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# New Jersey Supreme Court

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OXFORD CONSTRUCTION Co.

*Relator,*

*vs.*

CITY OF ORANGE and THOMAS J.  
DOWLING, Building and Plumb-  
ing Inspector of the City of  
Orange,

*Defendants.*

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## Notice and Grounds of Appeal.

To: FREDERIC J. SCHLOSSTEIN,  
Attorney for the Relator.

TAKE NOTICE that the City of Orange and Thomas J. Dowling, Building and Plumbing Inspector of the City of Orange, appeal from the order of the Supreme Court of the State of New Jersey made the 24th day of June, 1926, sustaining the demurrer filed on behalf of the relator to the return to the alternative writ of mandamus heretofore allowed in this cause and granting to the relator a peremptory writ of mandamus to the New Jersey Court of Errors and Appeals upon the following ground:

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That the Supreme Court of the State of New Jersey erred in sustaining the said demurrer and in granting a peremptory writ of mandamus to the relator.

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Respectfully,

WILLIAM A. CALHOUN,

Attorney for the Respondents.

Dated: June 28, 1926.

**Notice.**

Filed Dec. 7, 1925.

**NEW JERSEY SUPREME COURT.**


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 OXFORD CONSTRUCTION Co.

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*Relator,**vs.*
 CITY OF ORANGE and THOMAS J.  
 DOWLING, Building and Plumb-  
 ing Inspector of the City of  
 Orange,
*Defendants.*

## 20 TO THE CITY OF ORANGE:

TAKE NOTICE that on Saturday, the fifth day of December, 1925, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, I shall apply to the New Jersey Supreme Court, at the Court House, Newark, for an order to show cause why a writ of mandamus should not issue in the above entitled cause requiring the City of Orange to issue a permit for the erection of four five-

30 story brick apartment houses as set forth in the attached petition and affidavit.

FREDERICK W. SCHLOSSTEIN,  
*Attorney for Relator.*

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**Petition.**

(Filed Dec. 7, 1925.)

**NEW JERSEY SUPREME COURT.**

TO THE HONORABLE, THE JUDGES OF THE SUPREME  
COURT OF THE STATE OF NEW JERSEY:

The petition of the Oxford Construction Co., a corporation organized and existing under the laws of the State of New Jersey, with its principal office in the City of Newark, Essex County, New Jersey, respectfully shows: 10

1. Your petitioner is the owner of a certain tract of land and premises in the City of Orange, County of Essex and State of New Jersey, and bounded and described as follows: 20

All that lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Orange, in the County of Essex and State of New Jersey.

BEGINNING in the northerly line of Highland Avenue at the southeasterly corner of land conveyed by Peter M. Myers and wife to Emma Cooper, by deed dated May 10th, 1883, and recorded in Book Y 21 of Deeds for said County of Essex on pages 66, etc.; and thence running along the line of said land north forty-four degrees fifty-five minutes east two hundred and fifty-four feet and eighty-five hundredths of a foot to the northerly line of the lot conveyed to Anna W. Myers by Thomas Clarendon and wife; thence along said line of said lot south forty-five degrees forty minutes east one hundred and eleven feet and thirty-three hundredths of a foot to the west- 30 40

*Petition*

erly line of Lincoln Avenue; thence along said avenue south forty-five degrees two minutes west two hundred and sixty feet and forty-eight hundredths of a foot to the northwesterly corner of Lincoln Avenue and Highland Avenue; thence  
10 along said Highland Avenue north forty-two and one-half degrees west one hundred and sixteen feet and six inches to the place of BEGINNING.

2. Petitioner is desirous of erecting on said premises, four brick apartments, five stories in height, the size of each building to be forty-six feet by eighty-six feet, and to cost approximately Eighty Thousand Dollars each, making a total of Three Hundred Twenty Thousand Dollars.

20 3. On the eight day of October, 1925, petitioner applied to Thomas J. Dowling, Building and Plumbing Inspector of the City of Orange, for a permit for the erection of said apartment houses, by application in writing duly submitted to the said Building Inspector, accompanied by plans and specifications in duplicate as provided by the Building Code of the City of Orange, and also tendered and left with the said Inspector of  
30 Building, the legal fees fixed by the said Building Code.

4. After retaining said application, plans and specifications and fees for a period of time, the said Building Inspector notified petitioner, on October 20, 1925, that he would not issue the said permit, giving as his reason therefor that an Ordinance entitled "An Ordinance to regulate and  
40 limit the height and bulk of buildings, to regulate and determine the area of yards, courts and other

*Petition*

open spaces, and to regulate and restrict the location of buildings designed for specific uses and the location of trades and industries," passed May 11, 1922, and the various Ordinances amendatory and supplementary thereto, forbids the erection of the apartment houses on the premises owned by petitioner.

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5. Petitioner charges and insists that said Ordinance, insofar as it purports to prevent Oxford Construction Co. from erecting and constructing the said apartment houses as contemplated, is illegal in that the reservation of the district in which the petitioner's said property is located, to the use prescribed by said Ordinance is beyond the power of the City of Orange under the provisions of the statute and that the City of Orange under the statute, has no power to prevent the erection of the said apartment houses in said district and that the restriction is not designed to promote the public health, safety and general welfare; and that the effect of enforcing the provisions of said Ordinance to prevent the said petitioner from erecting the buildings which he seeks to erect would be to deprive the said petitioner of a right to possess and protect property in violation of the first clause of the Article 1 of the Constitution of the State of New Jersey; and would be a taking of the private property of the said petitioner for public use without just compensation, in violation of the 16th paragraph of Article 1 of the Constitution of New Jersey; and would be in effect a taking of private property for private purposes, in violation of the right secured to the said petitioner by

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*Petition*

the Constitution of the State of New Jersey, and would likewise be a violation of the rights secured to the said petitioner by the 14th Amendment to the Constitution of the United States in that it would be a deprivation of the petitioner of its property without due process of law and would be a denial to it of the equal protection of the law; and that the said Ordinance is for other reasons illegal and invalid.

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Petitioner therefore prays that a writ of mandamus may issue out of and under the seal of this Honorable Court directed to the said Inspector of Building of the City of Orange, to the City of Orange, commanding and enjoining them to issue the building permit granting permission to petitioner to erect the four apartment houses of the type above mentioned upon the lands and premises hereinbefore described, in accordance with the plans and specifications tendered by it to said Building Inspector pursuant to the statute in such case made and provided.

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And your petitioner will ever pray, etc.

FREDERICK W. SCHLOSSTEIN,  
*Attorney for Petitioner.*

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*Petition*

STATE OF NEW JERSEY, }  
 County of Essex. } ss.:

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

1. I am the secretary of the Oxford Construction Co., petitioner mentioned in the foregoing petition. 10

2. I further say that the Oxford Construction Co. is the owner of premises described in paragraph 1 of the petition.

3. I further say that the Oxford Construction Co. desires to erect upon the said premises, four five-story brick apartment houses, each building to be forty-six feet by eighty-six feet, and to cost approximately Eighty Thousand Dollars each, making a total of Three Hundred Twenty Thousand Dollars. 20

4. I further say that on October 8, 1925, Oxford Constuction Co. applied to Thomas J. Dowling, Building Inspector of the City of Orange, for a permit for the erection of said apartment houses, by application in writing duly submitted to the said Building Inspector, accompanied by plans and specifications in duplicate as provided by the Building Code of the City of Orange and also tendered and left with the said Inspector, the legal fees fixed by the said Building Code. 30

5. I further say that after retaining said appli- 40

*Petition*

10 cation, plans and specifications and fees for a  
period of time, the said Building Inspector noti-  
fied the Oxford Constuction Co. that permission  
was denied on the grounds that the section in  
which the Oxford Construction Co.'s property was  
located, was zoned off as a residence A Distict  
Zone, and that he would not issue the said permit  
because of an ordinance entitled "An Ordinance  
to regulate and limit the height and bulk of build-  
ings, to regulate and determine the area of yards,  
courts and other open spaces, and to regulate and  
restrict the location of buildings designed for  
specific uses and the location of trades and indus-  
tries," passed May 11, 1922, and the various Ordi-  
nances amendatory and supplementary thereto,  
20 forbids the erection of the apartment houses on  
the premises owned by petitioner.

6. I further say that the Oxford Construction  
Co. charges and insists that said ordinance inso-  
far as it purports to prevent it from erecting and  
constructing the said apartment houses as con-  
templated, is illegal in that the reservation of the  
district in which its said property is located, to  
30 the use prescribed by said Ordinance is beyond  
the power of the City of Orange under the pro-  
visions of the statute and that the City of Orange  
under the statute has no power to prevent the  
erection of the apartment houses in said district;  
and that the restriction is not designed to pro-  
mote the public health, safety and general wel-  
fare; and that the effect of enforcing the pro-  
visions of said Ordinance to prevent it from erect-  
ing the building which it seeks to erect would be  
40 to deprive it of a right to possess and protect

*Petition*

property in violation of the first clause of the Article 1 of the Constitution of the State of New Jersey; and would be a taking of the private property for public use without just compensation, in violation of the 16th paragraph of Article 1 of the Constitution of New Jersey; and would be in effect a taking of private property for private purposes in violation of the right secured to it by the Constitution of the State of New Jersey, and would likewise be a violation of the rights secured to it by the 14th Amendment to the Constitution of the United States in that it would be a deprivation of its property without due process of law and would be a denial to it of the equal protection of the law; and that the said Ordinance is for other reasons illegal and invalid. 10

I further say that the Oxford Construction Co. prays that a writ of mandamus may issue out of and under the seal of this Honorable Court directed to the said Inspector of Buildings of the City of Orange to the City of Orange commanding and enjoining them to issue the building permit granting permission to it to erect the apartment houses above mentioned, upon the said lands and premises hereinbefore described in accordance with the plans and specifications tendered by it to said Building Inspector pursuant to the statute in such case made and provided. 20 30

DAVID KANTROWITZ.

Sworn to and subscribed before me }  
 this 30th day of November, 1925. } ss.:

JOSEF H. STEINHARDT,

*A Master in Chancery of New Jersey.* 40  
 Service acknowledged Nov. 30, 1925.

WM. A. CALHOUN,  
*Attorney for Defendants.*

**Rule to Show Cause.**

(Filed Dec. 7, 1925.)

**NEW JERSEY SUPREME COURT.**

10	<p style="text-align: center;">OXFORD CONSTRUCTION Co.</p> <p style="text-align: right;"><i>Relator,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">CITY OF ORANGE and THOMAS J. DOWLING, Building and Plumb- ing Inspector of the City of Orange,</p> <p style="text-align: right;"><i>Defendants.</i></p>
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20 On reading the petition and affidavit filed in the above entitled cause, it is on this fifth day of December, 1925,

ORDERED that the City of Orange, and Thomas J. Dowling, Building and Plumbing Inspector of the City of Orange, in the County of Essex, do show cause before this Honorable Court at the State House in the City of Trenton, on Tuesday, the third Tuesday of January, 1926, at eleven o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why a peremptory or alternative writ of mandamus should not issue out of and under the seal of this Honorable Court commanding and directing them, the said City of Orange and Thomas J. Dowling, Building and Plumbing Inspector of the City of Orange, to issue a permit to the said Oxford Construction Co. for the erection of four apartment houses on the property of said Oxford Construction Co. in the said City of Orange, and it is further,

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*Rule to Show Cause.*

ORDERED that both parties have leave to take depositions.

Let the above rule be entered in the minutes.

WM. S. GUMMERE,  
*Chief Justice.*

I hereby consent to the making of the foregoing **10**  
order.

WM. A. CALHOUN,  
*Attorney for Defendants.*

On motion of  
FREDERIC W. SCHLOSSTEIN,  
*Attorney for Relator.*

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**Agreed State of Facts.**

(Filed Dec. 16th, 1925.)

**NEW JERSEY SUPREME COURT.**


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 OXFORD CONSTRUCTION Co.
*Relator,*

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*vs.*
 CITY OF ORANGE and THOMAS J.  
 DOWLING, Building and Plumb-  
 ing Inspector of the City of  
 Orange,
*Defendants.*

20 It is hereby stipulated by and between the parties hereto that the facts hereinafter set forth affecting the matters in controversy involved in these proceedings, are to be taken as true.

1. The Relator, Oxford Construction Co., is the owner of a certain tract of land and premises in the City of Orange, County of Essex and State of New Jersey, described as follows:

30 BEGINNING in the northerly line of Highland at the southeasterly corner of land conveyed by Peter M. Myers and wife to Emma Cooper, by deed dated May 10th, 1883, and recorded in Book Y 21 of Deeds for said County of Essex on pages 66, etc.; and thence running along the line of said land north forty-four degrees fifty-five minutes East two hundred and fifty-four feet and eighty-five hundredths of a foot to the northerly line of

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*Agreed State of Facts*

the lot conveyed to Anna W. Myers by Thomas Clarendon and wife; thence along said line of said lot south forty-five degrees forty minutes east one hundred and eleven feet and thirty-three hundredths of a foot to the westerly line of Lincoln Avenue; thence along said Avenue south forty-five degrees two minutes west two hundred and sixty feet and forty-eight hundredths of a foot to the northwesterly corner of Lincoln Avenue and Highland Avenue; thence along said Highland Avenue north forty-two and one-half degrees west one hundred and sixteen feet and six inches to the place of BEGINNING. 10

2. On October 8, 1925, relator applied to Thomas J. Dowling, Building and Plumbing Inspector of the City of Orange for a permit to erect four five story brick apartment houses on the said lot in accordance with certain plans and specifications therewith submitted, which application was made in writing, a copy of same with the endorsements thereon, being hereto attached and marked Exhibit A. 20

3. The said Building and Plumbing Inspector refused to issue said permit or accept such payment on the ground that an ordinance entitled "An Ordinance to regulate and limit the height and bulk of buildings, to regulate and determine the area of yards, courts and other open spaces, and to regulate and restrict the location of buildings designed for specific uses and the location of trades and industries," passed May 11, 1922, and the various ordinances amendatory and supplementary thereto, forbids the erection of apart- 30 40

*Agreed State of Facts*

ment houses on the area of the premises owned by realtor.

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

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5. By the terms of the said ordinance as in force at the time of the making of said application, the said premises are located in what is known as Residence A Zone.

6. The only reason for the refusal of the permit was the fact that the area was zoned against and for no other reason.

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FREDERICK W. SCHLOSSTEIN,  
*Attorney for Relator.*

WM. A. CALHOUN,  
*Attorney for Defendants.*

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*Schedule A—Attached to Agreed State of Facts***Schedule A.**APPLICATION TO THE INSPECTOR  
OF BUILDINGS

for Permit for the  
Construction of New Building by the **10**  
Owner, Architect or Builder

Orange, N. J., October 8, 1925.

The undersigned in compliance with the Building Ordinance, files the following report of a 4-5 story brick apartment Buildings.

Reported by Messrs. Raymond B. Flatt and Louis Kasoff. The following information is required for the Construction of New Buildings: **20**

1. Number of Buildings to be erected, 4; location, Lincoln and Highland Avenues.
2. Size of main Building, 46x86 feet; number stories, 5.
3. Depth of Foundation, 4 feet; thickness, 20 inches; material, brick. **30**
4. Footing or Base Course, width, 32 inches; thickness, 12 inches; material, concrete.
5. If piers, columns or posts are used, state what kind; see plans.
6. Thickness of outside wall: 1st story, 16 inches; 2d, 16 inches; 3rd, 12 inches; 4th, 12 **40**

*Schedule A—Attached to Agreed State of Facts*

- inches; 5th, 12 inches; 6th, inches; 7th, inches.
7. Thickness of inside partition walls: 1st story, 12 inches; 2d, 8 inches; 3rd, 8 inches; 4th, 8 inches; 5th, 8 inches; 6th, inches; 7th; inches.
- 10
8. Material of roof and style: Tar and gravel—flat roof.
9. Size of floor beams: 1st tier, 2x10 inches; 2d tier, 2x10 inches; 3rd tier, 2x10 inches; 4th tier, 2x10 inches; 5th tier, 2x10 inches; 6th tier, inches; 7th tier, inches.
- 20
- 10 Girders; of what material and sizes to support the floors see plans. How supported—
11. Distance of wood work from inside of any flue, 8 inches.
12. Distance of beams or headers from outside of chimney or flue, 8 inches.
- 30
13. Distance chimney projects inside of building  
Chimney, where started from  
Basement
14. Size of Chimney, flue lining 20 inches.
15. Hearths, how supported—
16. Height of ceiling: 1st story, 9 feet; 2nd, 9 feet; 3rd, 9 feet; 4th, 9 feet; 5th, 9 feet; 6th, feet; 7, feet.
- 40

*Schedule A—Attached to Agreed State of Facts*

17. Openings for doors or windows. State whether arched, or lintels are to be used. If lintels are used, material Lintels of steel.

## EXTENSION OR WINGS

18. Size of extention or wings, ;number 10  
of storied
- 19 Depth of foundation walls, feet; thick-  
ness, inches; material,
- 20 Footing or base course, width inches;  
thickness, inches; material,
21. If piers, columns or posts are used, state 20  
what kind.
22. Thickness of outside wall, 1st floor,  
inches; 2d, inches; 3rd, inches;  
4th, inches; 5th, inches; 6th,  
inches; 7th, inches.
23. Thickness of inside partition wall; 1st story,  
inches; 2d, inches; 3rd, inches; 4th,  
inches 5th, inches; 6th, inches; 30  
7th, inches.
24. Proposed use of building, Apartment Houses.  
Estimated cost of entire building: Each  
building, \$80,000; total, \$320,000.  
Time of Commencement, 192.

*Schedule B—Attached to Agreed State of Facts.***Schedule B.**

10 Sec. 2. (a) Within any RESIDENCE "A" DISTRICT, as indicated on the Building Zone Map, no building shall be erected and no building or premises shall be used for any business or industry permitted in Sections 5 and 6 this ordinance, nor for other than one or more of the following specified purposes:

(1) A dwelling for one family or for one house-keeping unit only provided that nothing herein shall prevent the taking of roomers or boarders.

20 (2) The office or studio of a professional person residing on the premises, provided there is no display of goods or advertising.

(3) Municipal playgrounds, parks or recreation buildings.

(4) Public and parochial schools.

(5) Churches or other places of worship, parish houses, Sunday School buildings.

30 (6) Farms, truck gardens, nurseries or greenhouses, excepting those used primarily for the growing of vegetables, plants or flowers to be sold at wholesale, and provided that there is no display of products and no advertising and provided that there is no power plant and that any greenhouse heating plant is at least twenty feet distant from each side lot line and also from the rear lot line of a corner lot.

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*Schedule B—Attached to Agreed State of Facts.*

(7) Accessory uses, customary or incident to the above uses and located on the same lot with them. Except as provided above, "accessory uses" shall not include any uses customarily carried on as a business or as an industry, nor any driveway or walk giving access thereto, nor any structure used as a billboard or advertising sign.

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(8) A private garage, only on the same lot with the building to which it is accessory, in which no business, service or industry connected directly or indirectly with motor vehicles is carried on. No such garage shall provide storage for more than one motor vehicle for each 20 feet of frontage of the lot on one street only, nor for more than one vehicle for each 2,500 square feet of lot area nor for more than five motor vehicles in any case, of which not more than one vehicle may be a commercial vehicle of not more than one and one-half tons weight or capacity. Space for two cars may be provided in any case. Space for not more than one non-commercial vehicle may be leased. Such private garage shall be everywhere distant at least 25 feet from each street line. The same regulations as for private garages shall apply also to private stables except that one horse and one vehicle shall be considered to be the equivalent of one motor vehicle.

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(9) Private schools, clubs, lodges, social community center and recreation buildings, are prohibited, unless the written consents of 80 per cent, by frontage, of the owners of all lots within 200 feet of the property in question be filed with the Building and Plumbing Inspector and unless

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*Schedule B—Attached to Agreed State of Facts.*

every application for the erection, enlargement or alteration of any such building shall be approved by the Board of Appeals.

10 (b) No part of any building shall be higher than the distance it sets back from the street line of each street on which it faces, except that along one side of a corner lot such set back distance may be reduced by ten feet. No building shall exceed two and one-half stories in height, and the slope of the main roof or mansard shall not start above the middle of the height of the third story.

20 (c) A rear yard is required. Its depth for a two or two and one-half story building shall be at least 25 feet, and for a one-story building or rear projection 15 feet. The required depth of the rear yard at any story level shall be increased six inches for each foot that the depth of the lot, measured from the main front wall of the building to the rear lot line, exceeds 75 feet; and for each foot of depth, thus measured, that it is less than 75 feet, at the time of the passage of this ordinance, six inches may be subtracted from the required depth of the rear yard at any level, 30 provided that no part of any rear yard shall be less than ten feet in depth. One and one-half story detached structures for permitted accessory uses and rear appendages may occupy, in the aggregate, not over 35 per cent. of the rear yard area required behind a two-story building, provided that no such one and one-half story structure is over 20 feet in height, and provided that it is 40 everywhere distant at least two feet from each side and rear lot line and if detached at least

*Schedule B—Attached to Agreed State of Facts.*

10 feet from the building. Structures shall not occupy, in the aggregate more than ten per cent of any additional part of a lot in the rear of the required rear yard unless the lot faces on another street. A ground story porch or bay window not over 12 feet in depth and not over 15 feet in height may be within not less than three feet from any side lot line. A common private garage may be built by adjoining property owners across their dividing lot line providing that it is so located and constructed as not to interfere with or diminish the light and ventilation requirement of this ordinance. 10

(d) A side yard is required along the full length of each side lot line. The sum of the average widths of both side yards for a two or two and one-half story building shall be at least 15 feet and for a one-story building or for one-story projections 10 feet, except that for each one foot that a lot is less than 50 feet wide at the time of the passage of this ordinance four inches may be subtracted from the above aggregate widths. No side yards shall be less than six feet in average width at the second-story level, nor less than four feet at the ground story level, nor less than four feet in minimum width in any case, except that where no rooms depend on required window openings giving solely on one of these side yards, such side yard may be not less than four feet wide at the second-story level and not less than three feet wide at the ground story level. The width of a court at any level shall be equal to one-half of its height at such level. Within 50 feet of the main front wall of a building, no garage or stable shall be placed within 12 feet of any side lot line. 20 30 40

**Rule for Alternative Writ of Mandamus.**

(Filed May 25, 1926)

**NEW JERSEY SUPREME COURT.**

10	<p style="text-align: center;">OXFORD CONSTRUCTION Co.</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: right;"><i>Relator,</i></p> <p style="text-align: center;">CITY OF ORANGE and THOMAS J. DOWLING, Building and Plumb- ing Inspector of the City of Orange,</p> <p style="text-align: right;"><i>Defendants.</i></p>
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20 The relator's Rule to Show Cause why a Mandamus should not issue in the above entitled cause having been submitted to the Court on briefs on January 29th, 1926; the Court having duly considered the arguments of respective counsel as contained in said briefs, filed its opinion at the May Term, 1926, to the effect that an alternative Writ of Mandamus should issue in this cause.

