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Notice of Appeal and Grounds.

New Jersey Supreme Court

MORRIS BOUER, Relator, *vs.* MAYOR AND ALDERMEN OF JERSEY CITY, a Municipal Corporation and EDWARD SPOERER, Superintendent of Buildings, Respondents.	On Mandamus. Notice of Appeal and Grounds.

To Thomas J. Brogan, Attorney of Respondents.

Sir:

PLEASE TAKE NOTICE that the Relator in the above entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause on the following grounds, to wit:

1. The Supreme Court erred in refusing to grant to Relator a peremptory writ of mandamus directing the respondents to issue to relator the permit in this matter applied for.

2. The Supreme Court erred in holding that the zoning ordinance of Jersey City entitled "An Ordinance regulating and restricting the location of trades and industries, and the location of buildings designed for specified uses, and regulating and limiting the height and bulk of buildings hereafter erected, and regulating and determining the

area of yards, courts and other open spaces surrounding buildings, and establishing the boundaries of districts for the aforesaid purposes and providing penalties for the violation of its provisions", affected the application of Relator here under review.

Respectfully yours,

MARK A. SULLIVAN,
Attorney of Relator.

Opinion.

NEW JERSEY SUPREME COURT,

No. 253, JANUARY TERM, 1928.

MORRIS BOUER,
Relator,

vs.

MAYOR AND ALDERMEN OF JERSEY CITY, a Municipal corporation, and EDWARD SPOERER, Superintendent of Buildings,
Respondents.

Submitted February 15, 1928; Decided May 18, 1928.

On Rule to show cause why a writ of mandamus should not issue.

Before
Justices TRENCHARD, KALISCH and KATZENBACH.

For the Relator, HENRY J. CAMBY.

For the Respondents, THOMAS J. BROGAN and CHARLES HERSHENSTEIN.

Opinion.

Per Curiam:

On June 24, 1927, the relator filed with the Building Department of the City of Jersey City, an application for permission to erect a four-story brick building containing five stores and 28 apartments on a plot of land situate at the northwesterly corner of Audubon Avenue and Hudson County Boulevard in Jersey City, of which said land the relator was the equitable owner. The application was heard by the Mayor and Aldermen of Jersey City and was denied because it would increase the fire hazard and because in point of fact the zoning ordinance of Jersey City zones the land in question as a residential district in which no stores are permitted.

Thereafter, on September 20, 1927, the relator obtained this rule to show cause why a mandamus should not issue commanding and enjoining the Mayor and Aldermen of Jersey City and the Superintendent of Buildings to grant the permit in question.

We think that the permit cannot be granted.

The essential factual situation of this case brings it within our decision in Koplin *vs.* Village of South Orange (Decided May 14, 1928). The result is that the rule to show cause in the present case will be discharged and the writ of mandamus denied accordingly.

Having reached the conclusion stated, we deem it important to all parties in interest to announce it promptly, and do so in this somewhat informal manner in order to enable relator to avail himself of the earliest possible opportunity for review, if a review is desired. And if a review is desired, the relator is hereby given permission to enter a rule allowing and directing the molding of the pleadings so as to permit of such review.

Order Discharging Rule.

NEW JERSEY SUPREME COURT.

MORRIS BOUER, Relator, *vs.* MAYOR AND ALDERMEN OF JERSEY CITY, a Municipal Corporation and EDWARD SPOERER, Superintendent of Buildings, Respondents.	Order Discharging Rule.

The above matter having been submitted at the June Term, 1928, of the Supreme Court, and the Court having determined by its opinion that the rule to show cause should be discharged,

It is on this day of , 1928, ORDERED that the rule to show cause heretofore obtained in the above entitled matter be and the same is hereby discharged,

And whereas, the said opinion did reserve to the relator the right to mould the pleadings in order to give the relator an opportunity to take an appeal,

It is FURTHER ORDERED that the relator have leave to mould the pleadings in this case in order that the relator may appeal to the Court of Errors and Appeals, and permission is hereby given to the said relator to appeal to the said Court of Errors and Appeals.

.....

Stipulation.

NEW JERSEY SUPREME COURT.

MORRIS BOUER, Relator, *vs.* MAYOR AND ALDERMEN OF JERSEY CITY, a Municipal Corporation and EDWARD SPOERER, Superintendent of Buildings, Respondents.	On Mandamus. Stipulation.

It is hereby stipulated and agreed by and between Counsel for the respective parties that the pleadings in the above entitled case have been moulded in conformity with an Order of the Supreme Court made in this matter and that said pleadings as moulded sets forth all the material facts of the case.

MARK A. SULLIVAN,
Attorney for Relator.

THOMAS J. BROGAN,
Attorney for Respondents.

Alternative Writ of Mandamus.

NEW JERSEY SUPREME COURT,

MORRIS BOUER, Relator, *vs.* MAYOR AND ALDERMEN OF JERSEY CITY, a Municipal Corporation, and EDWARD SPOERER, Superintendent of Buildings, Respondents.	Alternative Writ of Mandamus.

NEW JERSEY, ss.: The State of New Jersey to the Mayor and Aldermen of Jersey City and Edward Spoerer, Superintendent of Buildings: GREETING:

WHEREAS it is represented to us that

1. Morris Bouer, the Relator herein is the owner of a certain tract of land and premises situated in the City of Jersey City, Hudson County, New Jersey and known as No. 2011-15 Boulevard, being also known as Lot 140 in Block 1284-A on the official assessment map of Jersey City aforesaid.

2. On or about June 24th, 1927, the said Relator did file with the Building Department of said City of Jersey City, an application for a permit to erect a four-story brick building containing five stores and twenty-eight apartments on the premises aforementioned according to the plans and specifications filed with said Building Department.

3. On July 19th, 1927, a hearing on said application was held before the Board of Commissioners of the Mayor and Aldermen of Jersey City, at the conclusion of which hearing, said Board of Commissioners by Resolution denied and refused to grant to said Relator the said permit on the ground that an ordinance of the City of Jersey City limited the said premises to residential use only.

4. The aforementioned ordinance was at the time of the aforesaid hearing illegal and void insofar as it applies to the said premises of the Relator.

We, therefore, 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 a permit to Morris Bouer allowing him to erect a four-story brick building containing five stores and twenty-eight apartments on his said premises in the manner heretofore applied for by him or cause to us to the contrary signify, lest in your default, complaint should come to us repeated and how you shall execute this, our command, certify to our Justices of our Supreme Court of Judicature, at Trenton, on the first Tuesday of October, 1928, together with this, our Writ and this in no wise omit at your peril.

Witness, William S. Gummere, Chief Justice of our Supreme Court at Trenton this seventh day of August, 1928.

Fred L. Bloodgood,
Clerk.

Mark A. Sullivan,
Attorney.

Return to Alternative Writ of Mandamus.

NEW JERSEY SUPREME COURT.

MORRIS BOUER, Relator, *vs.* MAYOR AND ALDERMEN OF JERSEY CITY, a Municipal Corporation and EDWARD SPOERER, Superintendent of Buildings, Respondents.	On Mandamus. Return to Alternative Writ of Mandamus.

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

The Mayor and Aldermen of Jersey City and Edward Spoerer, Superintendent of Buildings, to whom the writ in this matter is directed, does herewith make return thereto to your Honors as therein commanded and assert and certify that they are not bound by the Laws of the land to obey the command of the said writ insofar as it commands the granting to the Relator of a permit to erect a four-story brick building containing five stores and twenty-eight apartments on the premises mentioned in said writ because

1. At the time the application for said permit was made by the Relator, and ever since, there has been in existence in the City of Jersey City an Ordinance entitled:

> "AN ORDINANCE regulating and restricting the location of trades and industries, and the location of buildings designed for specified

uses, and regulating and limiting the height and bulk of buildings hereafter erected, and regulating and determining the area of yards, courts and other open spaces surrounding buildings, and establishing the boundaries of districts for the aforesaid purposes and providing penalties for the violation of its provisions."

That part of said ordinance affecting the premises in question is attached hereto and marked "Schedule A".

2. The aforesaid Ordinance has zoned the block wherein the premises set forth in the writ herein lie, for residential purposes only and prohibits such premises from being used for commercial purposes.

3. On July 19th, 1927, a hearing on the application for the permit aforementioned was held before the Board of Commissioners of the Mayor and Aldermen of Jersey City. At the conclusion of such hearing said Board of Commissioners by resolution denied and refused to grant to said relator the said permit on the ground that the aforementioned ordinance limited the said premises to residential use only. A copy of said resolution is hereto attached and marked "Schedule B".

These respondents therefore humbly pray that said Writ be dismissed and that they be relieved from obeying the command therein given.

MAYOR AND ALDERMEN OF JERSEY CITY,
by EDWARD SPOERER,

THOMAS J. BROGAN,
Attorney.

"Schedule A."

ZONING ORDINANCE.

AN ORDINANCE regulating and restricting the location of trades and industries, and the location of buildings designed for specified uses and regulating and limiting the height and bulk of buildings hereafter erected, and regulating and determining the area of yards, courts and other open spaces surrounding buildings, and establishing the boundaries of districts for the aforesaid purposes and providing penalties for the violation of its provisions.

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

SECTION 1. Districts.

For the purposes of regulating and restricting the location of trades and industries and the location of buildings designed, for specified uses, the City of Jersey City is hereby divided into four districts, to wit: Residential, Business, Commercial and Manufacturing, and Industrial, as shown on the "Use District Map", which map is hereby made part hereof.

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

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

SECTION 2. Residential Districts.

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

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

"Schedule B."

RESOLUTION.

By Mayor Hague:

WHEREAS, application was made to the Board of Commissioners of Jersey City by Morris Bouer for permission to erect a four-story brick building to contain five (5) stores on the first floor and twenty-eight (28) living apartments above at 2011-2015 Boulevard.

WHEREAS, all parties interested in said application have been duly heard by the Board of Commissioners and the Board of Commissioners having investigated the facts appertaining to said application, and

WHEREAS, the said Board of Commissioners after said investigation and reports from the various departments having found as facts that it is a residential section and the proposed stores would increase the fire hazard, and create a public nuisance in a residential section, therefore, be it

RESOLVED, that the Board of Commissioners do hereby deny the application to erect said stores and apartment building.

BLDG. DEPT.

This is to certify that the foregoing is a true copy of a resolution passed by the Board of Commissioners of Jersey City, N. J., at its meeting held July 19, 1927.

(signed) EDWARD J. HOLLAND,
City Clerk.

Demurrer.

NEW JERSEY SUPREME COURT.

MORRIS BOUER, Relator, *vs.* MAYOR AND ALDERMEN OF JERSEY CITY, a Municipal Corporation and EDWARD SPOERER, Superintendent of Buildings, Respondents.	On Mandamus. Demurrer.

MORRIS BOUER, the Relator, by Mark A. Sullivan, his attorney, 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 directed to said Mayor and Aldermen of Jersey City, a Municipal Corporation and Edward Spoerer, Superintendent of Buildings, in conformity with the terms of the alternative writ, heretofore issued.

MARK A. SULLIVAN,
Attorney of Relator.

Joinder in Demurrer.

NEW JERSEY SUPREME COURT.

MORRIS BOUER, Relator, *vs.* MAYOR AND ALDERMEN OF JERSEY CITY, a Municipal Corporation, and EDWARD SPOERER, Superintendent of Buildings, Respondents.	On Mandamus. Joinder in Demurrer.

And the respondents, Mayor and Aldermen of Jersey City and Edward Spoerer say that:

1. 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 Edward Spoerer and the Mayor and Aldermen of Jersey City are ready to verify and prove the same as the Court shall direct and pray judgment thereupon.

THOMAS J. BROGAN,
Attorney of Respondents.

Rule Overruling Demurrer.

NEW JERSEY SUPREME COURT.

MORRIS BOUER, Relator, *vs.* MAYOR AND ALDERMEN OF JERSEY CITY, a Municipal Corporation, and EDWARD SPOERER, Superintendent of Buildings, Respondents.	On Mandamus. Rule Overruling Demurrer.

This matter being opened to the Court by Mark A. Sullivan, Attorney of Relator.

Whereupon all and singular the premises aforesaid being seen and by the said Court now here fully understood and mature deliberation thereupon had, it appears to the Court here that the return to the alternative writ of mandamus by the respondents presented and by the said relator demurred, is good and sufficient in the law and that the demurrer thereto is not well taken and that judgment be entered in favor of the said Mayor and Aldermen of Jersey City and Edward Spoerer, respondents against the said Morris Bouer, relator.

On motion of

THOMAS J. BROGAN,
Attorney of Respondents.

Dated, September 12th, 1928.

New Jersey Court of Errors and Appeals

MORRIS BOUER, *Relator-Appellee,* *v.* MAYOR AND ALDERMEN OF JERSEY CITY, a municipal corporation, and EDWARD SPOERER, Superintendent of Buildings, *Respondents-Appellants.*	On Mandamus.

BRIEF OF RESPONDENTS-APPELLANTS.

Statement of Facts.

The relator, being the owner of premises located on the northwest corner of Audubon Avenue and Hudson Boulevard, Jersey City, New Jersey, desiring to erect a four-story brick building containing twenty-eight (28) apartments and five (5) stores, filed his application on June 24, 1927, with the Superintendent of Buildings of Jersey City for the purpose of obtaining a permit.

The *locus in quo* is zoned by the Zoning Commission of Jersey City for a residential district (Case, p. 9, lines 14-20) and, in accordance with the Zoning Ordinance of Jersey City, no stores are permitted in a residential zone (Zoning Ordinance, Case, p. 10).

A public hearing was had before the City Commission on July 19, 1927, and the application rejected because the City Commission, "after investigation and reports from various departments

found as facts that it is a residential section and the proposed stores will increase the fire hazard and create a public nuisance in a residential section" (see Resolution, Case, p. 11, lines 20-26).

