INDEX.

Notice of Appeal to Court of Errors and Appeals.

(Filed Dec. 2, 1926.)

NEW JERSEY SUPREME COURT.

ROBERT REALTY COMPANY,
Relator,

vs.

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

Grounds of Appeal.

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

TAKE NOTICE that the City of Orange and Thomas J. Dowling, appeal from the order of the Supreme Court of the State of New Jersey made the 2nd day of December, 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:

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.

Respectfully,

WM. A. CALHOUN,
Attorney of Defendants.

Dated, December 2nd, 1926.

Notice of Application for Writ of Mandamus.

(Filed January 19, 1926.)

NEW JERSEY SUPREME COURT.

ROBERT REALTY COMPANY,
Relator,

vs.

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

TO THE CITY OF ORANGE:

TAKE NOTICE that on Saturday, the sixteenth day of January, 1926, at ten 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 permits for the erection of three four-story brick apartment houses as set forth in the attached petition and affidavit.

FREDERIC W. SCHLOSSTEIN,
Attorney for Relator

Petition for Writ of Mandamus.

(Filed January 19, 1926)

NEW JERSEY SUPREME COURT.

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

The petition of the Robert Realty 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:

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:

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 on the westerly side of Lincoln Avenue at the southeasterly corner of lot now or lately belonging to Margaret S. Griffin and John H. Griffin, Jr., and thence running along said westerly line of Lincoln Avenue southwesterly one hundred fifty feet to the corner of Mountainview Avenue; thence westerly along said Mountainview Avenue two hundred sixteen and fifty-seven hundreths feet; thence northwesterly and parallel with said Lincoln Avenue one hundred fifty feet to the southwesterly corner of said land of said Griffin; and thence easterly along their line two hundred sixteen and fifty-sevtn hundredths feet to the point and place of Beginning.

Being known as No. 73 Lincoln Avenue.

2. Petitioner is desirous of erecting on said premises three brick apartments four stories in height, the size of the building at the corner of Lincoln Avenue and Mountainview Avenue to be sixty feet by one hundred four feet and six inches and to cost One Hundred Thousand Dollars; the size of the next building on Lincoln Avenue seventy-five feet north of Mountainview Avenue to be seventy feet and six inches by eighty-one feet and to cost Eighty Thousand Dollars; and the third one on the north side of Mountainview Avenue, one hundred twenty-six feet west of Lincoln Avenue to be seventy-three feet and six inches by one hundred sixteen feet and six inches and to cost One Hundred Eleven Thousand Dollars.

3. On January 6, 1926, petitioner applied to Thomas J. Dowling, Building and Plumbing Inspector of the City of Orange, for permits 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 Buildings, 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 January 8, 1926, that he would not issue the said permit, giving as his reason therefor, 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 the apartment houses on the premises owned by petitioner.

5. Petitioner charges and insists that the said ordinance, insofar as it purports to prevent Robert Realty Co. from erecting and constructing the said apartment houses as contemplated, is illegal in that the reservation of the district in which the petitione'rs 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 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 deprival 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.

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 Buildings of the City of Orange, to the City of Orange, commanding and enjoining them to issue the building permits granting to petitioner permission to erect the three 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.

And your petitioner will ever pray, etc.

FREDERIC W. SCHLOSSTEIN,
Attorney for Petitioner.

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

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

1. I am the president of the Robert Realty Co., petitioner named in the foregoing petition.

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

3. I further say that the Robert Realty Co.

desires to erect upon the said premises three brick apartments four stories in height, the size of the building at the corner of Lincoln Avenue and Mountainview Avenue, to be sixty feet by one hundred and four feet and six inches and to cost one hundred thousand dollars; the size of the next building on Lincoln Avenue seventy-five feet north of Mountainview Avenue to be seventy feet and six inches by eighty-one feet and to cost Eighty Thousand Dollars; and the third one on the north side of Mountainview Avenue, one hundred twenty-six feet west of Lincoln Avenue to be seventy-three feet and six inches by one hundred sixteen feet and six inches and to cost One Hundred Eleven Thousand Dollars.

4. I further say that on January 6, 1926, Robert Realty Co. applied to Thomas J. Dowling, Building Inspector of the City of Orange, for permits 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.

5. I further say that after retaining said application, plans and specifications and fees for a period of time, the said Building Inspector notified the Robert Realty Co. that permission was denied on the grounds that the section in which the Robert Realty Co.'s property was located was zoned off as a residence A District 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 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 the apartment houses on the premises owned by petitioner.

6. I further say that the Robert Realty Co. charges and insists that the said ordinance insofar as it purports to prevent it from erecting and constructing the said apartment houses as contemplated, is illegal in that the reservation of the district in which its 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 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 it from erecting the buildings which it seeks to erect would be to deprive it 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 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 deprival 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.

I further say that the Robert Realty 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 permits granting permission to it to erect the apartment houses above mentioned upon the lands and premises hereinbefore described in accordance with the plans and specifications tendered by it to the said Building Inspector pursuant to the statute in such case made and provided.

LOUIS KOPPELON.

Sworn to and subscribed before me
this 12th day of January, 1926.

JOSEPH H. STEINHARDT,
A Master in Chancery, of New Jersey.

Service acknowledged, Jany.. 12/26.

WM. A. CALHOUN,
City Counsel.

Order to Show Cause.

(Filed January 19, 1926.)

NEW JERSEY SUPREME COURT.

ROBERT REALTY COMPANY, *Relator,* *vs.* CITY OF ORANGE and THOMAS J. DOWLING, Building and Plumbing Inspector of the City of Orange, *Defendants.*	On Mandamus

On reading the petition and affidavit filed in the above entitled cause, it is on this 16th day of January, 1926,

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 the fourth 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 permits to the said Robert Realty Co. for the erection of three apartment houses on the property of said Robert Realty Co. in the said City of Orange, and it is further

Order to Show Cause—Agreed State of Facts.

ORDEDED 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 order.

WILLIAM A. CALHOUN,
Attorney for Defendants.

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

Agreed State of Facts.

(Filed January 19, 1926.)

NEW JERSEY SUPREME COURT.

ROBERT REALTY COMPANY,
Relator,

vs.

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

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.

Agreed State of Facts.