30 It is ORDERED that an alternate Writ of Mandamus be issued in the above entitled cause. Entered May 25, 1926.

On motion of FREDERIC W. SCHLOSSTEIN,  
Attorney for relator.

**Alternative Writ of Mandamus.****NEW JERSEY SUPREME COURT.**

NEW JERSEY, SS.:

THE STATE OF NEW JERSEY to  
 (L.S.) City of Orange and Thomas J. Dowling,  
 Building and Plumbing Inspector  
 of the City of Orange, greeting: 10

Whereas in our Supreme Court lately held before the Justice thereof at Trenton upon the relation of Oxford Construction Co., we have been given to understand that the Relator, Oxford Construction Co. has applied to Thomas J. Dowling, Building and plumbing inspector of the City of Orange, for a Permit for the erection of four apartment houses, five stories in height to be constructed upon the premises of the said Oxford onstruction Co. on the northwesterly corner of Highland Avenue and Lincoln Avenue in the City of Orange, Essex County, New Jersey, and that the said Thomas J. Dowling, Building Inspector as aforesaid, has refused to issue the said permit, giving as his reason therefor, that an ordinance entitled "An Ordinance to regulate and limit the height and bulk of buildings, to regulate and determine the area of yards, courts and other open spaces, and to regulate and restrict the location of buildings designated for specific uses, passed May 11, 1922" and various ordinances amendatory and supplementary thereto, forbid the erection of the apartment houses in the premises owned by the said Relator, and 20 30 40

*Alternative Writ of Mandamus.*

Whereas it is charged and insisted that the purpose of the ordinances are merely designated to assist in carrying out the purposes of segregating definite classes of buildings in definite zones and are unlawful discriminations and ineffective to effectuate the purpose, and that the said Ordinance is illegal, discriminatory and is beyond the power of the Municipality, and that the effect of enforcing the provisions of said Ordinance to prevent the said Relator from erecting said buildings which it seeks to erect, would be to deprive the said Relator of a right to possess and protect property in violation of the first clause of the Article I of the Constitution of the State of New Jersey; and would be a taking of private property of the said Relator for public use without just compensation, in violation of the 16th paragraph of Article 1 of the Constitution of New Jersey; and would be in effect a taking of private property for private purposes, in violation of the right secured to the said Relator by the Constitution of the State of New Jersey, and as by the Complaint of the said Oxford Construction Co. we have understood.

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 the Relator, Oxford Construction Co. permit for the erection of four buildings aforesaid at the corner of Highland Avenue and Lincoln Avenue, Orange, Essex County, New Jersey, or cause to us to the contrary to 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,

*Alternative Writ of Mandamus.*

on the 14th day of June, 1926, together with this  
our writ, and this in nowise omit at your peril.

Witness William S. Gummere, Esquire, Chief  
Justice of our Supreme Court at Trenton, this  
25th day of May, in the year of Our Lord One  
Thousand Nine Hundred and Twenty-six.

EDWARD J. KELLEHER, Clerk.

FREDERICK W. SCHLOSSTEIN, Attorney.

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## Return to Alternative Writ of Mandamus.

## NEW JERSEY SUPREME COURT.

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OXFORD CONSTRUCTION Co.

*Relator,*

*vs.*

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CITY OF ORANGE and THOMAS J.  
DOWLING, Building and Plumb-  
ing Inspector of the City of  
Orange,

*Defendants.*

---

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

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We, the City of Orange, in the County of Essex,  
and Thomas J. Dowling, Building and Plumbing  
Inspector of the said City of Orange to whom the  
said writ is directed, do herewith make return  
thereto to your Honors and assert and certify,  
that all of the statements set forth in said writ  
are not true; that it is true that the said relator  
applied to respondent, Dowling as Building and  
Plumbing Inspector of said City, for a permit for  
30 the erection of four apartment houses five stories  
in height to be erected upon the premises of the  
said Oxford Construction Company at the north-  
west corner of Highland and Lincoln Avenues,  
Orange, New Jersey and that the said respondent  
Dowling refused to issue said permit giving as  
his reason therefor that an ordinance entitled  
"An Ordinance to regulate and limit the height  
and bulk of buildings, to regulate and determine  
the area of yards, courts and other open spaces  
40 and to regulate and restrict the location of build-

*Return to Alternative Writ of Mandamus.*

ings designed for specific uses and the location of trades and industries," passed May 11, 1922, forbade the erection of apartment houses on the premises owned by the relator.

That it is not true that the purposes of said ordinance are merely to assist in carrying out the purpose of segregating definite classes of buildings in definite zones, and is unlawful for such purposes; or that said ordinance is illegal, discriminatory and beyond the power of the municipality; or that the effect of enforcing the provisions of said ordinance to prevent the said relator from erecting the buildings which it seeks to erect would be to deprive the relator of a right to possess and protect property in violation of the first clause of the Article 1 of the Constitution of the State of New Jersey; or would be a taking of the private property of the said petitioner for public use without just compensation, in violation of the 16th paragraph of Article I of the Constitution of New Jersey; or would be in effect a taking private property for private purposes, in violation of the right secured to the relator by the Constitution of the State of New Jersey, but respondents assert that said ordinance is within the powers granted the said respondent, City of Orange, under and by virtue of the provisions of Chapter 146 of the Laws of 1924, and of the acts amendatory and supplementary thereof as appears from a copy of the said ordinance and of the amendment thereof, adopted July 19, 1924, by which said amendment a Board of Adjustment was established by the City of Orange. A copy of said ordinance and of said amendment are hereto annexed and made a part of this return.

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*Return to Alternative Writ of Mandamus.*

That said Board of Adjustment by virtue of the amendment of said ordinance establishing it and under the authority granted it by the provisions of Chapter 146 of the Laws of 1924 aforesaid, and by Chapter 315 of the Laws of 1926, is a statutory body quasi-judicial in character

10 authorized by law to hear appeals where it is alleged that there is error in any order, requirement, decision or determination made by any administrative official in the enforcement of said zoning acts, or of any ordinance adopted pursuant to them; to hear and decide special exceptions to the terms of the ordinance upon which the said Board is required to pass under said ordinance and to authorize upon specific appeals such

20 variance from the terms of the ordinance as will not be contrary to the public interest where owing to special conditions the enforcement of the provisions of the ordinance will result in unnecessary hardship, so that the spirit of the ordinance shall be observed and substantial justice done; and to determine on appeal to it whether any such ordinance tends to promote the public morals, health or welfare, and for the purposes aforesaid the public morals, health or welfare,

30 and for the purposes aforesaid the said Board of Adjustment is entitled to examine witnesses and to reverse or affirm wholly or partly, and to modify any order, requirement, decision or determination appealed from and to make such order, requirement, or decision as ought to be made and to that end to have all the powers of the officer from whom the appeal is taken, and to vary any requirement of the ordinance, so far as such ordinance shall be found not to tend to promote the

40 public morals, health, safety or welfare insofar as such ordinance shall affect the user of the property in relation to which such appeal is taken.

*Alternative Writ of Mandamus.*

That the said relator the Oxford Construction Company has never since the passing of Chapter 315 of the Laws of 1926 applied to said Board of Adjustment for relief in the premises upon the grounds alleged in said alternative writ of mandamus as the reasons wherefor it is asserted a peremptory writ of mandamus should issue out of this Court. 10

The said City of Orange and the said Thomas W. Dowling, Building and Plumbing Inspector as aforesaid, therefore pray that the said writ be dismissed and that they be relieved from obeying the command thereof.

CITY OF ORANGE.

By FRANK J. MURRAY, Mayor. 20

Attest: ALEXANDER NEILL, Clerk.

City of Orange.

THOMAS J. DOWLING,  
Building and Plumbing Inspector of the

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## Notice.

## NEW JERSEY SUPREME COURT.

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 OXFORD CONSTRUCTION Co.

*Relator,*
*vs.*

10

 CITY OF ORANGE and THOMAS J.  
 DOWLING, Building and Plumb-  
 ing Inspector of the City of  
 Orange,

*Defendants.*


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To the above named defendants:

20 TAKE NOTICE that on Thursday, June 24th, at eleven o'clock in the forenoon or as soon thereafter as counsel can be heard, I shall apply to the New Jersey Supreme Court, Part Two, for a peremptory writ of mandamus in the above stated matter on the grounds that no return has been made to the alternative writ of mandamus.

30 AND TAKE NOTICE that in the alternative, should it appear that the writ has been filed, as of time, I shall move to quash the return in a summary way on the grounds that it is false, frivolous and calculated to embarrass or delay the remedy sought.

FREDERICK W. SCHLOSSTEIN,  
 Attorney for Relator.

Service of within notice acknowledged this 19th day of June, 1926.

WILLIAM A. CALHOUN,  
 Attorney for Defendants.

**Rule for Judgment on Demurrer.**

**NEW JERSEY SUPREME COURT.**

<p style="text-align: center;">OXFORD CONSTRUCTION Co.</p> <p style="text-align: right;"><i>Relator,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">CITY OF ORANGE and THOMAS J. DOWLING, Building and Plumb- ing Inspector of the City of Orange,</p> <p style="text-align: right;"><i>Defendants.</i></p>	}	On Mandamus	10
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Heard by JUSTICES TRENCHARD, LLOYD and KATZ-  
ENBACH.

This matter coming on for hearing on applica-  
tion for peremptory writ of mandamus and in  
the alternative to quash the return in the pres-  
ence of Frederick W. Schlosstein, Attorney for  
Relator and Spaulding Frazer, Attorney for De-  
fendants, and counsel consenting in open court  
that it be considered that a demurrer to the re-  
turn has been filed and a return being this day  
filed, and the court having considered the argu-  
ments of counsel as to the sufficiency and merits  
of the demurrer, and the Court being of the opi-  
nion that the return to the alternative writ of  
mandamus is insufficient in law and that the de-  
murrer to said return is well taken and should  
be sustained;

It is ORDERED that the demurrer be sus-  
tained, and that a peremptory writ of manda-  
mus do issue as prayed for.

Let the above rule be entered,

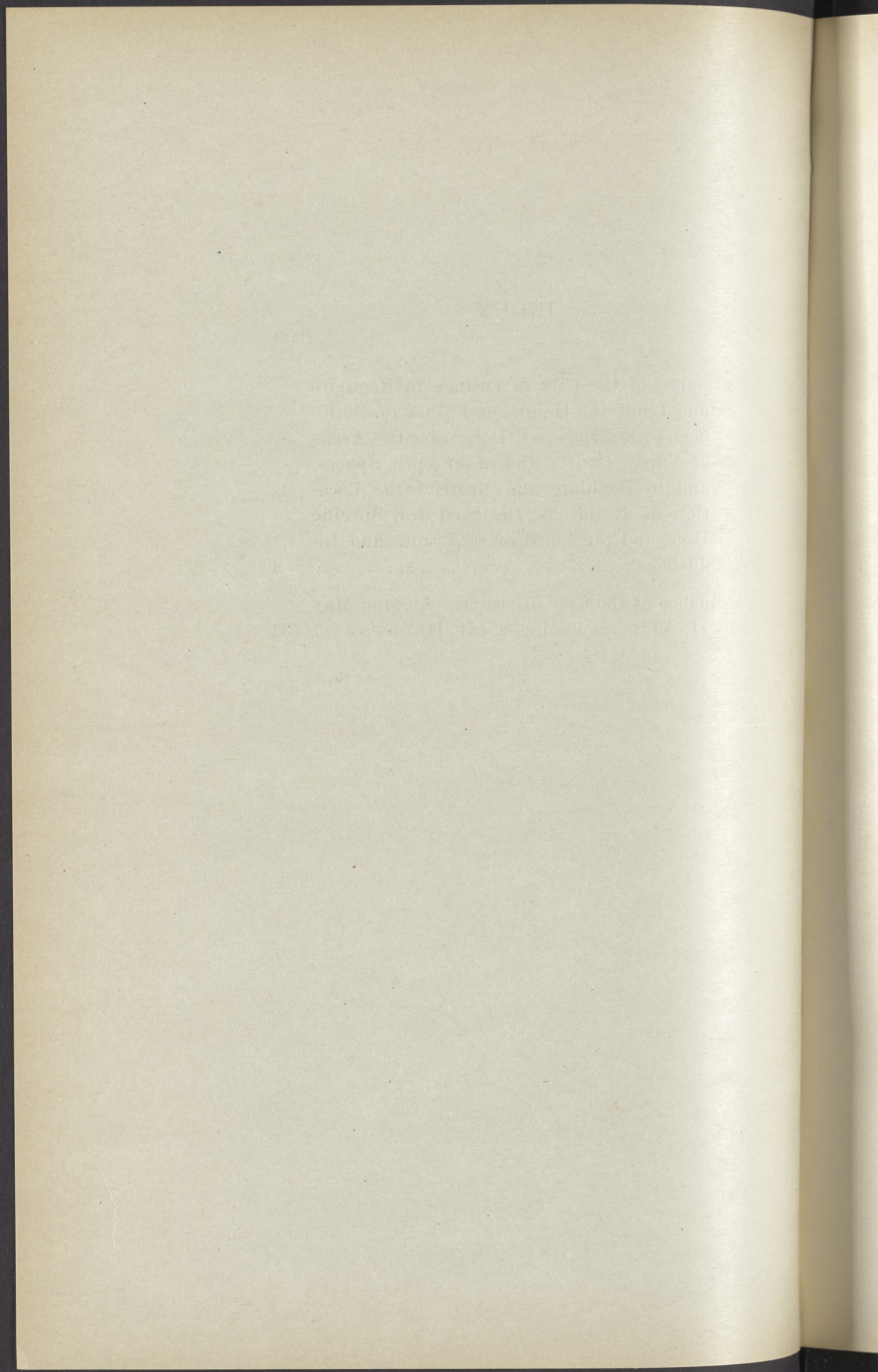
By the Court,  
THOMAS W. TRENCHARD, J. S. C.

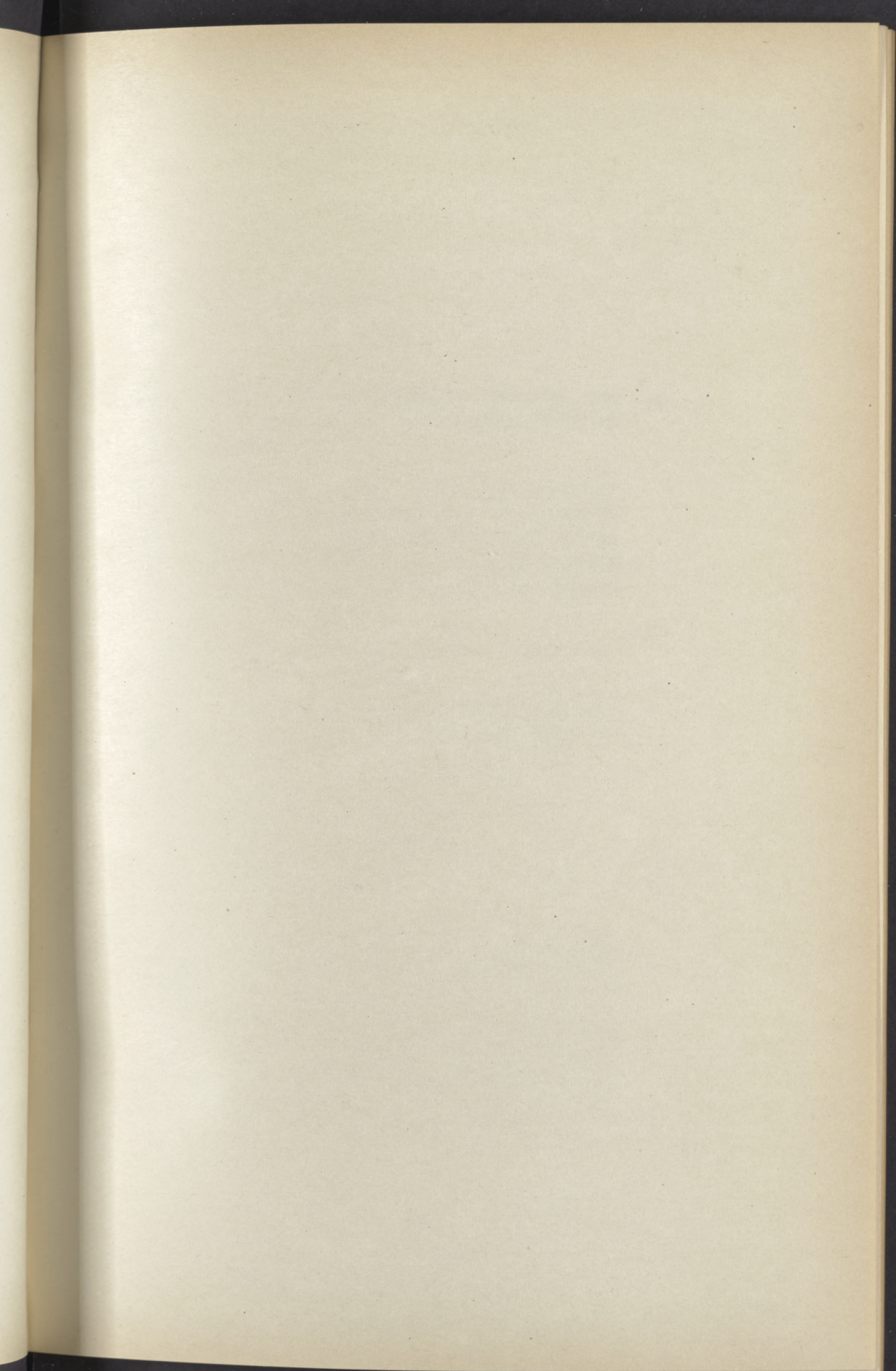


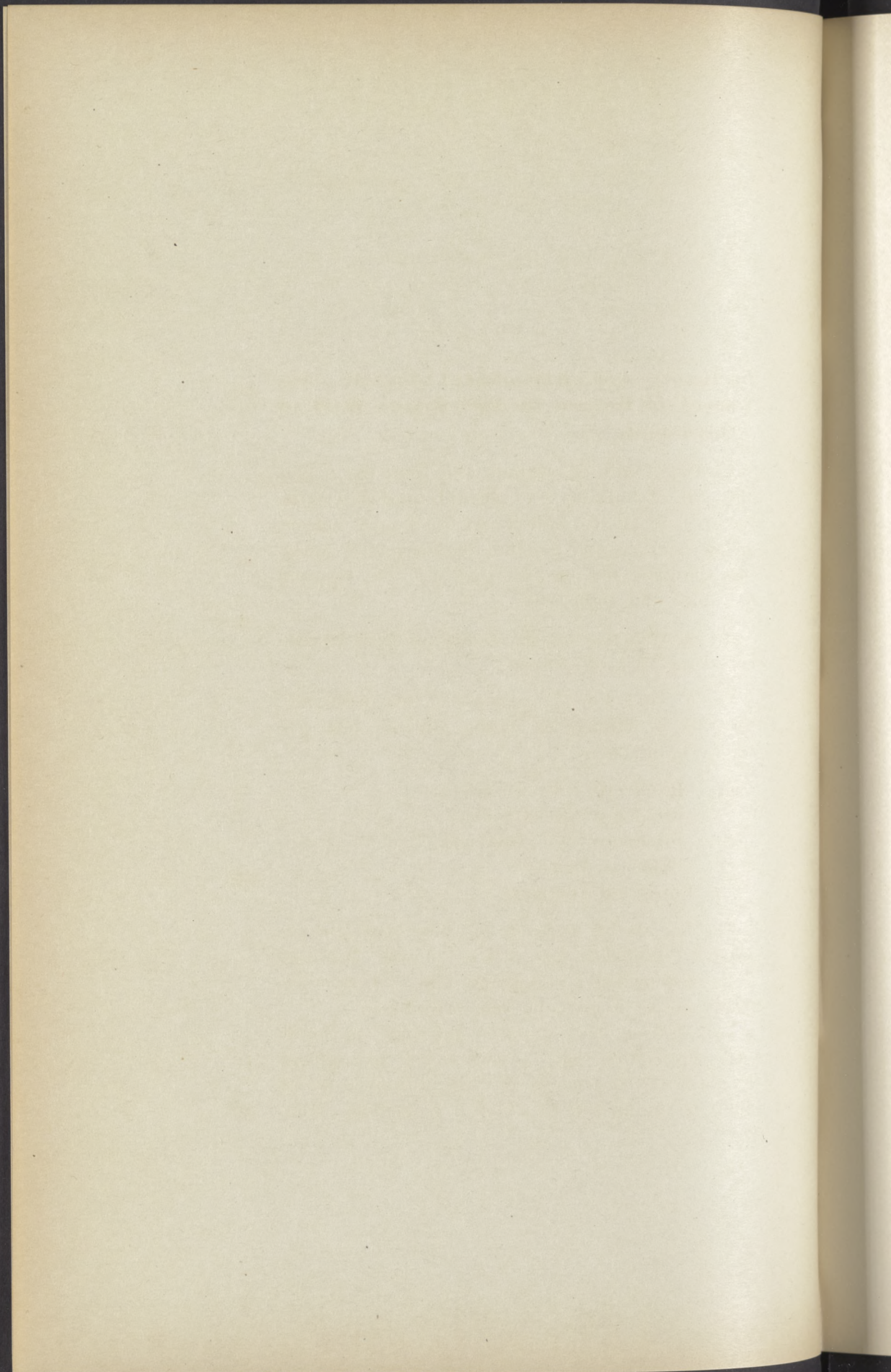
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Ordinance of the City of Orange to Regulate and Limit the Height and Bulk of Buildings, to Regulate and Determine the Areas of Yards, Courts and other open Spaces, and to Regulate and Restrict the Location of Buildings Designed for Specific Uses, and the Location of Trades and Industries .....	1
Ordinance of the City of Orange, adopted May 11, 1922, Amending above Ordinance ..	31







**Ordinance and Amendment thereto, annexed to Return to Alternative Writ of Mandamus.** 10

AN ORDINANCE to regulate and limit the height and bulk of buildings, to regulate and determine the areas of yards, courts and other open spaces, and to regulate and restrict the location of buildings designed for specific uses, and the location of trades and industries.

