 598, 31 Pac. 1081, 32 Pac. 1091; Schmucker *v.* Sibert (1877) 18 Kan. 104, 26 Am. Rep. 765; Crane *v.* Hughes (1897) 5 Kan. App. 100, 48 Pac. 865; Peck *v.* Hewlett (1898) 20 Ky. L. Rep. 45, 45 S. W. 104; Webb *v.* Reed (1894) 16 Ky. L. Rep. 447; Clay F. Ins. Co. *v.* Hickman (1884) 6 Ky. L. Rep. 308; Chilton *v.* Brooks (1890) 72 Md. 554, 20 Atl. 125; Fiske *v.* Tolman (1878) 124 Mass. 254, 26 Am. Rep. 659; Drury *v.* Tremont Improv. Co. (1866) 13 Allen (Mass.) 168; Strong *v.* Converse (1864) 8 Allen (Mass.) 557, 85 L. R. A. 1917C. Am. Dec. 732; Strohauer *v.* Voltz (1880) 42 Mich. 444, 4 N. W. 161; Winans *v.* Wilkie (1879) 41 Mich. 264, 1 N. W. 1049; Clifford *v.* Minor (1899) 76 Minn. 12, 78 N. W. 861; Hall *v.* Morgan (1883) 79 Mo. 47; Fuller *v.* Devolld (1910) 144 Mo. App. 93, 128 S. W. 1011; Keifer *v.* Shacklett (1900) 85 Mo. App. 449; State Ins. Co. *v.* Irwin (1896) 67 Mo. App. 90; Walker *v.* Goodsill (1893) 54 Mo. App. 631; Lang *v.* Cadwell (1893) 13 Mont. 458, 34 Pac. 957; Pendleton *v.* Cowling (1891) 11 Mont. 38, 27 Pac. 386; Green *v.* Hall (1895) 45 Neb. 89, 63 N. W. 119; Lawrence *v.* Towle (1879) 59 N. H. 28; Woodbury *v.* Swan (1878) 58 N. H. 380; Dingeldein *v.* Third Ave. R. Co. (1868) 37 N. Y. 575; Binsse *v.* Paige (1863) 1 Keyes (N. Y.) 87, 1 Abb. App. Dec. 138; Stebbins *v.* Hall (1859) 29 Barb. (N. Y.) 524; Smith *v.* Johnson (1843)

Hill & D. Supp. (N. Y.) 240; Tillotson *v.* Boyd (1851) 4 Sandf. (N. Y.) 516; Whitney *v.* Meister (1904) 26 Ohio C. C. 593; Walker *v.* Goldsmith (1879) 7 Or. 161; Granger *v.* Roll (1895) 6 S. D. 611, 62 N. W. 970; Chaffee *v.* Hawkins (1916) 89 Wash. 130, 154 Pac. 143, 157 Pac. 35; Tanguay *v.* Felthousen (1878) 45 Wis. 30; Real Estate Loan Co. *v.* Molesworth (1886) 3 Manitoba L. R. 116.

A declaration counting upon an express assumption of a mortgage by the grantee in a deed (the deed being made part of the declaration) will not be supported by a clause in the deed, "that the land is conveyed subject to the mortgage," the words of assumption being absent. *Loudenslager* v. *Woodbury Heights Land Co.* (1900) 64 N. J. L. 405, 45 Atl. 784.

Restrictions can only be imposed upon premises by a definite covenant made by the parties. If the agreement to pay a mortgage upon premises cannot be carried over to a grantee except upon his express agreement to pay the mortgage and a conveyance subject to the mortgage does not imply such an agreement, it would seem clear that when premises are conveyed subject to restrictions, that there is no new imposition of them unless the grantee agrees to be bound by such restrictions.

The sole purpose of this provision in the deed seems to have been to protect the grantor in his warranty contained in the deed. The very language of the entire provision seems clear that the grantor did not intend to impose the restrictions upon the grantor unless they already had some binding force and that seems to have been the case in regard to the municipal ordinances.

If, however, restrictions were thereby constituted can the defendants not being parties to the transaction, take advantage of them in these proceedings?

We earnestly insist that they cannot. If restrictions are thereby imposed, the question is one to be disposed of between the relator and the persons owning property affected by those restrictions. The only point to be solved in this case is whether or not the Building Inspector has a right to refuse to grant a permit by reason of the fact that the zoning in this case forbids him to do so. What, for instance, would be the situation if the application were to build a one-family house in that neighborhood but to be built fifty feet from the adjacent street line instead of seventy-five feet as provided in the restriction. It seems clear that the Building Inspector would not have gone into the question as to whether or not private restrictions existed on the property but that he would have left the persons injured by a violation of the restrictions to their remedy in law or at equity. The Building Inspector is in no position of authority to judge as to the effect of private restrictions between persons applying for building permits and their neighbors who may be affected by the erection of such buildings. He should not be concerned as to whether or not the permit to be issued by him is issued in accordance with the requirements of the various ordinances and statutes.

We respectfully contend that this court is not interested in the fact as to whether or not private restrictions may or may not exist against these premises. That is a matter that may safely be left to be disposed of by the court of equity in injunction proceedings.

For the above reasons, it is respectfully submitted that the decision of the Supreme Court should be affirmed.

HOWE & DAVIS,
Attorneys for Relator-Respondent.

EDWARD L. DAVIS.
Of Counsel.