INDEX

Page

Notice 1

Petition of Franklin Realty & Mortgage Company 2

Affiidavit of Abraham Rosenblum 5

Order to Show Cause 9

Agreed State of Facts 11

Schedule A. 16

Schedule B. 18

Opinion of Supreme Court 21

Order Moulding Pleadings and Directing Judgment to be Entered 23

Alternative Writ of Mandamus.............25

Return to Alternative Writ 28

Demurrer 30

Rejoinder 31

Notice and Grounds of Appeal 32

New Jersey State Library

NOTICE.

New Jersey Supreme Court

FRANKLIN REALTY & MORTGAGE COMPANY, *Relator.* *vs.* VILLAGE OF SOUTH ORANGE and IRA T. REDFERN, Building Inspector of the Village of South Orange. *Defendants.*	*Notice.*

10

To the Village of South Orange and Ira T. Redfern, Building Inspector of the Village of South Orange:—

20

TAKE NOTICE that on Saturday, the 18th day of July, 1925, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, we shall apply to the New Jersey Supreme Court at the Court House, Newark, for an order to show cause why an alternative writ of mandamus should not issue in the above-entitled cause requiring the Village of South Orange to issue permit for the erection of a two-story brick building containing six stores and one apartment for use of a janitor on the first floor and six apartments on the second floor, as set forth in the attached petition and affidavit.

30

HOWE & DAVIS,
Attorneys for Relator.

40

PETITION.

NEW JERSEY SUPREME COURT.

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

10

The petition of Franklin Realty & Mortgage Company, of the City of Newark, in the County of Essex and State of New Jersey, respectfully shows:

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

20 BEGINNING at the intersection of the southwesterly corner of South Orange avenue and Fairview avenue; thence (1) along Fairview avenue, south forty-four degrees thirty minutes west one hundred twenty-five feet; thence (2) north sixty degrees thirty-one and one-half minutes west one hundred feet; thence north fifty degrees forty-five and one-half minutes east one hundred feet to South Orange avenue; thence (4) along South Orange avenue, south seventy-six degrees thirty-four and one-half minutes east

30 one hundred feet to Fairview avenue and the point and place of BEGINNING.

2. Petitioner is desirous of erecting upon said premises a building containing six stores and one apartment for use of a janitor on the first floor and six apartments on the second floor, the said building to be seventy-two feet in depth on the easterly side and forty-six and six-tenths feet on the westerly side by one hundred feet

40 frontage and ninety feet in the rear and is to

be built to a height of twenty-five feet and to cost approximately forty thousand dollars, ($40,000.00).

3. On the 15th day of June, 1925, petitioner applied to Ira T. Redfern, Building Inspector of the Village of South Orange, for a permit for the erection of said building by application in writing duly submitted to said Building Inspector, accompanied by plans and specifications in duplicate as provided by the Building Code of the Village of South Orange, and also tendered and left with the said Inspector of Buildings the legal fees fixed by said Building Code. 10

4. After retaining said application, plans and specifications and fees for a period of time, the said Building Inspector notified petitioner that he would not issue the said permit, giving as his reason therefor that an ordinance entitled, "An ordinance to regulate and restrict the location hereafter of trades and industries and the subsequent location of buildings designed for a specified use and in a designated area and to regulate and limit the height and bulk of buildings hereafter erected and to regulate and determinate the area of yards, courts and other open spaces for that purpose to divide the Village of South Orange into districts," passed March 20, 1922, and the various ordinances amendatory and supplementary thereto, forbids the erection of the building upon the premises owned under contract by petitioner. 20 30

5. Petitioner charges and insists that said ordinance insofar as it purports to prevent Franklin Realty & Mortgage Company from erecting and constructing the said building as contemplated, is illegal in that the reservation 40

of the district in which the petitioner's said property is located, to the use prescribed by said ordinance is beyond the power of the Village of South Orange under the provisions of the statute and that the Village of South Orange under the
10 statute has no power to prevent the erection of the building 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 building which it seeks to erect would be to deprive the said petitioner of a right to possess and protect property in violation of the first clause of the Article I of the
20 Constitution of the State of New Jersey; and would be a taking of the private property of the said petitioner for public use without just compensation, in violation of the sixteenth paragraph of Article I of the Constitution of New Jersey; and would be in effect a taking of private property for private purposes, in violation of the right secured to the said petitioner by the Constitution of the State of New Jersey, and would likewise be a violation of the rights secured to the said petitioner by the Fourteenth Amend-
30 ment 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 Village of South
40 Orange to the Village of South Orange, com-

manding and enjoining them to issue the building permit granting permission to petitioner to erect the building of the type above mentioned, upon the said lands and premises hereinbefore described, in accordance with the plans and specifications tendered by it to said Building Inspector pursuant to the statute in such case made and provided. 10

And your petitioner will ever pray, etc.

HOWE & HOWE,
Attorneys for Relator.

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

Abraham Rosenblum of full age, being duly sworn according to law, on his oath deposes and says: 20

1. I am the president of the Franklin Realty & Mortgage Company, the petitioner in the above entitled cause, and the owner under contract of the premises described in paragraph one of the petition.

2. Petitioner desires to erect upon said premises a building containing six stores and one apartment for use of a janitor on the first floor and six apartments on the second floor, the said building to be seventy-two feet in depth on the easterly side and forty-six and six-tenths feet on the westerly side by one hundred feet frontage and ninety feet in the rear and is to be built to a height of twenty-five feet and to cost approximately forty-thousand dollars, ($40,-000.00). 30

3. On the 15th day of June, 1925, said company applied to Ira T. Redfern, Building In- 40

spector of the Village of South Orange, for a permits for the erection of said building by application in writing duly submitted to said Building Inspector, accompanied by plans and specifications in duplicate as provided by the
10 Building Code of the Village of South Orange, and also tendered and left with the said Inspector of Buildings the legal fees fixed by said Building Code.

4. After retaining said application, plans and specifications and fees for a period of time, the said Building Inspector notified petitioner that he would not issue the said permit, giving as his reason therefor that an ordinance entitled, "An ordinance to regulate and restrict the loca-
20 tion hereafter of trades and industires and the subsequent location of buildings designed for a specified use and in a designated area and to regulate and limit the height and bulk of buildings hereafter erected and to regulate and determine the area of yards, courts and other open spaces for that purpose to divide the Village of South Orange into districts," passed March 20, 1922, and the various ordinances amendatory and supplementary thereto, forbids the erection of the building upon the premises owned under
30 contract by petitioner.

5. Petitioner charges and insists that said ordinance insofar as it purports to prevent Franklin Realty & Mortgage Company from erecting and constructing the said building as contemplated, is illegal in that the reservation of the district in which the petitioner's said property is located, to the use prescribed by said ordinance is beyond the power of the Village of
40 South Orange under the provisions of the statute

and that the Village of South Orange under the statute has no power to prevent the erection of the building 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 building which it seeks to erect would be to deprive the said petitioner of a right to possess and protect property in violation of the first clause of the Article I of the Constitution of the State of New Jersey; and would be a taking of the private property of the said petitioner for public use without just compensation, in violation of the sixteenth paragraph of Article 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 Fourteenth 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 Village of South Orange to the Village of South Orange, commanding and enjoining them to issue the building permit granting permission to petitioner to erect the building of the type above mentioned, upon the said lands and premises hereinbefore

described, in accordance with the plans and specifications tendered by it to said Building Inspector pursuant to the statute in such case made and provided.

ABRAHAM ROSENBLUM.

10

Subscribed and sworn to this 7th day of July, 1925, before me, at Newark, N. J.

IRVING GELBER,
A Notary Public of New Jersey.

20

30

40

ORDER TO SHOW CAUSE.

NEW JERSEY SUPREME COURT.

10

FRANKLIN REALTY & MORTGAGE COMPANY, *Relator.* *vs.* VILLAGE OF SOUTH ORANGE, *et als., Defendants.*	*Order to Show Cause.*

On reading the petition and affidavit filed in the above-entitled cause, it is on this 18th day of July, 1925, ordered that the Village of South Orange and Ira T. Redfern, Inspector of Buildings of the Village of South Orange, in the County of Essex, do show cause before this Honorable Court at the State House in the City of Trenton, on Tuesday, the 6th day of October, 1925, at eleven o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an alternative or premptory writ of mandamus should not issue out of and under the seal of this Honorable Court commanding and directing them, the said Village of South Orange and Ira T. Redfern, Building Inspector of the Village of South Orange, to issue a permit to said Franklin Realty & Mortgage Company for the erection of a two-story brick building containing six stores and one apartment for use of a janitor on the first floor and six apartments on the second floor, on the property of the said Franklin Realty & Mortgage Company, in said Village of South Orange, and it is further or-

20

30

40

dered that both parties have leave to take depositions.

Let this rule be entered in the minutes.

WM. S. GUMMERE,
C. J.

10 We consent to making of the foregoing order.

RIKER & RIKER,
Attorneys for Defendant.

On motion of

HOWE & DAVIS,
Attorneys for Realtor.

20

30

40

AGREED STATE OF FACTS.

NEW JERSEY SUPREME COURT.