BE IT ORDAINED by the Board of Commissioners of the City of Orange: 20

Sec. 1. (a) For the purpose of this ordinance, the City of Orange is hereby divided into five classes of districts:

- (1) Residence "A" Districts.
- (2) Residence "B" Districts.
- (3) Residence "C" Districts.
- (4) Business Districts.
- (5) Industrial Districts. 30

The boundaries of each of these districts are hereby established as shown on the Building Zone Map which accompanies and is hereby declared to be a part of this ordinance.

(b) Except as hereinafter provided, no buildings or premises shall be used except in conformity with the provisions of this ordinance which apply to the district in which it is located. How- 40

*Ordinance Annexed to Return to Alternative Writ  
of Mandamus.*

ever, any non-conforming use, existing at the time of the passage of this ordinance may be continued, or, if in the opinion of the Board of Appeals no more harmful or objectionable than the first, may be changed to another non-conforming use, but not to a use prohibited in Section 6 for Industrial Districts, provided that the premises involved shall neither be altered or enlarged, nor shall the building be reconstructed except as provided in Sec. 12 (b) of this ordinance, unless such use be changed to a use permitted in the district. No non-conforming use, if once changed to a use permitted in the district in which it is located, shall ever be changed back to a non-conforming use.

(c) Every room in which persons live, sleep, work or congregate shall be adequately lighted and ventilated in all parts by at least one window or other opening, not in the ceiling, and giving directly upon a street or upon a yard, court or other open space located on the same lot and conforming with the requirements of this ordinance.

(d) No lot shall be so reduced in area that any yard, court or other open space will be smaller than is prescribed in this ordinance for the district in which the lot is located.

(e) Certain words in this ordinance are defined for the purposes thereof as follows:

(1) Words used in the present tense include the future; the singular number includes the plural and the plural the singular; the word "lot" includes the word "plot"; the word "building" includes the word "structure"; the word "occupied" includes the words "designed or intended to be occupied"; the word "used" includes

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the words "arranged, designed or intended to be used"; the word "shall" is always mandatory and not directory.

(2) For the purpose of this ordinance, a "lot" is any parcel of ground under the ownership of one individual, partnership, corporation, club or association—description of which is filed with the Building and Plumbing Inspector as provided in Sec. 9 (b), and which is occupied by only one building and its accessories, usually incident to it and including all open spaces required by this ordinance. 10

(3) The "curb level" is the mean level of the curb at that street frontage of the building where the average curb level is highest. Where no curb level has been established or wherever the average ground level of that portion of the lot which is within ten feet of a wall of a building is higher than the curb level, such average ground level shall be considered to be the curb level for the purposes of this ordinance in relation to such wall. 20

(4) The "street line" is the dividing line between a lot and a street, including sidewalks, or other public space, 30 feet or more, in width through which there is permanent access to the lot, but for the purposes of this ordinance, in every case, the street line shall be considered to be not less than 25 feet nor more than 50 feet from the center line of the street. 30

(5) The "depth of a lot" is the mean distance from a street line of the lot to its opposite rear line, measured in the general direction of the side lines of the lot. The "width of a lot" is the mean distance between the sides of a lot taken perpendicular to the depth of the lot. 40

*Ordinance Annexed to Return to Alternative Writ  
of Mandamus.*

(7) The "main front wall" of a building is a main wall facing on a street, not including bay windows and other projections that do not aggregate in width more than one-third of the width of the frontage of the building, and which  
10 do not project more than three feet, and not including projecting ground story porches and piazzas.

(7) The "height" of a building is the vertical distance from the curb level to the mean level of the slope of the roof, and in the case of a wall, to the mean level of the top of the wall, which mean level shall be averaged with the mean level of this slope of any gables, dormers or  
20 other projections on top of such wall.

(8) A "rear yard" is a required open unoccupied space, within and extending the full width of the lot, between the rear walls of the building and the rear line of the lot. In the case of a lot on the corner of two or more streets, either lot line not bordering on a street may be elected by the owner to be the rear line. One-half of the width of a railroad right of way and one-half of the width of a rear alley less than  
30 30 feet wide may be considered to be a part of a rear yard where the rear line of the lot abuts on such right of way or alley.

(9) The "depth of a rear yard" is the mean distance, at any given level, from the rear lot line or its vertical projection to the part of the building that is nearest at the level in question, to such rear lot line.

(10) A "side yard" is a required open unoccupied space within the lot between a side lot  
40 line and the part of the building nearest to such side lot line. Such a side yard must extend

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for its required width at any level, from the street line to the rear yard or to another street.

(11) A "court" is a required open unoccupied space other than a side or rear yard, behind the main front wall and on the same lot with a building. An outer court is any court opening for its full required width on a street or on a rear yard. An inner court is any other required court. "An offset to a court or yard shallower than its open end shall be considered to be a part of such court or yard." 10

(12) The "width of a side yard" or the "width of a court" at any level is the mean distance between the side lot line or its vertical projection and the part of the building nearest to such side lot line, or between the two opposite walls of a court if not on the lot line. 20

Sec. 2. (a) Within any *Residence "A" District*, as indicated on the Building Zone Map, no building shall be erected and no building or premises shall be used for any business or industry permitted in Sections 5 and 6 of this ordinance nor for other than one or more of the following specified purposes: 30

(1) A dwelling for one family or for one housekeeping unit only provided that nothing herein shall prevent the taking of roomers or boarders.

(2) The office or studio of a professional person residing on the premises, provided there is no display of goods or advertising.

(3) Municipal playgrounds, parks or recreation buildings. 40

(4) Public and Parochial schools.

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(5) Churches and other places of worship, parish houses, Sunday school buildings.

(6) Farms, truck gardens, nurseries or greenhouses excepting those used primarily for the growing of vegetables, plants or flowers to be sold at wholesale and provided that there is no display of products and no advertising and provided that there is no power plant and that any greenhouse heating plant is at least twenty feet distant from each side lot line and also from the rear lot line of a corner lot.

(7) Accessory uses, customary or incident to the above uses and located on the same lot with them. Except as provided above, "accessory uses" shall not include any uses customarily carried on as a business or as an industry, nor any driveway or walk giving access thereto, nor any structure used as a billboard or advertising sign.

(8) A private garage, only on the same lot with the building to which it is accessory, in which no business, service or industry connected directly or indirectly with motor vehicles is carried on. No such garage shall provide storage for more than one motor vehicle for each 20 feet of frontage of the lot on one street only, nor for more than one vehicle for each 2,500 square feet of lot area, nor for more than five motor vehicles in any case, of which not more than one vehicle may be a commercial vehicle of not more than one and one-half tons weight or capacity. Space for two cars may be provided in any case. Space for not more than one non-commercial vehicle may be leased. Such private garage shall be everywhere distant at least 25 feet from each street line. The same regulations as for private garages shall apply also to private sta-

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Nes except that one horse and one vehicle shall be considered to be the equivalent of one motor vehicle.

(9) Private schools, clubs, lodges, social community center and recreation buildings are prohibited unless the written consents of 80 per cent. by frontage, of the owners of all lots within 200 feet of the property in question be filed with the Building and Plumbing Inspector, and unless every application for the erection, enlargement or alteration of any such building shall be approved by the Board of Appeals. 10

(b) No part of any building shall be higher than the distance it sets back from the street line of each street on which it faces, except that along one side of a corner lot such set back distance may be reduced by ten feet. No building shall exceed two and one-half stories in height, and the slope of the main roof or mansard shall not start above the middle of the height of the third story. 20

(c) A rear yard is required. Its depth for a two and one-half story building shall be at least 25 feet, and for a one-story building or rear projection 15 feet. The required depth of the rear yard at any story level shall be increased six inches for each foot that the depth of the lot, measured from the main front wall of the building to the rear lot line, exceeds 75 feet; and for each foot of depth, thus measured, that it is less than 75 feet, at the time of the passage of this ordinance, six inches may be subtracted from the required depth of the rear yard at any level, provided that no part of any rear yard shall be less than ten feet in depth. One and one-half story detached structures for permitted accessory 30 40

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of Mandamus.*

1 : uses and rear appendages may occupy, in the  
aggregate, not over 35 per cent. of the rear yard  
area required behind a two-story building, pro-  
vided that no such one and one-half story struc-  
ture is over 20 feet in height, and provided that  
it is everywhere distant at least two feet from  
each side and rear lot line and if detached at  
least ten feet from the building. Structures  
shall not occupy, in the aggregate, more than  
ten per cent. of any additional part of a lot in  
the rear of the required rear yard unless the lot  
faces on another street. A ground story porch or  
bay window not over 12 feet in depth and not  
over 15 feet in height may be within not less than  
20 three feet from any side lot line. A common  
private garage may be built by adjoining prop-  
erty owners across their dividing lot line provid-  
ing that it is so located and constructed as not to  
interfere with or diminish the light and ventila-  
tion requirement of this ordinance.

(d) A side yard is required along the full  
length of each side lot line. The sum of the  
average widths of both side yards for a two or  
two and one-half story building shall be at least 15  
30 feet and for a one-story building or for one-story  
projections 10 feet, except that for each one foot  
that a lot is less than 50 feet wide at the time of  
the passage of this ordinance four inches may  
be subtracted from the above aggregate widths.  
No side yards shall be less than six feet in aver-  
age width at the second-story level, nor less than  
four feet at the ground story level, nor less than  
four feet in minimum width in any case, except  
40 that where no rooms depend on required window  
openings giving solely on one of these side yards,  
such side yard may be not less than four feet wide

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at the second-story level and not less than three feet wide at the ground-story level. The width of a court at any level shall be equal to one-half of its height at such level. With 50 feet of the main front wall of a building, no garage or stable shall be placed within 12 feet of any side lot line. 10

Sec. 3. (a) Within any "*Residence "B" District*", as indicated on the Building Zone Map, no building shall be erected and no building or premises shall be used for any business or industry permitted in Sections 5 and 6 of this ordinance, nor for other than one or more of the following specified purposes: 20

(1) Any use specified in Section 2 (a) of this ordinance as permitted in Residence "*A*" Districts.

(2) A dwelling, detached or semi-detached for not more than two families or more than two housekeeping units, including boarders or roomers as permitted in Section 2 (a) (1) of the ordinance for each family.

(3) Customary home occupations; provided there is no display of goods or advertising, and provided that such uses shall occupy an area equivalent to not over 25 per cent. of the floor area of one story; and provided that they shall not be carried on in accessory buildings. 30

(4) A private garage, as specified in Section 2 (a) (8) except that there shall not be space for more than one motor vehicle for each 15 feet of frontage of the lot, on one street only, nor more than one vehicle for each 1,500 square feet of lot area and except that space for not more 40

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of Mandamus.*

than one non-commercial vehicle may be leased for each 25 feet of frontage of the lot on one street only.

(5) Public buildings.

10 (6) Hospitals, sanitariums, philanthropic and eleemosynary institutions are prohibited, unless the written consent of 80 per cent., by frontage of the owners of all lots within 200 feet of the property in question be filed with the Building and Plumbing Inspector, and unless every application for the erection, enlargement or alteration of any such building shall be approved by the Board of Appeals.

20 (b) No part of any building shall be higher than twice the distance it sets back from the street line of each street on which it faces, except that on one street frontage of a corner lot such set-back distance may be reduced by five feet, nor shall it exceed three stories in height in any case.

(c) A rear yard is required. It shall conform to the requirements in Sec. 2 (c) for Residence "A" Districts.

30 (d) A side yard is required along the full length of each side lot line and each such side yard and each required court shall conform to the requirements specified in Sec. 2 (d) for Residence "A" Districts, except as hereinafter specified. For each foot that a lot is less than 50 feet wide at the time of the passage of this ordinance six inches may be subtracted from the sum of the widths of both side yards, provided that no side yard shall be less than two feet wide in  
40 any case. One side yard may be omitted entirely, provided that the other side yard shall have a

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width equal to the sum of the average widths of both side yards, on any one lot, as prescribed above. A double, semi-detached house for two three or four families may be erected on one lot not less than 50 feet wide, provided that each side yard conform to the requirements for side yards for lots of one-half the width at the time of passage of this ordinance. Where at the time of passage of this ordinance, an existing lot or unimproved portion of a lot is in a district where three-quarters of the improved lots within 100 feet on each side of and across the street from the property in question are less than 50 feet in width, such existing lot or unimproved portion of a lot may be considered to be divided into lots of substantially the average width of the above neighboring lots. Both side yards may be omitted provided that the building be not more than two rooms or 35 feet in maximum depth from the main front wall at the second-story level, except that a rear appendage, not over 25 feet in depth and distant at least two feet from each side lot line, may occupy not over 60 per cent. of the width of the lot.

Sec. 4. (a) Within any *Residence "C" District*, as indicated on the Building Zone Map, no building shall be erected and no building or premises shall be used for any business or industry permitted in Sections 5 and 6 of this ordinance nor shall be used for other than one or more of the following specified purposes:

(1) Any use specified in Sec. 2 (a) of this ordinance as permitted in Residence "A" Districts and any use specified in Sec. 3 (a) of this ordinance as permitted in Residence "B" Districts.

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(2) Apartment or tenement houses.

(3) Hotels, lodging houses or dormitories provided there is no display of advertising or conspicuous signs.

(4) A private garage as specified in Sec. 2 (a)  
10 (8) except that there shall not be space provided for more than one motor vehicle for each 12½ feet of frontage of the lot, on one street only, nor for more than one vehicle for each 1,000 square feet of lot area.

(b) No part of any building shall be higher than four times the distance it sets back from the street line of each street on which it faces, except that within 50 feet of any Residence "A"  
20 or "B" District such set back distance shall be increased to one-half of such height. No building shall exceed six stories in height.

(c) A rear yard is required and it shall have a depth at any story level equal to one-half of the height of the rear wall and shall otherwise conform to the requirements of Sec. 2 (c) for Residence "A" Districts, except that accessory buildings may occupy in the aggregate not over 50  
30 per cent. of the rear yard area required behind a second-story building, nor more than 20 per cent. of any additional part of the lot in the rear of the required rear yard, and in the case of hotels, lodging houses, dormitories or public buildings, the height of all yards and courts in relation to their widths may be determined by substituting the average level of the top of the ground story roof beams for the curb level.

(d) A side yard is required along the full  
40 length of each side lot line, except as hereinafter specified. Each such side yard and each required

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court shall have a clear unobstructed width at any story level equal to one-third of the height of its side wall and shall otherwise conform to the requirements of Sec. 2 (d) for Residence "A" Districts and of those in Sec. 3 (d) for Residence "B" Districts, except that a rear appendage may extend to the rear line and may not be over six stories in height, provided that over 40 feet back from the main front wall of the building, there shall be a required court along each side lot line. The depth of a court may exceed four times its required width, provided that for each additional ten feet of depth six inches per story above the ground story, shall be added to the width of such court at any story level throughout its depth. Groups of houses or apartments erected on one lot shall be provided with a side yard for each six families maximum housed thereon. 10 20

Sec. 5. (a) Within any *Business District*, as indicated on the Building Zone Map, no building or premises shall be used for other than one or more of the following specified purposes:

(1) Any use specified in Sec. 2 (a) of this ordinance as permitted in Residence "A" Districts and any use specified in Sec. 3 (a) of this ordinance as permitted in Residence "B" Districts, and any use specified in Sec. 4 (a) of this ordinance as permitted in Residence "C" Districts. 30

(2) Any one or more of the following specified uses:

Any retail store or stand where goods are sold or service rendered only at retail and where nothing is fabricated, manufactured, converted or altered, except for retail trade. 40

*Ordinance Annexed to Return to Alternative Writ  
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Amusement parks, or any of its features, dance halls or pavillions, skating rinks, baths, concert halls, theatres, motion picture houses, bowling alleys, billiard parlors, circuses.

Auction rooms.

10 Banks and fiduciary institutions.

Barber shops.

Structures used as billboards or advertising signs; provided that no such structures not on or attached to a building shall have less than three feet of clear space between it and the ground or shall at any point be higher than 14 feet above the ground level. No such structure shall have an unbroken length of more than 25 feet.

20 Brokerage offices.

Convenience stations.

Hotels and lodging houses.

Hospitals and semi-public institutions.

Offices.

Photographer's shop.

Restaurant or lunch counters.

Storage of articles for sale in connection with any of the above uses.

Studios and art galleries.

30 Telephone exchanges.

Wholesale salesrooms or sample rooms for articles needed in connection with any of the above uses.

Woodyards.

(3) Any of the following specified uses; provided that not more than five mechanics or skilled workers are engaged and that no mechanical power exceeding five rated horsepower is used and that  
40 no steam pressure in excess of 15 ponnds is employed and provided that not more than 25 per cent. of the floor area of the building is occu-

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pied by such uses, but the equivalent of the ground floor area may be thus occupied in any case.

Bakery, pastry, candy, confectionery, or ice cream shop.

Battery Service Station. 10

Bone or shell products manufacture.

Bottling of water, cider or soft drinks.

Canning, preserving or pickling of foods.

Canvas products manufacture.

Carpenter, cabinet making, furniture or upholstery shop.

Carpet, rug, rag or bag cleaning.

Contractors yard.

Creamery, butter or cheese making. 20

Dyeing where not more than one dyer is employed.

Electrician's shop.

Enameling, japaning or lacquering only where the liquid is applied by hand brush by not more than two employees or by dipping in tanks of not over five cubic feet capacity.

Express, carting or hauling service.

Feather, plume or artificial flower manufacture.

Jewelry, watches, clocks or optical goods and musical, professional or scientific instrument manufacture. 30

Laundry or dry-cleaning shop.

Leather goods manufacture, not including tanning.

Making or repairing of wearing apparel, knit goods, embroideries, rugs, umbrellas and canes.

Medicine manufacture.

Metal working shop, blacksmith, tinsmith, plumbing, gas, steam or hot water fitting shop. 40

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Milk bottling or distributing station, employing not more than two skilled workers.

Newspaper or job printing, where not more than ten skilled workers are employed or ten rated horsepower is used.

10 Paper box or goods manufacture.

Shoe making and repairing.

Stone or monument works, employing not more than two skilled workers.

Storage of foodstuffs, fodder, fuel or building material for sale at retail only.

Tailoring, and the repairing or altering of clothing.

20 Undertakers' or embalmers' service or mortuary chapel.

(4) A public garage battery service station, filling station or greasing station, provided that no part of the storage space or workshop shall be nearer than 25 feet to any public street, and that all entrance driveways shall have an unobstructed width of at least 15 feet except uncovered driveways to filling stations only, and that not more than five rated horsepower is used on the premises. There shall be no opening in the side or rear walls or roof of such a garage within 15 feet of any side or rear lot line. No automobile commercial repair work except emergency work and gasoline or oil filling shall be carried on out-of-doors. Automobiles may be parked temporarily on any part of a lot.

30 (5) No internal combustion engine shall be used unless vibration be virtually eliminated and it be equipped and operated with an effective 40 muffler or silencer so as to eliminate objectionable or unnecessary noise.

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(b) The height of no building shall exceed six stories or 75 feet from the curb level to the mean level of the slope of the roof and no part of a building shall be higher above the curb level than ten feet less than twice the distance that it sets back from the center line of each street on which it faces. 10

(c) A rear yard is required, of the minimum depth prescribed in and otherwise conforming to the requirements of Sec. 4 (c) for Residence "C" Districts except that on a corner lot within not over 50 feet from any main front wall, the rear yard may be omitted provided that a required inner court shall be substituted into which shall open required outer courts, and except that a ground story, where not used for dwelling purposes, may cover the whole lot up to a height of 20 feet above the curb level, and except that where a non-residence building on an interior lot runs through the block from street to street, no rear yard shall be required provided that over 50 feet back from each main front wall a court shall be required along the full length of each lot line. Where no part of the ground story is used for residence purposes, the heights of the walls of yards and courts, in relation to their depths and widths, may be measured from the average level of the top of the ground story roof beams, but in no case from a level over 20 feet above the curb level. 20 30

(d) A side yard is not required, but where any part of an upper story is used for offices, studios or workshops along each side lot line, over 50 feet back from the main front wall and above a level 20 feet above the curb level, a court is required, the minimum width of which at any level shall be one-third of the height of 40

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such level. Where any part of a story is used for residence purposes, such lot line courts shall be required over 35 feet back from the main front wall and in any case over two rooms in depth from the main front wall. The depth of a court may exceed four times its required width, provided that for each additional ten feet of length four inches per story above the ground story shall be added to the width of such court at any level throughout its depth.