1. The relator, Robert Realty 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:

BEGINNING on the westerly side of Lincoln Avenue at the southeasterly corner of lot now or lately belonging to Margaret S. Griffin and John H. Griffin, Jr., and thence running along said westerly line of Lincoln Avenue southwesterly one hundred fifty feet to the corner of Mountainview Avenue; thence westerly along said Mountainview Avenue two hundred sixteen and fifty seven hundredths feet; thence northwesterly and parallel with said Lincoln Avenue one hundred fifty feet to the southwesterly corner of said land of said Griffin; and thence easterly along their line two hundred sixteen and fifty seven hundredths feet to the point and place of BEGINNING.

Being known as No. 73 Lincoln Avenue.

2. On January 6, 1926, relator applied to Thomas J. Dowling, Building and Plumbing Inspector of the City of Orange, for permits to erect three four story brick apartment houses on the said lot in accordance with certain plans and specification therewith submitted, which applications were made in writing, copies of same with the endorsements thereon, being hereto attached and marked Schedules A, B, and C.

3. The said Building and Plumbing Inspector refused to issue said permits 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 the 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 apartment houses on the area of the premises owned by relator.

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

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

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

FREDERIC W. SCHLOSSTEIN,
Attorney for Relator.

WILLIAM A. CALHOUN,
Attorney for Defendants.

Schedule A attached to Agreed State of Facts.

APPLICATION TO THE INSPECTOR OF BUILDINGS

for Permits for the

Construction of New Buildings by the Owner, Architect or Builder

Orange, N. J., Jan. 6th, 1926.

The undersigned in compliance with the Building Ordinance, files the following report of a Brick apartment Building.

Reported by Edw. V. Warren.

The following information is required for the Construction of New Buildings:

1. Number of Buildings to be erected, one; location, W. side Mountainview 126 ft. W. of Lincoln Ave.
2. Size of Main Building, 73-6x116.6 feet; number of stories, 4.
3. Depth of Foundation, 7 & 8-6 feet; thickness, 16 inches; material, Brick.
4. Footing or Base Course, width, 28 inches; thickness, 12 inches; material, concrete.
5. If piers, columns or posts are used, state what kind piers and col.
6. Thickness of outside wall: 1st story, 16 inches; 2nd, 12 inches; 3rd, 12 inches, 4th, 12 inches; 5th, inches; 6th, inches; 7th, inches.
7. Thickness of inside partition walls: 1st story, 6 inches; 2nd, 6 inches; 3rd, 6 inches; 4th, 6 inches; 5th, inches; 6th, inches; 7th, inches.
8. Material of roof and style, flat slag roof.

Schedule A attached to Agreed State of Facts.

9. Size of floor beams: 1st tier, 2x10 inches; 2nd tier, 2x10 inches; 3rd tier, 2x10 inches; 4th tier, 2x10 inches; 5th tier, inches; 6th tier, inches; 7th tier, inches.
10. Girders; of what material and sizes to support the floors: 8 inch steel. How supported: on tiers and col.
11. Distance of wood work from inside of any flue, 8 inches.
12. Distance of beams or headers from outside of chimney or flue, 4 inches.
13. Distance chimney projects inside of building, outside chimney, where started from, cellar.
14. Size of Chimney, flue lining 18 inches.
15. Hearths, how supported, none.
16. Height of ceiling: 1st story, 9 feet; 2nd, 9 feet; 3rd, 9 feet; 4th, 9 feet; 5th feet; 6th, feet; 7th, feet.
17. Openings for doors or windows. State whether arched, or lintels are to be used. If lintels are used, material, arch and lintels.

EXTENSIONS OR WINGS

18. Size of extension or wings, ; number of stories .
19. Depth of foundation walls, feet; thickness, inches; material .
20. Footing or base course, width inches; thickness, inches; material .
21. If piers, columns or posts are used, state what kind .
22. Thickness of outside walls: 1st floor, inches; 2nd, inches; 3rd, inches; 4th, inches; 5th, inches; 6th, inches; 7th, inches.

Schedule B attached to Agreed State of Facts.

23. Thickness of inside partition wall: 1st story, inches; 2nd inches; 3rd, inches; 4th, inches; 5th, inches; 6th, inches; 7th, inches.
24. Proposed use of building: Apartment House. Estimated cost of entire building, $111,000. Time of Commencement, , 192 .

Schedule B attached to Agreed State of Facts.

APPLICATION TO THE INSPECTOR OF BUILDINGS

for Permits for the

Construction of New Buildings by the Owner, Architect or Builder

Orange, N. J., Jan. 6th, 1926.

The undersigned in compliance with the Building Ordinance, files the following report of a Brick apartment Building.

Reported by Edw. V. Warren.

The following information is required for the Construction of New Buildings:

1. Number of Buildings to be erected, one; location, N. W. cor. Lincoln & Mountainview Ave.
2. Size of Main Building, 60x104-6 feet; number of stories, 4.
3. Depth of Foundation, 7 & 8-6 feet; thickness, 16 inches; material, Brick.
4. Footing or Base Course, width, 28 inches; thickness, 12 inches; material, concrete.
5. If piers, columns or posts are used, state what kind piers and col.

Schedule B attached to Agreed State of Facts.

6. Thickness of outside wall: 1st story, 16 inches; 2nd, 12 inches; 3rd, 12 inches, 4th, 12 inches; 5th, inches; 6th, inches; 7th, inches.
7. Thickness of inside partition walls: 1st story, 6 inches; 2nd, 6 inches; 3rd, 6 inches; 4th, 6 inches; 5th, inches; 6th, inches; 7th, inches.
8. Material of roof and style, flat slag roof.
9. Size of floor beams: 1st tier, 2x10 inches; 2nd tier, 2x10 inches; 3rd tier, 2x10 inches; 4th tier, 2x10 inches; 5th tier, inches; 6th tier, inches; 7th tier, inches.
10. Girders; of what material and size to support the floors: 8 inch steel. How supported: on tiers and col.
11. Distance of wood work from inside of any flue, 8 inches.
12. Distance of beams or headers from outside of chimney or flue, 4 inches.
13. Distance chimney projects inside of building, outside chimney, where started from, cellar.
14. Size of Chimney, flue lining 18 inches.
15. Hearths, how supported, none.
16. Height of ceiling: 1st story, 9 feet; 2nd, 9 feet; 3rd, 9 feet; 4th, 9 feet; 5th feet; 6th, feet; 7th, feet.
17. Openings for doors or windows. State whether arched, or lintels are to be used. If lintels are used, material, arch and lintels.