FRANKLIN REALTY & MORTGAGE COMPANY, *Relator.* *vs.* VILLAGE OF SOUTH ORANGE, *et als.*, *Defendants.*	*Agreed State of Facts*

10

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. Neither party shall be precluded, however, by this stipulation from bringing in proof of additional facts should they so desire: 20

1. Realtor, Franklin Realty & Mortgage Company, is the owner under contract of a certain tract of land and premises in the Village of South Orange, County of Essex and State of New Jersey, and described as follows:

BEGINNING at the intersection of the south 30 westerly corner of South Orange avenue and Fairview avenue; thence (1) along Fairview avenue, south forty-four degrees thirty minutes west one hundred twenty-five feet; thence (2) north sixty degrees thirty-one and one-half minutes west one hundred feet; thence north fifty degrees forty-five and one-half minutes east one hundred feet to South Orange avenue; thence (4) along South Orange avenue, south seventy-six degree thirty-four and one-half minutes east 40

one hundred feet to Fairview avenue and the point and place of BEGINNING.

2. On June 15th, 1925, realtor applied to Ira T. Redfern, Building Inspector of the Village of South Orange, for a permit to erect a
10 building containing six stories and one apartment for use of a janitor on the first floor and six apartments on the second floor, in accordance with certain plans and specifications therewith submitted, which application was in writing, a copy of same with the endorsements thereon being hereto attached and marked Exhibit A. The said plans and specifications had first been approved by the Board of Tenement House Commissions of the State of New Jersey and the
20 legal fee required by law to be paid for the issuance of said permit was thereupon tendered to said Building Inspector.

3. The said Building Inspector refused to issue said permit or accept such payment on the ground that by an ordinance entitled "An ordinance to regulate and restrict the location hereafter of trades and industries and the subsequent location of buildings designed for a specified use and in a designated area and to regulate
30 and limit the height and bulk of buildings hereafter erected and to regulate and determine the area of yards, courts and other open spaces and for that purpose to divide the Village of South Orange into districts," passed March 20, 1922, and the various ordinance amendatory and supplementary thereto, forbids the erection of said building upon the premises owned by petitioner. The said building is to be seventy-two feet in depth on the easterly side and forty-six and
40 six-tenths feet on the westerly side by one hun-

dred feet frontage and ninety feet in the rear and is to be built to a height of twenty-five feet.

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

5. By the terms of the said ordinance as in force at the time of the making of said application, the said premises are located in what is known as resident A district. 10

6. The property in question is not within any tstablished fire limits in the Village of South Orange.

7. The firemen in the South Orange fire department are perpetually on duty except when allowed time for lunch and one day off in every six. There is no shift as there is but one platoon. 20

8. The block upon which realtor's property is situate is at the southwesterly corner of South Orange avenue and Fairview avenue. Fairview avenue joins South Orange avenue at the corner upon which realtor's property is situated at an acute angle.

9. The following is a statement of assessed valuations of the Village of South Orange for the past ten years: 30

Year	Valuation
1913	$10,950,662
1914	11,784,851
1915	11,963,338
1916	12,675,689
1917	13,410.045
1918	13,784,037
1919	14,127,009
1920	14,863,526
1921	15,756,795
1922	18,494,960
1923	20,663,754
1924	22,489,814

40

Agreed State of Facts.

10. The following is a statement of the appropriations for fire purposes for the past seven years:

1918	$ 8,600.00
1919	10,000,00
1920	12,000.00
1921	12,980.00
1922	16,507.00
1923	22,895.00
1924	25,151.00

The sum of $11,750.00 was spent for a combination chemical hose and pumping engine for the year 1924 and paid for an issue of bonds of The Village of South Orange. This last-mentioned sum is not included in the appropriation for 1924, but is an addition thereto.

11. The following is a statement taken from the annual reports of the Inspector of Buildings of the Village of South Orange from the years 1919 to 1923, inclusive, and correctly shows the information therein given:

	New Buildings		Additions & Alterations	
	Permits	Estim. Cost	Permits	Estim. Cost
1919	158	$1,047,227	22	$ 40,520
1920	166	916,918	40	67,976
1921	227	1,617.629	44	45,865
1922	285	2,087,435	46	101,958
1923	327	2,093,204	65	83,303
	1,163	$7,762,413	217	$339,622

Total Estimated Cost

$1,087.747	1919
984,894	1920
1,663,494	1921
2,189,393	1922
2,176,507	1923
8,102,035	

10

12. South Orange avenue is the same street as that referred to in the case of State v. Bigelow, 2 N. J. Misc., page 711.

HOWE & DAVIS,
Attorneys for Relator.

RIKER & RIKER,
Attorneys for Respondents.

20

30

40

Schedule A.

Application to the Inspector of Buildings for Permit for the Construction of New Buildings by the Owner, Architect or Builder.

South Orange, N. J., June 15, 1925.

10 The undersigned, in compliance with the Building Ordinance files the following report of a new Brick, Stone or Concrete Building:

Reported by Franklin Realty & Mortgage Co.

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

1. Number of Buildings to be erected, 1; Location, S. W. corner South Orange Avenue
20 and Fairview Avenue.

2. Size of Main Building, 100 front, 90 rear, East side 72; West 46.6; number of stories, 2; height of building, 25 feet.

3. Depth of foundation 1 ft; thickness 16 inches; material.

4. Mortar for foundation, Cement; cellar or trench wall, cellar; Waterproofed below grade, Yes.

30 5. Footing course; width 28 inches; thickness 12 inches; material, Brick.

6. If piers, columns or posts are used, state what kind, Iron; bound stone, Blue.

7. Thickness of outside walls; 1st story 12 inches; 2d, 12 inches, material Brick; fire stops at each story, yes.

8. Thickness of inside partition walls; 1st story, 6 inches; 2d, 6 inches; material, frame;
40 entrance to cellar from outside, Yes.

Schedule A.

9. Material of roof and style; also cornices and appendages, Slag roof, Terra Cotta.

10. Material of timber, Spruce and Fir; bearing partition walls, Steel.

11. Size of floor beam, 1st tier 2x10 inches; 2d tier 2x10 in; ceiling beams 2x6 inches; roof beams or rafters, 2x8. 10

12. Girders; of what material and size to support floors, Yellow pine 6x8; how supported, Lally Columns.

13. Iron Girders supporting walls; depth....

14. Iron or steel construction, Steel.

15. Distance of wood work from inside of any flue, 6 inches; size of flue linings, 8x16 inches.

16. Distance of beams or headers from outside of chimney or flue, 2 inches; concrete cellar bottom, Yes. 20

17. Distance chimney projects inside of building, Chimney, where started from, Cellar bottom.

18. Size of bridging, 2x2; rows in each tier, 1; material of lathing in cellar, Plaster Board.

19. Hearths, ...

20. Height of ceilings; 1st story, 12 feet; 2d, 9 feet. 30

21. Bulkhead on roof?.....; skylight, Yes; scuttle: Yes; elevator? No; dumwaiter? no.

22. Size and number wood ceilings, No; metal Ceilings, Yes.

23. Openings for doors and windows, State whether arched or lintels are to be used, Lintels. If lintels are used, materials, Iron; corner or interior lot, Corner.

24. Hall partitions; how fireproofed, Hollow Tile. 40

Schedule B.

25. Distance from property line, front, nine feet; side, nine feet; South side, 8 feet; Size of lot 100x80 54.6.

33. Proposed use of building, Apartments and stores. How heated, steam, how lighted, Elec.

10 Estimated cost (exclusive of lot) of each building separate $40,000.

Office of Inspector of Buildings.

Village of South Orange, June 15th, 1925.

I have this day received and examined the building plan submitted with this application, and find that it is not in accordance with the zoning ordinance of this Village and permit is rejected.

20 (Sgd.) IRA T. REDFERN,

Inspector of Buildings.

Schedule B.

Section 4.—GENERAL HEIGHT LIMITS AND SET-BACK FRONT YARDS.

(a) No building shall exceed three stories or 55 feet in height except that the provisions
30 of this ordinance with regard to height shall not apply to church spires, cupolas, belfries, chimneys, flag poles or water towers; nor to bulkheads, hose towers, elevator enclosures water tanks or scenery lofts, occupying an aggregate area of not over 25 per cent. of the ground area of the building. A mezzainine story shall always be considered to be a full story.

(b) Except along one street frontage of a
40 corner lot, no story of a building shall be nearer

Schedule B.

to the street line of any street on which it faces than the average alignment of the corresponding stories of existing buildings within 200 feet on each side of the lot and within the same block where such set-back distance is greater than that prescribed below in Section 5 for the district involved, excepting that no building shall be required to set back more than 50 feet from any street line.

10

Section 5.—DISTRICT HEIGHT LIMITS AND SET-BACK FRONT YARDS.

(a) In Residence "A" and Residence "C" Districts, no part of a building shall be higher above the curb level than the distance it sets back from the street line of the street on which it faces and the front yard setback distance to the main front wall shall not be less than 25 feet, except that on a corner lot the setback distance from one street line may be reduced to not less than 15 feet.

20

Section 10.—RESIDENCE "A" DISTRICTS "USE" PROVISIONS.

(a) Within any Residence "A" District, as indicated on the Building Zone Map, no building or premises shall be used for other than one or more of the following specified purposes except as hereinafter prescribed:

30

(1) A dwelling for one family or for one house-keeping unit only. Roomers or boarders shall not be prohibited; provided that there is no display or advertising or conspicuous sign.

(2) The office of a professional person, provided there is no display of goods or advertising and no conspicuous sign.

(3) Clubs, lodges, social and community center buildings, excepting those a chief activity

40

Schedule B.

of which is a service customarily carried on as a business.

(4) Recreation buildings, playgrounds or parks.

(5) Schools, memorial buildings, public li-
10 braries, public museums, public art galleries.

(6) Churches and other places of worship, parish houses, Sunday School buildings.

(7) Farms, nurseries or greenhouses not operated primarily for profit, provided that there is no display of products, other than in growth, and no advertising, and further provided that there is no power plant and that any greenhouse heating plant is at least 20 feet distant from each lot line.