10 Sec. 6. (a) Within any *Industrial District*, as indicated on the Building Zone Map, no building or premises shall be used for any of the following specified purposes:

- 20 Acetylene gas manufacture for commercial purposes.
- Ammonia, chlorine or bleaching powder manufacture.
- Arsenal.
- Asphalt manufacture or refining.
- Blast furnace.
- Boiler or pipe making, locomotive or railway car manufacture, or shops operating reciprocating riveting hammers or chisels, or other noise-producing electric or pneumatic tools.
- 30 Brick or tile manufacture.
- Carbon, lampblack, shoe blacking, graphite or stove polish manufacture.
- Celluloid and other cellulose products manufacture.
- Coal tar products.
- Coke ovens.
- 40 Creosote treatment or manufacture.
- Distillation of coal, wood or bones.

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- Explosives, fireworks or match manufacture,  
assembling or storage in bulk.
- Fat-rendering.
- Fish smoking or curing.
- Fertilizer manufacture or potash refining.
- Forge plant. 10
- Gas storage in bulk.
- Glue, size or gelatine manufacture or process  
involving recovery from fish or animal offal.
- Incineration, reduction or dumping of offal,  
garbage or refuse, except where controlled by  
the municipality.
- Lime, gypsum, cement, plaster or plaster of  
Paris manufacture.
- Linoleum or oil cloth manufacture. 20
- Oil storage in bulk.
- Ore reduction, or the smelting of iron, copper,  
tin, zinc or lead.
- Paint, oil, varnish, turpentine, shellac or enam-  
el manufacture.
- Perfume or extract manufacture.
- Petroleum refining.
- Plating work.
- Printing ink manufacture.
- Pyroxylin plastic manufacture or the manu- 30  
facture of articles therefrom.
- Radium extraction.
- Raw or green salted hides, or skins, their stor-  
age, coloring, dressing, curing or tanning.
- Rubber caoutchouc or gutta percha manufac-  
ture from crude or scrap material.
- Sand paper and emery cloth manufacture.
- Sauerkraut manufacture.
- Sausage manufacture. 40
- Sewage disposal plant, except where controlled  
by the municipality.

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Soap, soda or washing compound manufacture.

Starch, glucose or dextrine manufacture.

Stock yards.

Sulphurous, sulphuric, nitric or hydrochloric acid manufacture.

10 Tallow, grease, lard or candle manufacture or refining.

Tar distillation or the manufacture of dyes.

Tar roofing, or water-proofing manufacture.

Vinegar manufacture.

Wool pulling or scouring.

Yeast manufacturing.

No building or premises shall be used for any trade, industry or purpose that is noxious or  
20 offensive by reason of the emission of odor, dust, smoke, gas or noise or that is dangerous to public health or safety.

No public garage shall have any opening in any side or rear wall or in the roof within 15 feet of any bordering lot line.

(b) The height of no building shall exceed six stories or 80 feet from the curb level to the mean level of the slope of the roof.

(c) In Industrial Districts rear yard provisions shall conform to those required in Sec. 5 (c) for Business Districts, except that the depth of a rear yard at any level shall not exceed one-half of its height at such level above the average level of the top of the ground story roof beams and except that the whole lot may be built upon up to a height of 25 feet above the curb level where no part of the building is used for residence purposes except for sleeping quarters of  
30 a janitor or watchman.

(d) The side yard and court provisions shall conform to those required in Sec. 3 (d) for Busi-

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ness Districts except that no lot line court shall be required where no part of the building is used for residence purposes except for sleeping quarters for a janitor or a watchman.

Sec. 7. Exceptions and Special Provisions.

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(a) The Board of Appeals, hereinafter established, may in appropriate cases after public notice and hearing, determine and vary the application of the regulations herein established, in harmony with their general purpose and intent, and permit:

(1) The extension of change in use of an existing non-conforming building, or use, or the erection of a supplementary building on the same lot, even into a more restricted district; all under such conditions as will safeguard the character of the district and of the more restricted district; 20

(2) The granting in undeveloped sections of the city of temporary and conditional permits, of not more than one year's duration for structures and uses not permitted by this ordinance in the districts in which they are located, but which are necessary to the development of such section, provided that a contractor's tool house shall be permitted in any case wherever building construction is in progress. 30

(b) No public or private garage for more than five motor vehicles shall have an entrance or exit for motor vehicles within 50 feet of a Residence "A" or "B" District or within 200 feet of the entrance or exit of a public or private school, playground, public library, church, hospital, orphanage or children's home housing children under 16 years of age. 40

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(c) There shall be no dwelling or sleeping quarters behind another building on the same lot, except that not more than one chauffeur may be housed within an accessory garage and except that on a lot at least one-half acre in area, dwelling quarters for servants only may be provided where such dwellings shall have a clear access at least 25 feet wide to a street.

(d) No court shall be longer at any level than four times the required width at such level except that its required width at any level be increased by one foot for each additional ten feet of depth. However, any inner court not opening for its full required width on a street, a front yard or a rear yard shall have a width at any level equal to at least one-half of the height of the court at such level and shall have an area at any level equal to at least twice the square of its required width at such level. Courts or shafts used solely for lighting and ventilating, toilet compartments, baths, stairways or hallways, are exempt from the provision of this ordinance, except that such court or shaft shall never contain less than 40 square feet of net area nor be less than 4 feet wide.

(e) Chimneys or flues may be erected within a rear yard provided they do not exceed five square feet in aggregate external area and do not obstruct free ventilation. An open or lattice enclosed iron fire escape, or a fire-proof outside stairway or a solid floor open balcony to a fire tower, may project not more than five feet into a rear yard.

(f) Required courts or yards shall be open to the sky, unobstructed, except for the ordinary projection of parapets, skylights, window sills,

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door posts, rainwater leaders, cornices and other ornamental features, which may project not more than six inches into such yard or court.

(g) The provisions of this ordinance with regard to height shall not apply to church spires, cupolas, belfries, chimneys, flagpoles, gas holders, grain elevators, water towers, cooling towers and parapets not over 4 feet high, nor to bulkheads, hose towers, elevator enclosures, water tanks or scenery lofts and towers, occupying an aggregate area or not over 25 per cent. of the ground area of the building, provided that towers shall be distant at least 50 feet from the center line of each street and distant at least 25 feet from each lot line.

(h) No corner of any required court shall have a cut off longer than seven feet and no required window shall face on any offset to any court or yard where the width of the opening of the offset is less than the depth or less than four feet in any case.

(i) Nothing in this ordinance shall prevent the projection of a cornice over any required yard or court to an extent not exceeding one-quarter of the average width of such yard or court or to a distance of at least one foot in any case.

(j) No fence or barrier more than four feet high or more than one-quarter solid shall be erected within three feet of any side lot line within the limits of any side yard.

(k) Except along one street frontage of a corner lot, no story of a building shall be nearer to the street line of any street in which it faces than the general average alignment of the corresponding stories of existing buildings within 200 feet on each side of the lot and within the same

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block, provided that no building shall be required to set back more than 40 feet from any street line.

10 (1) Along and within 15 feet of any boundary line between two different kinds of districts, side or rear yards of courts, required in the less restricted district, shall be at least equal in depth or width respectively, at any level, to the depths or widths required for such yards or courts in the more restricted district.

Sec. 8. Interpretation: Purpose.

20 In their interpretation and application, the provisions of this ordinance shall be held to be minimum requirements, adopted for the promotion of the public health, safety, comfort, convenience and general welfare. It is not intended by this ordinance to repeal, abrogate, annul or in any way to impair or interfere with any existing provision of law or ordinance, or with any rules, regulations, or permits, previously adopted or issued or which shall be adopted or issued pursuant to law relating to the use of buildings or premises, nor is it intended by this ordinance to interfere with or abrogate or annul any easements, covenants or other agreements between parties; provided, however, that where this ordinance imposes a greater restriction upon the use of buildings or premises or upon height of buildings, or requires larger yards, courts or other open spaces than are imposed or required by such existing provision of law or ordinance or by such rules, regulations or permits, or by such easements, covenants or agreements, the provisions of this ordinance shall control.

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Sec. 9. Enforcement.

(a) This ordinance shall be enforced by the Building and Plumbing Inspector. If no Building and Plumbing Inspector exists, it shall be enforced by the officer delegated to enforce the Building Code. 10

(b) All applications for building permits shall be accompanied by a plan in duplicate, drawn to scale, showing the actual dimensions, radii and angles of the lot to be built upon, the exact size and location on the lot of the building and accessory buildings to be erected and such other information as may be necessary to determine and provide for the enforcement of this ordinance. 20

Sec. 10. Board of Appeals.

(a) A Board of Appeals, consisting of five members to be appointed by the Mayor and to serve without pay is hereby established as provided by law. All meetings of the Board of Appeals shall be public. A quorum shall consist of four members.

The Board of Appeals shall keep minutes of its proceedings, showing the vote of each member on every question. If a member is absent or fails to vote, the minutes shall indicate such fact. 30

(b) The Board of Appeals shall adopt from time to time such rules and regulations as it may deem necessary to interpret and carry into effect the provisions of this ordinance.

(c) Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the provisions of this ordinance the Board of Appeals shall have power in a 40

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specific case, after due notice and public hearing, to vary any such provision in harmony with the general purpose and intent of the ordinance so that the public health, safety and general welfare may be secured and substantial justice done.

- 10 (d) Where the street layout actually on the ground varies from the street layout as shown on the Building Zone Map, the designation shown on the map shall be applied to the unmapped street on the ground by the Board of Appeals, after due notice and public hearing, in such a way as to carry out the intent and purpose of the map for the particular section in question.

20 Sec. 11. Amendments.

(a) The Board of Commissioners may from time to time, on its own motion or on petition, after public notice and hearing, amend, supplement or change the regulations and districts here-in established. Every such proposed amendment, supplement or change, shall be referred by the Board of Commissioners to the Commission on Building Districts and Restrictions for report before the above public hearing.

- 30 (b) Whenever the owners of fifty per cent. (50 per cent.) or more of the frontage in any district or part thereof shall present a petition duly signed and acknowledged to the Board of Commissioners, requesting an amendment, supplement, change or repeal of the regulations prescribed for such district or such part thereof, it shall be the duty of the Board to vote upon said petition within 90 days after the filing of the  
40 same by the petitioners with the City Clerk. If, however, a protest against such amendment, supplement or change be presented, duly signed and

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acknowledged by the owners of twenty per cent. (20 per cent.) or more of the frontage of the district or parts thereof proposed to be altered, or by the owners of twenty per cent. (20 per cent.) of the frontage upon the street immediately in the rear thereof, or by the owners of twenty per cent. (20 per cent.) of the frontage opposite the district or part thereof proposed to be altered, such amendment shall not be passed except by a three-quarters vote of the full membership of the Board of Commissioners. 10

(c) If any area is hereafter transferred from one district to another district by a change in district boundaries, by amendment, as above provided, the provisions of this ordinance with regard to buildings or premises existing at the time of the passage of this ordinance, shall apply to buildings or premises existing in such transferred area at the time of passage of such amendment. 20

Sec. 12. Completion and Restoration of Existing Buildings.

(a) Nothing herein contained shall require any change in the plans, construction or designated use of a building for which a building permit has been heretofore issued, or for which plans are on file with the Building and Plumbing Inspector at the time of the passage of this ordinance, and for the erection of which a permit is issued within three months from the passage of this ordinance, and the construction of which, in either case, shall have been diligently prosecuted within three months of the date of such permit, and the ground story framework of which, including the second tier of beams, shall have been 30 40

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completed within a year of the date of such permit, and which entire building shall be completed according to such plans as have been filed, within two years from the date of the passage of this ordinance.

- 10 (b) Except for the uses prohibited in Sec. 6 of this ordinance, nothing in this ordinance shall prevent the restoration of a building destroyed by fire, explosion, act of God or act of the public enemy, subsequent to the passage of this ordinance, or shall prevent the continuance of the use of such building or part thereof as such use existed at the time of such destruction of such building or part thereof, or shall prevent a  
20 change of such existing use under the limitations provided in Sec. 7 of this ordinance. Nothing in this ordinance shall prevent the restoration of a building or part thereof declared unsafe by the Building and Plumbing Inspector.

Sec. 13. Certificate of Occupancy.

- (a) It shall be unlawful to use or permit the use of any building or premises or part thereof, hereafter created, erected, changed, converted or  
30 enlarged, wholly or partly, in its use or structure, until a certificate of occupancy shall have been issued by the Building and Plumbing Inspector. Such certificate shall show that such building or premises or part thereof and the proposed use thereof are in conformity with the provisions of this ordinance. It shall be the duty of the Building and Plumbing Inspector to issue a certificate of occupancy within five days  
40 after the request for the same shall be filed in his office by any owner, after having determined that the building and the proposed use thereof

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conform with all the requirements herein set forth.

(b) A temporary certificate of occupancy for a part of a building may be issued by the Building and Plumbing Inspector. Upon written request from the owner, the Building and Plumbing Inspector shall issue a certificate of occupancy for any building or premises existing at the time of the passage of this ordinance, certifying after inspection, the use made of the building or premises and whether such use conforms to the provisions of this ordinance. 10

Sec. 14. Violations and Penalties.

For any and every violation of the provisions of this ordinance, the owner, general agent or contractor of a building or premises where such violation has been committed or shall exist, and the lessee or tenant of an entire building or entire premises where such violation has been committed or shall exist, and the owner, general agent or contractor, lessee or tenant of any part of a building or premises in which part such violation has been committed or shall exist, and the general agent, architect, builder, contractor or any other person who commits, takes part or assists in such violation or who maintains any building or premises in which any such violation shall exist, shall for each and every violation, and for each and every day that such violation continues, be subject to a fine of not more than one hundred dollars and not to exceed \$200 maximum. Legal remedies for such violation shall be had and violations shall be prosecuted in the manner prescribed by law or ordinance effective in the City of Orange. 20 30 40

Sec. 15. Validity.

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The invalidity of any section or provision of this ordinance shall not invalidate any other section or provision thereof.

Sec. 16. Effect.

01 This ordinance shall take effect immediately.

BUILDING ZONE MAP.

Designations  
for the City of  
ORANGE, N. J.

02 District boundary lines, where not shown within a street are to be considered to be 100 feet back from and parallel to the nearest street line as scaled on the Building Zone Map, unless otherwise specifically indicated. Where two or more kinds of districts are shown in a block less than 200 feet in depth from street to street, the boundary line of the less restricted district shall be 100 feet back from and parallel to the street on which it faces.

03 Where a lot or a part of a lot, at the time of passage of this ordinance, is more than 100 feet in depth, the district boundary line may be 30 moved back within the lot, not more than 25 feet.

Where a corner lot is less than 100 feet in depth, at the time of the passage of this ordinance, a district shall be considered to extend back along the intersecting street to the then existing lot line, which, at the street line, is nearest to a point 100 feet back from the corner but not further than 125 feet from such corner.

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*Amendment to Ordinance Annexed to Return to  
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AN ORDINANCE to amend an ordinance entitled "An ordinance to regulate and limit the height and bulk of buildings, to regulate and determine the area of yards, courts and other open spaces, and to regulate and restrict the location of buildings designed for specified uses and the location of trades and industries," adopted May 11, 1922. 10

The Board of Commissioners of the City of Orange do ordain:

1. That Section 7 of an ordinance entitled "An ordinance to regulate and limit the height and bulk of buildings, to regulate and determine the area of yards, courts and other open spaces and to regulate and restrict the location of buildings designed for specified uses and the location of trades and industries" be and the same is hereby amended so as to read as follows: 20

Section 7. The Board of Adjustment hereinafter established may in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the term of this ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained or contained in Chapter 146, Laws of New Jersey for the year 1924, and in any Amendment or Supplement thereto. 30

2. That Section 10 of said ordinance be and the same is hereby amended so as to read as follows:

Section 10. (a) A Board of Adjustment is hereby established; which said Board shall in appropriate cases and subject to appropriate conditions and safeguards make special exception 40

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to the terms of this ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained.

(b) The Board of Adjustment shall consist of five members who shall be appointed by the  
10 Board of Commissioners of the City of Orange by resolution; of the original appointees to said Board one member shall be appointed for a term of one year; two members for a term of two years, and two members for a term of three years. Vacancies shall be filled for the unexpired term of any member whose term becomes vacant.

(c) Any member of said Board of Adjustment may be removed for cause by the said Board of  
20 Commissioners upon written charges and after public hearing.

(d) No member of the Board of Adjustment shall receive any compensation for his services.

(e) The Board of Adjustment shall choose its own chairman and acting chairman, who shall preside in the absence of the chairman.

(f) The City Clerk shall be the secretary of the Board and shall keep minutes of its proceedings showing the vote of each member upon  
30 each question, or if absent or failing to vote, indicating such fact, and shall keep records of its examinations, and other official actions; all of which shall be immediately filed in the office of the Board and shall be a public record.

(g) The office of the City Clerk shall be the office of the Board.

(h) Meetings of the Board shall be held at the call of the chairman or at the call of the acting chairman and at such other times as the  
40 Board may determine, and shall be open to the public.

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(i) The Board of Adjustment shall have all powers conferred on Boards of Adjustment by Chapter 146, Laws of New Jersey for the year 1924 and by any amendments or supplements hereinafter made thereto.

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**United States Supreme Court.**

No. 31.

(Filed November 22, 1926.)

VILLAGE OF EUCLID,

*vs.*

AMBLER REALTY COMPANY.

SUTHERLAND, *J.*

The Village of Euclid is an Ohio municipal corporation. It adjoins and practically is a suburb of the City of Cleveland. Its estimated population is between 5,000 and 10,000, and its area from 12 to 14 square miles, the greater part of which is farm land or unimproved acreage.

It lies, roughly, in the form of parallelogram, measuring approximately three and one-half miles each way. East and west it is traversed by three principal highways: Euclid Avenue, through the southerly border, St. Clair Avenue, through the central portion; and Lake Shore Boulevard, through the northerly border in close proximity to the shore of Lake Erie.

The Nickel Plate Railroad lies from 1,500 to 1,800 feet north of Euclid Avenue and the Lake Shore Railroad 1,600 feet farther to the north. The three highways and the two railroads are substantially parallel.

Appellee is the owner of a tract of land containing 68 acres, situated in the westerly end of the village, abutting on Euclid Avenue to the south and the Nickel Plate Railroad to the north. Adjoining this tract, both on the east and on the

west, there have been laid out restricted residential plats upon which residences have been erected.

On November 13, 1922, an ordinance was adopted by the Village Council, establishing a comprehensive zoning plan for regulating and restricting the location of trades, industries, apartment houses, two family houses, single family houses, etc., the lot area to be built upon, the size and height of buildings, etc.

The entire area of the village is divided by the ordinance into six classes of use districts, denominated U-1 to U-6, inclusive; three classes of height districts, denominated H-1 to H-3, inclusive; and four classes of area districts, denominated A-1 to A-4, inclusive.

The use districts are classified in respect of the buildings which may be erected within their respective limits as follows: U-1 is restricted to single family dwellings, public parks, water towers and reservoirs, suburban and interurban electric railway passenger stations and rights of way, and farming, non-commercial greenhouse nurseries and truck gardening; U-2 is extended to include two-family dwellings; U-3 is further extended to include apartment houses, hotels, churches, schools, public libraries, museums, private clubs, community center buildings hospitals, sanitariums, public play grounds and recreations, restaurants, theatres and moving picture U-4 is further extended to include banks, offices, studios, telephone exchanges, fire and police stations, restaurants, theatren and moving picture shows, retail stores and shops, sales offices, sample rooms, wholesale stores for hardware, drugs and groceries, stations for gasoline and oil (not exceeding 1,000 gallons storage) and for ice delivery, skating rinks and dance halls, elec-

tric sub-stations, job and newspaper printing, public garages for motor vehicles, stables and wagon sheds (not exceeding five horses, wagons or motor trucks) and distributing stations for central store and commercial enterprises; U-5 is further extended to include billboards and advertising signs (if permitted), warehouses, ice and ice cream manufacturing and cold storage plants, bottling works, milk bottling and central distributing stations, laundries, carpet cleaning, dry cleaning and dyeing establishments, blacksmith, horseshoeing, wagon and motor vehicle repair shops, freight stations, street car barns, stables and wagon sheds (for more than five horses, wagons or motor trucks), and wholesale produce markets and salesrooms; U-6 is further extended to include plants for sewage disposal and for producing gas, garbage and refuse incineration, scrap iron, junk, scrap paper and rag storage, aviation fields, cemeteries, crematories, penal and correctional institutions, insane and feeble minded institutions, storage of oil and gasoline (not to exceed 25,000 gallons), and manufacturing and industrial operations of any kind other than, and any public utility not included in, a class U-1, U-2, U-3, U-4 or U-5 use. There is a seventh class of uses which is prohibited altogether.

Class U-1 is the only district in which buildings are restricted to those enumerated. In the other classes the uses are cumulative; that is to say, uses in class U-2 include those enumerated in the preceding class, U-1; class U-3 includes uses enumerated in the preceding classes, U-2 and U-1, and so on.

In addition to the enumerated uses, the ordinance provides for accessory uses, that is, for use customarily incident to the principal use,

such as private garages. Many regulations are provided in respect of such accessory uses.

The height districts are classified as follows: In class H-1, buildings are limited to a height of two and one-half stories or thirty-nine feet; in class H-2, to four stories or fifty feet; in class H-3 to eighty feet. To all of these, certain exceptions are made, as in the case of church spires, water tanks, etc.