The Supreme Court discharged the rule to show cause and denied the writ of mandamus, giving the relator an opportunity to mould the pleadings in order that an appeal may be taken to this Court and the pleadings were accordingly moulded. The Supreme Court in its opinion determined that the essential factual situation of the case *sub judice* brings it within the decision of *Koplin* v. *Village of South Orange,* decided May 14th, 1928, and reported in 6 Misc. 489, and the relator now urges that the Court erred in determining the *Koplin* case as it did, and therefore seeks to reverse the Supreme Court in this case. We respectfully urge:

1. The Zoning Ordinance of Jersey City prohibiting the erection of stores in a residential district having been legalized by the Enabling Act of 1928, Chapter 274, the City Commission was justified in denying the permit.

POINT I.

The Zoning Ordinance of Jersey City prohibiting the erection of stores in a residential district having been legalized by the Enabling Act of 1928, Chapter 274, the City Commission was justified in denying the permit.

In July, 1927, the State of New Jersey was preparing for an election upon a Constitutional Amendment giving municipalities the power to zone, and such zoning was to be considered within the police power of such municipality.

The *locus in quo* was, in July, 1927, and still is zoned for residential purposes, in which zone, pursuant to the Zoning Ordinance of Jersey City, buildings for commercial purposes are prohibited. The City Commission, therefore, adopted the policy of denying permits for stores in residential zones upon the theory the amendment would be passed by the people of New Jersey and the Legislature, by an enabling act, would make it possible to so zone Jersey City.

We respectfully urge that this was a reasonable policy to pursue in view of the imminent election and the amendment having been adopted, it should inure to the benefit of the people in Jersey City.

The order to show cause in this case was obtained on September 20, 1927, the date of the adoption of the Constitutional Amendment.

The Legislature as a matter of fact did in 1928 legalize zoning in the State of New Jersey pursuant to the Constitutional Amendment, and did under Section 7 of Chapter 274 of said Act save to the cities the existing ordinances in force in municipalities. In *Koplin* v. *South Orange,* 6 Misc. 489, at page 494, the Supreme Court held:

> "We believe that the principle declared in that decision is conclusive of the present case in this court. It therefore follows that the writ applied for must be denied. For we believe it to be immaterial whether the changed conditions arise from an intervening valid municipal ordinance (as in that case) or from a statute enacted pursuant to an amendment of the constitution of the state, as in this case. Under the authority of the Zabriskie case, the writ of mandamus being discretionary, there can be no vested rights that control the exercise of that discretion, unless a permit is issued and work actually commenced thereunder."

Relator urges that the case should be decided as of the date of the making of the application as determined by the Supreme Court in the case of *Advance Development Corporation* v. *Jersey City,* 140 Atl. 788. In June, 1927, the people of the State of New Jersey knew of the pending election, which was to take place in September, 1927. The relator made his application anticipating that the result of the election would affect the legality of zoning in the State of New Jersey. The relator is charged with the knowledge of the coming election, and when the application was made, it must be held that the applicant made it knowingly, and had full knowledge that the people of New Jersey were about to pass upon whether or not the municipality shall have the right to adopt zoning ordinances which would thereafter be considered within the police power of a municipality. Being charged with that knowledge, the date of the making of the application should not determine the status of the applicant. The Constitutional Amendment involved a question of public policy, and the City Commission of Jersey City, knowing that a question of public policy is to be determined, should be permitted to decline to act until the question has been determined by all of the people of the State.

We also submit that the case of *Koplin* v. *South Orange* was determined in May, 1928, subsequent to the opinion of the Supreme Court in the case of *Advance Development Corporation* v. *Jersey City.* The latter case had been decided February 25th, 1928, and therefore the opinion of the Supreme Court in the *Koplin* case should supersede the decision rendered in the *Advance Development Corporation* case.

We respectfully submit that the Supreme Court did not err in determining the case sub judice as it did, and that the same should be affirmed with costs.

THOMAS J. BROGAN and
CHARLES HERSHENSTEIN,
Of Counsel with Respondents-Appellants.

[9724]

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New Jersey Court of Errors and Appeals

MORRIS BOUER, Relator-Appellant, *vs.* MAYOR AND ALDERMEN OF JERSEY CITY, a Municipal Corporation, and EDWARD SPOERER, Superintendent of Buildings, Respondents-Appellees.	ON MANDAMUS.

BRIEF OF RELATOR-APPELLANT.

Statement of Facts.

The Relator-Appellant on June 24th, 1927, applied to the Building Department of Jersey City for a permit to erect on his property located at 2011-15 Boulevard, Jersey City, a four-story brick building containing five stores and twenty-eight apartments (see alternative writ of mandamus, p. 6, lines 15-40, State of Case). A hearing on the application was held on July 19th, 1927, before the Board of Commissioners of Jersey City, at the conclusion of which the said Board of Commissioners refused to grant to Relator-Appellant, the said permit, on the ground that an Ordinance of the City of Jersey City limited the said premises to residential use only (see alternative writ of mandamus, p. 7, lines 1-12; see return to alternative writ, p. 8, lines 35-40; p. 9, lines 1-30; see ordinance, p. 10, and see resolution of the Board of Commissioners, p. 11, State of Case). Relator-Appellant then applied for and obtained from our Supreme Court, an order directing the Respondents-Appellees to show cause why a peremptory

writ or alternative writ of mandamus should not be issued commanding them to grant to the Relator-Appellant, the permit applied for. On the return of the rule to show cause and after argument thereon, the Supreme Court refused to grant a writ of mandamus on the ground that the essential factual situation in the case brought it within the principle of the decision in *Koplin* v. *Village of South Orange,* 6 Miscell. 489.

The opinion of the Supreme Court appears on ~~page 243~~ pp 2 and 3 of the State of the Case.

The Supreme Court, however, allowed the Relator-Appellant to mold his pleadings and to take an appeal from its decision to the Court of Errors and Appeals. Counsel for the respective parties have molded the pleadings in conformity with the said order of the Supreme Court and the case comes before the Court on such pleadings consisting of an alternative writ, a return thereto, a demurrer to such return, a joinder in demurrer and a rule over-ruling the demurrer.

ARGUMENT.

The Supreme Court erred in holding that the Zoning Ordinance of Jersey City affected the application of Relator here under review.

In determining whether or no a writ of mandamus should be issued in this case, the status of the parties must be taken as of the time of the filing of the application for the permit, which was on June 24th, 1927 (p. 6, lines 32-40, State of Case).

> "The status of the Relator is, we think, fixed at the time it made its application for the building permit." *Advance Development Co.* v. *Jersey City,* 140 Atl. 788 at p. 789.

> "We are asked by the respondent to consider in dealing with this case the fact that a constitutional amendment regarding zoning has been adopted by the voters of this State. In the present case the status of the parties was fixed long before the Zoning amendment was adopted. The constitutional amendment has, we think, no application to the present case and should not be considered in its disposition." *A. G. Construction Co.* v. *Scott,* 141 Atl. 760.

On June 24th, 1927, neither the constitutional amendment nor the subsequent legislation in relation to zoning had been adopted and Relator-Appellant was therefore not bound by the provisions of the Jersey City Zoning Ordinance.

The Court below in the case at bar rested its determination on the principle enunciated in the case of *Koplin* v. *South Orange,* reported in Vol. VI, Misc. Rep. 489. In the Koplin case the application for the building permit was filed on November 9th, 1926. A permit was refused "on the ground that the Zoning Ordinance of the Village, passed March 21st, 1922, prohibited the erection of the type of building proposed on the land in question". The Supreme Court apparently considered that the status of the parties was fixed as of the time of the filing of the application, but refused to grant a peremptory writ of mandamus on the ground that the act of the Legislature entitled "An Act to enable municipalities to adopt zoning ordinances limiting and restricting to specified districts and regulating therein buildings and structures, according to their construction, and the nature and extent of their use, and the repeal of sundry zoning laws", which Act became effective on April 3rd, 1928, and is Chapter 274 of the Laws of 1928, was retroactive in effect and made valid the aforementioned zoning ordinance

as of November 9th, 1926, the date of the filing of the aforesaid application.

It is the contention of the Relator-Appellant in the present case, that the said statute permitting municipalities to pass zoning ordinances is not retroactive and therefore that the zoning ordinance of Jersey City under which the permit herein was denied was at the time the application herein was made, of no effect.

POINT I.

It was not intended by the Legislature to give to the aforementioned statute a retroactive effect.

It is a well settled principle that the Courts will not give a retroactive meaning to a statute unless there is wording in the statute which is so clear that there can be no possible doubt but that the Legislature intended that such a statute should act retroactively.

In the case of *Citizens Gas Light Co.* v. *Alden*, 44 N. J. L. 648, Justice Knapp, in writing the opinion of the Court of Errors and Appeals, says on pages 653, 654:

> "It is not enough that words used in an act *may* be given a retrospect without doing violence to their meaning, or that such a course may coincide with their common understanding.
>
> Laws, generally, are enacted for the regulation of future affairs and conduct, and to establish the basis on which rights may thereafter under them be rested, and are not usually designed to alter or affect the quality or legal relations of past acts and concluded transactions, much less to disturb rights which have arisen under laws running concurrently with their birth. Hence we do not look for or expect in any enactment that it shall be

> operative as of time prior to its own existence; and before we are permitted to ascribe to it such purpose, there must be found in the law such clear and indubitable expression of the legislative design as precludes any other reasonable interpretation of the words used. The rule in the courts is, that retroactive effect will not be given to a statute when the words in it can be construed as designed to make it prospective only. Williamson *v.* N. J. S. R. R. Co., 2 Stew. Eq. 311. All legislation is framed, or presumed so to be, in view of this conspicuous canon of construction governing in courts where the duty of interpretation is reposed. And when the legislature intend to give to law of their enactment operation upon the past, they will and must do it with such choice of words as places it beyond the realm of doubt."

See also

> *Frelinghuysen* v. *Morristown,* 77 N. J. L. 493, at p. 496;
> *Jones* v. *D. L. & W. Railroad Co.,* 96 N. J. L. 197, at p. 200.

There is no wording in the Zoning Ordinance statute of 1928 (Chapter 274 of the Laws of 1928) which under the foregoing rules gives to it a retroactive effect.

The title of the act is

> "An Act to enable municipalities to adopt zoning ordinances limiting and restricting to specified districts and regulating therein buildings and structures, according to their construction, and the nature and extent of their use, and the repeal of sundry zoning laws." Laws 1928, p. 696.

Here we find no language that can be construed as making the purpose of the act retroactive. Everything is in the future "An act to enable

municipalities *to adopt* zoning ordinances * * * and the repeal of sundry zoning laws." Any verbiage making the act retroactive is not within the purpose as stated in the title and would therefore be unconstitutional.

But the Supreme Court in its opinion in the Koplin case points to Section 7 of the act as justifying its decision in regard to the retroactive character of the legislation.

Section 7 provides that ordinances existing at the time of the adoption of the act "shall continue in effect as if they had been adopted under the provisions of this act".

The purpose of that provision is to make it unnecessary to re-adopt these existing ordinances after the passage of the act but to treat them as if they had been adopted after such passage and therefore to validate them as of the date of approval of the act. How could such ordinances be adopted under the provisions of an act before the act was in existence? No retroactive effect was intended else the wording would have been different. If the legislature intended the construction put upon Section 7 by the Supreme Court, it would have said that existing ordinances "shall have the same effect as if this act had been adopted prior to their passage". But the Legislature did not say this and it is a plain misconception of its language to attribute to it such a meaning.

The most that can be said is that the verbiage of the act is dubious in this regard and if that be so, then the principle enunciated in *Citizens Gas Light Co.* v. *Alden,* 44 N. J. L. 648, *supra,* applies and prospective interpretation should prevail over the retrospective.

POINT II.

If the Court decides that the statute acts retroactively so as to validate the aforementioned zoning ordinance of Jersey City as of the time of the filing of the application herein, then the said statute in that particular is unconstitutional because it would divest the vested rights of the Relator-Appellant in the property in question.

At the time of the application for a permit, Relator-Appellant had a right to erect the character of building applied for, he attempted to exercise it and was illegally prevented from doing so. He immediately applied to the Courts for redress and is now deprived of this right because of subsequent constitutional amendment and subsequent legislation. Such a procedure violates Paragraph 16 of Article 1, paragraph 8 of Section VII of Article IV of the State Constitution and the fifth and fourteenth amendments to the United States Constitution.

In the case of *Ignaciunas* v. *Risley,* 98 N. J. L. 712, Justice Katzenbach speaking for the Supreme Court says on pages 715 and 716:

> "Article 1 of Section 16, and Article 4, Section 8 of the State Constitution, provide that private property shall not be taken for public use without just compensation. Section 1 of the fourteenth amendment to the federal constitution provides that no state shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the law.
>
> The right to acquire property, to own it, to deal with it and to use it, as the owner chooses, so long as the use harms nobody, is a natural right. This does not owe its origin to con-

> stitutions. It existed before them. Spann *v.* Dallas, 235 S. W. Rep. 513. It is, however, a right guaranteed by our constitutions. It is a right necessary to the existence of organized society. The protection of this natural right is one of the reasons which prompted men to form governments. The protection of private property is the aim of every well considered form of government. The right of private property has been called the keystone of the arch of civilization. A government which fails to protect the right of private property cannot endure. Men will not undergo the labor and hardships necessary to the acquisition of property if they find that the ownership and the enjoyment thereof is not to be protected. With the right of ownership and possession, goes the right to use, enjoy and dispose of the property owned. The substantial value of property lies in its use. If the right of use be denied, the value of the property is lessened or destroyed. A law which forbids a certain use of property deprives it of an essential attribute. The result in effect is a proscription of its ownership. Spann *v.* Dallas, *supra.*''

The Supreme Court in that case held that under the New Jersey Constitution as it then read, the only time that an owner could be restricted in the use of his real property by the public authority, was when such restriction was ''essential to the public health, safety and welfare'', and that at all other times ''the abridgement of its contemplated use is an invasion of the inherent and constitutional rights of the Relator (owner)''. That was the law of this State at the time of the application by Relator-Appellant for his permit.