20 (8) Inconspicuous real estate signs, advertising the sale, rental or lease of only the premises on which they are maintained. Such signs shall be distant at least 25 feet from any street line, except that they may be against such portion of a building as may be nearer to the street line

(9) 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, nor any billboard or advertising sign.

30 (10) Private garages as prescribed in Section 14.

Section 5.—DISTRICT HEIGHT LIMITS AND SETBACK FRONT YARDS.

(c) In Business Districts, no part of a building shall be higher above the curb level than ten feet less than twice the distance it sets back from the center line of the street it faces. Parapet walls and cornices may, however, extend
40 above such height limit not more than five feet.

NEW JERSEY SUPREME COURT.
No. 246. October Term, 1925.

FRANKLIN REALTY & MORTGAGE *Relator.* *vs.* VILLAGE OF SOUTH ORANGE and IRA T. REDFERN, Building Inspector of the Village of South Orange, *Defendants.*	*Opinion.*

10

Submitted October Term, 1925; decided February 2, 1926.

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

Before Justices Trenchard, Katzenbach and Lloyd.

20

For the realtor, Howe & Davis (Edward L. Davis, of counsel).

For the defendants,, Riker & Riker (Thomas E. Fitzsimmons of counsel).

Per Curiam:

This is a rule to show cause why an alternative or peremptory writ of mandamus should not issue directing the Village of South Orange and the Building Inspector of the village to issue a permit to the Franklin Realty & Mortgage Company for the erection of a two story brick building containing six stores and one apartment for the use of a janitor on the first floor, and six apartments on the second floor, on the property of the company.

30

It appears that the plans and specifications have been approved by the Board of Tenement House Commissioners of New Jersey, but that

40

permission to erect the building was refused bv the Building Inspector for the reason that a zoning ordinance forbids the erection of stores and apartments on the premises, the property being located in what is known as Residence "A" District, and for the reason that the proposed building would violate the "set back" provision of the ordinance respecting that district.

The block upon which the realtor's property is situated is at the southwest corner of South Orange Avenue and Fairview Avenue. The property has a frontage on South Orange Avenue of 100 feet and on Fairview Avenue of 125 feet. Fairview Avenue joins South Orange Avenue at the corner upon which realtor's property is situated, at an acute angle.

We think that this case is controlled by the principles laid down in Ignaciunas vs. Risley, 98 N. J. L. 712! affd. 99 N. J. L. 389.

The "set back" provision of the zoning ordinance is ineffective and constitutes no reason for denying the permit.

Eaton vs. South Orange, 3 N. J. Misc. R. 957, 958.

The contention made in the defendant's brief that the permit was properly refused because of the testimony as to increased traffic is also answered by the last mentioned case.

A peremptory writ of mandamus will be awarded. In case an appeal is desired an application will be entertained for an order for the moulding of the pleadings.

10

20

30

40

NEW JERSEY SUPREME COURT.

FRANKLIN REALTY & MORTGAGE COMPANY, *Relator.* vs. VILLAGE OF SOUTH ORANGE and IRA T. REDFERN, Building Inspector of the Village of South Orange, *Respondents*	*On Alternative Writ of Mandamus* Order Moulding the Pleadings and Directing Judjment to be Entered Thereon

10

The above named realtor having presented its petition and secured an order to show cause why a peremptory writ of mandamus should not issue as prayed for in said petition and the matter having been argued before, considered and de- 20 cided by this court in favor of the realtor, and having concluded and ordered the issuance of a peremptory writ; and the respondent desiring to appeal from said judgment,

It is now ORDERED by the Court that the pleadings in said cause be moulded by filing an alternative writ of mandamus, a return thereto in which papers the issues decided by this Court 30 shall be plainly expressed, and a demurrer to said return upon which demurrer judgment be and it is hereby ordered sustaining the demurrer, and directing the issuance of a peremptory writ of mandamus against the Village of South Orange and Ira T. Redfern, Building Inspector, forthwith do issue to said Franklin Realty and Mortgage Company a building permit authorizing the erection and construction of the building 40

Order Moulding

described in said petition upon the payment of the license fee required by law.

By the Court,

THOMAS W. TRENCHARD,
J. S. C.

10

Dated March 8th, 1926.

On Motion of

RIKER & RIKER,
Attorneys for Respondents.

20

30

40

NEW JERSEY SUPREME COURT.

New Jersey, ss.

(L. S.) The State of New Jersey to the Village of South Orange and Ira T. Redfern, Inspector of Buildings of the Village of South Orange and State of New Jersey GREETING Whereas Franklin Realty & Mortgage Company has applied to the Inspector of Buildings of the Village of South Orange for a permit to erect a two-story brick building containing six stores and one apartment for use of a janitor on the first floor and six apartments on the second floor, to be constructed upon the premises of said Franklin Realty & Mortgage Company at the Southwest corner of South Orange Avenue and Fairview Avenue, South Orange, New Jersey, the said plot of land having a frontage on South Orange Avenue of one hundred feet and a frontage on Fairview Avenue of one hundred twenty-five feet; and, whereas, the said Building Inspector of the Village of South Orange refused to issue said permit upon the sole ground that under an ordinance adopted by the Village of South Orange, approved March 20th, 1922, and entitled "An ordinance to regulate and restrict the location hereafter of trades and industries and the subsequent location hereafter of trades and industries and the subsequent location of buildings designed for a specified use and in a designated area and to regulate and limit the height and bulk of buildings hereafter erected and to regulate and determine the area of yards, courts and other open spaces and for that purpose to divide the village of South Orange into districts," and the various ordinances amendatory and supplementary thereto, said building

could not be erected because the said ordinance forbids its erection in what is called residence A district, the said property being located in residence A district; and, whereas, it is charged and insisted before us that said ordinance insofar
10 as it purports to prevent the said Franklin Realty & Mortgage Company from erecting and constructing the said building as contemplated, is illegal in that the reservation of the district in which the realtor's said property is located, to the use prescribed by said ordinance is beyond the power of the Village of South Orange under the provisions of the statute and that the Village of South Orange under the statute has no power to prevent the erection of said building in said
20 district, and that the restriction is not designed to promote the public health, safety and general welfare; and, whereas, it has also been represented to us that the effect of enforcing the provisions of said ordinance to prevent the said Franklin Realty & Mortgage Company from the erection and building which they seek to erect would be to deprive the said Franklin Realty & Mortgage Company of a right to possess and protect property in violation of the first clause of Article 1 of the Constitution of the State
30 of New Jersey, and would be taking of the private property of the said Franklin Realty & Mortgage Company 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 Franklin Realty & Mortgage Company by the Constitution of the State of New Jersey and
40 would likewise be a violation of the rights se-

cured to the said Franklin Realty & Mortgage Company by the 14th Amendment to the Constitution of the United States in that it would be a deprival of Franklin Realty & Mortgage Company of its property without due process of law and would be a denial to it of the equal protection of the law; all as by the complaint of the said Franklin Realty & Mortgage Company we have understood: 10

We, therefore, willing that due and speedy justice should be done in this behalf command and strictly enjoin you, that immediately after the receipt of this writ you do issue to the said Franklin Realty & Mortgage Company, a permit to erect the building aforesaid or cause to us to the contrary thereof signify, lest in your default complaint should come to us repeated; and how you shall execute this, our command certify to our Justices of our Supreme Court of Judicature, at Trenton, upon the 29th day of March, 1926, together with this our writ, and this in nowise omit at your peril. 20

WITNESS, the Honorable William S. Gummere, Chief Justice of the Supreme Court at Trenton, the 9th day of March, 1926.

EDWARD J. KELLEHER. 30

HOWE & DAVIS,
Attorneys for Relator.

Approved as to form.

RIKER & RIKER,
Attorneys for Defendants.

A true copy.

EDWARD J. KELLEHER,
Clerk. 40

FRANKLIN REALTY & MORTGAGE COMPANY, *Relator* *vs.* VILLAGE OF SOUTH ORANGE, *et als., Defendants.*	*On Mandamus.* *Return to Alternative Writ of Mandamus.*

10

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

We, the Village of South Orange and Ira T. Redfern, Inspector of Buildings, to whom the said writ is directed, do hereby make return thereto to your Honors and assert and certify
20 that all the statements set forth in said writ are not true; that it is true that we refused to issue the building permit referred to in the alternative writ of mandamus for the reason that the Village of South Orange has a Zoning Ordinance which prevents the erection of the type of building proposed by the realtor, which ordinance is designed to protect the health, safety and general welfare of the inhabitants of the Village of South Orange and is a valid exercise of the police power under the statutes and under the charter
30 of the Village of South Orange for the following reasons:

The Village of South Orange has not sufficient fire facalities to adequately protect the type of building proposed. The erection of an apartment house on the plot owned by realtor would present an extra hazardous traffic condition which would be injurious to the safety of the inhabitants of the Village of South Orange. The
40 Village of South Orange has a superadded power

in its charter to prevent the erection of the type of building proposed.

Therefore, we humbly pray that said writ may be dismissed and that we be relieved from obeying the command therein given.

VILLAGE OF SOUTH ORANGE,
By GEORGE H. BECKER,
President.

IRA T. REDFERN,
Building Inspector.

10

20

30

40

NEW JERSEY SUPREME COURT.

FRANKLIN REALTY & MORTGAGE COMPANY, *Relator.* *vs.* VILLAGE OF SOUTH ORANGE, *et als., Defendants*	*Demurrer to Return.*

10

Franklin Realty & Mortgage Company, the relator, demurs to the return of the defendants upon the following grounds:

1. Because the matters contained therein are insufficient in law to bar or preclude the relator from having or maintaining its action thereof against the said defendants.