The classification of area districts is: In A-1 districts, dwellings or apartment houses to accommodate more than one family must have at least 5,000 square feet for interior lots and at least 4,000 square feet for corner lots; in A-2 districts, the area must be at least 2,500 square feet for interior lots, and 2,000 square feet for corner lots; in A-3 districts the limits are 1,250 and 1,000 square feet, respectively; in A-4 districts, the limits are 900 and 700 square feet, respectively.

The ordinance contains, in great variety and detail, provisions in respect of width of lots, front, side and rear yards, and other matters, including restrictions and regulations as to the use of bill boards, sign boards and advertising signs.

A single family dwelling consists of a basement and not less than three rooms and a bathroom. A two-family dwelling consists of a basement and not less than four living rooms and a bathroom for each family; and is further described as a detached dwelling for the occupation of two families, one having its principal living rooms on the first floor and the other on the second floor.

Appellee's tract of land comes under U-2, U-3 and U-6. The first strip of 620 feet immediately north of Euclid Avenue falls in class U-2, the

next 130 feet to the north, in U-3, and the remainder in U-6. The uses of the first 620 feet, therefore, do not include apartment houses, hotels, churches, schools, or other public and semi-public buildings, or other uses enumerated in respect of U-3 to U-6, inclusive. The uses of the next 130 feet include all of these, but exclude industries, theatres, banks, shops, and the various other uses set forth in respect to U-4 to U-6, inclusive.

(The court below seemed to think that the frontage of this property on Euclid Avenue to a depth of 150 feet came under U-1 district and was available only for single family dwellings. An examination of the ordinance and subsequent amendments, and a comparison of their terms with the maps, shows very clearly, however, that this view was incorrect. Appellee's brief correctly interpreted the ordinance: "The northerly 500 feet thereof immediately adjacent to the right of way of the New York, Chicago & St. Louis Railroad Company under the original ordinance was classed as U-6 territory and the rest thereof as U-2 territory. By amendments to the ordinance a strip 630 [620] feet wide north of Euclid Avenue is classed as U-2 territory, a strip 130 feet wide next north as U-3 territory and the rest of the parcel to the Nickel plate right of way as U-6 territory.")

Annexed to the ordinance, and made a part of it, is a zone map, showing the location and limits of the various use, height and area districts, from which it appears that the three classes overlap one another; that is to say, for example, both U-5 and U-6 districts are in A-4 area districts, but the former is in H-2 and the latter in H-3 height districts. The plan is a complicated one and can be better understood by an inspection of the map, though it does not seem necessary to reproduce it for present purposes.

The lands lying between the two railroads for the entire length of the village area and extending some distance on either side to the north and south, having an average width of about 1,600 feet, are left open, with slight exceptions, for industrial and all other uses. This includes the larger part of appellee's tract.

Approximately one-sixth of the area of the entire village is included in U-5 and U-6 districts. That part of the village lying south of Euclid Avenue is practically in U-1 district. The lands lying north of Euclid Avenue and bordering on the long strip just described are included in U-1, U-2, U-3, and U-4 districts, principally in U-2.

The enforcement of the ordinance is entrusted to the inspector of buildings, under rules and regulations of the board of zoning appeals. Meetings of the board are public, and minutes of its proceedings are kept. It is authorized to adopt rules and regulations to carry into effect provisions of the ordinance. Decisions of the inspector of buildings may be appealed to the board by any person claiming to be adversely affected by any such decision. The board is given power in specific cases of practical difficulty or unnecessary hardship to interpret the ordinance in harmony with its general purpose and intent, so that the public health, safety and general welfare may be secure and substantial justice done.

Penalties are prescribed for violations, and it is provided that the various provisions are to be regarded as independent and the holding of any provision to be unconstitutional, void or ineffective shall not affect any of the others.

The ordinance is assailed on the grounds that it is in derogation of section 1 of the Fourteenth

Amendment to the Federal Constitution in that it deprives appellee of liberty and property without due process of law and denies it the equal protection of the law, and that it offends against certain provisions of the Constitution of the State of Ohio.

The prayer of the bill is for an injunction restraining the enforcement of the ordinance and all attempts to impose or maintain as to appellee's property any of the restrictions, limitations or conditions. The court below held the ordinance to be unconstitutional and void, and enjoined its enforcement. 297 Fed. 307.

Before proceeding to a consideration of the case, it is necessary to determine the scope of the inquiry. The bill alleges that the tract of land in question is vacant and has been held for years for the purpose of selling and developing it for industrial uses, for which it is especially adapted, being immediately in the path of progressive industrial development; that for such uses it has a market value of about \$10,000 per acre, but if the use be limited to residential purposes the market value is not in excess of \$2,500 per acre; that the first 200 feet of the parcel back from Euclid Avenue, if unrestricted in respect of use, has a value of \$150 per front foot, but if limited to residential uses, and ordinary mercantile business be excluded therefrom, its value is not in excess of \$50 per front foot.

It is specifically averred that the ordinance attempts to restrict and control the lawful uses of appellee's land so as to confiscate and destroy a great part of its value; that it is being enforced in accordance with its terms; that prospective buyers of land for industrial, commercial and residential uses in the metropolitan district of Cleveland are deterred from buying any part of this land because of the existence of the

ordinance and the necessity thereby entailed of conducting burdensome and expensive litigation in order to vindicate the right to use the land for lawful and legitimate purposes; and that the ordinance constitutes a cloud upon the land, reduces and destroys its value, and has the effect of diverting the normal industrial, commercial and residential development thereof to other and less favorable locations.

The record goes no farther than to show, as the lower court found, that the normal, and reasonably to be expected, use and development of that part of appellee's land adjoining Euclid Avenue is for general trade and commercial purposes, particularly retail stores and like establishments, and that the normal, and reasonably to be expected, use and development of the residue of the land is for industrial and trade purposes.

Whatever injury is inflicted by the mere existence and threatened enforcement of the ordinance is due to restrictions in respect of these and similar uses; to which perhaps should be added—if not included in the foregoing—restrictions in respect of apartment houses.

Specifically there is nothing in the record to suggest that any damage results from the presence in the ordinance of those restrictions relating to churches, schools, libraries and other public and semi-public buildings. It is neither alleged nor proved that there is or may be a demand for any part of appellee's land for any of the last named uses; and we cannot assume the existence of facts which would justify an injunction upon this record in respect of this class of restrictions.

For present purposes the provisions of the

ordinance in respect of these uses may, therefore, be put aside as unnecessary to be considered. It is also unnecessary to consider the effect of the restrictions in respect of U-1 districts, since none of appellee's land falls within that class.

We proceed then, to a consideration of those provisions of the ordinance to which the case as it is made relates, first disposing of a preliminary matter.

A motion was made in the court below to dismiss the bill on the ground that, because complainant (appellee) had made no effort to obtain a building permit or apply to the zoning board of appeals for relief as it might have done under the terms of the ordinance, the suit was premature. The motion was properly overruled.

The effect of the allegations of the bill is that the ordinance of its own force operates greatly to reduce the value of appellee's lands and destroy their marketability for industrial, commercial and residential uses; and the attack is directed, not against any specific provision or provisions, but against the ordinance as an entirety.

Assuming the premises, the existence and maintenance of the ordinance, in effect, constitutes a present invasion of appellee's property rights and a threat to continue it. Under these circumstances, the equitable jurisdiction is clear. See *Terrace v. Thompson*, 263 U. S. 197, 215; *Pierce v. Society of Sisters*, 208 U. S. 510, 535.

It is not necessary to set forth the provisions of the Ohio Constitution which are thought to be infringed. The question is the same under both Constitutions, namely, as stated by appellee:

Is the ordinance invalid in that it violates the constitutional protection "to the right of prop-

erty in the appellee by attempted regulations under the guise of the police power, which are unreasonable and confiscatory?"

Building zone laws are of modern origin. They began in this country about twenty-five years ago. Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities.

Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable.

And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.

But although a degree of elasticity is thus imparted, not to the meaning, but to the application of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall.

The ordinance now under review and all similar laws and regulations must find their justification in some aspect of the police power asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delineation.

It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities.

In solving doubts, the maxim *sic utere tuo ut alienum non lædas*, which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clew. And the law of nuisances likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the power.

Thus the question whether the power to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. *Sturgis v. Bridgeman*, L. R. 11 Ch. 852, 865.

A nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. *Radice v. New York*, 264 U. S. 292, 294.

There is no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable

limits, the character of materials and methods of construction, and the adjoining area which must be left open, in order to minimize the danger of fire or collapse, the evils of overcrowding, and the like, and excluding from residential sections offensive trades, industries and structures likely to create nuisances. See *Welch v. Swasey*, 214 U. S. 91; *Hadacheck v. Los Angeles*, 239 U. S. 394; *Reinman v. Little Rock*, 237 U. S. 171; *Cusack Co. v. City of Chicago*, 242 U. S. 526, 529-530.

Here, however, the exclusion is in general terms of all industrial establishments, and it may thereby happen that not only offensive or dangerous industries will be excluded, but those which are neither offensive nor dangerous will share the same fate.

But this is no more than happens in respect of many practice-forbidding laws which this Court has upheld although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves. *Hebe Co. v. Shaw*, 248 U. S. 297, 303; *Pierce Oil Corp. v. City of Hope*, 248 U. S. 498, 500.

The inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation.

In the light of these considerations, we are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the proscribed class. It can not be said that the ordinance in this respect

"passes the bounds of reason and assumes the character of a merely arbitrary fiat." *Purity Extract Co. v. Lynch*, 226 U. S. 192, 204.

Moreover, the restrictive provisions of the ordinance in this particular may be sustained upon the principles applicable to the broader exclusion from residential districts of all business and trade structures, presently to be discussed.

It is said that the Village of Euclid is a mere suburb of the City of Cleveland; that the industrial development of that city has now reached and in some degree extended into the village and, in the obvious course of things, will soon absorb the entire area for industrial enterprises; that the effect of the ordinance is to divert this natural development elsewhere with the consequent loss of increased values to the owners of the lands within the village borders.

But the village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit within the limits of the organic law of its creation and the State and Federal Constitutions. Its governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined, not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitely fixed lines.

If it be a proper exercise of the police power to regulate industrial establishments to localities separated from residential sections, it is not easy to find a sufficient reason for denying the power because the effect of its exercise is to divert an industrial flow from the course which it would follow, to the injury of the residential public if left alone, to another course where such injury will be obviated. It is not meant by this,

however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.

We find no difficulty in sustaining restrictions of the kind thus far reviewed. The serious question in the case arises over the provisions of the ordinance excluding from residential districts apartment houses, business houses, retail stores and shops, and other like establishments.

This question involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses are excluded. Upon this question this Court has not thus far spoken.

The decisions of the State Courts are numerous and conflicting; but those which broadly sustain the power greatly outnumber those which deny it altogether or narrowly limit it; and it is very apparent that there is a constantly increasing tendency in the direction of the broader view. We shall not attempt to review these decisions at length, but content ourselves with citing a few as illustrative of all.

As sustaining the broader view, see Opinion of the Justices, 234 Mass. 597, 07; *Inspector of Buildings of Lowell v. Stokosa*, 250 Mass. 52; *Spector v. Building Inspector of Milton*, 250 Mass. 63; *Brett v. Building Commissioner of Brookline*, 250 Mass. 73; *State v. City of New Orleans*, 154 La. 271, 282; *Lincoln Trust Co. v. Williams Bldg. Corp.* 229 N. Y. 313; *City of Aurora v. Burns*, 319 Ill. 84, 93; *Deynzer v. City of Evanston*, 319 Ill. 226; *State ex rel. v. Houghton*, 164 Minn. 146; *State ex rel Carter v. Harper*, 182 Wis. 148, 157-161; *Ware v. City of Wichita* 113 Kan. 153;

*Miller v. Board of Public Works*, 195 Cal. 147, 486-495; *City of Providence v. Stephens*, —R. I.—, 133 Atl. Rep. 514.

For the contrary views see *Goldman v. Crowther*, 147 Md. 282; *Ignaciunas v. Risley*, 98 N. J. L. 712; *Spann v. City of Dallas*, 111 Tex. 350.

As evidence of the decided trend toward the broader view, it is significant that in some instances the State courts in later decisions have reversed their former decisions holding the other way. For example, compare *State ex rel. v. Houghton*, supra, sustaining the power, with *State ex rel. Lachtman v. Houghton*, 124 Minn. 226; *State ex rel. Roerig v. City of Minneapolis*, 136 Minn. 479; and *Vorlander Hokenson*, 145 Minn. 484, denying it, all of which are disapproved in the Houghton case (p. 151) last decided.

The decisions enumerated in the first group cited above agree that the exclusion of buildings devoted to business, trade, etc., from residential districts, bears a rational relation to the health and safety of the community. Some of the grounds for this conclusion are—promotion of the health and security from injury of children and others by separating dwelling houses from territory devoted to trade and industry; suppression and prevention of disorder; facilitating the extinguishment of fires and the enforcement of street traffic regulations and other general welfare ordinances; aiding the health and safety of the community by excluding from residential areas the confusion and danger of fire, contagion and disorder which in greater or less degree attach to the location of stores, shops and factories.

Another ground is that the construction and repair of streets may be rendered easier and less expensive by confining the greater part of the

heavy traffic to the streets where business is carried on.

The Supreme Court of Illinois, in *City of Aurora v. Burns*, supra, pp. 93-95, in sustaining ordinance dividing the city into eight districts, including exclusive residential districts for one and two-family dwellings, churches, educational institutions and schools, said:

"The constantly increasing density of our urban populations, the multiplying forms of industry and the growing complexity of our civilization make it necessary for the State either directly or through some public agency by its sanction to limit individual activities to a greater extent than formerly. With the growth and development of the State the police power necessarily develops within reasonable bounds, to meet the changing conditions. \* \* \*

"\* \* \* The harmless may sometimes be brought within the regulation or prohibition in order to abate or destroy the harmful. The segregation of industries, commercial pursuits and dwellings to particular districts in a city, when exercised reasonably, may bear a rational relation to the health, morals, safety and general welfare of the community.

"The establishment of such districts or zones may, among other things, prevent congestion of population, secure quiet residence districts, expedite local transportation, and facilitate the suppression of disorder, the extinguishment of fires and the enforcement of traffic and sanitary regulations. The danger of fire and the risk of contagion are often lessened by the exclusion of stores and factories from areas devoted to residences, and, in consequence the safety and health of the community may be promoted. \* \* \*

"\* \* \* The exclusion of places of business from

residential districts is not a declaration that such places are nuisances or that they are to be suppressed as such, but it is a part of the general plan by which the city's territory is allotted to different uses in order to prevent, or at least to reduce the congestion, disorder and dangers which often inhere in unregulated municipal development."

The Supreme Court of Louisiana, in *State v. City of New Orleans*, supra, pp. 282, 283, said:

"In the first place, the exclusion of business establishments from residence districts might enable the municipal government to give better police protection. Partolmen's beats are larger, and therefore fewer, in residence neighborhoods than in business neighborhoods."

"A place of business in a residence neighborhood furnishes an excuse for any criminal to go into the neighborhood, where, otherwise, a stranger would be under the ban of suspicion. Besides, open shops invite loiterers and idlers to congregate; and the places of such congregations need police protection.

"In the second place, the zoning of a city into residence districts and commercial districts is a matter of economy in street paving. Heavy trucks, hauling freight to and from places of business in residence districts, require the city to maintain the same costly pavement in such districts that is required for business districts; whereas, in the residence districts, where business establishments are excluded, a cheaper pavement serves the purpose. \* \* \*

"Aside from considerations of economic administration, in the matter of police and fire protection, street paving, etc., any business establishment is likely to be a genuine nuisance in a neighborhood of residences. Places of business are noisy;

they are apt to be disturbing at night; some of them are malodorous; some are unsightly; some are apt to breed rats, mice, roaches, flies, ants, etc. \* \* \*

“If the municipal council deemed any of the reasons which have been suggested or any other substantial reason a sufficient reason for adopting the ordinance in question, it is not the province of the Courts to take issue with the council. We have nothing to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfactory to a majority of the citizens, their recourse is to the ballot—not the Courts.”

The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to rear children, etc.

With particular reference to apartment houses, it is pointed out that the development of detached house sections greatly retarded the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite constructed

in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district.

Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizes the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accomplishments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favorable localities—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed.

Under these circumstances, apartment houses, which in a different environment would be not only unobjectionable but highly desirable, come very near to being nuisances.

If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare. *Ousack Co. v. City of Chicago*, supra, pp. 530-531; *Jacobson v. Massachusetts*, 197 U. S. 11, 30-31.

It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in con-

nection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable.

But where the equitable remedy of injunction is sought, as it is here, not upon the ground of a present infringement or denial of a specific right, or of a particular injury in process of actual execution, but upon the broad ground that the mere existence and threatened enforcement of the ordinance, by materially and adversely affecting values and curtailing the opportunities of the markest, constitute a present and irreparable injury, the court will not scrutinize its provisions sentence by sentence to ascertain by a process of piecemeal dissection whether there may be, here and there, provisions of a minor character, or relating to matters of administration, or not shown to contribute to the injury complained of, which, if attacked separately, might not withstand the test of constitutionality.

In respect of such provisions, of which specific complaint is not made, it cannot be said that the land owner has suffered or is threatened with an injury which entitles him to challenge their constitutionality. *Hurpin v. Lemon*, 187 U. S. 51, 60.

In *Railroad Commission Cases*, 116 U. S. 307, 335-337, this Court dealt with an analogous situation. There an act of the Mississippi legislature, regulated freight and passenger rates on intrastate railroads and creating a supervisory commission from enforcing against the plaintiff railroad company any of its provisions.

In an opinion delivered by Chief Justice WAITE this Court held that the chief purpose of the statute was to fix a maximum of charges and to regulate in some matters of police nature the use of railroads in the State. After sustaining

the constitutionality of the statute "in its general scope" this Court said:

"Whether in some of its details the statute may be defective or invalid we do not deem it necessary to inquire, for this suit is brought to prevent the commissioners from giving it any effect whatever as against this company."

Quoting with approval from the opinion of the Supreme Court of Mississippi it was further said:

"Many questions may arise under it not necessary to be disposed of now, and we leave them for consideration when presented."

And finally:

"When the commission has acted and proceedings are had to enforce what it has done, questions may arise as to the validity of some of the various provisions which will be worthy of consideration, but we are unable to say that as a whole the statute is invalid."

The relief sought here is of the same character, namely, an injunction against the enforcement of any of the restrictions, limitations, or conditions of the ordinance. And the gravamen of the complaint is that a portion of the land of the appellee cannot be sold for certain enumerated uses because of the general and broad restraints of the ordinance.

What would be the effect of a restraint imposed by one or more of the innumerable provisions of the ordinance, considered apart, upon the value or marketability of the lands is neither disclosed by the bill nor by the evidence, and we are afforded no basis, apart from mere speculation, upon which to rest a conclusion that it or they would have any appreciable effect upon those matters.

Under these circumstances, therefore, it is enough for us to determine, as we do, that the

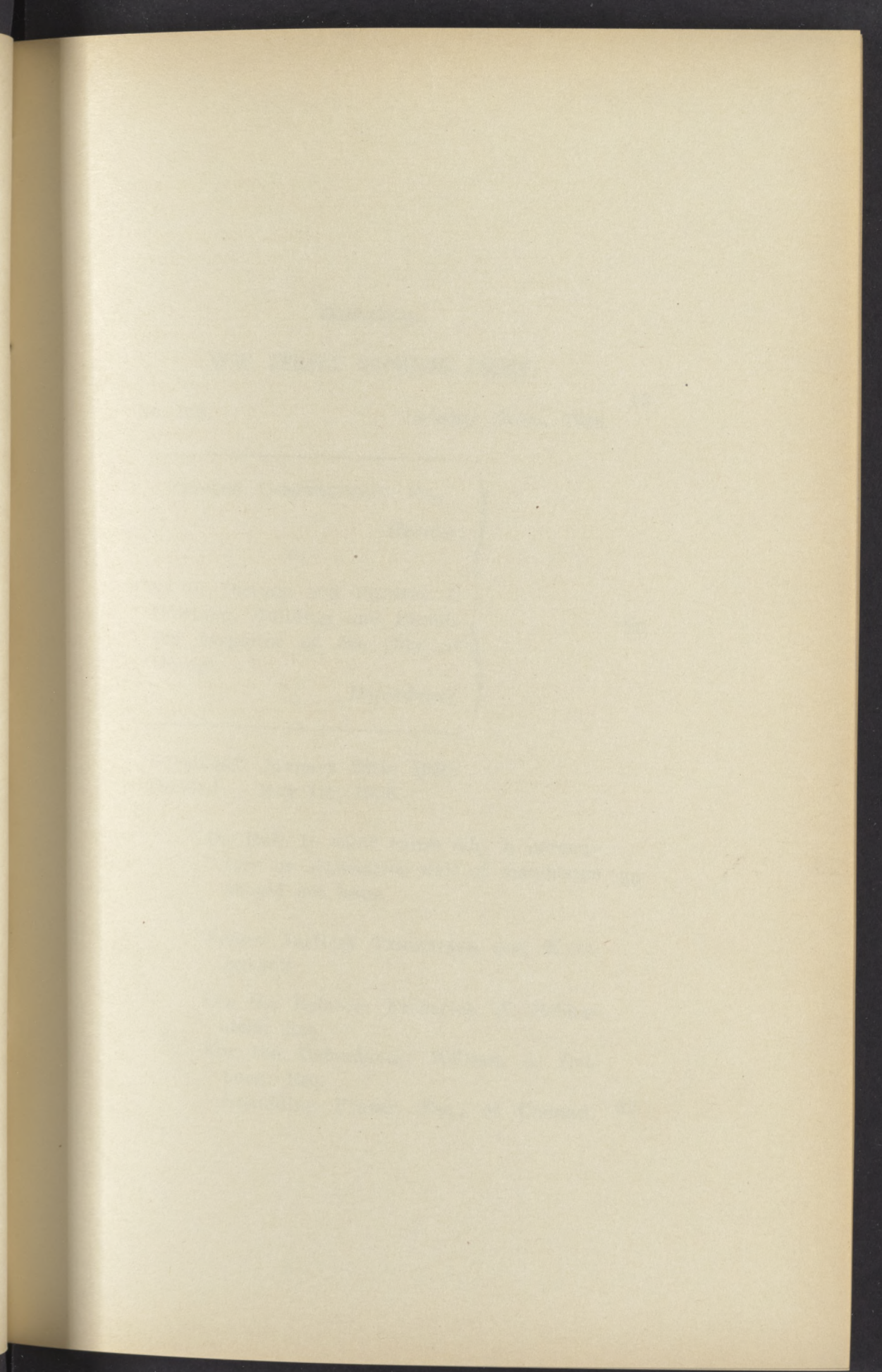
ordinance in its general scope and dominant features, so far as its provisions are here involved, is a valid exercise of authority, leaving other provisions to be dealt with as cases arise directly involving them.