EXTENSIONS OR WINGS

18. Size of extension or wings, ; number of stories .
19. Depth of foundation walls, feet; thickness, inches; material .

Schedule C attached to Agreed State of Facts.

20. Footing or base course, width inches; thickness, inches; material .
21. If piers, columns or posts are used, state what kind .
22. Thickness of outside wall: 1st floor, inches; 2nd, inches; 3rd, inches; 4th, inches; 5th, inches; 6th, inches; 7th, inches.
23. Thickness of inside partition wall: 1st story, inches; 2nd inches; 3rd, inches; 4th, inches; 5th, inches; 6th, inches; 7th, inches.
24. Proposed use of building: Apartment House. Estimated cost of entire building, $100,000. Time of Commencement, , 192 .

Schedule C attached to Agreed State of Facts.

APPLICATION TO THE INSPECTOR OF BUILDINGS

for Permits for the

Construction of New Buildings by the Owner, Architect or Builder

Orange, N. J., Jan. 6th, 1926.

The undersigned in compliance with the Building Ordinance, files the following report of a Brick apartment Building.

Reported by Edw. V. Warren.

The following information is required for the Construction of New Buildings:

1. Number of Buildings to be erected, one; loca-

tion, Lincoln Ave. W. side 75 ft. W. of Mountainview Ave.

2. Size of Main Building, 70-6x81 feet; number stories, 4.
3. Depth of Foundation, 7&8-6 feet; thickness, 16 inches; material, Brick.
4. Footing or Base Course, width, 28 inches; thickness, 12 inches; material, concrete.
5. If piers, columns or posts are used, state what kind piers and col.
6. Thickness of outside wall: 1st story, 16 inches; 2nd, 12 inches; 3rd, 12 inches, 4th, 12 inches; 5th, inches; 6th, inches; 7th, inches.
7. Thickness of inside partition walls: 1st story, 6 inches; 2nd, 6 inches; 3rd, 6 inches; 4th, 6 inches; 5th, inches; 6th, inches; 7th, inches.
8. Material of roof and style, flat slag roof.
9. Size of floor beams: 1st tier, 2x10 inches; 2nd tier, 2x10 inches; 3rd tier, 2x10 inches; 4th tier, 2x10 inches; 5th tier, inches; 6th tier, inches; 7th tier, inches.
10. Girders; of what material and size to support the floors: 8 inch steel. How supported: on tiers and col.
11. Distance of wood work from inside of any flue, 8 inches.
12. Distance of beams or headers from outside of chimney or flue, 4 inches.
13. Distance chimney projects inside of building, outside chimney, where started from, cellar.
14. Size of Chimney, flue lining 18 inches.
15. Hearths, how supported, none.
16. Height of ceiling: 1st story, 9 feet; 2nd, 9 feet; 3rd, 9 feet; 4th, 9 feet; 5th feet; 6th, feet; 7th, feet.

Schedule C 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, arch and lintels.

EXTENSIONS OR WINGS

18. Size of extension or wings, ; number of stories .
19. Depth of foundation walls, feet; thickness, inches; material .
20. Footing or base course, width inches; thickness, inches; material .
21. If piers, columns or posts are used, state what kind .
22. Thickness of outside wall: 1st floor, inches; 2nd, inches; 3rd, inches; 4th, inches; 5th, inches; 6th, inches; 7th, inches.
23. Thickness of inside partition wall: 1st story, inches; 2nd inches; 3rd, inches; 4th, inches; 5th, inches; 6th, inches; 7th, inches.
24. Proposed use of building: Apartment House. Estimated cost of entire building $80,000. Time of Commencement, , 192 .

Schedule D attached to Agreed State of Facts.

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:

(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.

(4) Public and Parochial schools.

(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 stables 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.

(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 dis-

tance 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.

(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 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 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 three feet from any side lot line. A common private garage may be built by adjoining proper-

ty 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.

(d) A side yard is required along the full length of each side lot line. The sum of the average widths of both 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.

NEW JERSEY SUPREME COURT.

No. 210 May Term, 1926.

ROBERT REALTY COMPANY,
Relator,
vs.
CITY OF ORANGE, et al
Respondents,

On Rule for Mandamus.

Before Justices Parker, Black and Campbell.

For Relator, Frederick W. Schlosstein.

For respondents, William A. Calhoun and Spaulding Frazer.

PER CURIAM:

On January 6, 1926, relator applied to the Building and Plumbing Inspector of the City of Orange for permits to erect three, four-story, brick apartment houses on the corner of Lincoln and Mountainview Avenues. The permits were refused because the Zoning Ordinance of the City "forbids the erection of apartment houses on the area of the premises owned by relator." So appears by the agreed State of Facts, which further sets forth:—"The only reason for the refusal of the permits was the fact that the area was zoned against and for no other reason."

Respondents, in their brief, urge two reasons why the permits should not be issued..

The first is that the Zoning Ordinance of the City prohibits buildings exceeding two and one-half stories in height, whereas the contemplated structures will be four stories in height; and, second, because the Zoning Ordinance requires a rear yard for a two and one-half story building of at least twenty-five feet and this amount is increased by six inches for each foot of lot in excess of seventy-five feet measured from the main front wall of the building. So that if the Lincoln Avenue side of the corner building be considered as the front, this building would have a rear yard of twenty-one and five tenths (21 5/10) feet, while the Ordinance calls for one of thirty-nine and six tenths (39 6/10) feet; and, if Mountainview Avenue be regarded as the front, the rear yard for this building is only fifteen (15) feet, where a rear yard of twenty-five (25) feet would be required. That if the spaces as proposed between the buildings are to be considered as side yards, the Ordinance provision would be further violated for the reason that between the Lincoln Avenue buildings there is a space of fifteen (15) feet, while buildings such as proposed, being at least forty (40) feet in heighth would require side yards of at least twenty (20) feet. The second building on Lincoln Avenue is only four and five tenths (4 5/10) feet from the property line where the minimum size yard required by the Ordinance would be fifteen (15) feet and the easterly sideyard of the second Mountainview Avenue building is only seventeen and seven one-hundredths (17 07/100) feet when at least twenty (20) feet would be required by the Ordinance.