20

2. Because said return sets up no answer or defense to the command of the alternative writ of mandamus.

3. Because said return does not set up facts sufficient in law to bar or preclude the relator.

WHEREFORE, by reason of the insufficiency of the said return in this behalf, the relator prays judgment and that a peremptory writ of mandamus may issue commanding the said defendants to perform according to the command of the alternative writ above, with costs.

30

HOWE & DAVIS,
Attorneys for Relator.

40

NEW JERSEY SUPREME COURT.

FRANKLIN REALTY & MORTGAGE COMPANY, *Realtor,* vs. VILLAGE OF SOUTH ORANGE *et al., Defendants-Respondents.*	*On Alternative Writ of Mandamus. Rejoinder*

10

And the said respondents say that the said return and the matters and things therein contained and set forth are sufficient in law for them, the said respondents, to prevent the issuance of a peremptory writ of mandamus and the said respondents are ready to verify and prove the same as the Court shall herein award.

20

RIKER & RIKER,
Attorneys for Respondents.

30

40

FRANKLIN REALTY & MORTGAGE COMPANY, *Realtor,* vs. VILLAGE OF SOUTH ORANGE and IRA T. REDFERN, Building Inspector of the Village of South Orange, *Defendants-Appellants.*	*On Mandamus. Notice and Grounds of Appeal.*

10

TO MESSRS. HOWE & DAVIS,
Attorneys for Appellee.

TAKE NOTICE that the appellants, Village of South Orange and Ira T. Redfern, Building Inspector of the Village of South Orange, appeal from the order of the Supreme Court of the State of New Jersey entered on the eighth day of March, 1926, granting to the relator-appellee a peremptory writ of mandamus to the New Jersey Court of Errors and Appeals upon the following grounds:

20

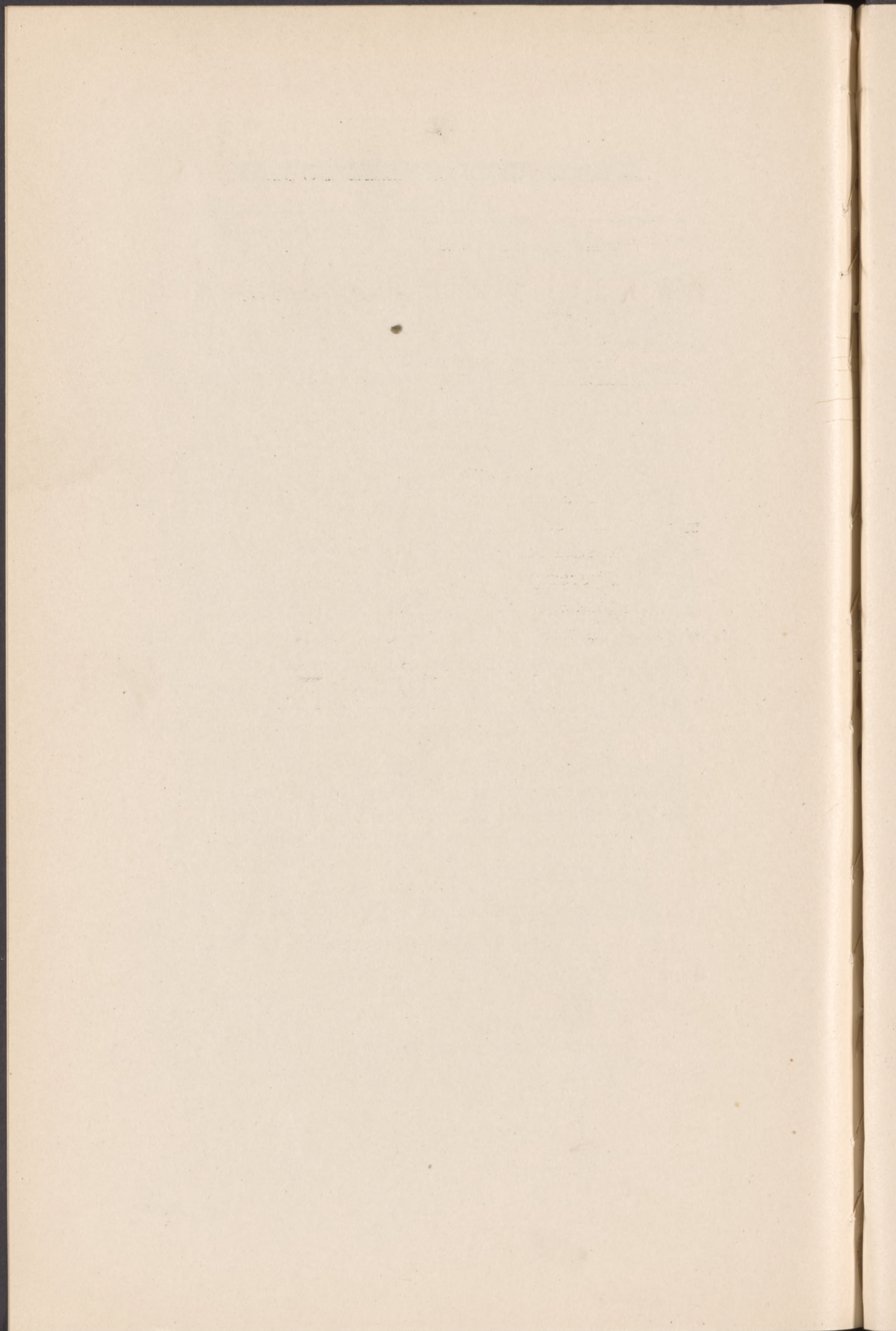
That the Supreme Court of the State of New Jersey erred in granting a peremptory writ of mandamus to the appellee instead of dismissing the application therefor.

RIKER & RIKER,
Attorneys for Defendants-Appellants.

30

Dated: February 19, 1926.

40



72 MAY.T.1926

New Jersey Court of Errors & Appeals

FRANKLIN REALTY AND MORTGAGE COMPANY, *Realtor—Appellee.* *vs.* VILLAGE OF SOUTH ORANGE AND IRA R. REDFERN, Building Inspector of the Village of South Orange, *Defendants, Appellants.*	*On Mandamus* *Brief for Defendants-Appellants*

FACTS.

This is an appeal from a decision of the Supreme Court granting a peremptory writ of mandamus to the Relator-Appellee directing the Village of South Orange and its Building Inspector to grant to the said Relator-Appellee a permit for the erection of a two story building on land owned by said Relator-Appellee located at the corner of South Orange Avenue and Fairview Avenue in said municipality, said building to contain six stores and one apartment for the use of janitor on the first floor and six apartments to accommodate six families on the second floor.

This appeal is taken on the ground that the Supreme Court erred in granting said peremptory writ of mandamus to the Relator-Appellee instead of dismissing the application therefor.

POINT 1.

A MUNICIPAL ORDINANCE PROVIDING A BUILDING LINE IS A REASONABLE EXERCISE OF THE POLICE POWER AND NOT UNCONSTITUTIONAL.

In view of the recent decision of the highest court of this state, it seems to be well established that any municipality under a proper exercise of its police power can make regulations which in effect mean a confiscation of property without compensation, provided that such regulation is reasonably necessary to protect the safety, health and general welfare of the municipality. This proposition is laid down by an opinion of this court decided June 19, 1922, in the case of Schait v. Senior, 97 Law 390. In that case, at page 391, Mr. Justice Trenchard, writing the opinion of the court, said:

> "The realtor contends that the Home Rule Acts of 1917 (Phamp. L., page 319), as supplemented by Chapter 240 of laws of 1920 (Pamph. L., page 455), pursuant to which the ordinance was avowedly enacted, is unconstitutional as depriving the relator of his property without compensation. To this it is sufficient for present purposes to say that the act authorizing a town in the exercise of

> its police power to enact a Zoning Ordinance to promote the public health, safety and general welfare, and in that respect and to that extent is constitutional. CLIFFSIDE PARK REALTY CO. v. CLIFFSIDE PARK, 96 N. J. L. 278."

In that case the realtor requested the Town of Montclair to issue a permit for the erection of a garage to accommodate more than five motor vehicles. The application was refused on the ground that the particular section in question was zoned by ordinance prohibiting the erection of a garage or a group of garages for more than five motor vehicles on any lot situated within a radius of two hundred feet of or within any portion of a street between two intersecting streets in which portion there existed a public library or a church and this court held that such regulation was a reasonable regulation touching public health, safety and general welfare of the Town of Montclair and was within the scope of the police power of the town and that such provision was valid.

In the instant case a somewhat similar question is involved. The property upon which the realtor proposes to erect the building containing six stores and one apartment for use of janitor on the first floor and six apartments to accommodate six families on the second floor is located at one of the busi-

est and most dangerous street intersections in the Village of South Orange. South Orange Avenue is the main artery of traffic between South Orange and Newark. Fairview Avenue is a connecting link between South Orange Avenue and Irvington Avenue, South Orange. These streets are constantly used both during day and night by all types of vehicles. At the particular corner in question a very bad traffic condition is presented. To build any type of building on the property would considerably affect the safety of the inhabitants of the Village of South Orange.

The regulations requiring the setback are not designed purely for aesthetic purposes, but, on the contrary, has been enacted by the governing body after making a complete survey of the conditions of the Village and determining that the regulation was reasonably necessary to safeguard the public. This proposition was further elaborated upon in the case of Schait v. Senior, supra, at page 392, where the court said:

> "The provision of the ordinance prohibiting the granting of the permit in such circumstances is a reasonable regulation touching public health, safety and general welfare and is within the scope of the police power of the town and is consequently valid. NINTH STREET IMPROVEMENT COMPANY v.