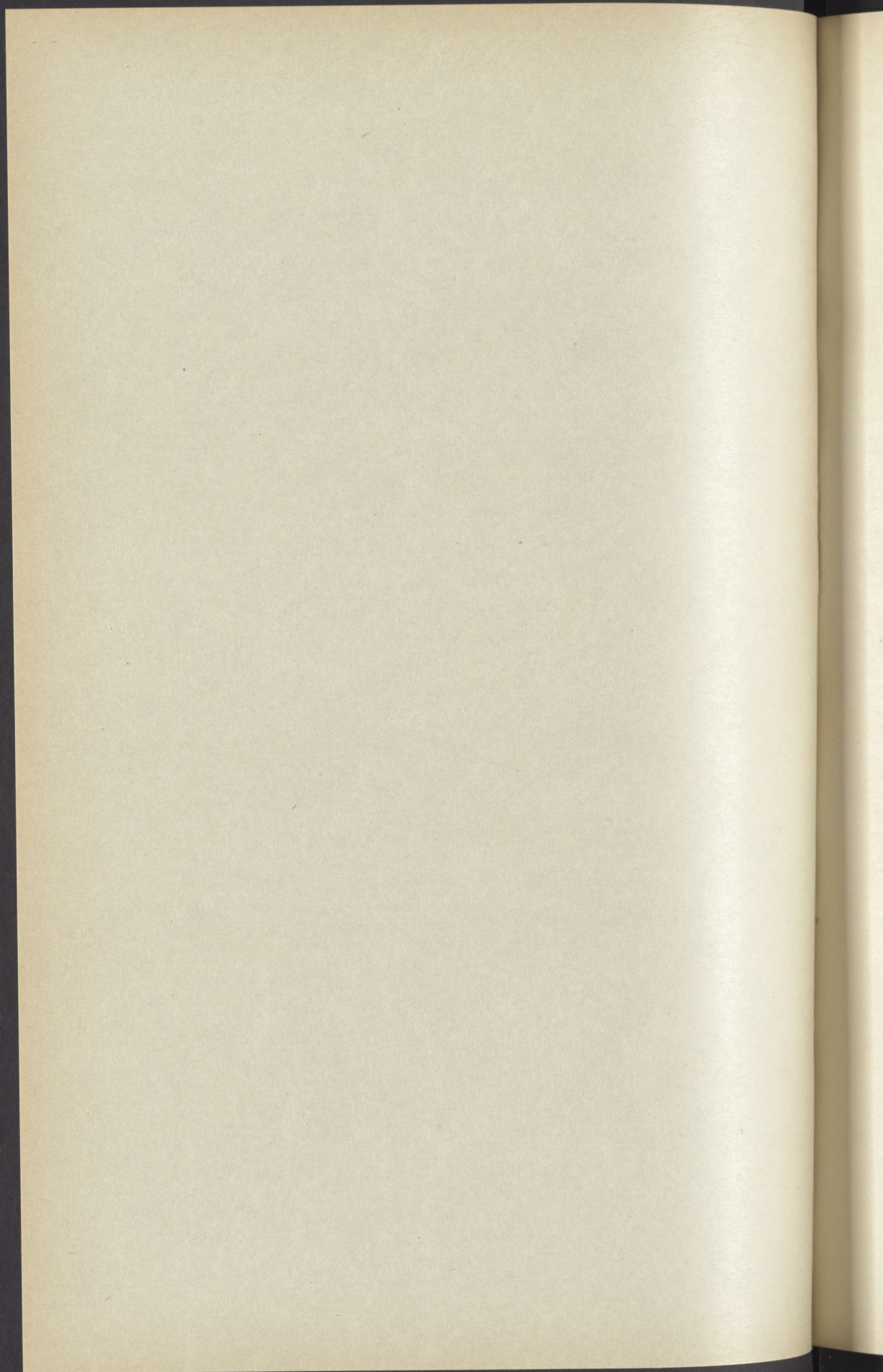
And this is in accordance with the traditional policy of this Court. In the realm of constitutional law, especially this Court has perceived the embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue.

It has preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempt to establish general rules to which future cases must be fitted. This process applies with peculiar force to the solution of questions arising under the due process clause of the Constitution as applied to the exercise of the flexible powers of police, with which we are here concerned.

Decree reversed.

Mr. Justice VAN DEVANTER, Mr. Justice McREYNOLDS and Mr. Justice BUTLER dissent.





**Opinion.**

**NEW JERSEY SUPREME COURT.**

No. 223.

January Term, 1926.

10

OXFORD CONSTRUCTION Co., <i>Relator,</i>	}	
<i>vs</i>		
CITY OF ORANGE and THOMAS J. DOWLING, Building and Plumb- ing Inspector of the City of Orange.	}	20
<i>Defendants.</i>		

Submitted: January 29th, 1926.

Decided: May 4th, 1926.

On Rule to show cause why a peremp-  
tory or alternative writ of mandamus 30  
should not issue.

Before Justices TRENCHARD and KATZ-  
ENBACH.

For the Relator: Frederick W. Schlos-  
stein, Esq.

For the Defendants: William A. Cal-  
houn, Esq.

Spaulding Frazer, Esq., of Counsel. 40

## PER CURIAM:

This is a zoning case. It is presented to this Court upon a rule to show cause why a peremptory or alternative writ of mandamus should not issue to command the City of Orange and Thomas J. Dowling, its Building and Plumbing Inspector, to issue a permit to the relator, Oxford Construction Company, for the erection of  
10 four five-story brick apartment houses. The case is submitted on a state of facts agreed upon by the parties. The facts agreed upon show that the relator is the owner of premises located at the northwest corner of Highland Avenue and Lincoln Avenue, in the City of Orange, having a frontage on Lincoln Avenue of 260.41 feet and on Highland Avenue of 116.50 feet. On October  
20 8th, 1925, the relator applied to the Building and Plumbing Inspector of Orange for a permit to erect four five-story brick apartment houses on the said lot in accordance with plans and specifications submitted. The Inspector refused to issue the permit on the ground that it would contravene the provisions of the Zoning Ordinance of the City of Orange, passed May, 11th, 1922. The agreed state of facts refers to schedules A and B annexed thereto which contains  
30 the section of the ordinance pertinent to the present controversy.

The premises of the relator are located in Residence A Zone. In this zone the ordinance prohibits the erection of any building for use other than a dwelling for one family or for one housekeeping unit. An office or studio is permitted, also a municipal building, parks, public and parochial schools, churches, farms, gardens,  
40 nurseries and green houses and under certain restrictions a private garage. Private schools,

lodges, social and community centers, recreation buildings are likewise prohibited unless the written consent to the erection of the proposed building by the owners of 80 per cent. of the frontage of all the lots within 200 feet of the property upon which it is proposed to build is filed.

Schedule B contains the following provisions: "No part of any building shall be higher than the distance it sets back from the street line of each street on which it faces, except that along one side of a corner lot such set back distance may be reduced by ten feet. No building shall exceed two and one-half stories in height, and the slope of the main roof or mansard shall not start above the middle of the height of the third story." There then follows requirements as to yards, rear yards, and side yards. 10

The relator relies upon the case of *Ignaciunas v. Risley*, 98 N. J. L. 712, and *Holding Corporation v. Hague*, 2 N. J. Mis. Rep. 74, and the later cases which have followed these decisions. As to the set back the relator relies on the case of *Heller v. Village of South Orange*, 3 N. J. Mis. Rep. 1080. Counsel for the respondents has filed an elaborate brief in which it is argued that every intendment is to be taken in favor of the validity of the ordinance and that it is valid so far as it relates to the height of the building. 30  
The respondents also contend that any regulation that reasonably tends to protect the morals, health, safety, and general welfare of a community is a valid exercise of the police power.

A large part of the brief is devoted to an effort to show that the zoning cases in this State decided by the Court of Errors and Appeals have been wrongly decided. This is not the Court to which to address such an argument. It should 40  
be addressed to the Court of Errors and Appeals.

The attempt to exclude apartment houses from a residential zone is a question which, standing alone, has been met in the various zoning cases and decided adversely to the contention of the respondents. There is no basis for the refusal on this ground of the Building and Plumbing Inspector of Orange to grant a building permit. The difficulty that we have met with in the present case is that the facts are not sufficiently set forth in the state of the case to enable us to determine whether or not the regulations in the ordinance with reference to the height of the building, requirements as to yards, rear yards and side yards, are within the proper exercise of the police power. If these provisions are general provisions applying throughout the City of Orange, then if reasonable they would be a valid exercise of the police power. If the provisions are merely designed to assist in carrying out the purpose of segregating different classes of buildings in different zones, then such provisions are unreasonable, discriminatory, and ineffective to effectuate the purpose intended. There is no reason why an apartment house should be limited as to height to two and one-half stories in one section of a city and be permitted to be built to a greater height in other sections of the same city. The facts stipulated in the state of the case are too meagre to enable us to pass upon this question in the present case. We will withhold the granting of a peremptory writ of mandamus but allow the relator an alternative writ. This will enable the relator to show upon the return of the alternative writ such additional facts as will enable the Court to determine whether the relator is entitled to a peremptory writ of mandamus or the issuing of a building permit.

New Jersey Court of Errors and Appeals

Oxford Construction Co.,  
Relator,

vs.

City of Orange and Thomas J.  
Dowling, Building and Plumbing  
Inspector of the City of Orange,  
Defendants.

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BRIEF FOR DEFENDANTS.

Facts.

The relator applied to Thomas J. Dowling, Building and Plumbing Inspector, for a permit to erect on the premises belonging to the relator at the corner of Highland Avenue and Lincoln Avenue in the City of Orange, four brick apartment houses 46x86 feet in area and five stories in height. The tract is 254.85' on its westerly side, 111.33' on its northerly side, 260.48' on its easterly side and 116.50' on its southerly side. Upon the refusal of the Building Inspector application was made to the Supreme Court for a writ of mandamus to compel the issuance of the permit, the matter having been submitted at the January term of that Court and on May 4, an opinion was handed down granting an alternative writ of mandamus on the grounds that the facts were not suf-

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ficiently set forth in the agreed state of facts to permit the Court to judge whether the provisions of the Orange ordinance, so far as they prohibit the erection of buildings of this type in the manner proposed to be erected in the application were reasonable.

10 An alternative writ was therefore granted to it, a return was made, and on motion to strike out the return permission given by the Supreme Court to consider such motion as a demurrer to the return, and an order entered sustaining the demurrer and directing the issuance of a peremptory writ. From this order sustaining the demurrer appeal was taken to this Court and the matter is before this Court to determine whether under the facts of the situation the regulations of the City of Orange are reasonable exercises of the police

20 power.

From the facts set forth in the return which as demurred to must be accepted as true, it appears that the restrictions in relation to the height of buildings, requirements as to yards, rear yards and side yards, are applicable only to the portions of the City of Orange within what is known as the residence "A" district. The height of buildings in this section of the city is limited to two and one-half stories and the slope of the main roof or mansard, shall not, under the terms of the ordinance, start above the middle of the height of the third story. Moreover the provisions of the ordinance in relation to side yards require, among other things, that the width of the court at any level shall be equal to one-half of its height at such level, which provision is clearly violated by the proposed buildings.

30 The concrete question then is whether for these violations of the ordinance a permit might reasonably be refused.

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## LAW.

**I. A municipality may reasonably divide itself into zones subject to discrepant regulations, provided the regulations are uniform throughout the respective zones.**

In its opinion in this cause the Supreme Court, in reference to the provisions of the ordinance here under consideration says: "If these provisions are general provisions applying throughout the City of Orange, then if reasonable they would be a valid exercise of the police power. If the provisions are merely designed to assist in carrying out the purpose of segregating different classes of buildings in different zones, then such provisions are unreasonable, discriminatory, and ineffective to effectuate the purpose intended. There is no reason why an apartment house should be limited, as to height to two and one half stories in one section of a city and be permitted to be built to a greater height in other sections of the same city." This statement of the law while it has support in our Courts is contrary to the weight of authority.

As was well said by Mr. Justice Katzenbach in *Dorison vs. Saul*, 118 Atl. 691 construing an earlier zoning act:

"The height of buildings in cities increases the fire hazard, especially if the fire department of the city is inadequately equipped to reach fires in high buildings. To permit a city to meet such conditions this statute was probably enacted."

It is true that the Supreme Court in the case of *Ingersoll vs. South Orange* 3 Misc. 335, laid down what appears to be the unusual rule, that a municipality might not prohibit the erection of apartment houses on the ground that they constituted an increased fire hazard but must rather increase the fire fighting facilities to keep pace with the increase of hazard which high buildings confes-

sedly create, and it would seem that under the particular facts of this case, the Court of Errors and Appeals in affirming the decision of the Supreme Court in *Ingersoll vs. South Orange* concurred in this reason.

10 The leading case in the country at large and one which has been followed in most of the jurisdictions is undoubtedly the case of *Welch vs. Swasey*, 79 N. E. 745, which originated in the Massachusetts Courts. In that decision, long before the question of zoning as such had ever arisen, the Massachusetts Courts held that a provision in an act of the Legislature of Massachusetts providing for the division of the City of Boston into two distinct districts thereafter to be set apart by a commission appointed for that purpose and establishing in the districts thus designated discrepant  
20 limitations as to the height of buildings therein, was constitutional, the Supreme Court saying:

“Regulations in regard to the height and mode of construction of buildings in cities are often made by legislative enactments, in the exercise of the police power, for the safety, comfort and convenience of the people, and for the benefit of property owners generally.”

30 The Court then cites the New York decision of *People vs. D'Oeuch* reported in 18 N. E. 862 where the limiting of heights of buildings in New York City was held to be unquestionably constitutional. Continuing,

“It is for the legislature to determine whether the public health or public safety require such a limitation on the rights of land owners in a given case.”

40 The designation of districts thus having been upheld the case was carried by the landowners to the United States Supreme Court 214 U. S. 91. Mr. Justice Peckham writing the opinion for that

Court upheld in all points the Massachusetts Courts, as will be seen from the citation of his opinion immediately following. Thus those factors of safety and convenience which seem on occasion to have been rejected by our Courts were to him dispositive of the question of the reasonableness of the regulations; especially is this true in regard to the increased fire hazard.

“We are not prepared to hold that this limitation of eighty to one hundred feet, while in fact a discrimination or classification, is so unreasonable that it deprives the owner of the property of its profitable use without justification and that he is therefore entitled under the Constitution to compensation for such invasion of his rights. The discrimination thus made is as we think, reasonable, and is justified by the police power. It might well be supposed that taller buildings in the commercial section of the city might be less dangerous in case of fire than in the residential portion. This court is not familiar with the actual facts, but it may be that in this limited commercial area the high buildings are generally of fire-proof construction; that the fire engines are more numerous and much closer together than in the residential portion, and that an unlimited supply of salt water can be more readily introduced from the harbor into the pipes, and that few women or children are found there in the daytime and very few people sleep there at night. And there may in the residential part be more wooden buildings, the fire apparatus may be more widely scattered and so situated that it would be more difficult to obtain the necessary amount of water, as the residence quarters are more remote from the water front, and that many women and children spend the day in that section, and the opinion is not strained that an undiscovered fire at night might cause great loss of life in a very high apartment house in that district. These are matters which it must be presumed were known by the

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legislature, and whether or not such were the facts was a question, among others, for the legislature to determine. They are asserted as facts in the brief of the counsel for the City of Boston. If they are, it would seem that ample justification is therein found for the passage of the statutes, and that the plaintiff in error is not entitled to compensation for the reasonable interference with his property rights by statutes. That in addition to these sufficient facts, considerations of an aesthetic nature also entered into the reasons for their passage, would not invalidate them. Under these circumstances there is no unreasonable interference *with the rights of property of the plaintiff* in error, nor do the statutes deprive him of the equal protection of the laws."

Even the case of *Ignaciunas vs. Risley*, reported for the Supreme Court in 98 N. J. L. page 712, and so often relied upon by those seeking to break down the principle of zoning recognizes that the limitation in the height of buildings is a valid regulation, Mr. Justice Katzenbach saying in his opinion:

"We are not unmindful of the fact that many of the features of this ordinance, which is a typical zoning ordinance, are permissible as a valid and proper exercise of the police power. For example, the regulation and determination of the area of yards, courts and other open spaces is proper in congested districts, and a valid exercise in the interest of public health of the public power. So that limitation of the height of buildings is a proper regulation in the interest of public safety."

If one analyses this statement of our Supreme Court it is apparent that since the regulation and determination of the area of yards, courts and other open spaces in "congested districts is permissible", another type of designation affecting districts not congested would be reasonable and that implicit in this statement of the law is the right to discriminate in regulations between different sections of the municipality. If such discrimination therefore is legitimate in relation to yards and courts, it would seem to be similarly reasonable as to the height of buildings, the limitation as to which may subserve the same general purpose of safety and health, as would be subserved by the regulation of yards and courts. Moreover, when we stop to think that in what has come to be known as the metropolitan district of New Jersey we have numerous municipal governments with jurisdiction over territory essentially alike in character of development and user, and that the lines of municipal demarcation are daily becoming more and more arbitrary so that it becomes well nigh impossible to determine from the type of development or nature of use when one municipality has been left and another entered; it would seem unreasonable to assert that a regulation adopted by one municipality is valid in that municipality because it affects the whole of it while a similar regulation designed to protect that portion of a larger municipality which is essentially like the municipality wherein the regulation has been sustained, becomes invalid because it fails to apply to the whole of a larger municipality wherein conditions in different portions are quite contrasting.

It would seem indeed that our courts are beginning to recognize the unreasonableness of such a position. This is especially so in regard to

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garages. In the case of *Schait vs. Senior*, 117 Atl. 517 a provision of a zoning ordinance excluding garages from being erected except at a certain distance from schools, libraries, and places of assemblage, was sustained. Similarly in *Max vs. Saul*, 3 N. J. Misc. 265 where a provision excluding garages from erection within ten feet of any private dwelling was sustained as reasonable. To  
 10 the same effect and in reliance upon the case of the *Ninth Street Improvement Co. vs. Ocean City*, 90 N. J. L. 107; affirmed 91 N. J. L. 703; the cases of *Hench vs. East Orange*, 2 Misc. 510; *Portnoff vs. Bigelow* 4 N. J. Misc. Repts. 539; sustained the right of the city to legislate against garages under certain conditions.

It is perfectly obvious that under present-day conditions garages must be built and maintained  
 2) in all of our municipalities and that none of the ordinances in question contemplate the absolute exclusion of garages. What they do contemplate to accomplish is the creation of zones varying in type under the different zoning ordinances, from which garages are excluded. The test in all of these cases has been whether under the facts as presented a reasonable basis existed for the exclusion. Similarly in the case of *Long vs. Scott* 4 N. J. Misc. 587 the ordinance excluded a gasoline  
 30 station from that portion of Park Avenue lying along the East Orange Parkway and again the courts sustained the exclusion; while in *Contras vs. Jersey City*, 4 N. J. Misc. 680 an alternative writ was allowed in case of a garage on the ground that the full facts were not before the Court. These decisions seem to differ in principle from certain other decisions of the type of *Finkel vs. Kaltenbach*, 4 N. J. Misc. 135, and *Williams vs. Gage*, 3 Misc. Reports 1095, were gasoline stations  
 40 in residential districts were held to be unobjectionable.

To summarize then it would seem that the New Jersey Courts had recognized the restrictions in the height of buildings as valid: that authority of the U. S. Supreme Court and other jurisdictions would indicate that such height regulations might differ for different portions of the same municipality: that the principle of varying regulations for varying parts of the same town is not only logical but has been recognized, notably in the case of garages, to be legitimate, by our courts, the later tendency being to return to the doctrine enunciated by the earlier cases and for a while departed from by our Court: that such being the case the mere assertion that a regulation does not affect the whole of the municipality is no answer to a refusal to grant a building permit for the reason which will be discussed in our next point.

**II. Every presumption is to be taken in favor of the reasonableness of the ordinance.**

The act pursuant to which the ordinance here under review was adopted provides for the regulation and restriction of the "height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes" for the purpose of "promoting the health, safety, morals or the general welfare of the community" and to that end permits the division of the municipality "into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this act". The act further provides "that all such regulations shall be uniform for each class or kind of buildings throughout each district, but

the regulations in one district may differ from those in other districts".

The act further provides in more specific language that the ordinance shall be designed to accomplish one of the following purposes: "to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements". P. L. 1924 page 324.

All of these purposes fall well within the general category known as the police power and upon him who attacks the power is the burden of showing the unreasonableness of the ordinance. "The presumption is that it is reasonable, and the burden of proving it otherwise is on the prosecutor." *Portnoff vs. Bigelow, supra, Hench vs. East Orange, supra, Long vs. Scott, supra, Neuman vs. Hoboken*, 82 N. J. L. 285, *McGonnell vs. Orange*, 98 N. J. L. 642, *Falco vs. Atlantic City*, 99 N. J. L. 19.