The Ordinance also provides that "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 (10) feet.

There is absolutely nothing in the case as it is before us showing that these restrictions are called for or necessary to protect the public health and safety or advance the public welfare. Giving to the restrictions that presumption of reasonableness, that in law is required, such presumption is completely overcome, by the conclusion that one is inevitably brought to, by a reading of these provisions of the Ordinance, that they are designed to prohibit and make impossible the construction, in the designated area, of apartment houses. In fact nothing but "a dwelling for one family or for one housekeeping unit only" is the limitation contained in Subdivision one of Section 2 (a) of residence A district in which relator's property is located.

Such ordinances have met with the emphatic disapproval of this Court and similar provisions have been declared illegal and not a valid exercise of the police power. *Heller vs. South Orange,* 3 N. J. Miscl. Reps. 1076.

We are not here called upon to decide nor are we attempting to pass pon the question of reglation of areas and open spaces nor heights of buildings. In proper cases reasonable and proper regulations to protect the public health and promote safety would be a reasonable and proper exercise of the police power but as before stated we do not find such a situation presented by the terms of the ordinance in question. Its terms are prohibitory rather than regulatory.

The peremptory writ of mandamus prayed for is allowed.

Rule to Mold Pleadings.

(Filed Dec. 2, 1926.)

NEW JERSEY SUPREME COURT.

ROBERT REALTY COMPANY,
Relator,

vs.

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

Rule to mold Pleadings.

Application having been made on behalf of the defendants in the above entitled cause for leave to mold the pleadings, and this matter coming on to be heard in the presence of Frederic W. Schlosstein, counsel for the relator, and Spaulding Frazer, attorney for and of counsel with the defendants, and it appearing to the Court that a peremptory writ of mandamus has already issued out of and under the seal of this Court, it is on this 30th day of November, 1926,

ORDERED, that leave is hereby granted to mold the pleadings to the end that the judgment of this Court in said case may be reviewed by the Court of Errors and Appeals, and it is

FURTHER ORDERED that the judgment heretofore entered granting to the relator a peremptory writ of mandamus be and the same is hereby opened and the operation of said peremptory writ of mandamus be, and the same is hereby stayed, upon the following terms:

Rule to Mold Pleadings.

1. That the pleadings be molded for the purposes of said appeal within ten days of the date of this order and that said appeal be perfected within a like time.

2. That said appeal be brought on for argument at the next term of the Court of Errors and Appeals.

And it is FURTHER ORDERED that upon the filing with the Clerk of this order a rule for judgment directing the issuance of an alternative writ of mandamus in the above entitled cause, be forthwith entered.

It is FURTHER ORDERED that upon the failure of the defendants so to mold the pleadings and bring on said cause for appeal, as above provided within the time herein limited that the rule for judgment directing the issuance of an alternative writ of mandamus be and become of no effect and the judgment of this Court heretofore entered shall become and be in full force and effect, and that the stay of the peremptory writ of mandamus shall cease and determine, and said peremptory writ of mandamus become and be in full force and effect.

CHARLES C. BLACK,
Justice Supreme Court.

I consent to the form of the foregoing order.

FREDERICK W. SCHLOSSTEIN,
Counsel for the Relator.

Rule to Show Cause.

(Filed Dec. 2, 1926.)

ROBERT REALTY COMPANY, *Relator,* *vs.* CITY OF ORANGE and THOMAS J. DOWLING, Building and Plumbing Inspector of the City of Orange, *Defendants.*	Rule for alternative writ

The relator's rule to show cause why a writ of mandamus should not issue in the above entitled cause, having been submitted to the Court and the Court having duly considered the argument of respective counsel, it is on this 2nd day of December, 1926.

ORDERED that an alternative writ of mandamus do issue in the above entitled cause.

Alternative Writ of Mandamus.

NEW JERSEY SUPREME COURT.

NEW JERSEY, ss:

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

WHEREAS in our Supreme Court lately held before the Justice thereof at Trenton upon the relation of Robert Realty Company, we have been given to understand that the Relator, Robert Realty Company, has applied to Thomas J. Dowling, Building and Plumbing Inspector of the City of Orange, for a permit for the erection of three brick apartments four stories in height, to be constructed upon the premises of the said Robert Realty Company, one apartment house at the corner of Lincoln Avenue and Mountainview Avenue to be sixty feet by one hundred four feet and six inches; the second apartment house on Lincoln Avenue seventy-five feet north of Mountainview Avenue to be seventy feet and six inches by eighty-one feet; and the third apartment house on the north side of Mountainview Avenue, one hundred twenty-six feet west of Lincoln Avenue to be seventy-three feet and six inches, by one hundred sixteen feet and six inches, all 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

WHEREAS it is charged and insisted that the purpose of the ordinances is merely disigned 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 1 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 Robert Realty Company we have understood.

We, therefore, being willing that due and speedy justice should be done in this behalf, command and strictly enjoin you that, immedi-

ately after the receipt of this writ, you do issue the Relator, Robert Realty Company, permit for the erection of three brick apartment houses aforesaid at Lincoln and Mountainview Avenues, as above set forth, 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 on the 2nd day of December, 1926, together with this our writ, and this in no wise omit at your peril.

WITNESS, William S. Gummere, Esquire, Chief Justice of our Supreme Court at Trenton, the 2nd day of December, 1926.

EDWARD J. KELLEHER,
Clerk.

Return to Alternative Writ of Mandamus.

(Filed Dec. 2, 1926.)

NEW JERSEY SUPREME COURT.

ROBERT REALTY COMPANY,
Relator,

vs.