> OCEAN CITY, 90 N. J. L. 106, affirmed Id. 703. It is not designed for aesthetic purposes. It is a designation of the uses for which certain buildings may not be erected giving reasonable consideration to the character of the district and the necessities of the public safety and welfare. It is a reasonable regulation of the size and location of garages, in view of their obvious and recognized possibilities for incidental dangers if unreasonably large and unduly near churches, public libraries or the like where large bodies of citizens habitually congregate."

It is unnecessary to advance further argument on this point or to cite further cases as those quoted above are on all fours with the present case and are of recent origin in this court.

POINT II.

A MUNICIPAL ORDINANCE PROHIBITING THE ERECTION OF APARTMENT HOUSES IN AREAS WHICH CANNOT BE PROPERLY PROTECTED FROM FIRE IS A VALID EXERCISE OF THE POLICE POWER.

The Village of South Orange is a small residential municipality, having a population of about twelve thousand people. Its fire depart-

ment is composed of a chief and four paid men who are regularly on duty every day. In addition to these men there are about ten volunteer call men who attend fires when they are in town upon hearing an alarm which is sounded. These men are paid a small sum of money each year for their services, depending upon the percentage of fires attended. Its apparatus consists of three pieces of motor apparatus as follows—one city service hook and ladder truck, one triple combination motor car and one ton Ford truck for handling small fires such as still alarms and brush fires.

At the time the ordinance in question was adopted there existed in the Village of South Orange three apartment houses, two of which are located in the zone now set apart for apartment houses. At that time a complete survey of the municipality was made and careful consideration was given to the erection of additional apartment houses in the municipality and the governing body after consulting disinterested experts and upon the advice of the chief engineer of the fire department, determined that on account of its limited fire facilities it would be highly dangerous and detrimental to the safety and general welfare of the inhabitants of said municipality to allow apartment houses to be built promiscuously throughout its territory. As a result it was decided to prohibit the erection of apartment houses in certain areas and to confine the same to an area where under certain condi-

tions it might be possible to protect said apartments and other houses in the vicinity with some degree of success.

In the testimony attached to the agreed state of case it appears without being contradicted that the present fire department of the Village of South Orange is inadequate to properly take care of apartment houses of the type proposed. The fire chief testified that it has not sufficient men to take care of a four story apartment house and that in the event of a fire it is necessary for him to place one man at each floor. If that is true and that testimony is corroborated by a disinterested witness, Matthew P. A. McDermit, Deputy Chief of the Fire Department of the City of Newark, a man who has been connected with the Newark Fire Department for a period of more than forty years, that with the man power, which the Chief of the Fire Department of the Village of South Orange has at the present time, he could not adequately cope with a fire that might break out in apartment houses.

It appears by the uncontradicted testimony of Louis F. Bird, Chairman of the Fire Committee of the Village of South Orange, and Harry J. Becker, Chief of the Fire Department of said Village, that the Civil Service Commission has been requested on many occasions to furnish an eligible list for membership in the

fire department of the Village of South Orange, but it appears that the Commission has been unable to do so. This is a condition which has been created by the Legislature of this state and is one over which the governing body of the Village of South Orange has absolutely no control, and until that statute is amended or supplemented the Village of South Orange is powerless to obtain the men necessary to increase its department both in man power and in apparatus to properly care for the existing conditions as well as further development especially if that development is to be along the line of apartment house structures promiscuously built throughout the community.

We are very familiar with all of the cases that have been decided recently by the courts of this state relative to zoning in municipalities and feel that the section of the ordinance under attack is valid exercise of the police power as defined by our courts and in this case it has been our purpose to show both the testimony introduced and the argument in this brief that the regulation was made for the safety of the public both from the standpoint of traffic conditions and the hazard of fire. It has been determined many times that zoning in order to be legal must be brought within some phase of the exercise by a municipality of its police power, which is defined by different authors and jurors in many ways. In

Words and Phrases it is defined as follows: (p. 1066, para. 2.)

> "'Police Power' is nothing more or less than the power of government inherent in every sovereignty. While generally speaking the police power of the state is said to extend to the protection of the public health, the public morals, and the public safety, the law does not recognize those as the extent of the powers, but it embraces regulations designed to promote public convenience and general prosperity as well and the rights of a sovereign state to regulate public service corporations rests on the police power of the state. In re Arkansas Rate Cases, 187 Fed. 290, 292, 297; State v. Kofines, 80 Atl. 432, 33 R. I. 211 Ann. Cas. 19130 (citing License Cases 5 How. 583, 12 L. Ed. 256; Chicago, B. & O. Ry. Co. v. Drainage Commissioners, 26 Sup. Ct. 341, 200 U. S. 561, 592, 50 L. Ed. 596, 4 Ann. Cas. 1175)."

At page 1067, para. 3, under the heading "Delegation of Power," the following definition is found:

> "Court and law writers have found it difficult to define the extent and

boundaries of the 'police power.' It certainly extends to the protection of the lives, health and property of the citizens and to the preservation of good order and public morals. Every citizen has the constitutional guaranty of life, liberty and the enjoyment of his property and they cannot be taken from him except by due process of law. Social and conventional rights, however, are subject to such reasonable limitations in their enjoyment as will prevent them from being dangerous and hurtful to the body politic, and the law-making department of the government, under the power vested in it by the constitution, can enact laws providing for such reasonable restraints and regulations as may be necessary and expedient to secure social order and public morals. A City Council has a large discretion in the enactment of ordinances and an ordinance enacted under the police power will not be declared void unless it is clearly oppressive or unreasonable. Commonwealth, for Use of City of Madisonville v. Price, 94 S. W. 32, 33, 123 Ky. 163, 13 Ann. Cas. 489 (quoting and adopting definition in Dunn v. Commonwealth, 105 Ky. 834, 49 S. W.

813, 43 L. W. A. 701, 88 Am. St. Rep. 344)."

In this State the accepted view of our court in reference to the police power is that a municipality can, in its exercise of this great power, adopt reasonable regulations to safeguard the health, safety and general welfare of the community. The logical conclusion that must be drawn from the above definitions is that there are two questions of primary importance to the property owners in a municipality adopting a comprehensive plan controlling building development. 1—Do such regulations come within the purview of the police power? 2—Can the particular regulations adopted be sustained as a competent and reasonable exercise of that power?

There seems to be no doubt concerning the constitutionality of the law under which the ordinance under consideration was adopted and the following cases are cited as authority on this point:

CLIFFSIDE PARK REALTY CO. v. CLIFFSIDE PARK, 114 Atl. 797.

ROMER REALTY CO. v. HADDONFIELD, 114 Atl. 248.

HANDY v. SOUTH ORANGE, 118 Atl. 838.

DORISON v. SAUL, 118 Atl. 691.

VERNON v. WESTFIELD, N. J. Adv. Rep. 1031.

LEVY v. MRAVLAC, 115 Atl. Rep. 350.

ELY v. HIGHTSTOWN, 1 N. J. Mis Rep. 391.

SCHAIT v. SENIOR, 117 Atl. 517.

IGNACIUNAS v. RISLEY, 121 Atl. 783, affirmed 125 Atl. 121.

COOPER LUMBER CO. v. DAMMERS, 125 Atl. 325.

It is contended by counsel for the relator that the erection of an apartment house on the property in question would have no marked effect upon the fire risk or safety of said neighborhood. Experience, however, has shown that risk from fire is greater in these large structures than in small dwellings. This statement is substantiated by the testimony of Mr. McDermit that in the City of Newark apartment houses and large structures are considered the greatest fire hazard possible and is a problem which is constantly confronting the authorities of that city. Counsel also argues that the erection of one or two apartment houses would not seriously increase the fire hazard. This contention is not sound because it would be foolhardy and lack of good judgment upon the municipal authorities to increase a hazard that already exists. In addi-

tion this case is a very important one because it is one of first impression in this state, as there seems to be no decision directly in point on the subject of excluding or regulating the erection of apartment houses under circumstances such as are presented in this case. At the present time there are three applications before this court for a peremptory writ of mandamus to compel the Village of South Orange to grant a permit for the erection of apartment houses. If the permit is granted in this case the door is immediately thrown open to other property owners to apply for permits to erect apartment houses under similar circumstances and the creation of such a precedent will be injurious to the health, safety and general welfare of the Village of South Orange.

Certain principles have been laid down by the Supreme Court of the United States expressive of its attitude with reference to the exercise of the police power by the several states. It has been declared repeatedly that the police power is not susceptible of limiting and confining definitions.

In CAMFIELD v. U. S. 167 U. S. 518, it was held

> "The police power is not subject to any definite limitations but is co-extensive with the necessities of the case

> and the safeguard of the public interests."

In CUSACK CO. v. CHICAGO, 242, U. S. 526, 530, it was said in an opinion sustaining an ordinance prohibiting billboards within a described district:

> "While this court has refrained from any attempt to define with precision the limits of the police power, yet its disposition is to favor the validity of laws relating to matters completely within the territory of the state enacting them and it so reluctantly disagrees with the local legislative authority, primarily the judge of the public welfare, especially when its action is approved by the highest court of the state whose people are directly concerned, that it will interfere with the action of such authority only when it is plain and palpable that it has no real or substantial relation to the public health, safety, morals, or to the general welfare. JACOBSON v. MASSACHUSETTS, 197 U. S. 11, 30."

In CHICAGO, BURLINGTON & QUINCY RAILROAD v. DRAINAGE COMMISSIONERS, 200 U. S. 561, 692, it was said:

"We hold the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety * * *. And the validity of a police regulation. whether established directly by the state or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose."