The rule of law here enunciated was applied in the zoning cases above cited and in the absence of proof of the unreasonableness of the zoning regulations the redress sought was denied by the courts. It is well established that the enunciation of policy is for the legislative branch of the government, the courts being confined to the determination as to whether the Legislature had the power in a given instance to enunciate such a policy. The clear line of demarcation between the functions of the Legislature and the Court's judicial power is thus stated in *Chicago, Burlington & Quincy R. R. vs. McGuire*, 219 U. S. 549.

"The principle involved in these decisions is that when the legislative action is arbitrary

and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but when there is a reasonable relation to an object within governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative consideration in dealing with matters of *police*. Whether the enactment is wise or unwise, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance."

In the case at bar as in numerous other decisions of our courts the mere statement of certain zoning restrictions without regard to surrounding physical industrial or social conditions has been deemed a sufficient compliance with this rule. It is therefore respectfully submitted that in view of the difference in opinion between our courts on certain phases of this problem and the overwhelming and daily growing preponderance of the courts of other jurisdictions there is "so earnest a conflict of serious opinion" to use the words of Mr. Justice Hughes as substantially to remove the question of the police power nature of zoning regulations as a whole from the competence of the court to pass upon in the absence of proof that the municipal authorities, which in such growing numbers have adopted ordinances of this type and which with such growing frequency have sought to establish before our courts their right to such enactments, have wilfully adopted regulations in their judgment having no connection with the police power function.

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In support of this contention, and as our last point, we pass briefly in review the development of the law of zoning, with special stress on those instances where the courts originally opposed have reversed themselves as we believe the courts of New Jersey should and eventually will reverse themselves.

10 **III. The great and growing weight of authority is in support of the zoning ordinances.**

The principle underlying zoning ordinances has been upheld in practically every jurisdiction. Even New Jersey, which has been pointed to as one of the least progressive jurisdictions in this respect, has upheld their validity in a number of cases.

20 *Cliffside Park Realty Co. vs. Cliffside Park*, 114 Atl. 797.

*Schait vs. Senior*, 97 N. J. L. 390.

*Max vs. Saul*, 3 Misc. Rep. 265.

*Eaton vs. Newark*, 3 Misc. Rep. 363.

30 The line of cleavage has always been, not whether such ordinances if involving an appropriate exercise of the police powers, are legally sustainable, but whether under a given state of facts the police powers may properly be held to be invocable. It must be admitted that thus far our Supreme Court has pronounced unfavorably in more instances than it has pronounced favorably, on the state of facts before it. The question however, except in the Nutley case and in the Ingersoll case referred to above, has not been determined by our Court of Errors and Appeals. In the former case, the decision in the higher court was based, not upon the constitutional grounds asserted  
40 in the Supreme Court opinion, but upon a finding that the Nutley authorities had exceeded the grant of power contained in the zoning law then in existence. Since that decision, a new and far more

comprehensive law, has been enacted, establishing a board of adjustment for examining into specific cases and for relaxing the ordinance provisions if no proper ground for police power regulation appears. The Nutley case is therefore no longer a precedent of binding weight, despite its frequent citation by our Supreme Court.

The Ingeroll case is likewise distinguishable. While decided under the new law, the Village of South Orange failed to avail itself of the appellate machinery provided for in law by failing to set up a board of adjustment. In that case, no proper machinery existed for testing the reasonableness of the regulation under the existing conditions since no tribunal with that function had been established. No body vested with a discretion passed upon the reasonableness or unreasonableness of the exclusion complained of, no issue of fact or law was raised and the utmost that was presented to the court was an informal stipulation containing certain conclusions but failing by far to present all the salient facts upon which such conclusions might be supposed to rest. 10  
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Moreover, as has already been mentioned in passing, while the village trustees maintained their right to exclude apartment houses on account of insufficient fire protection and their unwillingness to increase the fire equipment, it appeared in the case that apartment houses requiring such additional protection and equipment already existed and it is a grave question whether the trustees had not been guilty of a gross neglect of duty if the conditions which they alleged as a basis for invoking the police powers, actually existed. The decision then might be confined to holding that where apartment houses already existed, the coming of others could not successfully be opposed by asserting that the municipality had inadequate fire fighting facilities to cope with apartment house fires. 30  
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We therefore contend that the law has never been settled in this state in a way which would prevent this court's finding to the contrary, that apartment houses may be excluded from definite areas of the town. Although this court has in several instances pronounced against such exclusion, the rule "stare decisis" is a rule of policy and may where new conditions or a new view of old conditions renders such action advisable in the opinion of the court be departed from.

In considering this problem, new conditions must be taken into consideration. Law proper for conditions a generation or even ten years ago, needs modification to meet conditions now presented by urban over-crowding, either actually existing or reasonably to be anticipated. The attitude of the courts of New Jersey at the present time in relation to zoning ordinances, seems to be to hold their restrictions unenforceable except in those cases where a limitation resulting from the zoning ordinance, has previously been sustained under other legislation. Thus the frequency of the sustaining of the rejection of garage permits may be traced and in *Hench vs. East Orange, supra*, frankly is traced to an earlier case of similar prohibition prior to the zoning enactments. *Ninth Street Improvement Co. vs. Ocean City, supra*.

But there can be no question of changes in conditions, nor of changes in the susceptibility and sensitiveness of the normal man in the past generation. The location a generation ago or so of ill-smelling tanneries, with foul pools of water exposed to public view, on one of the main business streets of our largest city was endured for years, presumably because the citizens and probably the courts of that day did not consider it a nuisance. Would anyone today question that such an industry in such a location would be a restrainable nuisance? While our courts in *Westcott vs. Mid-*

*dleton*, 43 N. J. E. 478 (affirmed in 44 N. J. Eq. 297) held a complainant objecting to the location next to him of an undertaking establishment a man of hyper aesthetic temperament, the highest courts of California, Louisiana, Michigan, Minnesota, New York and North Dakota have held the conduct of such a business in a residential neighborhood, at least when accompanied by the storage or embalming of cadavers, or the holding of funeral services from the premises, to be essentially a nuisance, tending to the injury of the health of the community as a result of reiterated confrontation with the thought of death, and to the depreciation of neighboring property values for that reason and because of the fear, real or imaginary, of actual danger of infection.

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*Rowland vs. Miller*, 139 N. Y. 93, 34 N. E. 765;

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*Saier vs. Joy* 164 N. W. 507 (Mich.);

*Densmore vs. Evergreen Camp*, 112 Pacific 255 (Wash.);

*Osborne vs. Shreveport*, 79 So. 542 (La.);

*Wasem vs. Fargo*, 190 N. W. (N. D.) 546;

*St. Paul vs. Kessler*, 178 N. W. 171 (Minn.);

*Meagher vs. Qessler*, 179 N. W. 732 (Minn.);

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*State vs. Armor Company*, 190 N. W. 59 (Minn.);

*Brown vs. Los Angeles*, 192 Pac. (Cal.) 716.

Moreover, the growing problems of urban congestion are more and more leading the courts to appreciate that, for the preservation of the health, safety, morals and welfare of the community, its development must be, on general lines at least, controlled and its anticipated expansion made to conform to some scheme of orderly increase. To this

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end, zoning legislation, starting with the necessities of New York City, has swept the country to an extent almost unprecedented. The application of the doctrine is but a decade old and yet, within that period, the great weight of judicial opinion has swung to the propriety of such legislation. States like California, Illinois, Minnesota, originally registered as our courts are to a large extent today, have swung to the other side and have sustained the exclusion of stores from residential districts, of multi-family dwellings from one and two family area. A detailed reference to such cases would fill pages and pages. Today the courts of New Jersey, Missouri, Texas and Maryland are almost the only ones holding to the position that such restrictions are unreasonable, and as is pointed out by Mr. Edward M. Bassett in National Municipal Review for September, 1924, where the constitutionality of zoning is considered, with a large citation of supporting authorities, in Missouri, Texas and California (then opposed), the first acted without an enabling act and the two others had no provisions whereby the necessarily more or less arbitrary features of a general zoning ordinance might be judicially modified through appeal to a board similar to our adjustment board, and the reasonableness or unreasonableness of the ordinance, as affecting specific property, judicially ascertained from a direct presentation of the facts in the case.

As showing the growing tendency which we here contend, the case of *Tighe vs. Osborn*, 133 Atl. Rept. 465, Daily Record of Baltimore, April 10, 1926, is of unusual interest since in that case the Court of Appeals of Maryland sustained an ordinance regulating the issuance of permits for structures to be used for other than residence purposes and delegating to the zoning commissioners the power to determine, whether the buildings or the

proposed use of them would menace the public's health, morals or safety, and providing for an appeal from this decision to the Board of Zoning Appeals and from that body to the City Court.

It must be conceded that under the mandamus procedure used in the case at bar, and so generally adopted in our courts and formerly established prior to the supplement of 1926, P. L. 1926 pg. 526, by the decisions in *Lozick vs. Binda*, 130 Atl. 537, no proper presentation of facts can be made to the Court. With the application of a general rule unknown special conditons may operate as unfairly and as much against the public interest in specific instances as the cast iron application of non-appealable ordinances may work in private cases. Under the recent decision, therefore, of Chief Justice Gummere in *Chancellor Development Corporation vs. Senior*, 4 N. J. Adv. Rept. 633, the function of the Adjustment Board as a tribunal of review under the supplement last above cited seems to have been reestablished and the review in future of zoning ordinances would seem properly to be by certiorari and not by mandamus.

The reasons for the present attitude of the great majority of our state courts are well set forth in the opinion *Carter vs. Harper* 196 N. W. Wis.) 451, as follows:

“When we reflect that one has always been required to so use his property as not to injure his neighbors and that restrictions against the use of property in urban communities have in that the luxuries of one decade become the use to which such sections are devoted, is un-

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necessities of another, can it be said then an effort to preserve various sections of a city from intrusion on the part of institutions that are offensive to and out of harmony with the use to which such sections are devoted, is unreasonable? The present standards of society prompt a revolt against such unbecoming intrusions, and they constitute such a recognized interference with the rights of the residents of such section as to justify regulation.

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"The benefits to be derived to cities adopting such regulations may be summarized, as follows: they attract a desirable and assure a permanent citizenship; they foster pride in and attachment to the city; they promote happiness and contentment; they stabilize the use and value of property and promote the peace, tranquility and good order of the city. We do not hesitate to say that the attainment of these objects affords a legitimate field for the exercise of the police power. He who owns property in such a district is not deprived of its use by such regulations. He may use it for the purposes to which the section in which it is located is dedicated. That he shall not be permitted to use it to the desecration of the community constitutes no unreasonable or permanent hardship and results in no unjust burden."

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Courts which have sustained zoning regulations similar to those rejected by our courts in the Nutley and Ingersoll decisions include the highest tribunals of Massachusetts (*Opinion of Justices*, 127 N. E. 515; *Building Inspector vs. Stohlosa*, 145 N. E. 262; *Spector vs. Building Inspector*, 145 N. E. 265; *Brett vs. Building Inspector*, 145 N. E. 269); of Wisconsin (in the case just cited and *Holzbauer vs. Ritter*, 198 N. W. 852); of Iowa (*Des Moines vs. Manhattan Oil Co.*, 184 N. W. 823); of Kansas

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(*Ware vs. Wichita*, 214 Pac. 99); of California

(*Miller vs. Board etc. of Los Angeles*, 234 Pac. 381)  
*Zahn vs. Board*, 234 Pac. 388); *Ex parte White*  
 234 Pac. 396; of *Louisiana State vs. New Orleans*,  
 101 So. 798); of Utah, (*Salt Lake City vs. West-*  
*ern Foundry etc. Co.* 187 Pac. 829); of New York  
 (*Lincoln Trust Co. vs. Williams*, 128 N. E. 209,  
 and a host of later cases); of Minnesota (*State*  
*vs. Houghton*, 204 N. W. 569).

This last case is especially interesting as one of  
 the most recent examples of change in attitude on  
 the part of courts, already illustrated by the courts  
 of Illinois and California. In sustaining an ordi-  
 nance excluding a four-family flat building from a  
 restricted residence zone, the court said:

“We hold that a fair zoning ordinance, re-  
 sulting in the exclusion of a four-family flat  
 building from a designated residential dis-  
 trict is constitutional. *This holding is not*  
*in harmony with our earlier decisions.* It  
 is directly opposed to the result reached  
 in *State vs. Minneapolis*, 162 N. W. 477. \* \* \*  
 So far as in conflict with the view now adopt-  
 ed they are not to be followed.”

The court in this case cites essentially the list  
 above set forth, referring in a preceding paragraph  
 to the fact that “the trend of the authorities is  
 in the way of sustaining legislative restrictions”,  
 citing *Walsh vs. Swasey*, supra, and the classic  
 cases of *Hadachek vs. Sebastian*, 239 U. S. 394,  
*Reinman vs. Little Rock*, 237 U. S. 171, and  
*Cusack vs. Chicago*, 242 U. S. 526.

The *Houghton* case is not however rested on au-  
 thority alone. The court says:

“Zoning statutes are becoming common.  
 The police power, in its nature undefinable,  
 and quickly responsive, in the interest of com-  
 mon welfare, to changing conditions, author-

izes various restrictions upon the use of private property as social and economic changes come. A restriction which years ago would have been intolerable and would have been thought an unconstitutional restriction of the owner's use of his property, is accepted now without a thought that it invades a private right. As social relations become more complex, restrictions on individual rights become more common. With the crowding of population in the cities, there is an insistence upon the establishment of residential districts from which annoying occupations and buildings, undesirable to the community, are excluded. \* \* \* Finally, the exercise of the police power is legislative. Its policy is not for the courts. Only when its exercise unconstitutionally affects personal or property rights, do the courts take cognizance; and it is presumed that the legislative body investigated and found conditions such that the legislation which it enacted was appropriate. *Central Lumber Co. vs. South Dakota* 226 U. S. 157" and other cases.

Such then is the pronouncement of the Supreme Court of Minnesota, turning its back courageously on its earlier view, in the light of modern conditions, carrying with it conviction as to the reasonableness of such ordinances. When we consider how wide-spread throughout the country such regulations are, how generally the larger municipalities of this state have adopted them, how strenuously they have sought to support general sentiment of the state and country. It is true that such a sentiment is no basis for breaking down constitutional barriers, for which proceeding a method is provided in that document itself; but it is also true that the doctrine "sic utere tuo" is based, as to the question of extent of application, on the feelings of the average man.

and that such generality of acceptance indicates that the normal man approves of zoning restrictions and regards their violation as in effect nuisances. It is also true that the local legislative bodies are far better cognizant of the needs of their respective municipalities and are eager to act for their improvement and welfare. So general a movement as the zoning one must spell conviction as to the necessity for such regulation and so general a conviction can rarely, if ever, them, there can be no doubt that they reflect the arise. in the absence of actual conditions justifying it.

No review, however, of the present tendencies in zoning nor the reasons on which they are based would be complete without reference to the case of *Wulfsohn vs. Mount Vernon*, 120 N. E. 120, in which the opinion for the Court of Appeals of New York was written by Chief Judge Hiscock.

This case is so on all fours with the case at bar and so ably reviews the reason on which the great weight of opinion in the country rests that we feel no apology is required for the lengthy citation from the opinion which here follows:

“In support of such a regulation we think the zoning authorities could assume and the courts below could have found that the orderly and advantageous development of the City of Mount Vernon and the welfare of its citizens would be promoted by fundamental division of the city into districts devoted respectively to business and residential purposes under which its dwellers might establish homes in the latter districts where they would be free from the disturbing conditions and risks and deprivations of health and conditions such as light and air ordinarily incident to congested business districts; that in the residential dis-

10 tricts of Mount Vernon municipal facilities for sewage and water were liable to be overtaxed if the erection of large apartment houses was permitted; that through the construction of apartment houses whereby there would be gathered a large number of people in the space ordinarily occupied by a single family, there would result a congestion of population increasing the dangers of traffic, especially to children, and multiplying the chances that through the carelessness of some individual fire and conflagration might be started or disease communicated, and epidemics set on their way; that the advantages and value of property devoted to private residences would be impaired.

20 "If we are right that such facts could be found or assumed we do not think that a court could say as a matter of law that a zoning regulation excluding large apartment houses could not be justified. There would be no objection in creating a residential district unless there were to be secured to those dwelling therein the advantages and that immunity from risks and danger which would ordinarily be considered as the main benefits of such residences.

30 "Of course, zoning regulations are an exercise of the police power and as we approach the decision of this question, we must realize that the application of the police power has been greatly extended during a comparatively recent period and that while the fundamental rule must be observed that there is some evil existent or reasonably to be apprehended which the police power may be invoked to prevent and that the remedy proposed must be generally adapted to the purpose, the limit upon conditions held to come within this rule has been greatly enlarged. It is not limited to regulations designed to promote public health, public safety or to the suppression of what is offensive, disorderly or unsanitary but extends to so dealing with conditions which

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exist as to bring out of them the greatest welfare of the people by promoting public convenience or general prosperity. *Bavon vs. Walker*, 204 U. S. 311, 17-18.

"Being designed to promote public convenience or general prosperity as well as public health, public morals or public safety the validity of a police regulation must depend upon the circumstances of each case and the character of the regulation for the purpose of determining whether it is arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose.

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"*C. B. & Q. Ry. vs Drainage Commrs.* 200 29 U. S. 561. The field of regulation constantly widens into new regions. The question (of regulation) in a broad and definite sense is one of degree. Changing economic conditions temporary or permanent may make necessary or beneficial the right of public regulation.

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"*Peo. ex rel. Durham Realty Corp. vs Fetra*, 230 U. S. 429; affirmed in principle—257 U. S. 665. While the validity of police regulation certainly is not to be rested upon popular opinion it has been said that it has been 'put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.' (*Noble State Bank vs. Haskell*, 219 U. S. 104, 575.

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"Acting in accordance with these general principles courts on the whole have been consistently and sensibly progressive in adjusting\*the use of land in thickly populated districts to the necessities and conditions created by congested and complex conditions by upholding as a constitutional exercise of the police power zoning ordinances passed under state authority to regulate the use of land in urban districts. What was once a matter of voluntary submissions to restrictive covenants in grants has become a matter of com-

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pulsory obedience to ordinances having the force of statutes. It has come about that 40 states have passed laws authorizing zoning ordinances which in one form and another had, in January, 1925, been adopted by 320 municipalities. Commencing, generally speaking, where restrictive covenants commonly stopped with the exclusion from residential districts of factories and business buildings they have developed until as in the present case they create residential districts in a large sense limited to private dwellings as distinguished from hotels and apartment houses. Thus far these regulations have been sustained as being conducive to public health, safety and morals. With few exceptions courts have not been ready to say that they might be sustained merely because they preserved the aesthetic appearance of a private residential district and prevented its appearance from being blotched by the erection of some incongruous structure whereby the value of all neighboring property was impaired. The Supreme Court of the United States has, however, gone so far as to approve in substance the views of the Massachusetts Supreme Court that aesthetic considerations might be considered as auxiliary of what thus far have been regarded by the courts as more effective and sufficient reasons.

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"Welsh vs. Swasey, 193 Mass. 364:  
"Welch vs. Swasey, 214 U. S. 91, 108.

"In attempting to apply all of these principles to the present case we deem it unnecessary to consider the proposition that zoning authorities may establish residential districts. This court has so definitely approved that proposition that we may take its decision as a starting point in the consideration of the further question now before us.

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"Lincoln Trust Co. vs. Williams Bldg. Corp., 229 N. Y. 313.

“Having the power as we thus assume to establish residential districts it seems to us that the zoning authorities of Mount Vernon had the power to make such classification really effective by adopting such regulations as would be conducive to the welfare, health and safety of those desiring to live in such a district and enjoy the benefits thereof as we ordinarily conceive of them. Outside of large cities where more or less congestion is inevitable, we ordinarily think of a residential district as devoted to private homes rather than to commercial buildings. Such was apparently the character of the territory here involved before the zoning regulations were adopted. The primary purpose of such a district is safe, healthful and comfortable family life rather than the development of commercial instincts and the pursuit of pecuniary profits. Such life goes on by night as well as by day. It includes children as well as people of mature judgment and is housed in buildings which are not ordinarily of that character most designed to resist conflagrations and where fire protection is scantier and less effective than it would be elsewhere.

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“*Welch vs. Swasey*, 214 U. S. 91, 107

“It seems to us quite in accordance with the decisions and principles to which we have referred that zoning authorities should have the right in a residential district to promote these purposes and to protect the people desiring to enjoy these conditions by excluding big apartment houses like the one proposed by appellant whereby the congestion and dangers of traffic on streets where children might be, and the dangers of disease and fires would be increased to say nothing of other things such as the destruction of the character of the district as a residential one and the impairment in value of property already devoted to private residences.

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“This view has been taken by the courts

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of several states and to it we give our adherence, notwithstanding the fact that courts of other states have decided otherwise.

10 "In re Opinion of Justices,, 234 Mass. 597; *Brett vs. Building Commrs.* (Mass. Sup. Ct.) 145 N. E. 265; *Spector vs. Building Inspector* (Mass. Sup. Ct.) 145 N. E. 265; *Windsor vs. Whitney*, 95 Conn. 357; *De Moines vs. Manhattan Oil Co.* 193 Ia. 1096; *Miller vs. Board of Pub. Works* (Cal. Sup. Ct.) 234 Pac. 381; *Ware vs. City of Wichita* (Kan. Sup. Ct.) 234 Pac. 978; *Kahn Bros. vs. Youngstown*, 25 Ohio N. P. (N. S.) 2; *Peo. vs. Harper*, 182 Wis. 148; *State vs. New Orleans*, 154 La. 271.