> ''A state constitution, or an amendment thereof, which is retrospective in its operation is not invalid where it does not * * * divest vested rights. A subsequent legislative enactment explanatory of a previous law can-

not retroact so as to affect the rights of parties under such previous law, as even in the absence of an express constitutional prohibition of retrospective laws, a statute or ordinance is void where its operation would impair vested rights." 12 C. J. 1085, Sec. 779.

"It is well settled by authority that statutes are not to be given a retrospective operation except where it is manifest the legislature intended they should have such operation; and, as already shown, it is not competent even for the legislature to give such operation to an act where it will affect existing or vested rights. *Thomason* v. *Alexander,* 11 Ill. 54; *Betts* v. *Bond, Breese,* 223; *People* v. *Thatcher,* 95 Ill. 109; *People* v. *Peacock;* 98 Id. 172; *Garrett* v. *Wiggins,* 1 Scam. 335; *Rhinehart* v. *Schuyler,* 2 Gilm. 473; *Bruce* v. *Schuyler,* 4 Id. 221; *Marsh* v. *Chestnut,* 14 Ill. 223; *Conway* v. *Cable,* 37 Id. 82; *Dobbins, et al.* v. *First Natl. Bank,* 112 Ill. 553 at p. 565.

See also

City of Chicago v. *Collin, et al.,* 134 N. E. Rep. 751, at p. 753;

Arnold & Murdock Co. v. *Industrial Commission et al.,* 145 N. E. Rep. 342, at p. 343;

Smolen v. *Industrial Commission, et al.,* 154 N. E. Rep. 441, at p. 443;

Fawcett v. *Andrews,* 197 N. Y. Supp. 208;

Colonial Motor Coach Corp. v. *City of Oswego, et al.,* 215 N. Y. Supp. 159.

POINT III.

If the Court decides that the statute acts retroactively, it cannot retroact further than the date upon which the constitutional amendment took effect.

This would seem to be obvious because if we assume any date before the adoption of the amendment we must assume the constitution as it was at that date and such legislation being on the assumed date unconstitutional, it would be void.

The statute of 1928 therefore cannot affect the case *sub judice* because not only was the application for a permit and denial before the adoption of the amendment, but this case was actually in court at the time.

POINT IV.

If the right of the Relator-Appellant was vested so as to prevent its being taken away either by constitutional amendment or by legislation, the Supreme Court in the exercise of its discretion should grant the writ herein prayed for.

The principle enunciated in the case of *Rohrs* v. *Zabriskie,* 133 Atl. 65, has no application here because in that case a question of public safety arose and the passage of the ordinance did not alter the existing fact. Here neither public safety nor public health enters into the matter and an indifferent act is prohibited. Said act could not have been legally prohibited at the time of the application and therefore months before such prohibition Relator was illegally denied his right. He immediately sought redress in the only form of action

open to him and has since diligently pursued such action. What more could he do? Is it not a denial of a plain existing right for the Court to now refuse to help him?

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

MARK A. SULLIVAN,
Of counsel with Relator-Appellant.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

(6446)

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Relator's Exhibits.

Respondent's Exhibits.

Notice of Appeal and Grounds.

New Jersey Supreme Court

MORRIS BOUER, Relator, *vs.* MAYOR AND ALDERMEN OF JERSEY CITY, a municipal corporation and JOHN J. BEGGANS, Director of Public Safety, Respondents.	On Mandamus. Notice of Appeal and Grounds.

To Thomas J. Brogan, Attorney of Respondents:

Sir:

PLEASE TAKE NOTICE that the relator in the above entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause on the following grounds, to wit:

1. The Supreme Court erred in refusing to grant to relator a peremptory writ of mandamus directing the respondents to issue to relator the permit in this matter applied for.

2. The Supreme Court erred in holding that the zoning ordinance of Jersey City entitled "An Ordinance regulating and restricting the location of trades and industries, and the location of buildings designed for specified uses, and regulating

and limiting the height and bulk of buildings hereafter erected, and regulating and determining the area of yards, courts and other open spaces surrounding buildings, and establishing the boundaries of districts for the aforesaid purposes and providing penalties for the violation of its provisions'', affected the application of Relator here under review.

Respectfully,

MARK A. SULLIVAN,
Attorney of Relator.

Order Discharging Rule.

NEW JERSEY SUPREME COURT.

MORRIS BOUER, Relator, *vs.* MAYOR AND ALDERMEN OF JERSEY CITY, a municipal corporation and JOHN J. BEGGANS, Director of Public Safety, Respondents.	Order Discharging Rule.

The above matter having been submitted at the June Term, 1928, of the Supreme Court, and the Court having determined by its opinion that the rule to show cause should be discharged,

It is on this day of , 1928, ORDERED that the rule to show cause heretofore obtained in the above entitled matter be and the same is hereby discharged,

And whereas, the said opinion did reserve to the relator the right to mould the pleadings in order to give the relator an opportunity to take an appeal,

It is FURTHER ORDERED that the relator have leave to mould the pleadings in this case in order that the relator may appeal to the Court of Errors and Appeals, and permission is hereby given to the said relator to appeal to said Court of Errors and Appeals.

Stipulation.

NEW JERSEY SUPREME COURT.

MORRIS BOUER, Relator, *vs.* MAYOR AND ALDERMEN OF JERSEY CITY, a municipal corporation and JOHN J. BEGGANS, Director of Public Safety, Respondents.	On Mandamus. Stipulation.

It is hereby stipulated by and between the attorneys for the respective parties hereto, that pursuant to the order of the Supreme Court of New Jersey, the record herein be regarded and treated as moulded and considered as if an alternative writ had heretofore been allowed in this matter and that all of the testimony and depositions heretofore taken be regarded as taken upon and under said alternative writ.

MARK A. SULLIVAN,
Attorney of Relator.

THOMAS J. BROGAN,
Attorney of Respondents.

Order to Show Cause.

(Filed September 20, 1927.)

NEW JERSEY SUPREME COURT.

MORRIS BOUER, Relator, *vs.* MAYOR and ALDERMEN OF JERSEY CITY, a municipal corporation, and JOHN J. BEGGANS, Director of Public Safety, Respondents.	On Application for Mandamus. Order to Show Cause.

Upon reading and considering the affidavit filed in the above stated cause,

IT IS, on this 20th day of September, 1927, ORDERED by the Court that the Mayor and Aldermen of the City of Jersey City, a municipal corporation, and John J. Beggans, Director of Public Safety, show cause before this Court at the State House in the City of Trenton, on the 4th day of October, 1927, at 10 o'clock in the forenoon of that day, why a peremptory or alternative writ of mandamus should not be issued out of and under the seal of this Court, commanding and enjoining it, the said Mayor and Aldermen of Jersey City, and John J. Beggans, Director of Public Safety, to grant a permit to the relator herein for the erection of an ornamental drive-in gasoline station in accordance with the affidavit filed in this cause, and,

Order to Show Cause.

It is further ordered, that both parties hereto have leave to take affidavits, and

It is further ordered, that a true copy of this order, and the affidavit upon which this order is based (which copies may be certified by the attorney for the relator), be served on the respondents herein within three days from the date hereof.

Let this rule be entered in minutes.

James F. Minturn,
Justice.

On motion of

Henry J. Camby,
Attorney of Relator.

Depositions.

NEW JERSEY SUPREME COURT.

MORRIS BOUER, Relator, *vs.* MAYOR and ALDERMEN OF JERSEY CITY, a municipal corporation, and JOHN J. BEGGANS, Director of Public Safety, Respondents.	On Application for Mandamus. Depositions.

Before:

LEON ABBETT, Esq.,
Supreme Court Commissioner.

At Law Department,
City Hall, Jersey City, N. J.

November 4th, 1927.

Appearances:

HENRY J. CAMBY, Esq., Attorney for Relator.

CHARLES HERSHENSTEIN, Esq., Attorney for Respondents.

Richard J. McGrath sworn as stenographer.

MORRIS BOUER, relator, sworn in behalf of himself:

Direct examination by Mr. Camby:

Q. Mr. Bouer, where do you live? A. 133 Zabriskie Street, Jersey City.

Q. What is your business? A. Builder.

Q. Do you own the property known as lots 1-A and 1-B, city block 1364, Jersey City, Hudson County, New Jersey, lying on the easterly side of the Hudson County Boulevard, between McAdoo and Cator Avenues? A. I have a contract to take title the 15th of November.

Q. With whom is your contract to purchase that property? A. The Golden Holding Company of Jersey City.

Q. Did you make application to the Director of Public Safety of Jersey City John J. Beggans, and the Mayor and Aldermen of Jersey City for a permit to erect an ornamental drive-in gasoline station on the property which you have just described? A. Yes, sir.

Q. On what date? A. July 29th, 1927.

Q. This application which I show you marked Exhibit R- is the same application which you filed with the A. Yes, sir.

Mr. Hershenstein:

Mr. Camby: I offer the application in evidence.

Mr. Hershenstein: No objection.

Mr. Abbett: Received and marked exhibit R-1.

(It is stipulated between counsel that this exhibit is the same as Exhibit D-1.)

Mr. Camby:

Q. What action was taken, if any, on the part of the City of Jersey City with respect to your application? A. They rejected it.

Q. Was there a hearing on the application? A. Yes, sir.

Q. Before whom? A. Before Beggans.

Q. Before Commissioner Beggans, Commissioner of Public Safety? A. Yes, sir.

Q. And not before the City Commission? A. No, sir.

Q. Do you recall the date on which the hearing was had? A. On August 22nd, 1927.

Q. Where did this hearing take place? A. In the City Hall.

Q. At Jersey City? A. Yes, sir, on the second floor.

Q. Who stated to you that the application was rejected? A. Commissioner Beggans.

Q. Personally? A. Yes, sir, he was there.

Q. What did he say when he told you it was rejected? A. He just said "permit denied".

Q. Did Commissioner Beggans give you any reason for the denial of this application? A. No.

Mr. Hershenstein: I consent to Mr. Camby examining Mr. Bouer upon the blue print which Mr. Camby produces and which later he will identify.

Q. Mr. Bouer are you familiar with the location and the section of the City of Jersey City in which your lots on the Hudson Boulevard between McAdoo and Cator Avenues are located? A. Yes, sir.

Q. I show you a blue print of a survey, which will be identified and offered in evidence later and call your attention to that part of this sketch marked 1-A and 1-B, adjoining which on the south side appears to be a one-story frame building and then two pumps in the front of the buildings on the curb line, and then another one-story frame building—I ask you if these two buildings and those pumps were there on September 15th,

1927, at the time you made your affidavit? A. Yes, sir.

Q. Will you describe if you can what kind of pumps they are? A. Two gasoline pumps, two Standard gasoline pumps.

Q. Do you know of your own personal knowledge how long these pumps and these buildings have been there? A. The pumps to my knowledge —there for the last three years, that I know of.

Q. And the buildings? A. They are there longer—that I know.

Q. Adjoining your property on the north are vacant lots, are there not? A. Yes, sir.

Q. Is there anything in the front of these lots according to this survey and your own personal knowledge? A. Billboards there of some company.

Q. And then going to the corner of Hudson Boulevard and McAdoo Avenue is there a building there? A. Next to the lots—next to the billboards is a drive-in station for a gas station.

Q. And on the corner? A. There is a store with two floors above.

Q. To the rear of this store and the dwelling house is a drive-in gas station? A. Yes, sir.

Q. With how many pumps? A. Two—I know there is two.

Q. Opposite that corner on McAdoo Avenue and diagonally facing the corner of the Hudson Boulevard and McAdoo Avenue are there any other gas stations? A. Yes, there is Greenberg's drive-in gasoline station with five pumps and a lubricating building with a station, and north of that is two Standard Gasoline pumps again about 25 feet away from that——

Q. Opposite your property on the Hudson Boulevard on the other side of the street between Terhune Avenue and Cator Avenue are there any

stores or gas pumps there? A. The whole block is occupied with stores about 75 feet away from Cator Avenue corner, and then there is a public garage with two stores in front of it, and a gasoline pump in front of it.

Q. This situation with respect to the existence of these buildings at the place you have just mentioned existed on September 15th, 1927? A. Yes, sir.

Q. For how long before that? A. I remember for the last two years. They were there from away before that. How long I do not recall.

Mr. Camby: That is all.

Cross-examination by Mr. Hershenstein:

Q. Adjacent to your property known as lots 1-A and 1-B and fronting on the Hudson Boulevard there is already located two gas pumps? A. Yes, sir.

Q. And on the corner of Old Bergen Road and the Boulevard facing Old Bergen Road, there is at present erected a large gasoline station with a pump? A. Yes.

Q. And there is also a pumping station, or a gas pump rather, on the Boulevard on the opposite side of your lots? A. Yes, sir.

Q. Now adjacent to the southerly boundary of your block line there is a one-story frame building? A. Yes, sir.

Q. And adjoining that one-story frame building, there is another one-story frame building? A. Yes, sir.

Q. And the land to the north of your lot line is vacant? A. Yes.

Q. That is all.

Deposition of George W. Snow, Jr.—Direct.

JAMES V. HOGAN, JR., sworn in behalf of the relator.

Direct examination by Mr. Camby:

Q. What is your business Mr. Hogan? A. Civil Engineer and Surveyor.

Q. How long have you been in that business? A. Twenty odd years.

Q. Where is your place of business? A. 68 Hudson Street, Hoboken.

Q. Do you live in Jersey City? A. Yes, sir.

Q. Are you familiar with that part of Jersey City in the vicinity of the Hudson Boulevard and McAdoo and Cator Avenues? A. Yes, sir.

Q. At the request of Mr. Bouer, the relator in this proceeding, on October 22nd, 1927, did you make a survey of lots 1-A and 1-B on the easterly side of the Hudson County Boulevard between McAdoo and Cator Avenues? A. I made a general survey of that particular locality, but not particularly of those lots.