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

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF NEW JERSEY:

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 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 the erection of three apartment houses four stories in height, to be erected upon the premises of the said Robert Realty Company at Mountainview 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 and to regulate and restrict the location of buildings 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 1 of the Constitution of New Jersey; or would be in effect a taking of 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 having the

powers granted by said Chapter 146 of the Laws of 1924, and the acts amendatory and supplementary thereof; that under said ordinance of July 19, 1924, the City of Orange is divided into residence "A" districts, residence "B" districts, residence "C" districts, business districts and industrial districts. That in the residence "B" districts two-family houses but no apartment houses are permitted. In residence "C" districts and in the business and industrial districts under said ordinance apartment houses are permitted. The limitations in the heights of buildings in residence "B" districts and "C" districts in said ordinance are as follows:

RESIDENCE "B" DISTRICTS.

(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.

(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 any case. One side yard may be omitted entirely, provided that the other side yard shall have a 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 l 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 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.

RESIDENCE "C" DISTRICTS.

(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" 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 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 length of each side lot line, except as hereinafter specified. Each such side yard and each required 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.

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 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 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 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 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.

That the said relator, the Robert Realty 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.

The said City of Orange and the said Thomas J. 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.

THOMAS J. DOWLING,
Building and Plumbing Inspector
of the City of Orange.

Attest:
ALEXANDER NEILL,
Clerk, City of Orange.

Demurrer.

(Filed Dec. 2, 1926.)

NEW JERSEY SUPREME COURT.

ROBERT REALTY COMPANY, *Relator,* *vs.* CITY OF ORANGE and THOMAS J. DOWLING, Building and Plumbing Inspector of the City of Orange, *Defendants.*	On mandamus.

Robert Realty Company, by Frederic W. Schlosstein, its attorney, comes and demurs to the return of the respondents, and says: That the matters contained therein, in manner and form as the same are stated and set forth do not show sufficient cause in law to warrant the respondents in refusing to comply with the command of the alternative writ and to issue to the said Robert Realty Company a permit to erect the building referred to in the alternative writ, and for causes of demurrer specifies:

1. The said return is wholly insufficient in law.

2. The enforcement of the zoning ordinance would deprive relator of a right to protect and possess property in violation of the first clause of Article 1 of the Constitution of the State of New Jersey.

3. The effect of the enforcement of the said ordinance to prevent the erection of the building contemplated would be a taking of private property for public use without compensation, in violation of the 16th paragraph of Article 1 of the Constitution of the State of New Jersey.

4. The effect of the enforcement of said ordinance to prevent the erection of the building contemplated by the relator would be a violation of the rights secured to relator by the 14th Amendment to the Constitution of the United States and a denial to relator of the equal protection of the law, and would deprive it of its property, without due process of law.

5. Because the said zoning ordinance and the said building code are for other reasons unreasonable, illegal and void.

FREDERIC W. SCHLOSSTEIN,
Attorney for Relator.

Rule for Judgment on Demurrer.

(Filed Dec. 2, 1926.)

NEW JERSEY SUPREME COURT.

ROBERT REALTY COMPANY, *Relator,* *vs.* CITY OF ORANGE and THOMAS J. DOWLING, Building and Plumbing Inspector of the City of Orange, *Defendants.*	On mandamus.

This matter coming on to be heard on an alternative writ of mandamus, return and demurrer to said return, in the presence of Frederick W. Schlosstein, Attorney for and Counsel with the Relator, and Spaulding Frazer, Attorney for and of Counsel with the Defendants, and the Court having considered the arguments of counsel as to the sufficiency and merits of the demurrer, and the Court being of the opinion that the return to the alternative writ of mandamus is insufficient in law and that the demurrer to said return is well taken and should be sustained;

It is ORDERED that the demurrer be sustained, and that a peremptory writ of mandamus do issue as prayed for.

Dated, December 2nd, 1926.

New Jersey Court of Errors and Appeals.

ROBERT REALTY COMPANY,
Relator-Respondent,
vs.
CITY OF ORANGE, and THOMAS J. DOWLING, Building and Plumbing Inspector of the City of Orange,
Defendants-Appellants.

Appellants' Brief.

Facts.

The relator applied to Thomas J. Dowling, Building and Plumbing Inspector of the City of Orange, for a building permit to erect three four-story buildings at the corner of Mountainview and Lincoln Avenues, in the City of Orange, to be used as apartment houses. This application was denied on the ground that it violated the provisions of the zoning ordinance of the City of Orange, the essential portions of which, so far as they relate to the matters in controversy, are contained in the return to the alternative writ of mandamus on pages 36, 37 and 38 of the State of the Case.

The buildings proposed to be erected were so placed that, to quote the opinion of the Supreme Court, "If the Lincoln Avenue side of the corner building be considered as the front, this building would have a rear yard of 21.5 feet, while the ordinance calls for one of 39.6 feet; and, if Mountainview Avenue be regarded as the front, the rear yard for this building is only 15 feet, where a

rear yard of 25 feet would be required. That if the spaces as proposed between the buildings are to be considered as side yards, the ordinance provision would be further violated for the reason that between the Lincoln Avenue buildings there is a space of 15 feet, while buildings such as proposed, being at least 40 feet in height, would require side yards of at least 20 feet. The second building on Lincoln Avenue is only 4.5 feet from the property line where the minimum size yard required by the ordinance would be 15 feet and the easterly side yard of the second Mountainview Avenue building is only 17.07 feet when at least 20 feet would be required by the ordinance."

In addition, the ordinance limits the buildings to buildings of two and one-half stories in height and also limits the height so that "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-bck distance may be reduced by ten feet." Moreover, the zoning ordinance prohibits in this portion of the City the erection of any aparment houses whatsoever.

The return to the alternative writ of mandamus allowed under a rule to mold the pleadings having been demurred to, the demurrer was sustained by the Supreme Court and the case comes before this Court on appeal from the judgment on demurrer.

LAW.

I.

The height limitation of the Ordinance is valid.

The ordinance prohibits buildings exceeding two and one-half stories in height (State of the Case, p. 23). The proposed buildings are to be four stories high.

Such a provision is valid. In *Dorison vs. Saul*, 118 Atl. 691, Mr. Justice Katzenbach said, construing an earlier statute:

> "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 these conditions this statute was probably enacted. * * * The only power given to the municipality is that of fixing the height above which a building shall not be erected."

Again, in the *Nutley* case, 98 N. J. Law 719, the same justice, in holding the ordinance void as to its application to the facts in that case, reiterates this view:

> "'In arriving at this conclusion 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 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."

This limitation is sustained in other jurisdictions.