In HADACHEC v. SEBASTIAN, 239 U. S. 143, it was held, p. 541:

"The principle (that the police power cannot be arbitrarily exercised is familiar, but in any given case it must plainly appear to apply. It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed seem harsh in its exercise usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot

> be asserted against it because of conditions once obtaining. CHICAGO & ALTON R. R. v. TRAILBARGER, 238 U. S. 67, 78. To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress and if in its march private interests are in the way they must yield to the good of the community. The logical result of petitioner's contention would seem to be that a city could not be formed or enlarged against the resistance of an occupant of the ground and that if it grows at all it can only grow as the environment of the occupation that are usually banished to the purlious."

For analogous cases see MURPHY v. CALIFORNIA, 225 U. S. 623; SLICH v. KIRKWOOD, 237 U. S. 52; MILLER v. STRAHL, 239 U. S, 426; EAST v. VAN DENMAN & LEWIS, 240 U. S. 342; ARMOUR & CO. v. NORTH DAKOTA, 240 U. S. 510; HUTCHINSON ICE CREAM CO., v. IOWA, 242 U. S. 153, and numerous other cases cited.

In the case of LINCOLN TRUST COMPANY v. WILLIAMS BUILDING CORPORATION, 128 N. E. 209, a leading New York case, it was held that the exercise of police power within constitutional limitations,

depends largely on the discretion and judgment of municipal authorities with which the courts are reluctant to interfere and that municipalities in the exercise of such police powers may regulate the conduct of an individual and the use of his property.

The attention of the court is particularly directed to the testimony of Matthew P. A McDermit, Deputy Chief of the Fire Department of the City of Newark, which appears on pages 33-41 of the testimony attached to the state case. He testifies in general that he has been connected with the department of which he is Deputy Chief as a paid man for forty-one years and that he has made a survey of the conditions existing in the Fire Department of the Village of South Orange. H states that in his opinion the erection of apart ment houses in that municipality would be very dangerous and detrimental to the safety and general welfare of the municipality states that the fire hazard is greater with apartment houses than it is with a normal one, two or three family house and that until the Village of South Orange is able to increase its department to the point where it will have a reserve company no further apartment houses should be allowed to be constructed. This testimony is very valuable coming from a man of the exeperience of Mr. McDermit, who is entirely disinterested in this case. It stands before this court without being contradicted in

the slightest degree and should be weighed very carefully by this court in arriving at a decision.

The future of the Village of South Orange and many other communities throughout the state which are confronted with the same difficulties as the Village of South Orange in connection with securing ample fire protection is at stake in this case and it is our contention that, if there is any evidence upon which the regulations complained of can be sustained, it should be done.

There is not the slightest indication in the testimony produced in this case or in the argument of counsel that the Village authorities have abused the discretion which the Legislature of this state has placed in it, and further there is absolutely no proof whatever to indicate that the regulations contained in the ordinance under attack are not reasonable exercise of the police power inherent in every municipality designed for the safety, health and general welfare of the public.

POINT III.

THE ORDINANCE IN QUESTION IS DESIGNED TO PROMOTE THE GENERAL WELFARE OF THE VILLAGE OF SOUTH ORANGE.

Too much emphasis cannot be placed upon the tendency which zoning ordinances have

to preserve, especially in suburban communities such as South Orange, the community for the purposes of which it was originally established.

Let us for a moment consider the inducements which have been offered to prospective residence of the suburban community such as the Village of South Orange. The trend from the more populous urban centers to the smaller, more highly restricted urban communities has been continuous for many years past. The controverting of what had been regarded as excellent residential section in our cities into semi-residential sections such as boarding and rooming houses and then into business sections has gone on to such a degree that it is obvious to the most casual observer that the injection of (apartment houses) into a residence community involves a change in use which is inconsistent with the full enjoyment of residential property, and owners of valuable residence property in cities have time and again disposed of their property at a sacrifice in ty. The intent to prevent the incrusion even of dwellings not of a specified type or not surrounded by a certain minimum of land has clearly been shown in so many suburban developments by restrictive covenants placed in deeds as to indicate beyond question that those who have sought to develop outlying sections have clearly appreciated that any restrictive covenant which would insure a certain type

31 Crawford

31 Bray

32 Gratton

31 Hackett

30 Parker

30 Hough

32 Plant

1008
12#4

of development of the ideal of the suburban dwelling would be realized and it is the multiplication of these individual ideals of the suburban dwellers that constitutes the ideal community.

It may be said that in most instances these restrictive covenants were for a limited number of years and that those who established them anticipated that eventually conditions would so change as to make the restrictive covenant a burden. It is true that the old indefinite restrictions and the far more stringent conditions which were placed in deeds for restrictive purposes have to a large extent been abandoned, but a moment's consideration will show that the abandonment of this viewpoint was based primarily upon the hardships which arose on account of the gradual change of neighborhoods due to the approach of business. Under the former policy of municipal developments such an attitude was a reasonable one, for the theory was that by the end of a period, say of twenty years, a community would be so well settled as to have established its general type and that little danger was to be anticipated of changes became a matter of common convenience and general benefit. With the adoption, however, of the legislative policy of restricting the type of buildings and other uses to define areas this former attitude in relation to restrictive covenants becomes merely evidence of the owners

and occupants of land to maintain the use of their land in undisturbed integrity.

The town, whether under building restriction or by an actual development, has built up into fairly well defined residence districts of more or less pretentious type and into business districts. While the incrusion into the residence districts of stores will repeat the old haphazard of municipal development involving wasteful demolition or remodeling of buildings to uses not contemplated when they were built it will do more. It will destroy the ideal of suburban community which the Village of South Orange typifies. The very life and prosperity of the community were posited upon maintenance of the conditions established. It was because such conditions existed either actually or potentially that development of th Village of South Orange along the lines which have resulted in the Village of today was possible. The fact that, to those who desired, lands at moderate prices might be obtained whereon to erect modest homes with the advantage of fresh air, comparative quiet and congenial neighbors determined one type of development; the fact that elsewhere in the town other lands might be obtained of higher price with greater seclusion and greater quiet determined a development in other parts of another type; but those typical developments in the various parts of the Village taken as whole show the community ideal and deter-

mined what in the case of the Village of South Orange might properly be considered the public convenience and general prosperity or, to use the language of the 1920 and 1921 Acts of the State Legislature, the public or general welfare.

The defendants respectfully submit that the rule to show cause granted in this case be dismissed on the ground that the provisions of the ordinance under attack is a valid and reasonable exercise of the police power based upon public necessity and is designed to protect the health, safety and general welfare of the municipality in accordance not only with the authority granted to municipalities of this state by the Acts of the Legislature passed in 1920 and 1921, but also under the inherent police power vested in municipalities by the Legislature.

RIKER & RIKER,
Attorneys for Defendants.

THOS. E. FITZSIMMONS,
of Counsel.

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

New Jersey Court of Errors and Appeals

Franklin Realty & Mortgage Company,
Relator,
vs.
Village of South Orange, *et al.,*
Defendants.

BRIEF FOR RELATOR.

FACTS.

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

The relator, Franklin Realty & Mortgage Company, is the owner of a tract of land at the southwest corner of South Orange avenue and Fairview avenue, in the Village of South Orange. The frontage on South Orange avenue is one hundred feet and on Fairview avenue is one hundred twenty-five feet.

The relator desires to erect upon this lot a two-story brick building containing six stores and one apartment for use of a janitor on the first floor and six apartments on the second floor, at a cost of approximately $40,000.

On June 15, 1925, application was made for a permit for the erection of said building, which application was accompanied by plans and specifications and a tender was made of the legal fee. Said plans and specifications complied with the Building Code of South Orange and have

been approved by the Tenement House Commission of New Jersey.

Section 5 (a). "In Residence 'A' and Residence 'C' Districts, no part of a building shall be higher above the curb level than the distance it sets back from the street line on the street on which it faces, and the front yard set-back distance to the main front wall shall not be less than 25 feet, except that on a corner lot the set-back distance from one street line may be reduced to not less than 15 feet." The proposed height of the building was 25 feet. Prospect street at this point is 50 feet wide, the sidewalk on each side being 10 feet and the road from curb to curb being 30 feet in width. At that point, South Orange avenue is 80 feet wide, being 50 feet from curb to curb, with a sidewalk of 15 feet on each side. A double-track trolley line runs along South Orange avenue, the tracks being on either side of the road, the main portion of the roadway used by vehicular traffic lying in the middle between the two tracks and being approximately 20 feet in width. The Building Inspector of the Village testified that under ordinary circumstances the bulk of the automobile traffic run along the portion of the road lying between the trolley tracks, the remainder of the road not being level or in good shape for such traffic.

There are four other apartment houses in the Village of South Orange, each consisting of two buildings joined together.

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

LAW.

So far as the right of a municipality to forbid the erection of retail stores in any section of a community is concerned, the question seems to have been settled by the case of *Ignaciunas* v. *Risley* (Nutley case), 98 N. J. L. 712.

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

One question is now raised, however, that if presented in the Nutley case, was not mentioned in the opinion. It is that the ordinance provides a set-back from the street or property line and that as the proposed building will use up almost the entire lot it may not be erected.

The ordinance in question provides on the matter of set-back as follows:

"In Residence 'A' and Residence 'C' Districts, no part of a building shall be higher above the curb level than the distance it sets back from the street line of the street on which it faces and the front yard set-back distance to the main front wall shall not be less than 25 feet, except that on a corner lot the set-back distance from one street line may be reduced to not less than 15 feet."