Q. But that general survey, which you say you made includes a general survey of the lots in question? A. Yes, sir.

Q. I show you a blue print of a survey marked "made October 22nd, 1927 by Jas. V. Hogan, Jr." and ask you if this is a true and accurate blue print of the general survey, which you say you made? A. Yes, sir.

Mr. Camby: I offer this in evidence.

Mr. Hershenstein: No objection.

Mr. Abbett: Received and marked exhibit R-2.

Mr. Hershenstein: Counsel for the Respondents, for the purpose of this record consents that the testimony of the Relator

Bouer with regard to this blue-print now offered in evidence, was in evidence at the time of such testimony.

Mr. Camby:

Q. Mr. Hogan, I show you this blue print marked exhibit R-2 and call your attention to two pumps to the south of lots 1-A and 1-B, apparently alongside the curb of the east side of the Hudson Boulevard and also to a drive way and two pumps in the rear of the three-story frame building on the corner of McAdoo Avenue and Hudson Boulevard and also Greenberg's Lubricating Station with five pumps and parking space on McAdoo Avenue and Old Bergen Road, and two gas pumps on the Hudson County Boulevard to the north of Greenberg's Lubricating Station and ask you if those buildings and those pumps were there, if you know of your own personal knowledge, before the survey was made? A. Yes, sir.

Q. Do you know of your own personal knowledge about how long they were there? A. I could not say—with the exception of the one adjoining lot 1-A which I recall having bought gasoline there two or three years ago.

Q. They are both gasoline pumps or one of them? A. I do not recall whether there was two there or not, but I recall buying gasoline there two or three years ago.

Q. As to the other pumps, particularly the one at Greenberg's Lubricating Station on McAdoo Avenue and Old Bergen Road, do you know whether these pumps were there on Sept. 15th, 1927? A. Yes, sir, they were.

Q. Did the same situation exist with respect to the two gas pumps on the Hudson Boulevard to

the north of Greenberg's lubricating station? A. There were gas pumps there, whether there were two there or not I do not know.

Q. I call your attention to one gas pump along the curb line on the west side of the Hudson Boulevard, diagonally opposite lots 1-A and 1-B, between Terhune Avenue and Cator Avenue and ask you if that gas pump was there, so far as your personal knowledge is concerned, on Sept. 15th, 1927? A. Yes, sir.

Mr. Camby: That is all.

Mr. Hershenstein: No questions.

Mr. Bouer, relator, recalled.

Re-direct examination by Mr. Camby:

Q. Mr. Bouer, with respect to this application which you made for a drive-in gasoline station to be erected on the premises in question, have you prepared plans and specifications for the work? A. Yes, sir.

Q. Have they been completed? A. Not yet.

Q. Are they in process of preparation? A. Yes, sir.

Q. Who is your architect? A. Nathan Welitoff.

Q. If the permit for which you have made application is hereafter granted to you, you would be prepared immediately thereafter to proceed with this work? A. Yes, sir.

Q. Have you applied for and received estimates for the material and labor necessary to be used and performed for this work? A. Yes, sir.

Q. You intend to build this plant yourself? A. Yes, sir.

Q. How many gasoline pumps would you install? A. Five.

Deposition of George W. Snow, Jr.—Direct.

Q. Have you incurred any expense as a result of the preparation of these plans and specifications? A. Yes, sir.

Mr. Hershenstein: I object to any reference to any expense to be incurred, in view of the fact that the application was denied, and nothing can be done pursuant to the permit which has already been denied.

Mr. Bouer, relator, recalled by Mr. Canby.

Q. Mr. Bouer, since the last hearing, have you taken title to the premises in question? A. I did.

Q. On what date? A. Saturday, November 12th, 1927.

George W. Snow, Jr., sworn in behalf of respondents.

Direct examination by Mr. Hershenstein:

Q. It is stipulated by counsel that the locus in quo is zoned, pursuant to the Zoning Ordinance of Jersey City, as a residential district.

Mr. Hershenstein: (continuing) I now offer in evidence the original application.

Mr. Abbett: Received and marked Exhibit D-1.

Mr. Hershenstein:

Q. You are the inspector in the Bureau of Combustibles in Jersey City? A. Yes, sir.

Q. For how long a period have you been such an inspector? A. Since October, 1919.

Q. And as an inspector, what are your duties? A. To inspect buildings and localities for fire risks.

Q. And I take it that it is your duty to determine whether fire hazards in certain localities are increased or decreased by the construction of certain buildings or types of buildings? A. Yes, sir.

Q. Or gasoline stations? A. Yes.

Q. And were you delegated by the Inspector of Combustibles and Fire Risks to make an examination and inspection of the premises owned by Mr. Bouer at 1772-1774 Boulevard for the purpose of ascertaining the exact situation with regard to the contemplated construction of a gasoline station? A. I was.

Q. Did you make such an inspection? A. I did.

Q. When did you make the inspection? A. Yesterday.

Q. Did you make an inspection prior to yesterday? A. I have made numerous inspections of that locality.

Q. Did you make an inspection with regard to this application at the time the application was made? A. I did.

Q. When was that? A. In August, 1927.

Q. What did you find? A. I found that the premises on which the permit was applied for is a vacant plot of ground, located right next to premises at which a gasoline station has already been established for a number of years, and there are 1100 gallons of gasoline stored at this place; 200 feet from this site there is another gasoline station which stores 1100 gallons of gasoline; 300 feet from this site there is another gasoline station which stores 2700 gallons of gasoline. And 150 feet across the street from this proposed station there is a storage tank of 550 gallons. The

hazard, to my mind, there is sufficiently large for that neighborhood, and to increase the quantity of gasoline stored in any close location to that site would be going beyond the safety lines.

Q. As an inspector of that department is it your opinion that the construction of a gasoline station would materially increase the fire hazard? A. Any addition to the storage of gasoline at this site would increase the fire hazard.

Q. And did you so report to the Inspector of Combustibles? A. I did.

Q. Was the report in turn given to Commissioner Beggans, in charge of the Department of Public Safety? A. It was.

Q. Are you still of the opinion, Mr. Inspector, that because of the accumulation of gasoline in that particular locality, that the erection and construction of another gasoline station would jeopardize the lives of the people in that neighborhood? A. I am.

Q. And did you make any recommendations as to the granting or rejecting of this application? A. I recommended that the permit be denied due to the fact that there was a large quantity of gasoline stored in this immediate vicinity, and to increase the quantity would be getting beyond the lines of safety, and particularly in view of the short distance from public buildings.

Q. Now, Mr. Snow, from your knowledge of the situation surrounding the storing of gasoline, will you say that the greater the amount of gasoline that is being stored in a certain location decreases the safety to the people in that community? A. The greater the storage, the decrease in safety is in proportion.

Q. And from your experience you find that there is a certain amount of gasoline which a neighbor-

hood may, with safety, permit to be stored in a particular locality? A. Yes, sir.

Q. But beyond a certain point, from your experience, you would say that it would become a very dangerous thing to that community? A. Yes, sir.

Q. Now, with regard to this application, do I understand that your testimony is that there is already sufficient gasoline stored in this particular locality, that the addition of any more gasoline would jeopardize the lives of the people in that neighborhood? A. It would.

Mr. Hershenstein: That is all.

Cross-examination by Mr. Camby:

Q. During the time that you have been employed as an inspector in the Department of Combustibles, about how many applications for permts for gasoline stations, on an average during the year, did you investigate? As near as you can remember? A. You mean an application for a new location—I imagine it would average fifty a year—one a week.

Q. And your duties as an inspector, as you stated in your direct examination, are to determine whether the operation of a gas station at a certain locality would be or would not be a fire hazard? A. Yes.

Q. Do you mean by that, that you not only make a recommendation, but that you are the final judge of what constitutes, or what does not constitute a fire hazard, or do you mean that you only make a recommendation, and the governing body of the City acts, either favorably or unfavorably, on your recommendation? A. I make the recommendation and the governing body generally denies the application.

Mr. Hershenstein: You mean they generally adopt your recommendation?

A. Yes, sir.

Mr. Camby:

Q. And in some cases the governing body does not follow your recommendation? A. That has happened where the circumstances which were not fully developed at that time altered the case.

Q. Just what do you mean by circumstances which had not fully developed at the time altered the case? A. Where permits have been refused and when frame buildings, the buildings have been torn down, and fire-proof structure raised, then a permit has been granted for that site.

Q. So that where there is a fire-proof structure erected in a locality, where a gasoline station is proposed to be built, notwithstanding your recommendation to deny the application for a permit or deny a permit, the governing body has in some cases rejected your recommendation and granted a permit?

Mr. Hershenstein: I object to the question, it is not based upon the facts testified to by this witness. The witness testified that in some cases where circumstances were altered subsequent to his recommendation, then the governing body granted a permit. This may have been pursuant to a second recommendation.

Mr. Camby: I withdraw the question.

Mr. Camby (continuing examination):

Q. You testified before that the governing body generally followed your recommendation against

the granting of a permit for the operation of a gasoline station, and then you stated that where they did not follow your recommendation, and granted the permit, it was where there were other circumstances which altered the situation, did you mean by that, that these circumstances developed after you made your inspection and report? A. Yes, sir, when the applicant would find out that he could not place a tank at that particular site, due to a frame construction, he would alter his plans, so as to overcome our objections for the denial of the tank.

Q. Do you then mean that in every case where the circumstances were not changed, and where you recommended the denial of a permit that the governing body in every case followed your recommendation and denied the permit? A. So far as I know.

Q. So that then, practically speaking, you are the sole judge in determining what is and what is not a fire hazard?

Mr. Hershenstein: Objected to on the ground that that is not the assumption or conclusion from the witness's testimony, he testified it is his duty to make recommendations——

Mr. Camby: He said he determines——

Mr. Hershenstein: After he determines whether or not it is a fire hazard——

Mr. Abbett: Note the objection on the record and answer.

A. Yes, sir—every application in the City is not referred to me. I am not the sole judge for the whole city. I am the sole judge for those which I inspect.

Q. As a matter of fact, is it the fact that you merely, as your official title imports, investigate and make recommendations, and that the governing body of the city acts on your recommendation? A. They act on my recommendation.

Q. Are you familiar with the particular locality, where the property of Mr. Bouer is, upon which he desires to erect this gas station, located? A. Yes, sir, I am very familiar.

Q. Do you live in the neighborhood? A. Yes, sir.

Q. Do you know, of your own personal knowledge, when the gas station on the southeast corner of the Hudson Boulevard and McAdoo Avenue was erected? A. That gasoline station was established prior to my connection with the fire department, prior to 1919.

Q. And so far as your personal knowledge is concerned that gasoline station has been in operation at least since you have been connected with the department of combustibles? A. Yes, sir.

Q. Do you know, of your own personal knowledge, when the Greenberg Lubricating Station on the northeast corner of Old Bergen Road and McAdoo Avenue was erected? As near as you can recall? A. About two years ago.

Q. Did you, at that time, make an investigation of the application for the permit to erect the Greenberg Lubricating Station? A. I did.

Q. The gasoline pumps north of the Greenberg Lubricating Station on the Hudson Boulevard, are how many feet north of the Greenberg Station? A. Why they are 75 feet.

Q. And do you know how long those two pumps have been in place there? A. One of them was there prior to 1919.

Q. And the other one, when? A. About a year ago.

Q. Did you have charge of the investigation of the application for the pump which was placed there about a year ago, as you say? A. The installation of the pump on the Boulevard—the authority is vested in the Boulevard Commission and not in the City Commissioners.

Q. So that your answer is no, to that? A. Yes, sir.

Q. So that you say then, the investigation of applications for permits to erect gas stations or gas pumps, which front on the Boulevard are not under the jurisdiction of your department? A. Outside of the building line.

Q. And inside of the building line they are in the jurisdiction of your department? A. Yes, sir.

Q. Is there an apartment house near the Greenberg Lubricating Station? A. There is a small apartment house about 125 feet from it.

Q. 125 feet east of the Greenberg station? A. Sort of southeast.

Q. Your answer is that this apartment house is across the street? A. It is on the other side of the street.

Q. On McAdoo Avenue? A. On McAdoo and Old Bergen Road.

Q. Is this a brick structure? A. It is.

Q. How many stories? A. Three.

Q. How long erected, so far as your personal knowledge is concerned? A. Well, I remember about 18 years anyhow.

Q. About 18 years? A. Yes, sir.

Q. So that when this Greenberg Lubricating Station was erected, there already was on the corner of McAdoo Avenue and Old Bergen Road,

this particular house to which you refer? A. There was.

Q. Do you know if this apartment house on the corner of McAdoo Avenue and Old Bergen Road is a fire-proof building, complying with the ordinances of the city of Jersey City? A. It complies with the State Tenement House Act, and to my mind should not be classified as an apartment house.

Q. But you referred to it before as an apartment house? A. I think you made the first reference to it.

Q. Your answer was yes? A. Yes.

Q. You say it should not be referred to as an apartment house, what would you call it? A. I would call it a heated flat.

Q. I ask you again, is this apartment house or heated flat, as you now call it, so far as you know, erected to comply with the general ordinances and the fire ordinances of the city of Jersey City? A. Not those that are now in effect.

Q. Do you make these inspections of buildings, to which you referred, upon the request of your superior officers, or do you make them in any other way? A. I make inspections at the request of superior officers. I make general inspection of the entire district, and also on complaints.

Q. Have you received any complaints relating to the violation of any fire ordinances in connection with this heated flat, to which you referred at McAdoo Avenue and Old Bergen Road? A. I cannot bring to mind any.

Q. So that so far as you personally know, there has been no objection raised to this particular apartment house or heated flat as being erected in violation of either the then existing fire ordinances or the present fire ordinances? A. I never heard of any objection.

Q. Are there any buildings on the north side of McAdoo Avenue on the same side on which is erected the Greenberg Lubricating Station? A. East of Greenberg's Lubricating Station there is a plot of vacant ground, 75 feet, then comes a one family frame dwelling——

Q. Then what? A. Another one family dwelling.

Q. Right next to the frame dwelling? A. Yes, sir.

Q. There are two-frame dwellings, one next to the other? A. Yes, sir.

Q. Is there any building of any kind north of the Greenberg Lubricating Station, and south of the two gas pumps on the Hudson Boulevard? A. Yes, there is.