People vs. D'Oeuch, 18 N. E. (N. Y.) 862;
Attorney-General vs. Williams, 55 N. E. 77;
Welch vs. Swasey, 79 N. E. (Mass.) 745.

This last case was affirmed by the United States Supreme Court in 214 U. S. 91, where Mr. Justice Peckham writes as follows:

> "This court is not familiar with the actual facts, but it may be in this limited commercial area the high buildings are generally of fireproof construction; that the fire engines are more numerous and much closer together than in the industrial 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 waterfront, 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 to the legislature, and whether or not such were the facts was a question, among others, for the legislature to determine."

II.

The yard provisions are valid.

We need only to refer once again to the opinion of Mr. Justice Katzenbach in the *Nutley* case, *supra.* to show the propriety of this phase of the ordinance:

> "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 police power."

The ordinance requires a rear yard for a two and one-half story building of at least 25 feet and this amount is increased by six inches for each foot of lot in excess of 75 feet measured from the main front wall of the building (Case, p. 23). If the Lincoln Avenue side of the corner building be considered as the front, this building has a rear yard of but 21.5 feet, while the ordinance would call for one of some 39.6 feet; if Mountain-view Avenue be regarded as the front, the rear yard for this building is but 15 feet, where 25 feet are required.

If we consider the spaces between the buildings as side yards, the ordinance provision is again violated. Between the Lincoln Avenue buildings there is a space of but 15 feet, while the buildings with four stories, each with a ceiling height of 9 feet, must be at least 40 feet in height and would, under the ordinance, require side yards of at least 20 feet. As shown above, the second building on Lincoln Avenue is but 4.5 feet from the property line, and so cannot have even the minimum side yard of fifteen feet on the northerly side. Similarly, the easterly side-yard of the

second Mountainview Avenue building is but 17.07 feet where 20 at least is required, since the ordinance provides for side-yards of a minimum of 15 feet and not less than one-half the height of the building, the ordinance saying:

> "The width of a court at any level shall be equal to one-half of its height at such level." (Case, p. 24.)

It is respectfully submitted that where a lot some four-fifths of an acre in size is to be covered with four-story apartments to about two-thirds of its area, the district may be considered congested within the meaning of Justice Katzenbach's statement of the law in the *Nutley* case, *supra*.

III.

The burden of proof to show the ordinance unreasonable is on the Relators.

Zoning ordinances are not, *per se*, void. That, within certain limitations, they are valid has been held on numerous occasions by our courts. Even the Supreme Court opinion in the *Nutley* case recognizes this fact. In the early case of *Cliffside Realty Co. vs. Cliffside Park*, 114 Atl. 797, their general propriety as an exercise of the police power was conceded, and an attack upon the ordinance itself by certiorari defeated, since some, at least, of the purposes for its adoption were legitimate. Numerous other cases, especially sustaining the exclusion of garages, have been before our courts and, while the decisions are not wholly harmonious, the great weight is in favor of the validity of the ordinance in such cases.

Portnoff vs. Bigelow, 4 Misc. 539;
Max vs. Saul, 3 Misc. 265;

Eaton vs. Newark, 3 Misc. 363;
Ninth St. Imp. Co. vs. Ocean City, 90 N. J. L. 107; affirmed 91 N. J. L. 703;
Long vs. Scott, 4 Misc. 587;
Contras vs. Jersey City, 4 Misc. 680.
Schait vs. Senior, 117 Atl. 517;

Such being the situation, every presumption is in favor of the ordinance. As stated in *Portnoff vs. Bigelow, supra,*

> "The presumption is that it is reasonable and the burden of proving it otherwise is on the prosecutor."

See also:

Neumann vs. Hoboken, 82 N. J. L. 285;
McGonnell vs. Orange, 98 N. J. L. 642;
Falco vs. Atlantic City, 99 N. J. L. 19.
Hinch vs. East Orange, 2 Misc. 510;

No court has yet declared the Zoning Act of 1924 (P. L. 1924, p. 324) unconstitutional and, since ordinances adopted under it have been sustained, the act, in principle, has been sustained, only its application in particular instances having been criticized. But in this criticism, the fundamental doctrine relating to the exercise by ordinance of a legislative grant of authority seems to have been frequently overlooked. In *Blake vs. Pleasantville,* 87 N. J. L. 426, the rule is thus stated:

> "An ordinance will be presumed to be in conformity with the statute from which it derives its vitality, unless the contrary is expressly made to appear."

The statute itself is clear as to its purposes. It 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 and other purposes", in the interest of "promoting the health, safety, morals or the general welfare of the commuity". To that end, different districts with different regulations as to the foregoing subject matter may be established, to bring about the desired results, stated later to be as follows: "to lessen congestion in the streets; to secure safety from fire, panic or 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."

None of these purposes has ever been asserted by our courts to be beyond the scope of the police powers, nor has it ever been seriously contended that the coming of apartment houses will not increase congestion, danger from fire, the difficulty of providing, under certain conditions at least, adequate light and air and adequate transportation, water, sewer and similar necessities. While it has been frequently held that the validity of an ordinance, under a given state of facts, is not to be determined by the possibility that it would be unreasonable under a different state of facts, our courts with few exceptions have not inquired into the facts at all. In the case at bar, no inquiry has been directed to ascertaiin whether in fact the proposed buildings will unduly increase street congestion at their proposed location; whether their proximity to each other will in this instance tend to prevent an adequate supply of light and air; whether adequate water supplies

exist or can reasonably be provided in the territory into which it is proposed to bring them; whether fire hazards may not be unduly increased by their presence. These and many other similar questions are ignored and the ordinance held unreasonable because in other sections of the city, concerning the features of which in these regards the court can have no knowledge, similar structures are permitted. On the doctrine of *Ingersoll vs. South Orange*, 3 Misc. 335, affirmed 130 Atl. 721, the municipality, at whatever cost, must, to suit the whim or the desire for financial aggrandizement of an individual property owner, supply all necessary public facilities to relieve congestion, to protect against fire, to supply water and sewers, although all of those facilities, adequate to the development of the neighborhood along the lines contemplated by the zoning ordinance, may already have been provided at public cost and may, by this change in use, be rendered essentially valueless.