That such a deprivation of the property of an individual can be made is certainly true. It can be done under the right of eminent domain, and it can be done under the exercise of the police power. But the right of eminent domain carries with it the right to compensation. Whether or not South Orange would be justified in taking this property under that right is not before the Court, since the ordinance contains no provision

for compensation and is passed manifestly under the theory of police power. We will, therefore, not enter into any discussion on it.

In this case the taking must be and is attempted to be justified on the theory of the police power. But the police power can only be exercised when some real public interest is involved, such as the public health, safety or welfare.

Before proceeding, it might be advisable to consider the right of a municipality to establish a building line generally under the exercise of the police power as distinguished from the right of eminent domain.

Perhaps the leading case in the State of New Jersey on that question is the case of *Passaic* v. *Paterson Bill Posting Co.,* 72 N. J. L. 285, a Court of Errors case which held that a city ordinance requiring that sign or bill boards shall be constructed not less than ten feet from the street line is a regulation not reasonably necessary for the public safety, and cannot be justified as an exercise of the police power. In part, the opinion of the Court, written by Swayze, *J.,* says:

> "Upon this question the legal rule is accurately stated in the opinion of the Supreme Court in this case as follows: 'The true rule to be extracted from the cases, and the one abundantly supported by them, is that when statutes are obviously intended to provide for the public safety, and the ordinances prescribed under them are reasonable and in compliance with their purposes, both the statutes and the ordinances are lawful and must be given due effect. When the control attempted to be exercised over private rights is in excess of that essential to effectuate such legitimate authority, it deprives the owner of his property by circumscribing the use of it, without giving him the just compensation secured to him in such case by the organic law.'

The Supreme Court held that because the erection of such signs might be attended with danger to the public at times of severe storms, or by the decay of their supports, the ordinance was not without legal authority. In our opinion the legality of the ordinance does not depend upon the possibility of danger thus suggested, but upon whether such a regulation is reasonably necessary for the public safety. There must always be a possibility of danger from the erection of any structure and from its decay, but such a possibility is not sufficient to justify the municipal authorities in depriving a man of the ordinary use of his land. In all our cities and towns fences and buildings are erected upon the street line, involving the same or even greater possibility of danger from severe storms or natural decay, but it would hardly be maintained that a municipality could be authorized by the legislature to compel the owners of buildings already erected to take them down or move them back ten feet from the street line. Yet the danger to the public from bricks or slates, ice and snow, falling from a building is much greater than any possible danger from a billboard. *In determining whether a regulation is reasonably necessary to secure the public safety, and therefore within the legitimate exercise of the police power, existing habits and customs are of great weight, and the universal custom of building upon the street line is cogent evidence that the public safety does not require that structures like billboards should be set back from the line.* The very fact that this ordinance is directed against signs and billboards only, and not against fences, indicates that some consideration other than the public safety led to its passage. It is obvious from the face of the ordinance that the object of the first section was not to secure the public safety; that section contains no reference to a dangerous condition of billboards, while the second sec-

tion expressly undertakes to deal with those that become dangerous.

We think the control attempted to be exercised is in excess of that essential to effect the security of the public. It is probable that the enactment of section 1 of the ordinance was due rather to aesthetic considerations than to considerations of the public safety. No case has been cited, nor are we aware of any case which holds that a man may be deprived of his property because his tastes are not those of his neighbors. Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take property without compensation."

That case quoted with approval the case of *St. Louis* v. *Hill* (Mo.), 21 L. R. A., page 226, which held that there is a taking of property within the meaning of the Constitution when the owner of a lot fronting on a boulevard is, by authority of a statute or ordinance, prohibited from building upon a certain portion of it between a building line thereby established and the street. That case said:

> "The use of a given object is the most essential and beneficial quality or attribute of property. Without it all other elements which go to make up property would be of no effect. If the city were allowed to deprive the defendant to use of his entire lot, it would leave in his hands but a barren and Barmecidal title; and what is true of property rights as an integer is true of each fractional portion. If plaintiff's theory be correct, then the city could pass and enforce an ordinance which would deprive defendant of the use of his entire lot, and still there would be no 'taking,' within the terms of section 21, art. 2, of the Constitution, and consequently no right to compensation. The statement of such a position is sufficient to accomplish its utter repudiation.

> The day before the ordinance went into operation defendant had the unquestionable right to build at will on his lot. The day afterwards he was as effectually prevented from building on the forty-feet strip, except under peril of punishment, as if the city had built a wall around it, and this, too, without any form of notice, and species of judicial inquiry, or any tender of compensation. If this is not a 'taking' by mere arbitrary edict, it is difficult to express in words the meaning which should characterize the act of the city.''

The case of *Fruth* v. *Board of Affairs* (W. Va.), L. R. A. 1915-C, page 981, holds that an ordinance of a municipal corporation ordained pursuant to a provision of its charter authorizing it, establishing a building line on a certain street, and inhibiting abutting owners from encroaching thereon, based on merely aesthetic considerations, is not within the police power, and is unenforceable as a police regulation.

The case of *Willison* v. *Cooke,* 44 L. R. A. (N. S.) 1030 (Colo.), holds that an ordinance prohibiting the owner of a lot on a residence street of a city from erecting thereon a business block, without the consent of a majority of the neighboring property owners, and requiring the buildings to be placed on a building line, a certain distance from the street, deprives him of his constitutional property rights. That case said:

> ''One of the essential elements of property is the right to its unrestricted use and enjoyment; and, as we have seen, that use cannot be interfered with beyond what is necessary to provide for the welfare and general security of the public. Enforcing the provisions of the ordinances in question does not deprive the petitioner of title to his lots. He would not be ousted of possession. He would still have the power to dispose of

> them; but, although there would be no actual or physical invasion of his possession, he would be deprived of the right to put them to a legitimate use, which does not injure the public, and this without compensation, and with due process of law, which our Federal and State Constitutions not only inhibit, but which would be repugnant to justice, independent of constitutional provisions on the subject. St. Louis *v.* Hill, 116 Mo. 527, 21 L. R. A. 226, 22 S. W. 861; Bill Posting Signs Co. *v.* Atlantic City, 71 N. J. L. 72, 58 Atl. 342; Com. *v.* Boston Advertising Co., *supra;* Denver *v.* Rogers, 46 Colo. 479, 25 L. R. A. (N. S.) 247, 104 Pac. 1042. For these reasons, the provisions of the ordinances involved are also invalid."

Presbyterian Church v. *Edgcomb,* 27 A. L. R. 437, holds that "Chapter 213, Laws of 1915, as amended by Chapter 185, Laws 1919, empowers cities of the metropolitan class to impose regulations by ordinance, 'designed to secure the safety from fire and other dangers, and to promote the public health and welfare, including, so far as conditions may permit, provisions for adequate light, air and convenience of access.' Held, that, under the act in question, it is not permissible for such cities to impose unreasonable regulations upon the owners of property with respect to the area of such real estate that they may cover by a proposed building."

The decision in the case of *Windsor* v. *Whitney,* 12 A. L. R. 669, 111 Atl. 354, is *contra.* But the dissenting opinion filed in that case is such a lucid discussion of the principles involved that we desire to direct the attention of the Court to it. The dissenting opinion said, among other things:

> "I do not at all question the desirability of suitable building lines. Nor do I question the power of the state constitutionally to establish them under the eminent domain

doctrine. The repeated argument in the opinion as to the desirability of building lines may be all admitted. It by no means follows that the establishment of such a line is not a taking of property. The question in the case is not at all the desirability of such a line, but its effect, when established upon property rights. Upon this point the United States Supreme Court said, in Chicago, B. & Q. R. Co. *v.* Illinois, 200 U. S. 561, 50 L. Ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175: 'The validity of a police regulation, whether established directly by the state or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose. Private property cannot be taken * * * for public use under a police regulation relating strictly to the public health, the public morals or the public safety, any more than under a police regulation having no relation to such matters, but only to the general welfare. * * * The constitutional requirement of due process of law, which embraces compensation for private property taken for public use, applies in every case of the exertion of governmental power. If in the execution of any power, no matter what it is, the government, Federal or state, finds it necessary to take private property for public use, it must obey the constitutional injunction to make or secure just compensation to the owner.'

What I do insist upon is that if the establishing of such a line does, in the judgment of a properly constituted tribunal, in fact damage an owner by taking of his property, to the extent of that damage he is entitled to compensation.

By the opinion in this case, if the owner sustains such damage as matter of fact, he is yet compelled to contribute that as a private owner, and not as a member of the

public at large. He is not even allowed to raise the question of damage. But this is a taking of property without compensation. Calling what in fact is an exercise of the right of eminent domain an exercise of the police power does not avoid the constitutional question. Building lines are ancillary to highways, and in effect extend the width of highways for the purpose, not indeed of liberal travel, but of light, air, and freedom of view. A somewhat similar case is that of Re Clinton Ave., 57 App. Div. 166, 68 N. Y. Supp. 196; the court says: 'Conceding that the legislature has the power to increase the width of Clinton avenue that it would be justified in taking possession of private property for this purpose upon the payment of just compensation, we are of opinion that it has a right to take a lesser estate in the property than would be necessary for a complete dedication to the use of the public, and that the use is none the less public to the extent to which the property is taken because it is left in the partial control of the present owners. The right that is proposed to be taken is not the right to walk or ride over these particular additions to the width of the avenue, but to afford "ample space for the access of light and air, and also to beautify and adorn." ' Re Curran, 38 App. Div. 82, 55 N. Y. Supp. 1018, 'A street may,' to quote the same case, 'in part unite the two purposes—one to furnish a way for travel, and the other as a park or public place.' It may hardly be questioned that the legislature may authorize the taking of any part of this right which it may deem advantageous to the public, on the payment of just compensation. 10 Am. & Eng. Enc. Law, 2d ed. 1088, and authorities there cited. This is in harmony with the opinion of the court in Re Bushwick Ave., 48 Barb. 9, which is very similar to the case at bar, where the court below held (p. 12) that 'the taking of 20 feet on each side of the avenue, and the appropriation of the same as courtyards

> only, is such a taking as will justify an appraisement of damages therefor. A dominion is asserted over this land by the public, to the extent of depriving the owner of his right to use and enjoy the same for any other purpose than a courtyard. It is so far taking for public use, and is subject for compensation.' "

A statute providing for a plan or map of a city to be made, locating streets, and denying compensation for any building erected within the lines of a proposed street after the filing of the map or the locating of the street, although the opening of the street is not at present contemplated and may not take place for an indefinite time thereafter, is unconstitutional as taking property without just compensation.