Q. What kind? A. Frame dwelling.

Q. And immediately in front of this frame dwelling are the two gas pumps to which you referred to, facing the Hudson Boulevard? A. Very close to the front—yes, there are two pumps there. The dwelling that I refer to is between the Greenberg Lubricating Station and the frame building in front of which are two gas pumps.

Q. Are there any apartments on the east side of the Hudson Boulevard between McAdoo and Cator Avenues? A. There is a six family frame flat at the corner of Cator Avenue and the Boulevard, it being the—it being the northeast corner of Cator and the Boulevard.

Q. About how many feet from the property owned by Mr. Bouer, is this apartment house? A. About 250 feet.

Q. In between the property owned by Mr. Bouer and this apartment house, to which you have just referred, in other words, a distance of 250 feet, is that all vacant land? A. No.

Q. What is there? A. May I refer to this diagram? There are three or four frame dwellings.

Q. Do you know that on the curbline on the Hudson Boulevard, in front of these frame buildings, there are gasoline pumps? A. Not between the dwellings, but just north of the dwellings is a frame one-story accessory store with two pumps at the curb.

Q. Do you know if, on the northwest corner of Cator Avenue and Hudson Boulevard at the curbline, there is erected a gas pump? A. There is one pump—one tank.

Q. How far from the property owned by Mr. Bouer, the property in question, in any direction, is there a municipal fire house? A. There is one at the corner of Van Nostrand Avenue and the Boulevard, which I would imagine to be, a quarter of a mile.

Q. Is that the nearest fire house to this property? A. It is.

Q. How far is the next nearest fire house to this property? A. In the other direction there is one on Linden Avenue, near Old Bergen Road, which is a distance of about one-half mile.

Q. Within a radius of one mile of this property in question, how many fire houses are there? A. Three.

Q. Do you consider that the fire houses, which you have just mentioned, are well equipped to handle a fire within the respective localities? A. They are well equipped to handle an ordinary fire, such as a building.

Q. You are familiar with the fire ordinances of the city of Jersey City, I take it? A. Yes.

Q. So that before you recommend the granting of an application for a permit to erect a gasoline station, you must be satisfied that all of the re-

quirements of the fire ordinances have been complied with? A. Yes, sir.

Q. And having been satisfied that all of the requirements of the fire ordinances have been complied with, it is your practice to recommend the granting of a permit? A. Yes, sir.

Q. And after you recommend the granting of a permit in a case where you are satisfied that all of the requirements of the fire ordinances have been complied with, are you then satisfied that there is no danger of any fire hazard in connection with the particular property? A. No.

Q. Will you please explain that answer more fully? A. The establishment of an additional gasoline station, not only increases the fire hazard, because of the fact that more gasoline is stored, but it introduces more handling above ground, and at times, after a place has been established, we find the operators thereof, are very careless and do not obey all the rules for the handling of gasoline.

Q. Was then your reason for recommending the denial of a permit for a gas station at this place, not so much the initial or original hazard, as it is what may subsequently happen in the management and handling of the gas station? A. I give consideration to both.

Q. Would you say that you give more consideration to the fact that, in your opinion, the erection of additional gas stations, creates a fire hazard, or to the fact that the management and operation subsequent to the granting of the permit, creates the fire hazard? A. The subsequent management at times no matter how careful introduces the extraordinary hazard of handling gasoline, and it is in the handling that the more serious danger is involved.

Q. How do you know that the maintenance of these gasoline stations is rendered hazardous by reason of the conduct and management of these gas stations? A. From experience.

Q. In inspecting them after they have been maintained? A. Yes, sir.

Q. What has been your practice after you have inspected already established gas stations and found there violations insofar as the management or operation is concerned?

Mr. Hershenstein: I object to the question as it is entirely irrelevant, immaterial and incompetent.

Mr. Abbett: Note the objection on the record. Witness may answer.

A. To correct the violation or the careless practice and sometimes threaten to withdraw the permit for gasoline storage on the premises.

Q. So that you know then that in case you find any violation, the operators of the gasoline stations are subject to punishment under the ordinances of the city of Jersey City, and also to the revocation of their permit? A. Yes, sir, but there is another condition for which the operators of gasoline stations are not responsible, and that is the carelessness of the public, the actions of which they cannot always control.

Q. In what way does the public exercise any control or supervision over the conduct of a gas station? A. It is not that that I refer to. In the ordinary conduct of business, the operator of the car frequently or generally takes off his own gasoline cap and it has happened at night that they have tried to see how much gasoline they have in their tank with the use of a match, in which has resulted a fire. They also keep their engine running, when it should be shut off.

Q. Assuming that a gasoline station has been erected in any part of Jersey City in compliance with the ordinances of the city of Jersey City and has been properly conducted by the owner of the gasoline station, would you then say that there was a fire hazard to the city of Jersey City? A. Gasoline cannot be used or handled in any shape or form without involving a serious hazard.

Q. Would you say that that statement were true, where there was only one gasoline station erected on a block? A. Yes, sir.

Q. So that you say that even without the erection of a gas station by Mr. Bouer at this location, you would consider that there already exists a fire hazard? A. From my viewpoint, yes, sir. We do not desire to increase it.

Q. And if all of these gasoline stations and pumps, which are now erected and maintained in this immediate vicinity have been constructed according to law, and according to the ordinances of the city of Jersey City, and they have been properly and efficiently operated and managed, would you say that the fire hazard, which you say exists, is minimized? A. Well, proper conduct of a gas station minimizes the hazard involved, but it does not entirely eliminate it, because that is impossible.

Q. In other words, it is true, then, that the operation of a gas station, no matter how conducted is accompanied by some fire hazard? A. Yes, sir.

Q. And that is also true in apartments which are heated by oil burners. Is not that so? A. Yes, but there is a difference in the hazard.

Q. But, nevertheless, whatever difference there is between the operation of a gas station and the operation of an oil burner in an apartment house in degree, there is still a fire hazard? A. Yes.

Q. And do you know that there is in this immediate neighborhood any apartment which is heated by fuel oil? A. Not an apartment house. I do not know of any. In the immediate neighborhood.

Q. Yes? A. I would not call it immediate neighborhood.

Q. Can you tell us which has had more influence upon you in the consideration of this application, the fire hazard in erecting the gas station, or the subsequent operation and management of it? A. I would say the subsequent operation and management is the greatest.

Q. How frequently does your department make investigations of existing gas stations? A. I guess about every four months.

Q. Do you take into consideration in investigating these applications for gas stations, the feeling of the people living in the neighborhood? A. I have nothing to do with that. My inspection is as to fire hazards.

Q. Is it not a fact, Mr. Snow, that your department has jurisdiction over the conduct and operation of the gas pumps which are on the curb line on the Hudson Boulevard? A. We assume it. I do not know the legal answer to that, but we assume that authority.

Q. And you have exercised that authority as well? A. Yes, sir.

Q. So that when you stated earlier in the examination that the Boulevard Commission was the body that had the supervision over the gas pumps which are erected on the curbline of the Boulevard, that was not true, so far as the practical feature was concerned? A. The subsequent management of those pumps we direct.

Q. And you see that they are conducted and operated in compliance with the fire ordinance of Jersey City? A. Yes, sir.

Deposition of J. Van Rosencrance—Direct.

Q. Is it your opinion that in case of a fire in one of these gas stations, or at one of these gas pumps, the fire department of the city of Jersey City would be unable to cope with the situation? A. I do not think. That would depend upon whether or not there was an explosion.

Q. Suppose there was an explosion? A. If there was an explosion involving the throwing around of the gasoline, I would hesitate to say what would actually happen.

Q. And your hesitancy is due to the fact that you do not know? A. It is due to the fact that we have not had such a catastrophe during my connection with the fire department.

Q. In other words, you have had no explosions since 1919? A. We have had fires and then followed by explosions.

Mr. Camby: I think that is all from Mr. Snow.

Mr. Hershenstein: I offer in evidence the fire ordinance and zoning ordinance of Jersey City.

(Admitted as Exhibits D-2 and D-3, respectively.)

J. Van Rosencrance, sworn in behalf of respondents.

Direct examination by Mr. Hershenstein:

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

Q. In what capacity? A. An inspector.

Q. And as an inspector of that department, what

are your duties? A. General and special inspections.

Q. For what purpose? A. Ascertaining the fire hazards.

Q. Are you especially assigned to make reports and investigations as to whether or not the erection or construction of gasoline pumps or gasoline stations would be detrimental to certain localities or neighborhoods? A. Yes, sir.

Q. Were you requested to make an examination of the application of Morris Bouer, to install gasoline tanks and pumps at 1772-1774 Boulevard, Jersey City? A. Yes, sir.

Q. Did you make such investigations? A. Yes, sir.

Q. When did you make the investigation? A. On November 21st, 1927. I made a previous inspection last August.

Q. And did you report the results of your investigation, both to the Inspector of Combustibles and Fire Risks, and also to me? A. Yes, sir.

Q. Now, Mr. Van Rosencrance, did you find—what did you find to be the actual condition at that location in November, 1927? A. I find that an application was made by Morris Bouer to install a gasoline tank at 1772-1774 Boulevard. I made a careful survey of the immediate vicinity, and I find these conditions. I have a copy of my report here, may I refer to it.

Mr. Hershenstein: Yes.

Mr. Camby: May I find out what it is? I have objected to this—if he is going to read this, as it is dated November 21st I object, upon the ground that it is irrelevant, immaterial and incompetent, what he found in November, 1927.

Mr. Hershenstein (continuing examination):

Q. Mr. Van Rosencrance, you have made this investigation at the request of the Department of Combustibles, also at my request, for the purpose of testifying here today as an expert, as to whether or not the granting of this application would result in either an increase or decrease of the fire hazard? A. Yes, sir.

Q. How long have you been connected with the Department of Combustibles? A. Seven years.

Q. And have you made very frequent investigations? A. Yes, sir.

Q. As a matter of fact, that is your chief duty? A. That is one of my duties.

Q. Have you made them all over Jersey City? A. Yes, sir.

Q. Are you familiar with the fact as to whether certain conditions do or do not increase fire hazards? A. Yes, sir.

Q. Have you determined from an examination of the facts in this case as to whether or not the contemplated application, if granted, would or would not increase the fire hazard? A. Yes, sir, it would.

Q. Will you tell me what you found when you made your inspection in November, 1927?

Mr. Camby: I object to any testimony as to what the witness found existed in November, 1927, upon the ground that it is irrelevant, incompetent and immaterial.

Mr. Hershenstein: I withdraw the last question.

Q. Do you know, of your own knowledge, of the conditions that existed in November, 1927, if they were similar to conditions that existed in August of the same year?

Mr. Camby: I object to the question, upon the ground that it is incompetent, irrelevant and immaterial, and it is not competent for witness to testify as to what conditions existed in November, 1927.

A. Yes, sir.

Q. The conditions as you found them in November are exactly similar to the conditions which you know existed during the month of August, 1927?

Mr. Camby: I make the same objection.

A. The same conditions.

Q. What were those conditions?

Mr. Camby: I make the same objection on the record.

A. I made a careful survey of the conditions in August, and also in November, and I find these facts: I find that at the northwest corner of the Boulevard and Danforth Avenue, the Wacker Motor Car Company has two underground gasoline tanks, each with a capacity of 500 gallons, making a total of 1,000 gallons. The northwest corner of the Boulevard and Cator Avenue, the Public Tire Company has one gasoline tank, with a capacity of 500 gallons. At 1770 Boulevard, Peter Mauer has two underground tanks, each with a capacity of 500 gallons, making a total of 1,000 gallons. The Greenberg Lubricating Station, at 60 McAdoo Avenue, and the Brumage Drive-in Station, at the Boulevard and McAdoo Avenue, has four underground gasoline tanks, each with a capacity of 500 gallons, making a total of 2,000 gallons. At 1810 Boulevard, the "Auto Accessories" has two gasoline tanks, with a capacity

of 1,000 gallons—that is, 500 gallons each, a total of 1,000 gallons. The Texas Company, at Boulevard, Old Bergen Road and McAdoo Avenue, has a drive-in station; entrance is from the Boulevard and Old Bergen Road; they have two gasoline tanks, each with a capacity of 500 gallons, a total of 1,000 gallons; and which makes a total of thirteen underground tanks and a grand total of 6,500 gallons.

Q. Now, Mr. Van Rosencrance, you say this condition existed during the month of August, 1927, and prior thereto? A. I know it existed during the month of August.

Q. Now, what traffic junctions have we in that location? A. There are two intercepting traffic junctions between Stevens Avenue and McAdoo Avenue; one at Boulevard, Old Bergen Road and McAdoo Avenue, and the other at the Boulevard, Bergen Avenue and Stevens Avenue. The Boulevard bus, running north and south on the Boulevard, intercept the Bergen Avenue busses, running north and south on Bergen Avenue, Boulevard and Old Bergen Road, between—they intercept each other on the Boulevard, between Stevens Avenue and McAdoo Avenue.

Q. What schools or other public buildings, such as hospitals, do you find in that location? A. I find Public School 34, facing the Boulevard, between Warner Avenue and Wade Street.

Q. How far from the location in question? A. Two blocks.

Q. About two city blocks? A. Two city blocks north—and across the Boulevard are the Greenville Hospital, and the Greenville Branch of the Public Library.

Q. Where is the Greenville Hospital and—— A. (Interrupting) Across from Public School 34

are the Greenville Hospital and the Greenville Branch of the Public Library.

Q. And they are about two block away from the *locus in quo?* A. Yes, sir.

Q. What else do you find? A. About two blocks south, on the same side of the street, and almost directly opposite to this location in question is the Zion Lutheran Church.