Such an attitude on the part of our courts is a clear departure from the rule in relation to the burden of proof. It places, not upon the relator, the duty of proving the unreasonableness, under the conditions, of the ordinance restrictions, but upon the city the duty of proving affirmatively their reasonableness. While modifications to the building code requiring buildings for specified uses to be fire-proof, to reduce the hazard of fire and the cost of fire fighting departments, are sustained (*Rohrs vs. Zabriskie*, 133 Atl. 65), the same result, when sought through a zoning ordinance, is held to be unattainable. Were the usual rule applied to zoning cases—and there seems no justification in principle for refusing to do so—in the absence of all proof as to conditions

rendering the ordinance unreasonable as to the buildings here sought to be erected, the ordinance must be held to be in furtherance of the aims expressed in the statute on which it is based and to prevent the granting of the relief here souht.

IV.

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

Only in the case of zoning ordinances does there seem to have arisen question as to the right, under proper grant of authority, to divide a municipality into districts to which discrepant regulations in regard to construction may be applicable. For years, the so-called fire-limit regulations have been held valid exercises of the police power, although the provisions thereof may not be, and usually are not, uniform throughout the municipality. Similarly, as we have above pointed out, even in the instance of zoning regulations, the propriety of discriminatory regulation under certain conditions is impliedly conceded, even in the very *Nutley* case on which such reliance has been placed, both by the Supreme Court and by the advocates of zoning abolition. For, when Mr. Justice Katzenbach states, as he does in that case, that

> "the regulation and determination of the area of yards, courts and other open spaces is proper in congested districts"

he, by necessary implication, asserts that a regulation suitable for congested districts might well be unsuitable for uncongested ones and tacitly

affirms the distinction which we have here in mind and which is stated by Mr. Justice Sutherland in the *Euclid* case (47 U. S. Reporter, 114) in these words:

> "The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to great cities, might be clearly invalid as applied to rural communities."

A parity of reasoning would justify a parity of result though a single municipality, and not two different ones, be under consideration.

Indeed, it is difficult to see the force of the argument, typically stated for our Supreme Court in *Oxford Construction Co. vs. Orange*, 4 Misc. 515, that if

> "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."

In the first place, the result here stated to be improper is precisely that brought about under "fire-limits" ordinances, as above pointed out. In the second place, there seems no solid foundation in reason for sustaining an ordinance, merely because its terms are applicable to the whole of a municipality. With the growing tendency of our municipalities, in the more intensively developed parts of our state, to overrun their political boundaries and to become, as to their built-up

sections, confluent with their neighbors, there can be no foundation in reason which would permit of certain restrictive provisions affecting, let us say, Montclair or South Orange, merely because they covered the whole area of those municipalities, while denying validity to similar restrictions, affecting territory, similar as to the conditions of its use and the nature of its development, in Newark or Orange, merely because other parts of those cities, wholly different in character, might not be covered by the ordinance provisions. Such a rule establishes in fact a discrimination far greater than the one it seeks to avoid in theory and ignores the existence of actual economic conditions to emphasize an abstraction, a physically nonexistent municipal line, established merely for convenience in local administration. In short, it blinds itself to actualities to reason technically about abstractions.

The third gronnd is, however, the most important. The adoption of the rule here under consideration confuses the function of court and legislature. It has been pointed out that there are no *facts* before this court to show that the restrictions of the ordinance, as applied to the proposed buildings of the relator, are actually unreasonable, and we have already discussed the general rule as to the burden of proof in such cases. It must be conceded that, with the question of *policy,* the courts have nothing to do. Their function is limited to the question of *power.* In the exercise of that function, the question of motive does not enter. And yet, in the citation from the *Oxford Construction Company* case, *supra,* and both explicitly and implicitly in many others, the decision of our court turns wholly on the question of legislative motive. The true rule is thus suc-

cinctly stated in *Chicago, Burlington & Quincy RR. 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 *policy.* 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 absence of proof of the specific unreasonableness of the ordinance, as applied to these buildings, we quote from the *Euclid* case:

> "'It cannot 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. vs. Lynch,* 226 U. S. 192, 204."

Indeed, so general has become the recognition of this principle, that the great trend of the courts of this country has been to sustain, on the broadest lines, the right to exclude, from given sections of municipalities, buildings of certain types and uses, or of more than a specified height. In fact,

the principle underlies the whole doctrine of the separation of the legislative and judicial powers and was firmly established long before its extension through zoning legislation, as such, was contemplated. We have only to turn to the oft-cited cases of *Hadacheck vs. Sebastian*, 239 U. S. 394, and *Reinmann vs. Little Rock*, 237 U. S., 171, to see its application to questions of user, not strictly of the nuisance variety, an application, moreover, in both these instances retroactive in character. As to the districting of a city on the basis of heights of building we have already referred to the leading case of *Welch vs. Swasey*, 79 N. E. (Mass.), 945, and 214 U. S. 91, and no further comment is here necessary.

Turning then to the zoning principle as such, we find it upheld in the great majority of our jurisdictions on grounds more and more based upon the changing conditions of our civilization and upon the necessity of sufficient elasticity in the construction of our constitutions to meet changing conditions. So true is the fact of this change in attitude of our courts, that a number, originally opposed to zoning on traditional grounds, have courageously altered their position and reversed themselves. To this fact we have in other arguments before this Court adverted, but not with the authority with which the same fact has been noted by the United States Supreme Court in the *Euclid* case, *supra*. That court thus speaks of the matter here under consideration:

> "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 ex-

cluded. 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, 607; *Inspector of Buildings of Lowell vs. Stokosa,* 250 Mass. 52; *Spector vs. Building Inspector of Milton,* 250 Mass. 63; *Brett vs. Building Commission of Brookline,* 250 Mass. 73; *State vs. City of New Orleans,* 154 La. 271, 282; *Lincoln Trust Co. vs. Williams Bldg. Corp.,* 229 N. Y. 313; *City of Aurora vs. Burns,* 319 Ill. 84, 93; *Deynzer vs. City of Evanston,* 319 Ill. 226; *State ex rel vs. Houghton,* 164 Minn. 146; *State ex rel Carter vs. Harper,* 182 Wis. 148, 157-161; *Ware vs. City of Wichita,* 113 Kan. 153; *Miller vs. Board of Public Works,* 195 Cal. 471, 486-495; *City of Providence vs. Stephens,* R. I., 133 Atl. Rep. 614.