Moale v. *Baltimore* (1854), 5 Md. 314, 61 Am. Dec. 276;

Edwards v. *Bruorton* (1904), 184 Mass. 529, 69 N. E. 328;

Forster v. *Scott* (1893), 136 N. Y. 577, 18 L. R. A. 543, 32 N. E. 976;

Re New York (1910), 200 N. Y. 536, 93 N. E. 498 (in effect);

Re Saratoga Ave. (1919), 226 N. Y. 128, 123 N. E. 197;

Re Rogers Ave. (1885), 29 Abb. N. C. 361, 22 N. Y. Supp. 27;

German-American R. E. Title Guarantee Co. v. *Meyers* (1898), 32 App. Div. 41, 52 N. Y. Supp. 449.

A statute providing for the building line setback from the street which does not provide for compensation to the owner is unconstitutional. *People, ex rel. Dilzer* v. *Calder* (1903), 89 App. Div. 503, 85 N. Y. Supp. 1015, *supra.*

The Central Law Journal of February 25, 1916 (Vol. 82, p. 142), reports the case of *Lavery* v.

Board of Commissioners of Jersey City in the Supreme Court of New Jersey, holding an ordinance unconstitutional as transcending the limits of the police power which provided that, for the purpose of protecting property in residential streets, etc., no building of any kind shall be constructed, built, erected or moved upon any land in Jersey City so as to be in front of the whole or any part of any private dwelling house situated upon such land, or in any way that will cut off the frontage of the same, unless a permit is obtained from the Superintendent of Buildings. (This case was reported in the advance sheets of Vol. 96 Atl., page 292, but was not reported in the bound volume, and has not been reported in the New Jersey official reports.

In the case of *Ignaciunas* v. *Risley,* 121 Atl. 783 (Supreme Court), Mr. Justice Katzenbach said:

> "The right to acquire property, to own it, to deal with it, and to use it, as the owner chooses, so long as the use harms nobody, is a natural right. This does not owe its origin to constitutions. It existed before them. Spann *v.* Dallas, 111 Tex. 350, 235 S. W. 513, 19 A. L. R. 1387. It is, however, a right guaranteed by our Constitution. It is a right necessary to the existence of organized society. The protection of this natural right is one of the reasons which prompted men to form governments. The protection of private property is the aim of every well-considered form of government. The right of private property has been called the keystone of the arch of civilization. A government which fails to protect the right of private property cannot endure. Men will not undergo the labor and hardships necessary to the acquisition of property if they find that the ownership and the enjoyment thereof is not to be protected. With the right of ownership and possession goes the right

to use, enjoy and dispose of the property owned. The substantial value of property lies in its use. If the right of use be denied, the value of the property is lessened or destroyed. A law which forbids a certain use of property deprives it of an essential attribute. The result in effect is a prescription of its ownership. Spann *v.* Dallas, *supra.* The defendants, however, say that the right of private property is subject to the police power of the state and must yield to such measures as are designated to promote the public health, safety and general welfare of a community. This, as a general proposition, is true. But the police power is based upon public necessity, and only public necessity can justify its use. The abridgment of the rights of the individual is the usual result of its exercise. It should never be exercised unless it is clear that the subject to be attained is so essential to the public health, safety and welfare as to fully justify its exercise. The use of the police power has grown in recent years, and courts have sustained laws and ordinances as valid which formerly would have been declared invalid and invasions of private rights. Its use affords an easy route to the attainment of ends otherwise impossible. Each case must be considered separately and tested by these general principles. In the present case the question to be determined is whether or not the provisions of the ordinance which prevent the relator from using his property for a store are necessary for the health and safety of the public, of Nutley, for, unless the use of said property for store purposes reasonably endangers or threatens the public safety, health, or welfare, the abridgment of its contemplated use is an invasion of the inherent and constitutional rights of the relator. A provision of an ordinance which assumed to be a police regulation, but which in reality is designed to deprive one of the use of his property under the pretense that it is enacted to promote the public welfare,

safety and health, will be set aside as an invasion of the right of private property."

From these authorities it seems clear that a building line may not be established under the police power, but if at all, under the right of eminent domain. But it is urged that a real principle of public safety is involved, that if the building is not set back 25 feet, a situation of traffic danger is created. As to this objection:

The ordinance in question provides: "In Residence 'A' and Residence 'C' Districts, no part of a building shall be higher above the curb level than the distance it sets back from the street line of the street on which it faces and the front yard set-back distance to the main front wall shall not be less than 25 feet, except that on a corner lot the set-back distance from one street line may be reduced to not less than 15 feet."

In other words, no building may be erected nearer than 25 feet from the property line, and for each foot of height above 25 feet it must recede an additional foot back from the property line.

But in business districts no set-back whatever is required. A business district is normally more closely built up and more congested than a mere residence district. Nevertheless, under this ordinance in business districts no set-back is required, but in the less closely settled districts a set-back of at least 25 feet is required.

It will be at once noticed that this differs considerably from the usual building line case. What is generally meant by a building line is a fixed determined distance back of the property line beyond which no building may be erected. But such a building line is not the kind involved in

this case. Here we are dealing not with a definite line, but an indefinite, varying line, which may be set back from the street anywhere from 25 to 55 feet. The relator's building is to be 18 feet in height. He must therefore build back 25 feet from the street line. His neighbor may wish to erect only a 20 feet high bungalow. He need go back, then, only 25 feet. The man next to him may wish to build a building 55 feet in height, which is the limit of height permitted. He must recede 55 feet. The next may be back 35 feet, and so on. There is no regularity about the line at all. It is hard to see what principle of public interest is involved in such a jagged, staggering line. It does not even seem to be consistent with the principles which are at the basis of the zoning laws, for it offends from an aesthetic point of view.

Is such a building line justified under the police power? Does the failure to set back create a situation of traffic danger?

What is the supposed danger to traffic that such a building may create? It is that if a building is allowed to be erected up to the property line, such a building will constitute an obstruction to the vision of motorists approaching each other on the intersecting streets. The danger does not seem to exist to any other class than motorists. Certainly the danger to pedestrians approaching each other at such a corner is so negligible as to be non-existent. Nor is there any danger of collisions between an automobile and a pedestrian. For the relative speed of a pedestrian is such that he would have ample time to sight an automobile in the time it would take to pass into view around the corner of the building and reach the curb of the street. No danger need be anticipated in that direction.

The only traffic danger is that of collision between vehicles, particularly motor vehicles. The danger, it would appear, grows out of the fact that one or both of these vehicles may be operating at a high speed, and be unable to stop in time. If this be so, and it is so, the danger is due, not to the mere presence of the cars, but to the speed at which they are operating. But the Motor Vehicle Act in force in New Jersey provides that the maximum speed that may be employed under the circumstances existing at this corner is not more than 12 miles an hour. We do not believe that with automobiles operating at 12 miles an hour, there is ever the slightest real danger of collision. The conclusion is inevitable, then, *that danger exists only when the motorists are disobeying the law.*

We find, then, that the police power is being invoked for the relief of only a small portion of the public, to wit, motorists, and then only when they are breaking the law. What sort of police power is this that is called upon for the benefit of such a class, and in such a manner as to encourage them in their wrongdoing? The police power, we thought, was invoked only to cover some situation of public necessity. If it be used to establish the right of a citizen to break the statutes, or to make it easier for him to do so, it will do much more harm than good.

It becomes quite apparent that this argument as to danger to traffic is an argument contrived by the ingenuity to support an ordinance, which, without it, is plainly invalid. It is not a reason inducing the passage of the ordinance, but the excuses offered to sustain it after its passage. It is insincere and factitious. It has not been shown that a situation of traffic danger is so serious in South Orange and in particular at this

corner as to demand the passage of an ordinance correcting the condition as to buildings. We have not been shown that on street corners where buildings have been erected up to or near the property line (and it is admitted that there are such corners in South Orange and that in the business section of the town permission to build up to the property line is given) numerous accidents have resulted. It does not appear that in the business section of the village, which is closely built up, the situation has become so grave as to demand corrective action by the municipal authorities.

It will also be noticed that the argument applies only to corner lots and not to lots which are in the middle of a block. Certainly, buildings built 100 or more feet from a corner have no tendency to obstruct the view of automobiles coming along a cross street. Yet the ordinance applies equally to such lots as to corner lots.

It seems plain that the object sought to be obtained by this ordinance in this particular instance is the improvement by the municipality of that neighborhood from an aesthetic point of view.

We therefore respectfully contend that this case cannot on its merits be distinguished from the Nutley case and that a peremptory writ of mandamus should therefore be granted.

HOWE & DAVIS,
Attorneys for Relator.

EDWARD L. DAVIS,
Of Counsel.