Q. From your experience in ascertaining whether certain conditions increase or decrease fire hazards, and whether certain conditions add to the seriousness of such hazards, will you tell us from your experience whether you consider the construction of another gasoline station, such as is applied for by the relator in this case, materially affects the fire hazard in that location?

Mr. Camby: I object to that question upon the ground that the witness is not competent to testify as an expert; and also upon the ground that it is immaterial.

Mr. Hershenstein: I submit in response to the first part of the objection that counsel may have an opportunity of examining the witness as to his qualifications, which he may do now or reserve that right after examination.

Mr. Camby: I reserve the right.

A. It does.

Q. Now will you please tell us why you say that, sir? A. In the first place, because of the congested condition of the thoroughfares in the immediate vicinity, both as to pedestrian and motor vehicle traffic. In the second place, because of the interception at this junction point, causing the stoppage of traffic. In the third place be-

cause a gasoline station in itself, is a serious fire hazard.

Q. Now you have described to us the number of gasoline tanks already located in the immediate vicinity of the *locus in quo,* will you tell us whether you have taken into consideration in determining the fire hazard, whether there is already enough gasoline stored at that point, so as to already create a fire hazard?

Mr. Camby: I object to that question upon the ground that, in the first place, the witness is not competent to testify as an expert, and, in the second place, that the question is immaterial, incompetent and irrelevant.

A. They do create a fire hazard.

Q. What in your opinion, will the storing of more gasoline, by the erection or construction of additional tanks, affect that situation?

Mr. Camby: I make the same objection as to the previous question.

A. It would increase the fire hazard.

Mr. Camby: Will you stipulate that I may have the same objections, as to the competency of the witness, and as to the relevancy of the questions, as I have before, noted on the record as to the succeeding questions of the witness.

Mr. Hershenstein: That is, to questions relating to the fire hazard.

Mr. Camby: Yes, sir.

Mr. Hershenstein: Yes, sir.

Q. Mr. Van Rosencrance, does the quantity of the gasoline stored within a certain neighborhood or within a certain location affect the question of fire hazard? A. It does, yes, sir.

Q. And how does it affect it? A. Any gasoline stored in any locality from the standpoint of the Fire Department, is a fire hazard, and as you increase the quantity, you materially increase the fire hazard.

Q. Is there a certain amount of gasoline which a certain locality could absorb with safety? A. From a Fire Department standpoint we consider gasoline a very serious fire hazard, and in my judgment this locality has passed that saturating point.

Q. And therefore, from your expert opinion you believe that the storing of any further gasoline in addition to what the tanks at the present time contain would be a very serious increase in the fire hazard? A. Yes, sir.

Q. Would the storing of any additional gasoline, in your opinion, be dangerous to the lives of the people living in that neighborhood? A. It would add to the dangers that already exist there.

Q. Would it, from your expert opinion, result in a dangerous condition? A. Yes, sir.

Mr. Hershenstein: That is all.

Cross-examination by Mr. Camby:

Q. Mr. Van Rosencrance, in response to a previous question, you testified that from a fire department standpoint you considered gasoline a very serious fire hazard, and that, in your judgment, this particular locality has passed that "saturation point". When do you think, Mr. Van Rosencrance, that this locality has passed the

saturation point, to which you refer, giving your answer with respect to the number of gasoline tanks, and the number of gallons of gas stored? A. When the quantity stored in the present number of tanks installed is sufficient to accommodate the inhabitants of the immediate community——

Q. Perhaps you did not understand my question? A. When the quantity stored is sufficient to accommodate those living in the immediate vicinity.

Q. I will state the question in another way. You testified that on or about August 23rd, 1927, in this, what you call "immediate vicinity", there were 13 tanks, in which there was stored or there could be stored 6,500 gallons of gasoline, and then you testified that, in your judgment, this locality has passed the saturation point, now I ask you to tell me, if you can, what number of tanks and what number of gallons, in your opinion, were within the saturation point. In other words, what I mean is, by how many tanks and how many gallons, has the saturation point been passed? A. In my opinion one-half of the tanks there would be sufficient for the accommodation of the immediate vicinity.

Q. And I assume by that that you would also mean that one-half of the number of gallons of gas to be stored would be sufficient. A. Yes, sir.

Q. Is there any table or rule which you follow in determining when the saturation point is reached? A. No, sir, it is matter of personal judgment.

Q. Well, upon what basis do you arrive at this judgment, which you speak of? A. From my personal observation of the traffic and the conditions and the requirements.

Q. What do you mean by requirements, what

requirements? A. The amount of gasoline that people in the vicinity might want to obtain from this locality.

Q. How do you know and how do you determine the amount of gasoline that the people in the vicinity might want to use? Do you interview the people to find out how much gas they will use? A. I do not, no.

Q. As a matter of fact, is not your judgment in respect to these things, an arbitrary and personal judgment? A. I would not call it an arbitrary one, I would call it a reasonable judgment.

Q. But you say it is not based upon any table, on any rules, any statistics, on any schedule? A. I base it, largely, upon what the owners of these gasoline stations have told me, as to the amount of gasoline that they sell, and the amount of customers that they have.

Q. Well, how does any statement, which the present operators of the present gasoline stations, with respect to the amount which they sell, affect the safety or the hazard in the neighborhood? A. The greatest hazard is in the handling of the gasoline after it is stored. There is a hazard in the storing of it, but the transference of it from the tank to the automobile is the greatest hazard.

Q. Mr. Van Rosencrance, you probably did not understand my question,—I repeat it in another form. How does the quantity of gas which any one of these operators in the vicinity tell you that they can use, affect the fire hazard? A. Well, the more they use, the more they sell, the more fire hazard there is.

Q. And that is then, the only reason and the only basis that you have for arriving at the conclusion that this increases the fire hazard, is it? A. That is the only real reason, as far as I know.

Q. You are not a traffic expert, are you, Mr. Van Rosencrance? A. No, sir.

Q. I assume that you are familiar with the fire ordinances of the City of Jersey City. A. Generally I am, yes, sir.

Q. You have read it? A. Yes, sir.

Q. And I assume that you have studied the various forms of combustibles? A. Yes, sir.

Q. How have you made a study of these combustibles, chemically or with respect to storage purposes? A. Not entirely from a chemical standpoint. We have a chemical expert in the department.

Q. But have you had anything to do with the chemical end of it? A. No, sir.

Q. And ever since you have been connected with the Jersey City Department of Combustibles, you have had experience with applications for gasoline stations? A. Yes, sir, I issue the permits in the name of the inspector.

Q. And before you entered the employ of the City as an inspector in the Fire Department, what line of business were you engaged in? A. I worked for the Pennsylvania Railroad for twenty years before that.

Q. In what capacity? A. In the freight service.

Q. In Jersey City? A. In Jersey City, New York and Brooklyn. Yardmaster and conductor.

Q. Are you familiar with that neighborhood, Mr. Van Rosencrance? A. That immediate vicinity. I do not live in that neighborhood. Only as I have made this special inspection in August and in November.

Q. Why was it necessary for you, Mr. Van Rosencrance, to make another inspection in November of this year, after the hearings in this proceeding had been begun? A. For the reason of

ascertaining whether conditions existed the same in November as they did in August, and just what those conditions were.

Q. What difference would that make if the conditions were such in August of this year as to justify your conclusion that it would increase the fire hazard, what difference would it make in November? A. If there had been more instalments between August and November, the conditions would be more serious than they were in August.

Q. But according to what you say, the application for a permit was rejected in August, 1927? A. This particular permit.

Q. That is what we are talking about? A. Yes, sir.

Q. Did you conduct personally any fire tests of any kind at any time with respect to the combustibility of gasoline and other combustibles, and the manner and kind of storage of gasoline and combustibles? A. I have never made any personal chemical test, but I do know that gasoline, because of its inflammability and volatility, is a very serious fire hazard.

Q. And you knew that even before you became an inspector in the Fire Department of Jersey City? A. Yes, sir.

Q. And as a matter of fact, that is common knowledge, Mr. Van Rosencrance? A. Yes, sir.

Q. Then your answer is that you have never made any tests for the city of Jersey City of any kind relating to the combustibility of gasoline and other combustibles, and the storage of gasoline and other combustibles? A. I have never made any test.

Q. So that, can you tell us definitely how you arrive at your conclusions as to the increase in the fire hazard if the permit for this particular station was granted? A. Because of my knowledge and experience in the use of gasoline.

Q. And that is the only basis for your conclusion? A. Yes, sir.

Q. That conclusion is partly derived by your own personal knowledge, which you testified before was also common knowledge, that gasoline by its very nature is hazardous, as far as use and storage is concerned? A. Yes, sir, and also in relation to fires that have happened because of the storage and use of gasoline.

Q. Do you know, of your own personal knowledge, if there are any fire houses in the immediate neighborhood? A. There are two—in what I call 'immediate neighborhood.'

Q. How close are they? A. One at the Boulevard and Stevens—about three blocks north on the same side of the Boulevard, and the other is on Linden Avenue, that is about six or seven blocks away.

Q. Are there any others, which you would say are in the neighborhood, but not in the immediate neighborhood? A. Well, I call them 'immediate' they would respond to a fire in that locality. They are the two furthest south in the City.

Q. Are there any others close by? A. No, sir.

Q. Where are the other fire houses which are nearest to these two that you mentioned? A. One at Boyd Avenue.

Q. Another where? A. At Ocean Avenue.

Q. How far are they from the premises in question? A. Either one of them—they are 12 or 15 blocks away.

Q. That would be probably a half mile away? A. Yes, within that.

Q. I assume that you consider that the fire department of Jersey City is a very efficient fire department? A. Yes, sir, we think we have the best there is.

Mr. Camby: That is all.

Exhibit R-1.

(Same as Exhibit D-1, which please see.)

Exhibit R-2.

(Blueprints of Survey.)

2 Gas Pumps

2 Sty. Frame

Fence

Greenberg Lub. Sta.

Parking Space

5 Pumps

OLD BERGEN ROAD

McADOO AVE.

3 Story Fr. Bldg.

2 Pumps

Curb

Curb

2 Story Frame Bldg.

Bill Boards

Bill Posters

1B

1A

1 Sty. Frame Bldg.

1 Sty. Frame Bldg

2 Pumps

Curb

BOULEVARD

HUDSON

TERHUNE AVE.

Curb

Stores

Curb

0 Gas Pumps

CATOR AVE.

Curb

Curb

OLD BERGEN ROAD

Made - October 22, 1927.
By - JAS. V. HOGAN, JR.
Contractors - Engineers
68 Hudson St., Hoboken, N.J.

6414.

Exhibit D-1.

BOARD OF COMMISSIONERS OF JERSEY CITY
Department of Public Safety—

FIRE

Bureau of Combustibles
244 BAY STREET

Jersey City, N. J., July 29, 1927.

The undersigned, carrying on the business of drive-in gasoline station at 1772-74 Boulevard, City of Jersey City, makes application, as required by law to keep the following articles for sale in accordance with the regulations of the Fire Department, and agree not to violate any of the conditions imposed by the Bureau of Combustibles and Fire Risks.

Respectfully,

(signed) MORRIS BOUER

I hereby consent to the installation of Gasoline Tank and Pump in front of my property at No. 1772-1774 Boulevard, opposite Terhune Avenue. Size and height 2—550 gallon tanks

Name MORRIS BOUER
133 Zabriskie St.,
Jersey City.

Location of tank on own property—underground.

Material to be stores gasoline etc.

Material of tank ¼" steel.

Approved by Commissioner of Public Safety .....

Approved by Inspector of Combustibles.....
.....

Exhibit D-1.

Approved by Commissioner of Streets and Public Improvements.....

Violation of any of the conditions imposed by the Bureau of Combustibles and Fire Risks will result in the immediate cancellation of permits, and steps will be taken to punish offenders, as provided in the city ordinance.

N. G.

Exhibit D-2.

STATEMENT.

The object of this ordinance is to safeguard life and limb, protect the health of the general public and reduce the fire hazard in Jersey City.

AN ORDINANCE

entitled

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

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

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

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

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

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

Exhibit D-2.

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

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

PENALTIES AND FINES.

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

Section 7. This ordinance shall take effect immediately upon its final passage.

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

Passed June 3, 1924.

EDWARD J. HOLLAND,
City Clerk.

Exhibit D-3.

ZONING ORDINANCE.

AN ORDINANCE regulating and restricting the location of trades and industries, and the location of buildings designed for specified uses, and regulating and limiting the height and bulk of buildings hereafter erected, and regulating and determining the area of yards, courts and other open spaces surrounding buildings, and establishing the boundaries of districts for the aforesaid purposes and providing penalties for the violation of its provisions.

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

SECTION 1. *Districts.*

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

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

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

Exhibit D-3.

SECTION 2. *Residential Districts.*

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

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

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

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

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

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

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

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

SECTION 2 (a). *Areas and Heights.*

The requirements and limitations of the New Jersey Board of Tenement House Supervision and the Jersey City Building Code shall govern the findings of the Commission on Building Dis-

tricts and Restrictions as to the height and bulk of buildings, the percentage of lot that may be occupied, the area of yards, courts and other open spaces.

SECTION 3. *Business District.*

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

1. Any kind of manufacturing, other than the manufacture of products, the major portion of which are to be sold at retail on the premises where manufactured to the ultimate consumer.

2. Blacksmith shop or horse-shoeing establishment.

3. A milk bottling or distributing station.

4. A carpet or bag cleaning establishment.

5. A coal yard or lumber yard, or mason's material yard.

6. Any trade, industry or use excluded by Section 4 of this Ordinance.

7. A terminal shed for public conveyances, unless the Public Utilities Commission deems it necessary for the public convenience.

8. A garage for more than five automobile motor vehicles or a group of garages for more than five automobile motor vehicles, or a motor vehicle service station, if any part of the lot or plot in question is situated within a distance of one hundred and fifty (150) feet as measured

along the public street of, or in any case within any portion of a street between the intersecting streets in which portion there exists:

(a) A public school.