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

"As evidence of the decided trend toward the froader 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. vs. Hughton, supra,* sustaining the power. with *State ex rel. Lachtman vs. Houghton,* 134 Minn. 226; *State ex rel. Roerig vs. 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."

To the states sustaining the broader view, not specifically mentioned in the last citations might be added Utah (*Salt Lake City vs. Western Foundry etc. Co.* 187 Pac. 829) and Iowa (*Des-Moines vs. Manhattan Oil Co.* 184 N. W. 823) as well as the Supreme Court of the District of Columbia. Of the three states cited as in opposition, the Texas Courts would seem, despite the general language employed and so largely adopted in the Supreme Court opinion in the *Nutley* case, to have been dealing with an instance of municipal usurpation, since no zoning act conferring the power necessary to the action of the Dallas authorities, was in existence. Moreover the Maryland courts would seem to be modifying their former attitude if the decision in *Tighe vs. Osborn,* 133 Atl. 465 be compared with its earlier decisions. In this last case an ordinance was sustained delegating to the zoning commissioner power to determine whether proposed buildings, for which a building permit was sought, or the proposed use of them, would menace the public health, morals or safety.

Such being the case as to the decisions of our sister jurisdictions let us turn to some of the later ones to ascertain their basis. It is interesting that while earlier authority is frequently relied on, the courts in many instances analyse the subject as in cases of first impression. Turning first to the most recent, as also the most important on account of the dignity of the tribunal, we quote as follows from the Euclid case (*Village of Euclid vs. Ambler Realty Company,* 47 U. S. Reporter, p. 114):

> "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 delimitation.

"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 doubt, the maxim sic utere tuo ut alienum non laedas, 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 vs. Bridgman,* L. R. 11 Ch. 852, 855—C. A.

"'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 vs. 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 vs. Swasey,* 214 U. S. 91; *Hadacheck vs. Sebastian,* 239 U. S. 394; *Reinman vs. Little Rock,* 237 U. S. 171, *Cusack Co. vs. 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 will happen 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. vs. Shaw,* 248 U. S. 297, 303; *Pierce Oil Corp. vs. 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."

Commenting on this excerpt, it might be pointed out that the ordinance, in its restrictive features, prohibiting apartment houses in given sections, is essentially the same as the one at bar; and that, while the court sustains the ordinance, it still allows recourse in specific instances where the application of the ordinance would be unreasonable. Presumably, however, the unreasonableness would have affirmatively to appear, and would not be deducible from the mere application for a building permit and the ordinance itself. How broad the power of restriction in the view of our highest tribunal is, appears from the following excerpt:

"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 secties 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."

Again citing from the same opinion, we find:

> "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 lesser 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."

and again:

> "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 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 disor-

ders; 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 is greatly retarded by 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 monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, 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 privileges 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 not only be 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. *Cusack Co. vs. City of Chicago,* 242 U. S. 530-531; *Jacobson vs. Massachusetts* 197 U. S. 11, 30-31."

Before turning to decisions of other states, it will be well to note that the *Euclid* decision sets at rest the question raised by Mr. Justice Katzenbach in the *Nutley* case of the violation by the Nutley ordinance of the inhibitions of the Federal Constitution. Except as our zoning provisions are violative then, of the State Constitution, they are valid. But the reasoning by which the learned justice arrived at the conclusion that the Federal Constitution was infringed, was in all essentials the same reasoning as led to a similar result as to the State Constitution, and if the reasoning was faulty in one instance, it is only reasonable to infer a similar faultiness in the other instance. While the decision of the Federal court in regard to the Federal Constitution, is not binding upon our courts in construing our State Constitution, it must be admitted that the great authority of the United States Supreme Court should be at least persuasive to an extent which calls for a full review of the whole question and an unprejudiced reconsideration of the soundness of the logic upon which the earlier decisions turned.

The grounds given in the *Euclid* case are essentially those relied on by the State courts upholding our contention. Thus, in *Aurora vs. Burns,* 319 Ill. 84, the curt says:

> "The constantly increasing density of our urban population, 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."

Again, in *State vs. New Orleans,* 154 La. 282:

"In the first place, the exclusion of business establishments from residence districts might enable the municipal government to give better police protection. Patrolmen'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."

In *Carter vs. Harper,* 196 N. W. (Wis.) 451:

"When we reflect that one has always been require to so use his property as not to injure his neighbors and that restrictions against the use of property in urban communities have increased with changing social standards, and that the luxuries of one decade become the necessities of another, can it be said that 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.

"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."

In *Wulfsohn vs. Mt. Vernon,* 120 N. E. 120:

"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 districts 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 b ya 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.

"If we are right that such facts could be found or assumed, we do not think that a court would 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.

"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 and 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 the 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 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."

" * * * 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 compulsory 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."

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

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."

"* * * It is not an effective argument against those 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 pecuinary profits of the individual. *Spector vs. Building Inspector* (Sup. Ct. Mass.), 145 N. E. 266, 267.

"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 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 than the restrictive provisions regulating height and air spaces. The open spaces not only tend to minimize the danger of fire to adjoining buildings and thus spread a 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.*"

Such citations might be almost indefinitely continued. We believe sufficient have been pre-

sented to show that the overwhelming weight of authority is in opposition to the decision of the Supreme Court in this cause; that this authority rests not only on earlier authority but on reason and public necessity as well; that on broad lines, the ordinance under review should be sustained.

We further contend that certain specific features for reasons more briefly referred to under the earlier points in the brief would lead to the same conclusion; that, for instance, under our own decisions the provisions of the ordinance relating to height of buildings and to size of yards are valid; that no facts were elicited to show such provisions unfair or improper as regards the particular buildings here under consideration; and that the decision of the Supreme Court in holding such provisions unsustainable, as not applicable to the city as a whole, ignored the burden of proof which was on the relator to sustain and was not so sustained; and was gratuitously based upon the question of motive and not of power in the council adopting the ordinance; that in so doing the Supreme Court overstepped the judicial function and entered the field of legislative policy. For all of these reasons, the judgment below should be reversed.

Respectfully submitted,

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