20 "In addition we think that this view was impliedly adopted in the case of *People ex rel. Riverside Realty Co. vs. Kleinert* (237 N. Y. 580) decided by this court without opinion and wherein a writ of error was dismissed by the supreme court by decision rendered June 8, 1925.

"It is not an effective argument against these ordinances, if otherwise valid, that they limit the use and may depreciate the value of appellant's premises. That frequently is the effect of police regulation and the general welfare of the public is superior in importance to the pecuniary profits of the individual. *Spector vs. Building Inspector* (Sup. Ct. Mass.) 145 N. E. 265, 267.

30 "But even if it should be thought that zoning authorities would not have the right to protect the health, safety and welfare of those desiring to live in a residential district by excluding apartment houses, and which power of exclusion if possessed would give the right to restriction, it seems to us quite clear that they would have the right to regulate the construction of apartment houses as has been done by the zoning regulations now presented to us for consideration. *These regulations restrict the height of an apartment house and prescribe the open area which*

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*shall surround it.* It is to be borne in mind that there is nothing otherwise restricting the size of such a building. While in the present case the desire is to erect one on a lot of somewhat limited dimensions there is no legal or practical bar which would prevent a person from combining two or three lots and putting up an apartment much larger than the one which appellant desires to erect. The zoning authorities had the right to consider the different possibilities of apartment house construction and make general rules which would govern them. When we consider this we do not think the restrictions which have been adopted can be said as matter of law to be so unreasonable that they exceed the limits of discretion imposed in the zoning commission and approved by the courts below. *All of the reasons which we have given tending to sustain the authority of the zoning commission to exclude apartment houses from such a residential district apply with even more force to the restrictive provisions regulating height and air space. The open spaces not only tend to minimize the danger of fire to adjoining buildings and thus a spreading conflagration, but they also afford a greater opportunity for access by fire departments to a burning building and thus increase the possibility of successfully stopping a conflagration before it spreads to other buildings.*

“Then it seems to be urged that an arbitrary discrimination is displayed in the matter of setbacks and rear yards between apartment houses and other buildings, all located in the same district. When we keep in mind that while apartment houses may be constructed with a height of five stories in A residential districts while other buildings are restricted to a height of two and one-half stories and that all non-residential buildings other than apartment houses and hotels are subject to regulations calling for open rear yards and set-backs of some extent, we think that it can-

not be said as matter of law that the zoning authorities acted arbitrarily in making the differentiation which they did between apartment houses and other buildings permitted in A and B residential districts. An examination of the zoning regulations shows that the other buildings permitted in A residential districts other than one-family residences were of such an entirely different character than a large apartment house that it seems obvious that different regulations might properly be prescribed for the others. This particular proposition of appellant's is presented for him most favorably by the provisions allowing the erection in B residential districts of hospitals and sanatoriums for non-contagious diseases, dispensaries and charitable institutions except correctional institutions, and public and semi-public buildings. We think, however, that in the case of these buildings there was a clear basis for difference in regulations. Their height was very limited, the erection of these institutional buildings we know, as a matter of common observation, would be limited. <sup>1</sup> Observation and watchfulness for contagious diseases would be much greater and more systematic than in an apartment house separated into the occupation of many different families and the probability of fire in one of these institutions or in a public building usually not occupied at night would be much less than in a building which was subject to accidents arising from the carelessness of one of a great number of people and not apt to be detected by any systematic watchfulness.

"In conclusion it is to be kept in mind that appellant's proposed building violates three different regulations—the one providing for open back yards, for set-backs of 50 feet in A residential districts and of 25 feet in B residential districts. In our opinion these provisions are so distinct and severable that one regulation might survive even though oth-

ers did not. Therefore, appellant can only succeed by establishing as matter of law that each of these regulations is so arbitrary and unreasonable as to be invalid. It would not be enough for him to establish for instance that a set-back of 50 feet on a large apartment house such as he proposes to erect is arbitrary and unreasonable, but he must go further and establish that a set-back even of 25 feet is invalid because of its arbitrary and unreasonable character. If we have been right in our reasoning it cannot be held as matter of law that any of these regulations are so arbitrary and unreasonable as to be invalid. But certainly it seems to us that a requirement of 25 feet of open space between an apartment house such as the one proposed and adjoining property cannot be said to be an unreasonable protection against some of the dangers which we have referred." 10

For the foregoing reasons it is respectfully submitted that the demurrer herein, should be overruled and the writ of mandamus denied. 20

Respectfully submitted,

WILLIAM A. CALHOUN,  
Attorney for and of Counsel  
with the Defendants,

SPAULDING FRAZER,  
Of Counsel.

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## New Jersey Court of Errors and Appeals

OXFORD CONSTRUCTION Co.,  
*Relator-Appellee,*

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vs.

CITY OF ORANGE and THOMAS J.  
DOWLING, Building and  
Plumbing Inspector of the  
City of Orange,  
*Defendants-Appellants.*

### BRIEF FOR RELATOR-APPELLEE

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#### Facts

The facts as set out in the brief of the defendants are correctly stated with the exception that it might be well at this point to refer more fully to the opinion of our Supreme Court. The state of the case as presented to the Supreme Court only contains that part of the zoning ordinance of the City of Orange which has reference to Residence A Districts. It would not appear from that part of the ordinance that apartment houses were permitted in any other part of the city.

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“OPINION: The attempt to exclude apartment houses from a residential zone is a question, which, standing alone, has been met in the various zoning cases and decided adversely to the contention of the respon-

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10 dents. There is no basis for the refusal on this ground of the building and plumbing inspector of Orange to grant a permit. The difficulty that we have met with in the present case is that the facts are not sufficiently set forth in the state of the case to enable us to determine whether or not the regulations in the ordinance with reference to the height of the building, requirements as to yards, rear yards and side yards are within the proper exercise of the police power. If these provisions are general provisions applying throughout the City of Orange, then if reasonable, they would be a valid exercise of the police power. If the provisions are merely designed to assist in carrying out the purpose of segregating different classes of buildings in different zones, then such provisions are unreasonable, discriminatory and ineffective to effectuate the purpose intended. There is no reason why an apartment house should be limited as to two and one-half stories in one section of the city and be permitted to be built to a greater height in other sections of the same city."

30 An alternative writ was allowed and the defendants made return which contained a *complete* copy of the zoning ordinance. The ordinance disclosed that only one family houses, recreation buildings, public and parochial schools, churches, parish houses, Sunday schools and green houses, none of which to be more than two and one-half stories were permitted to be erected in Residence A District. *No apartment houses of any height were permitted under such terms.* Only the fore-  
40 going and two family houses, public buildings and

hospitals under certain conditions, no building to be higher than three stories were permitted in Residence B District. No apartment houses of any height were permitted. The foregoing and apartment houses, tenements, hotels and lodging houses not exceeding six stories are permitted in Residence C District. It is not necessary to point out what buildings are allowed in business districts, the next classification, or in the industrial districts, the last classification. The set back as provided in the ordinance is the height of the building in Residence A District, one-half the height of the building in Residence B District and one-quarter of the height of the building in Residence C District. The rear yards and side yards are also different for each district. Obviously the return disclosed those facts which the Supreme Court desired. It showed that while apartment houses, no matter of what height, were excluded from Residence A and Residence B Districts, they were, nevertheless, permitted in the other districts of the city. It further showed that the provision as to height and yard spaces were not reasonable or uniform and were designed merely to assist in carrying out the purpose of segregating different classes of buildings in different zones. On this return, relator-appellee moved for a judgment for a peremptory writ. To permit the defendant-appellants to present this matter to this court, relator-appellee consented to file a demurrer so that the order sustaining the demurrer might be appealed. It is a fact that the zoning ordinance prohibits entirely apartment houses from Residence A and Residence B Districts, and also that provisions contained in the ordinance concerning height, yard spaces or set backs disregarded apartment houses for the obvious reason that the framers of this ordinance

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intended to prohibit apartment houses entirely from Residence A and Residence B Districts. In Residence C District, apartment houses of not more than six stories are permitted. The plans of the relator-appellee conform to all the requirements for an apartment house that might be erected in Residence C District, except as to set  
 10 back. It is a fact that the permit was denied, not because of any height regulation, set back regulation or open yard spaces regulation, but because it was an apartment house. The agreed state of facts in this matter contains a stipulation that the *only reason* for the refusal of the permit was the fact that the *area was zoned against* and for *no other* reason. This question, therefore, cannot be raised, first, because there  
 20 are no regulations in the ordinance governing apartment houses in Residence A District, and secondly, because of the stipulation that the issuance of the permit was refused because the premises of the relator-appellee was *zoned against* and for *no other reason*.

## LAW

30 **I. Decisions from other States must be read with one eye on the constitution of that State.**

The first point raised by the defendants in their brief is that a Municipality may reasonably divide itself into Zones subject to discrepant regulations providing the regulations are uniform throughout the respective zones. We cannot subscribe to that statement of the law. The defendants in their brief do not try to support this  
 40 statement of the law, but frankly admit it is not

the law of this state, but that it has the weight of foreign authority. Particular stress is laid upon the decision in the Massachusetts Courts. It might be well to point out here that the Constitution of the State of Massachusetts was specifically amended to permit the limiting of buildings "according to their use or construction to specified districts of cities and towns." Amendment #60. The Court of Massachusetts *in re* 10

*Opinion of Justices*, 127 N. E. at 529,

cited by the defendants, says:

"Enhancement of the artistic attractiveness of the city or town \* \* \* can be considered not as the main purpose to be obtained, but only as subservient to another or other main ends regarded as sufficient under Amendment #60 and the general principles governing the exercise of the police power." 20

New Jersey has no Amendment #60. It is not wise or advisable to take reported cases of sister States as any authority unless it can be shown that their State Constitution contains provisions similar to those provisions of our State Constitution which protect the relator-appellee. 30

## II. Effect upon public health, safety, and welfare, only "safe test."

Defendants next cite the case in this court of *Ignacunas v. Risley*, 98 N. J. L. 712, and point out that Justice Katchenbach in the 40

opinion for the Supreme Court stated that the regulations and determinations of the area of yards, courts and other spaces is proper in congested districts and a valid exercise of the police power. Implied in this statement of the law they say is a right to discriminate in regulations between different sections of the Municipalities.

- 10 This reason is not impressive or logical. The fact that the district was congested would be the basis for the reasonable regulation as to height, etc. Certainly in a district not congested there is no need for such regulations and such attempted regulations would obviously be improper and unreasonable.

- 20 The true test as stated by this Court on the appeal of the *Nutley* case is "will the erection and user of an apartment house upon the lot of relator-appellee constitute a menace to the health or the safety of the people of Orange or to the general welfare of the Municipality"?

This case is square within the *Nutley* case. As it was said by this Court in the *Nutley* case:

- 30 "The legislature in its grant of power to the several Municipalities of the State to regulate the use to which a property owner may put his property even to the extent of prohibiting its use for a particular purpose limited that power by the provision of the Statute that such regulation must be designed to promote the public health, safety and general welfare."

- 40 The 1924 Act of the Legislature passed since the determination of the *Nutley* case in this court, still provides that it must be for the purpose of

promoting health, safety, morals or the general welfare of the community.

If, as was said in the *Nutley* case, the ordinance in its application to the property of any particular owner does not come within the limitation of the statute to that extent, it is without legal justification and void. *The narrow question in this case as in the Nutley case is "will the erection of an apartment house upon the lot of relator-appellee constitute a menace to the health or the safety of the people of Orange or to the general welfare of the community."* The question of whether an apartment house of more than two and one-half stories would be a menace whereas one of two and one-half stories would not be, is not before this Court. As has been pointed out, the ordinance does not permit the erection of *an apartment house of any size* in a Residence A District. 10 20

That the mere erection of this building regardless of the use to which it may afterwards be put is likely to be injurious to the health or safety of the residents of the City of Orange is rebutted by defendants-appellants. The defendants admit the reverse of this proposition by permitting apartment houses of six stories in height in other parts of the city and not much more than a stone's throw from the premises in question. Common experience and common sense demonstrate the unsoundness of any statement that the mere erection of an apartment house is a menace. 30

### III. Ordinances only sustained when kept within the "safe test."

The other cases in New Jersey which the defendants cite all deal with garages. We agree with 40

these cases in principle. They were reasonable regulations of the size and location of garages in view of the obvious and recognized possibilities of incidental dangers if unreasonably and unduly near churches, public libraries or the like where large bodies of citizens habitually congregate. They are not in point. There is nothing inherently harmful or incidently harmful in an apartment house.

#### IV. Regulation as to yard space diametrically opposed to reason.

The ordinance provides for *less yard space in congested areas* than in the residential areas. In Residence A District as has been before stated, the provision for a set back of a distance equal to the height of the building and a yard space of at least twenty-five feet, in Residence B District, a set back of a distance of one-half the height of the building, the same yard space, and in Residence C District a set back equal to one-fourth of the height of the building and yard space of one-third of the height of the building. *The back yard spaces are also less in congested districts.* The city fathers in their wisdom must surely have felt that "To him that hath shall be given." If the regulations were reasonable because of congestion, certainly the open spaces should be larger in the congested districts than in the uncongested districts. On the face of it, it is unreasonable and cannot be supported, even if defendants are correct in their contentions. Such an unreasonable regulation is void as violative of the rights of private property guaranteed to the relator-appellee by the Federal and State Constitution. Article 1 of Section 16 and Article 4 of Section 8

of the State Constitution provide that private property shall not be taken for public use without just compensation. Section 1 of the 14th Amendment of 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.

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**V. If ordinance is plainly unreasonable it is duty of Court to declare it void.**

We pass to the next point of defendants' brief, that every presumption is to be taken in favor of the reasonableness of the ordinance. As an abstract proposition that is true. The act as pointed out by defendants' brief provides for the regulation and restriction of the height, number of stories and size of buildings and other structures and land for trade industries, residences or other property for the purpose of promoting health, safety, morals or the general welfare of the community and further provides that all such regulations shall be uniform for each class or kind of building throughout each district. It is urged that the purposes as set forth in the Act are within the police power and that the presumption is that they are reasonable. This may be true, but that presumption is immediately rebutted by the terms of the ordinance itself. It does not regulate the height, open spaces, yards of apartment houses in Residence A and B Districts, but prohibits them entirely. If apartment houses were permitted in Residence A and B Districts but were limited to height, the presumption might throw the burden on the relator-appellee of showing its unreasonableness, but not where it prohibits apartment

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houses entirely for reasons openly aesthetic in purpose. And again any presumption that the ordinance is reasonable in prohibiting the apartment houses in Residence A and B Districts is rebutted by permitting them in other districts.

10 This court in the Nutley case on such a showing placed the burden on the defendants to show on what theory it could be said that the restraining of the relator from erecting a combined store and dwelling house on his property would tend to promote the general welfare of the community. In the Nutley case, the defendants set up as their reasons that people in their homes need quietude and that stores bring noise and that the sidewalks and road ways near stores would be more dangerous for children and that stores would create litter and dust and that it might start a blight area.

20 In the zoning cases following in the Supreme Court and in this court, the defendants have tried to justify the enforcement of ordinances of this type on similar grounds, noticeably the danger of fire. These reasons have been deemed by the Supreme Court and by this Court to be insufficient. The defendants, however, in this case, do not attempt to set up any reason whatever to justify the proposition that the regulation is designed to promote the public health, safety and

30 general welfare. One of the cases cited by the defendants is the case of

*McGonnell v. Orange*, 98 N. J. L. 642.

To cite from that case

40 “Every intendment is made in favor of their (ordinances) reasonable character and to support them a construction will be placed on them which will make them rea-

sonable rather than unreasonable. But the question of their unreasonable character is for the court which will not hesitate to declare them void if plainly unreasonable. This is familiar law, acted upon in a multitude of cases in many of which the court confined its action to the particular part of the ordinance shown to be unreasonable, leaving the rest to stand." 10

The Court then goes on to cite the opinion of Chief Justice Beasley in this court:

"If this by-law (ordinance) be subject to this imputation (that it is unreasonable) there can be no doubt that it would be the duty of this court to pronounce it a nullity." 20

#### VI. New Jersey's view on zoning in force in many jurisdictions.

The last point made by defendants that the great and growing weight of authority is in support of zoning ordinance is merely interesting and does not help for a decision. As has been pointed out, the Constitutions of the different states differ. But even so the statement that the great weight is in support of zoning ordinance cannot be passed unchallenged. 30

*Spann v. Dallas, Texas*, 225 S. W. 517;  
*Hill v. Stone*, 236 S. W. 234;  
*City of Dallas v. Burns*, 250 S. W. 117;  
*State v. McKelvey*, Missouri;  
*People v. Chicago*, 261 Ill. 16;  
*Sign Works v. Training School*, 249 Ill. 436; 40

*Gunning Company v. St. Louis*, 235 Missouri 200;  
*Willison v. Cooke*, 130 Pac. 828, Colorado case;  
*State v. Edgecomb*, 189 N. W. 617, Nebraska.

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**VII. Right to use of land cannot be denied unless it invades the "safe test," the public health, safety or welfare.**

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It is settled that with the right of ownership and possession goes the right to use and enjoy and dispose of the property owned. The right of private property is subject to the police power of the state and must yield to such measures as are designed to promote the public health and safety and general welfare of a community. But the police power is based upon public necessity and only public necessity can justify its use. It should never be used unless it is clear that the object to be attained is so essential to the public health, safety and welfare as to fully justify its exercise. The question before the Supreme Court in this case is whether or not the provisions of the ordinance which prevent the relator from using its property as an apartment house are necessary for the health and safety of the public of Orange, for unless the use of said property for an apartment house reasonably endangers or threatens the public health or welfare the abridgement of its contemplated use is an invasion of the inherent and constitutional rights of the relator-appellee. What makes it reasonably necessary to exclude apartments in one district and allow them in another? The height question cannot be raised. As has been said the agreed state of facts

contain the statement that the permit was refused because the area was zoned against and for no other reason.

**VIII. Proposed apartments comply with requirements of Apartment Zone and State Tenement Law.**

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The apartments proposed to be erected as to height and yard space fulfill the requirements for an apartment in Residence C District, the first district in which apartments are permitted. They are five stories in height and in Residence C District a height of six stories is allowed. The frontage of the relator's property is 254.85 feet. The frontage of the building is 4x46 or 184 feet, leaving yard space of 70 feet. The yard space required of the apartments in Residence C District is one-third in height. The plans show that the required space will be between the buildings. The plans, however, are not in the state of the case because of the agreed state of facts. One of the buildings to be erected is on the corner of the plot. The buildings are 86 feet deep leaving an open yard space in the rear extending from 25 feet at one point to 30 feet in another. The set back provision of the zoning ordinance in this case is ineffective under the case of

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*Eaton v. South Orange*, 3 N. J. Misc. Reports 957.

It is also a fact that the plans for these apartment houses have been approved by the New Jersey Tenement House Board, showing conformity with the State Tenement law as to percentage of area to be built upon. This fact does not appear

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in the state of the case because of the agreed state of facts. The practice is and indeed the requirements of all Municipal Building Departments are that the owner must have the approval of the Tenement House Board before submitting the plans to the building inspector and the court in this case can take judicial notice of that practice although the fact does not show in the case because of the agreed state of facts.

### CONCLUSION

We are not unmindful of the fact that some property owners of our State and some newspapers have openly expressed disapproval of the decision of this Court in the *Nutley* case and the cases based on that decision. Even the defendants insist this Court should follow Minnesota and reverse itself because other states are doing so. Such an argument has no place in this forum. The right of private property has been clearly defined and the line drawn between what can be taken under the police power and what must be acquired by right of eminent domain. If the City of Orange wants a set back the way is open. The property for the set back may be condemned under the Home Rule Act and the damages awarded. Many Municipalities have done so, the assessment for benefits equalling the awards for damages, the Municipality thus obtaining a set back without financial outlay. If the people desire to live in a community of only one-family houses, the way is open by voluntary deed restriction. There is an aesthetic and cultural side of Municipal development which may be fostered within reasonable limitations. New Jersey does not deny that. We lay out and embellish parks, public squares,

beaches, public resorts and boulevards leading thereto. We plant shade trees, open new streets and widen old ones. Establish set backs or building lines, acquire water fronts, build community centres and authorize and encourage Municipal zoning. But when in order to accomplish these things it becomes necessary to invade private rights, we pay for what we take. The cheap short cut offered by an interpretation of the police power that is little short of communistic does not suffice to induce us to nullify the guarantees of our written constitution. 10

Withhold beginnings:

*Boyd v. U. S.*, 116 U. S. at 635.

McKenna, J.:

“Who can know to what end they will conduct.” 20

*Block v. Hirsh*, 256 U. S. at 160.

“Such legislation may invade one class of rights today and another tomorrow.”

*Spann v. Dallas, supra.*

South Broad Street, Newark, a few years ago consisted of only one-family residences. Today it is all business and values have increased a hundred fold. Suppose this section had been zoned against. Our State is growing tremendously. People must be housed. The one-family house in a restricted neighborhood cannot take care of the masses. They cannot afford such luxury and are forced to the multi-family houses. They are in the majority. To restrict a locality to one-family houses under this ordinance is vicious class legislation for the benefit of the few and against the 30 40

welfare of the masses. In Orange under this ordinance, one-half of the city is restricted to one-family houses. See map attached to ordinance. About one-fifteenth of the city is allowed to apartment houses and the balance for industrial and business purposes. Of course the apartment may be built in the factory and industrial districts with little open area or set back. Can it be said with any sincerity that this ordinance is conducive to the general welfare of the community? Certainly not. Relator's apartments comply with all requirements as to rear and side yards and height if the district was a Residence C District. The permit was denied only because the district was a Residence A District. The *Nutley* case controls and there is no reason for this Court to reverse itself. The judgment of the Supreme Court in sustaining the demurrer should be affirmed.

Respectfully submitted,

FREDERIC W. SCHLOSSTEIN,  
*Attorney for Relator-Appellee.*

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(1941)