(b) A duly organized school, other than a public school, conducted for children under sixteen years of age and giving regular instruction at least five days a week for eight or more months a year.

(c) A hospital maintained as a charitable institution.

(d) A church.

(e) A theatre containing at least three hundred seats.

(f) A public library.

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

Section 3 (a). *Areas.*

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

Section 3 (b). *Heights.*

No building shall hereafter be erected which is less than three stories in height on the following streets: West Side Avenue, Communipaw Avenue, Jackson Avenue, Ocean Avenue, Grand Street, Monticello Avenue, Bergen Avenue, Sum-

mit Avenue, Central Avenue, Sip Avenue, Montgomery Street, Grove Street, Coles Street, Pacific Avenue, Hudson Boulevard, Newark Avenue, Old Bergen Road, Danforth Avenue, or on any street or avenue within the following boundaries, which upon the "Use District Map" is zoned for business: North—the north side of West Newark Avenue from the west side of West Side Avenue to the Five Corners, continuing easterly along the north side of Newark Avenue to the east side of Baldwin Avenue; South—the south side of Communipaw Avenue; West—the west side of West Side Avenue; East—the east side of Baldwin Avenue from the north side of Newark Avenue to Summit Avenue and the east side of Summit Avenue from the junction of Summit and Baldwin Avenues to the north side of Grand Street; nor on the north side of Grand Street up to its junction with Communipaw Avenue, EXCEPT, garages where permissible.

SECTION 4. *Commercial and Manufacturing District.*

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

1. Ammonia, bleaching powder or chlorine manufacture.

2. Asphalt manufacture or refining.

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

Exhibit D-3.

4. Celluloid manufacture or treatment.

5. Cement, lime or plaster of paris manufacture.

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

7. Creosote treatment or manufacture.

8. Die stuffs manufacture.

9. Electric central station power plant.

10. Fat rendering.

11. Fertilizer manufacture.

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

13. Grease, lard or tallow manufacture or refining.

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

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

16. Junk or scrap iron storage.

17. Lamp black manufacture.

18. Linoleum or oil cloth manufacture.

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

20. Planing mill or saw mill.

21. Pyroxylin plastic manufacture or articles therefrom.

22. Rags and scrap paper—storage or baling.

23. Railroad yards or roundhouses.

Exhibit D-3.

24. Rolling mill.

25. Slaughtering of animals or fowl.

26. Stock yards.

27. Stone crushing.

28. Sugar refining.

29. Tar distillation or manufacture.

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

31. Distillation of bones, coal or wood.

SECTION 4 (a). *Areas and Heights.*

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

SECTION 5. *Industrial District.*

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

1. Celluloid manufacture or treatment.

2. Cement, lime or plaster of paris manufacture.

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

4. Fat rendering.

5. Fertilizer manufacture.

Exhibit D-3.

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

SECTION 5 (a). *Areas and Heights.*

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

SECTION 6. *"Use District" Exceptions.*

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

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

SECTION 7. *District Boundaries.*

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

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

SECTION 8. *Plans and Statement.*

Before the erection, construction or alteration of any building or any part thereof, the owner, lessee, agent, architect or builder actually engaged in the management or performance of such erection, construction, alteration or conversion shall submit to the Commission on Building Dis-

tricts and Restrictions a complete copy of the plans of the proposed work and file a statement, duly subscribed by the owner or his agent on blank to be furnished by the said Commission, reciting the use intended to be made of the building or structure designated in said plans.

SECTION 9. *Approval of Plans and Statement.*

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

If, on any inspection by the Commission on Building Districts and Restrictions, the conditions of a building or premises or its use or occupancy are found not to conform to the requirements of this ordinance or the plans and statement as approved, the inspector shall at once issue written notice to the owner or his agent, specifying the manner in which the building or premises or its use or occupancy fails to so conform, and directing said owner or his agent to comply with the provisions of the aforesaid written notice within five (5) days from the date of the service thereof upon him.

SECTION 10. *Penalties.*

Any person or persons violating the provisions of this ordinance or taking part or assisting in any violation of this ordinance, or who maintains

any building or premises in which any violation of this ordinance shall exist, shall for each and every violation be imprisoned in the Hudson County Jail for a period not exceeding thirty days or be fined not exceeding Fifty Dollars, or both. Each day that a violation is permitted to exist shall constitute a separate offense.

SECTION 11. *Validity of Ordinance.*

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

SECTION 12. *Appeal.*

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

SECTION 13. *When effective.*

This ordinance is passed under and by virtue of the authority conferred by Chapter 152 of the

Exhibit D-3.

Laws of 1917 and the various supplements thereto and amendments thereof, and Chapter 229 of the Laws of 1920, and the various amendments thereof and supplements thereto, and this said ordinance shall take effect immediately upon its final passage.

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

Passed March 21st, 1922.

FRANK A. DOLAN,
City Clerk.

Opinion.

NEW JERSEY SUPREME COURT.

No. 254, January Term, 1928.

Morris Bouer,
Relator,

vs.

Mayor and Aldermen of Jersey City, a Municipal Corporation, and John J. Beggans, Director of Public Safety,
Respondents.

Submitted February 16, 1928; Decided May 18, 1928.

On rule to show cause why a writ of mandamus should not issue.

Before:

Justices Trenchard, Kalisch and Katzenbach.

For the Relator, Henry J. Camby.

For the Respondents, Thomas J. Brogan and Charles Hershenstein.

Per Curiam:—

On July 29, 1927, the relator applied to the Department of Public Safety and the Mayor and Aldermen of Jersey City (P. 7 State of Case) for a permit for the erection of an ornamental drive-in gasoline station, designed for pumps and tanks for the storage of gasoline on land of which he is

the equitable owner, being described as Lots 1-a and 1-b in City Block 1364 Jersey City. The application was heard and denied.

It is stipulated that the premises in question were zoned by the zoning ordinance of Jersey City "as a residential district" and apparently the application was denied because it was in conflict with the provisions of the ordinance, and also on account of increased fire hazard. Thereupon, on September 20, 1927, the relator obtained this rule to show cause why a mandamus should not be issued commanding the granting of such permit.

The depositions disclose that there is already in the immediate neighborhood of the *locus in quo* underground tanks providing for the storage of 6,500 gallons of gasoline.

We think that the permit cannot be granted. For all essential purposes the factual situation in this case brings it within the principle of our decision in *Koplin* vs. *Village of South Orange* (Decided May 14, 1928). The result is that the rule to show cause in the present case will be discharged and the writ of mandamus denied accordingly.

Having reached the conclusion stated, we deem it important to all parties in interest to announce it promptly, and we do so in this somewhat informal manner in order to enable the relator to avail himself of the earliest possible opportunity for review, if a review is desired. And if a review is desired the relator is hereby given permission to enter a rule allowing and directing the molding of the pleadings so as to permit of such review.

New Jersey Court of Errors and Appeals

MORRIS BOUER, *Relator-Appellee,* *v.* THE MAYOR AND ALDERMEN OF JERSEY CITY, a municipal corporation, and JOHN J. BEGGANS, Director of Public Safety, *Respondents-Appellants.*	On Application for Mandamus.

BRIEF OF RESPONDENTS-APPELLANTS.

Statement of Facts.

Relator being the owner of Lots 1-A and 1-B, in City Block 1364, on the east side of Hudson County Boulevard in Jersey City, desiring to erect thereon a service station, made application to the Superintendent of Buildings of Jersey City on July 29th, 1927, for a permit to erect the same. The building being used for other than residential purposes, the application was referred to the Board of Commissioners, pursuant to the Fire Hazard Ordinance of Jersey City, which ordinance is set out in Case, page 45.

Commissioner Beggans, in charge of the Department of Public Safety, held a hearing upon the application on August 24, 1927, and after hearing all the parties interested in the application, denied the same. This denial was the result of an examination and investigation of the facts and the

finding that the erection of a service station would create a serious fire hazard in that locality.

Depositions were taken pursuant to the rule to show cause, which disclosed the fact that in the immediate vicinity of the *locus in quo* there are a great many gasoline pumping stations storing approximately 6,500 gallons of gasoline (Case, p. 34, line 12). The relator desires to erect five (5) pumps on his land (Case, p. 14, lines 40-41). Upon the blueprint, annexed to the State of the Case, there is delineated the pumping stations in the immediate vicinity of the *locus in quo*.

The premises in question are also zoned for residential purposes, pursuant to the Zoning Ordinances of Jersey City. The rule to show cause in this matter was obtained on September 20, 1927, the very day the Constitutional Amendment involving zoning was voted upon and adopted by the people of New Jersey.

The Supreme Court discharged the rule to show cause and denied the writ of mandamus and particularly set out that the depositions disclosed "that there is already in the immediate neighborhood of the *locus in quo* underground tanks providing for the storage of 6,500 gallons of gasoline" (Case, p. 62, lines 17-21).

The Supreme Court also determined that the permit cannot be granted because the factual situation brings this case within the principle of *Koplin* v. *Village of South Orange*, decided May 14th, 1928, reported in 6 Misc. 489, and gave the relator permission to mould the pleadings so that an appeal may be taken to this Court. The relator now urges that the decision of the Supreme Court be set aside because the case of *Koplin* v. *South Orange* was incorrectly determined by that Court.

The facts in this case are not at all analogous to those in the *Koplin* case. Relator here is at-

tempting to erect a service station in a vicinity where there are already 6,500 gallons of gasoline stored in underground tanks and thus create a fire hazard which would be detrimental to the lives of people living in that community. It is to be noted that the Supreme Court in its opinion pointed out this fact which creates the fire hazard. We respectively urge that it will serve no purpose to discuss the merits of the decision in the *Koplin* case heretofore decided by the Supreme Court, for this case must be determined upon facts which were not existent in the *Koplin* case, and therefore we respectfully submit:

1. The storing of additional gasoline in the locality where there are already stored 6,500 gallons of gasoline would create a serious fire hazard.

2. The premises being zoned for residential purposes, the City is justified in denying the permit.

POINT I.

The storing of additional gasoline in the locality where there are already stored 6,500 gallons of gasoline would create a serious fire hazard.

A survey of the conditions existing in the immediate neighborhood of the *locus in quo* discloses the following state of facts, as testified to by Mr. Joseph Van Rosencrance, an inspector in the Department of Combustibles in Jersey City:

> "A. I made a careful survey of the conditions in August, and also in November, and I find these facts: I find that at the northwest corner of the Boulevard and Danforth Avenue, the Wacker Motor Car Company has two underground gasoline tanks, each with a capacity of

> 500 gallons, making a total of 1,000 gallons. The northwest corner of the Boulevard and Cator Avenue, the Public Tire Company has one gasoline tank, with a capacity of 500 gallons. At 1770 Boulevard, Peter Mauer has two underground tanks, each with a capacity of 500 gallons, making a total of 1,000 gallons. The Greenberg Lubricating Station, at 60 McAdoo Avenue, and the Brumage Drive-in Station, at the Boulevard and McAdoo Avenue, has four underground gasoline tanks, each with a capacity of 500 gallons, making a total of 2,000 gallons. At 1810 Boulevard, the 'Auto Accessories' has two gasoline tanks, with a capacity of 1,000 gallons—that is, 500 gallons each, a total of 1,000 gallons. The Texas Company, at Boulevard, Old Bergen Road and McAdoo Avenue, has a drive-in station; entrance is from the Boulevard and Old Bergen Road; they have two gasoline tanks, each with a capacity of 500 gallons, a total of 1,000 gallons; and which makes a total of thirteen underground tanks and a grand total of 6,500 gallons" (Case, pp. 33-34).

The *locus in quo* is on the Hudson County Boulevard near McAdoo Avenue, and for better reference we respectfully refer to the blueprint annexed to the State of Case.

Mr. Van Rosencrance further testified that the storing of more gasoline by the erection of additional tanks will increase the fire hazard because of the present storage of 6,500 gallons of gasoline (Case, p. 36, lines 20-25). In summing up his testimony on that point, Mr. Van Rosencrance says:

> "Q. And, therefore, from your expert opinion you believe that the storing of any further gasoline in addition to what the tanks at the present time contain would be a very serious increase in the fire hazard? A. Yes, sir.
>
> "Q. Would the storing of any additional gasoline, in your opinion, be dangerous to the lives of the people living in that neighbor-

hood? A. It would add to the dangers that already exist there" (Case, p. 37, lines 20-30).

It is, therefore, due to no mere whim on the part of the Commissioners of Jersey City that the application was denied, but is the result of an honest fear that the storing of additional gasoline on the Boulevard, in the vicinity of Cator Avenue, would expose the residents of Jersey City in that locality to a very serious and grave fire hazard and for that reason the permit was denied.

POINT II.

The premises being zoned for residential purposes, the City is justified in denying a permit.

In July, 1927, the State of New Jersey was preparing for an election upon a Constitutional Amendment giving municipalities the power to zone, and such zoning was to be considered within the police power of such municipality.

The *locus in quo was,* in July, 1927, and *still is* zoned for residential purposes, in which zone, pursuant to the Zoning Ordinances of Jersey City, buildings for commercial purposes are prohibited. The City Commission, therefore, adopted the policy of denying permits for gasoline service stations in residential zones upon the theory that the Amendment would be passed by the people of New Jersey, and the Legislature, by an enabling act, would make it possible to so zone Jersey City.

The enabling act, as passed by the Legislature in 1928 and known as Chapter 274, preserved intact the ordinances which were adopted prior to the adoption of that act.

Irrespective, therefore, of the question whether the proposed service station would be a fire hazard,

such a service station has been prohibited by the Zoning Ordinance of Jersey City and the statute enacted pursuant to the Constitutional Amendment legalized the validity of such a provision.

We therefore respectfully urge that the judgment rendered by the Supreme Court should be affirmed with costs.

THOMAS J. BROGAN and
CHARLES HERSHENSTEIN,
Of Counsel with Respondents-Appellants.

New Jersey Court of Errors and Appeals

MORRIS BOUER, Relator-Appellant, *vs.* MAYOR AND ALDERMEN OF JERSEY CITY, a Municipal Corporation, and JOHN J. BEGGANS, Director of Public Safety, Respondents-Appellees.	On Application for Mandamus.

BRIEF OF RELATOR-APPELLANT.

Statement of Facts.

The Relator-Appellant is the owner in fee of a plot of land situated in the City of Jersey City, Hudson County, New Jersey, known as Street No. 1772-74 Boulevard, and being also known as Lots 1-A and 1-B in Block 1364 on the Official Assessment Map of Jersey City.

On July 29th, 1927, the Relator-Appellant applied to the Board of Commissioners of Jersey City and to the Commissioner of Public Safety for a permit to store on the above mentioned premises, gasoline and automobile oils, intending to use said premises as an automobile supply station.

On August 22nd, 1927, a hearing on the aforesaid application was held in the City Hall of Jersey City before the Commissioner of Public Safety of Jersey City, at the conclusion of which hearing, the said Commissioner denied to the Re-

lator-Appellant the permit. No reason was given by the said Commissioner or by the Board of Commissioners of Jersey City for refusing to issue the said permit to the Relator-Appellant (p. 8, lines 1-40; p. 9, lines 1-21; p. 15, lines 15-20 and Exhibit D-1, p. 46, State of Case).

A Zoning Ordinance of Jersey City, passed March 21st, 1922, laid out and divided Jersey City into districts of which certain ones are set aside and designated as residential districts. The aforesaid Ordinance declares that no premises in the residential district can be used for "business, trade, commercial or industrial purposes, the manufacture or sale of any commodity". This Ordinance appears as Exhibit D-3 on pp. 50-60, State of Case. The limitation on residential districts appears in Section 2, Paragraph 1 of said Ordinance (p. 51, lines 11-13, State of Case). The premises in question are located in a residential district (p. 15, lines 25-30, State of Case).

After being denied by the Respondents-Appellees the permit as applied for, the Relator-Appellant obtained a rule to show cause from our Supreme Court directing the Respondents-Appellees to show cause why a peremptory or alternative writ of mandamus should not be issued, commanding them to grant to the Relator-Appellant the permit aforementioned (pp. 5 and 6, State of Case). On the return to said rule to show cause and after argument thereon, the Supreme Court refused to grant a writ of mandamus on the ground that the factual situation in the case brought it within the principle of the decision in *Koplin* v. *Village of South Orange,* 6 Miscell. 489.

The opinion of the Supreme Court appears on pages 61 and 62 of the State of the Case.

The order of the Supreme Court dismissing the rule to show cause also permitted the Relator to

mold the pleadings and to appeal to the Court of Errors and Appeals (p. 3, State of Case).

It is stipulated by counsel for the respective parties, that the pleadings be regarded and treated as molded and considered as if an alternative writ had heretofore been allowed in this matter and that all of the testimony and depositions heretofore taken be regarded as taken upon and under said alternative writ (p. 4, State of Case).

The Relator takes the position, that the only question on appeal is whether the Zoning Ordinance of Jersey City aforementioned affected the application of the Relator-Appellant here under review.

ARGUMENT.

The Supreme Court erred in holding that the Zoning Ordinance of Jersey City affected the application of Relator here under review.

In determining whether or no a writ of mandamus should be issued in this case, the status of the parties must be taken as of the time of the filing of the application for the permit, which was on July 29th, 1927 (p. 8, lines 12-20, State of Case).

> "The status of the Relator is, we think, fixed at the time it made its application for the building permit." *Advance Development Co.* v. *Jersey City,* 140 Atl. 788 at p. 789.
>
> "We are asked by the respondent to consider in dealing with this case the fact that a constitutional amendment regarding zoning has been adopted by the voters of this State. In the present case the status of the parties was fixed long before the Zoning amendment was adopted. The constitutional amendment

has, we think, no application to the present case and should not be considered in its disposition." *A. G. Construction Co.* v. *Scott*, 141 Atl. 760.

On July 29th, 1927, neither the constitutional amendment nor the subsequent legislation in relation to zoning had been adopted and Relator-Appellant was therefore not bound by the provisions of the Jersey City Zoning Ordinance.

The Court below in the case at bar rested its determination on the principle enunciated in the case of *Koplin* v. *South Orange*, reported in Vol. VI, Misc. Rep. 489. In the Koplin case the application for the building permit was filed on November 9th, 1926. A permit was refused "on the ground that the Zoning Ordinance of the Village, passed March 21st, 1922, prohibited the erection of the type of building proposed on the land in question". The Supreme Court apparently considered that the status of the parties was fixed as of the time of the filing of the application, but refused to grant a peremptory writ of mandamus on the ground that the act of the Legislature entitled "An Act to enable municipalities to adopt zoning ordinances limiting and restricting to specified districts and regulating therein buildings and structures, according to their construction, and the nature and extent of their use, and the repeal of sundry zoning laws", which Act became effective on April 3rd, 1928, and is Chapter 274 of the Laws of 1928, was retroactive in effect and made valid the aforementioned zoning ordinance as of November 9th, 1926, the date of the filing of the aforesaid application.

It is the contention of the Relator-Appellant in the present case, that the said statute permitting municipalities to pass zoning ordinances is not

retroactive and therefore that the zoning ordinance of Jersey City under which the permit herein was denied was at the time the application herein was made, of no effect.

POINT I.

It was not intended by the Legislature to give to the aforementioned statute a retroactive effect.

It is a well settled principle that the Courts will not give a retroactive meaning to a statute unless there is wording in the statute which is so clear that there can be no possible doubt but that the Legislature intended that such a statute should act retroactively.

In the case of *Citizens Gas Light Co.* v. *Alden*, 44 N. J. L. 648, Justice Knapp, in writing the opinion of the Court of Errors and Appeals, says on pages 653, 654:

> "It is not enough that words used in an act *may* be given a retrospect without doing violence to their meaning, or that such a course may coincide with their common understanding.
>
> Laws, generally, are enacted for the regulation of future affairs and conduct, and to establish the basis on which rights may thereafter under them be rested, and are not usually designed to alter or affect the quality or legal relations of past acts and concluded transactions, much less to disturb rights which have arisen under laws running concurrently with their birth. Hence we do not look for or expect in any enactment that it shall be operative as of time prior to its own existence; and before we are permitted to ascribe to it such purpose, there must be found in the law such clear and indubitable expression of the legislative design as precludes any

> other reasonable interpretation of the words used. The rule in the courts is, that retroactive effect will not be given to a statute when the words in it can be construed as designed to make it prospective only. Williamson *v.* N. J. S. R. R. Co., 2 Stew. Eq. 311. All legislation is framed, or presumed so to be, in view of this conspicuous canon of construction governing in courts where the duty of interpretation is reposed. And when the legislature intend to give to law of their enactment operation upon the past, they will and must do it with such choice of words as places it beyond the realm of doubt."

See also

> *Frelinghuysen* v. *Morristown,* 77 N. J. L. 493, at p. 496;
> *Jones* v. *D. L. & W. Railroad Co.,* 96 N. J. L. 197, at p. 200.

There is no wording in the Zoning Ordinance statute of 1928 (Chapter 274 of the Laws of 1928) which under the foregoing rules gives to it a retroactive effect.

The title of the act is

> "An Act to enable municipalities to adopt zoning ordinances limiting and restricting to specified districts and regulating therein buildings and structures, according to their construction, and the nature and extent of their use, and the repeal of sundry zoning laws." Laws 1928, p. 696.

Here we find no language that can be construed as making the purpose of the act retroactive. Everything is in the future "An act to enable municipalities *to adopt* zoning ordinances * * * and the repeal of sundry zoning laws." Any verbiage making the act retroactive is not within the purpose as stated in the title and would therefore be unconstitutional.

But the Supreme Court in its opinion in the Koplin case points to Section 7 of the act as justifying its decision in regard to the retroactive character of the legislation.

Section 7 provides that ordinances existing at the time of the adoption of the act "shall continue in effect as if they had been adopted under the provisions of this act".

The purpose of that provision is to make it unnecessary to re-adopt these existing ordinances after the passage of the act but to treat them as if they had been adopted after such passage and therefore to validate them as of the date of approval of the act. How could such ordinances be adopted under the provisions of an act before the act was in existence? No retroactive effect was intended else the wording would have been different. If the legislature intended the construction put upon Section 7 by the Supreme Court, it would have said that existing ordinances "shall have the same effect as if this act had been adopted prior to their passage". But the Legislature did not say this and it is a plain misconception of its language to attribute to it such a meaning.

The most that can be said is that the verbiage of the act is dubious in this regard and if that be so, then the principle enunciated in *Citizens Gas Light Co.* v. *Alden,* 44 N. J. L. 648, *supra,* applies and prospective interpretation should prevail over the retrospective.

POINT II.

If the Court decides that the statute acts retroactively so as to validate the aforementioned zoning ordinance of Jersey City as of the time of the filing of the application herein, then the said statute in that particular is unconstitutional because it would divest the vested rights of the Relator-Appellant in the property in question.

At the time of the application for a permit, Relator-Appellant had a right to erect the character of building applied for, he attempted to exercise it and was illegally prevented from doing so. He immediately applied to the Courts for redress and is now deprived of this right because of subsequent constitutional amendment and subsequent legislation. Such a procedure violates Paragraph 16 of Article 1, paragraph 8 of Section VII of Article IV of the State Constitution and the fifth and fourteenth amendments to the United States Constitution.

In the case of *Ignaciunas* v. *Risley,* 98 N. J. L. 712, Justice Katzenbach speaking for the Supreme Court says on pages 715 and 716:

> "Article 1 of Section 16, and Article 4, Section 8 of the State Constitution, provide that private property shall not be taken for public use without just compensation. Section 1 of the fourteenth amendment to the federal constitution provides that no state shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the law.
>
> The right to acquire property, to own it, to deal with it and to use it, as the owner chooses, so long as the use harms nobody, is a natural

> right. This does not owe its origin to constitutions. It existed before them. Spann *v.* Dallas, 235 S. W. Rep. 513. It is, however, a right guaranteed by our constitutions. It is a right necessary to the existence of organized society. The protection of this natural right is one of the reasons which prompted men to form governments. The protection of private property is the aim of every well considered form of government. The right of private property has been called the keystone of the arch of civilization. A government which fails to protect the right of private property cannot endure. Men will not undergo the labor and hardships necessary to the acquisition of property if they find that the ownership and the enjoyment thereof is not to be protected. With the right of ownership and possession, goes the right to use, enjoy and dispose of the property owned. The substantial value of property lies in its use. If the right of use be denied, the value of the property is lessened or destroyed. A law which forbids a certain use of property deprives it of an essential attribute. The result in effect is a proscription of its ownership. Spann *v.* Dallas, *supra.*''

The Supreme Court in that case held that under the New Jersey Constitution as it then read, the only time that an owner could be restricted in the use of his real property by the public authority, was when such restriction was ''essential to the public health, safety and welfare'', and that at all other times ''the abridgement of its contemplated use is an invasion of the inherent and constitutional rights of the Relator (owner)''. That was the law of this State at the time of the application by Relator-Appellant for his permit.

> ''A state constitution, or an amendment thereof, which is retrospective in its operation is not invalid where it does not * * *

divest vested rights. A subsequent legislative enactment explanatory of a previous law cannot retroact so as to affect the rights of parties under such previous law, as even in the absence of an express constitutional prohibition of retrospective laws, a statute or ordinance is void where its operation would impair vested rights." 12 C. J. 1085, Sec. 779.

"It is well settled by authority that statutes are not to be given a retrospective operation except where it is manifest the legislature intended they should have such operation; and, as already shown, it is not competent even for the legislature to give such operation to an act where it will affect existing or vested rights. *Thomason* v. *Alexander,* 11 Ill. 54; *Betts* v. *Bond, Breese,* 223; *People* v. *Thatcher,* 95 Ill. 109; *People* v. *Peacock;* 98 Id. 172; *Garrett* v. *Wiggins,* 1 Scam. 335; *Rhinehart* v. *Schuyler,* 2 Gilm. 473; *Bruce* v. *Schuyler,* 4 Id. 221; *Marsh* v. *Chestnut,* 14 Ill. 223; *Conway* v. *Cable,* 37 Id. 82; *Dobbins, et al.* v. *First Natl. Bank,* 112 Ill. 553 at p. 565.

See also

City of Chicago v. *Collin, et al.,* 134 N. E. Rep. 751, at p. 753;

Arnold & Murdock Co. v. *Industrial Commission et al.,* 145 N. E. Rep. 342, at p. 343;

Smolen v. *Industrial Commission, et al.,* 154 N. E. Rep. 441, at p. 443;

Fawcett v. *Andrews,* 197 N. Y. Supp. 208;

Colonial Motor Coach Corp. v. *City of Oswego, et al.,* 215 N. Y. Supp. 159.

POINT III.

If the Court decides that the statute acts retroactively, it cannot retroact further than the date upon which the constitutional amendment took effect.

This would seem to be obvious because if we assume any date before the adoption of the amendment we must assume the constitution as it was at that date and such legislation being on the assumed date unconstitutional, it would be void.

The statute of 1928 therefore cannot affect the case *sub judice* because not only was the application for a permit and denial before the adoption of the amendment, but this case was actually in court at the time.

POINT IV.

If the right of the Relator-Appellant was vested so as to prevent its being taken away either by constitutional amendment or by legislation, the Supreme Court in the exercise of its discretion should grant the writ herein prayed for.

The principle enunciated in the case of *Rohrs* v. *Zabriskie,* 133 Atl. 65, has no application here because in that case a question of public safety arose and the passage of the ordinance did not alter the existing fact. Here neither public safety nor public health enters into the matter and an indifferent act is prohibited. Said act could not have been legally prohibited at the time of the application and therefore months before such prohibition Relator was illegally denied his right. He immedi-

ately sought redress in the only form of action open to him and has since diligently pursued such action. What more could he do? Is it not a denial of a plain existing right for the Court to now refuse to help him?

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

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