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**Notice of Appeal.**

(Filed March 26, 1928.)

**New Jersey Supreme Court**

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ADVANCE DEVELOPMENT CORPORATION,  
Relator,  
v.

THE MAYOR AND ALDERMEN OF JERSEY CITY, FRANK HAGUE, MICHAEL I. FAGEN, WILLIAM B. QUINN, ARTHUR POTTERTON, and JOHN J. BEGGANS, Commissioners of the City of Jersey City, and EDWARD SPOERER, Superintendent of Buildings of Jersey City,  
Respondents.

On Mandamus.

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The Mayor and Aldermen of Jersey City appeal to the New Jersey Court of Errors and Appeals from the issue of the peremptory writ of mandamus decreed to the said respondents commanding them to forthwith issue to relator a building permit for the erection and construction of a five-story apartment house on the southeast corner of Westside and Bentley Avenues, Jersey City, New Jersey, and from the whole of the judgment so entered in this cause.

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Dated March 15, 1928.

THOMAS J. BROGAN,  
Attorney for Respondents.

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**Grounds for Reversal.**

(Filed April 6, 1928.)

**NEW JERSEY COURT OF ERRORS AND APPEALS.**

10 ADVANCE DEVELOPMENT CORPORATION,  
*Relator-Appellee,*

*v.*

THE MAYOR AND ALDERMEN OF JERSEY CITY; FRANK HAGUE, ARTHUR POTTERTON, JOHN J. BEGGANS, MICHAEL I. FAGEN and WILLIAM B. QUINN, Board of Commissioners of Jersey City; and EDWARD J. SPOERER, Superintendent of Buildings of Jersey City,

*Respondents-Appellants.*

On Appeal.

The Respondents-Appellants do hereby set down the following grounds for reversal from the judgment of the Supreme Court in the granting of a peremptory writ:

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1. The Supreme Court erred in determining that The Mayor and Aldermen of Jersey City intended not to act on the application.

2. The Supreme Court erred in holding that the passage of the zoning amendment to the Constitution does not warrant a delay on the part of The Mayor and Aldermen of Jersey City in passing upon the application of the relator-appellee.

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*Stipulation.*

3. The Supreme Court erred in allowing a peremptory writ to issue.

4. The Supreme Court erred in divers other respects in allowing a peremptory writ of mandamus.

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THOMAS J. BROGAN,  
Attorney for Respondents-Appellants.

**Stipulation.**

**NEW JERSEY SUPREME COURT,**

HUDSON COUNTY.

ADVANCE DEVELOPMENT CORPORATION,  
*Relator,*

*v.*

THE MAYOR AND ALDERMEN OF JERSEY CITY; FRANK HAGUE, ARTHUR POTTERTON, JOHN J. BEGGANS, MICHAEL I. FAGEN and WILLIAM B. QUINN, Board of Commissioners of Jersey City; and EDWARD J. SPOERER, Superintendent of Buildings of Jersey City,

*Respondents.*

On Application for Mandamus.

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It is hereby stipulated between the attorneys of the respective parties hereto that the record herein be regarded and treated as molded, and considered as if an alternative writ had heretofore been allowed herein, and that all of the testimony and depositions heretofore taken be regarded as taken upon and under said alternative writ, in order that

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*Affidavit of Nathan Weisman.*

the respondents might take an immediate appeal to the Court of Errors and Appeals from the judgment entered herein, should they so desire.

GROSS & GROSS,  
Attorneys of Relator.

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THOMAS J. BROGAN,  
Attorney of Respondents.

**Affidavit.**

(Filed Sept. 21, 1927.)

NEW JERSEY SUPREME COURT,  
HUDSON COUNTY.

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ADVANCE DEVELOPMENT CORPORATION,  
*Relator,*

*v.*

THE MAYOR AND ALDERMEN OF JERSEY CITY; FRANK HAGUE, ARTHUR POTTERTON, JOHN J. BEGGANS, MICHAEL I. FAGEN and WILLIAM B. QUINN, Board of Commissioners of Jersey City; and EDWARD J. SPOERER, Superintendent of Buildings of Jersey City,

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*Respondents.*

On Application  
for Mandamus.

State of New Jersey, }  
County of Hudson, } ss.:

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NATHAN WEISMAN, being duly sworn, on his oath deposes and says:

*Affidavit of Nathan Weisman.*

That he is treasurer of Advance Development Corporation, a corporation of the State of New Jersey, which is the owner of the lands and premises situated at the southeasterly corner of West Side Avenue and Bentley Avenue, in the City of Jersey City, County of Hudson and State of New Jersey, being known as Lot 12 in Block 1811 on map of property of Peter Bentley, Hudson County, N. J., dated September 21, 1905, and filed in the Hudson County Register's office on October 23, 1905; the same consisting of a plot of land 50 feet in width along the southwesterly side of Bentley Avenue by about 117 feet in depth fronting on West Side Avenue.

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That acting for and on behalf of said Advance Development Corporation, deponent did, on August 9, 1927, make application for a building permit for the erection upon the said lands of a five-story apartment house strictly in accordance with the Building Code of Jersey City. That said application was so made to the Superintendent of Buildings of Jersey City, and was by him referred to the Board of Commissioners of Jersey City hereinafter named, before which said Board of Commissioners said corporation did press its application for said building permit, which the said Board of Commissioners did defer acting upon from week to week, and did fail and refuse to either grant or deny to said corporation said building permit.

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That said corporation did file with the Superintendent of Buildings of Jersey City a written application for said building permit, together with the plans and specifications of said proposed building, and the same was again presented to the said Board of Commissioners of Jersey City on September 13, 1927, at a meeting of said Board of

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*Affidavit of Nathan Weisman.*

Commissioners, whereupon the said Board of Commissioners again failed and refused to definitely act upon the same, and stated that it would not act upon said application until after the special election to be held on Sept. 20, 1927, for the adoption of the so-called Zoning Amendment to the Constitution of the State of New Jersey.

That the said property of said Advance Development Corporation is not zoned against the erection of an apartment house thereon by virtue of the Zoning Ordinance of Jersey City, and the said building permit is unlawfully withheld from it, resulting in the deprivation of its property, which it has gone to great expense in purchasing and maintaining for the purpose of erecting such apartment house thereon, and there is no lawful reason why the said Superintendent of Buildings of Jersey City and said Board of Commissioners of the City of Jersey City, have failed and still fail and refuse to act upon said application for a building permit, except as aforesaid; and that the refusal of the said Superintendent of Buildings of Jersey City and said Board of Commissioners of Jersey City to act upon said application is tantamount to a refusal and denial of said building permit.

That West Side Avenue, upon which the property of said corporation fronts for a depth of over 117 feet, is within one block thereof devoted to business and stores wherein retail businesses of various kinds are being conducted, and in fact, said property of said corporation was primarily available for apartment house purposes.

That deponent is duly authorized by and on behalf of said Advance Development Corporation to make this affidavit for it and on its behalf.

That the Superintendent of Buildings of Jersey

*Affidavit of Nathan Weisman.*

City is Edward J. Spoerer, and the Board of Commissioners of the City of Jersey City are Frank Hague, Arthur Potterton, John J. Beggans, Michael I. Fagen and William B. Quinn.

Wherefore said Advance Development Corporation prays that a writ of mandamus issue out of and under the seal of this Court, directed to the said The Mayor and Aldermen of Jersey City; Frank Hague, Arthur Potterton, John J. Beggans, Michael I. Fagen and William B. Quinn, Board of Commissioners of Jersey City; and Edward J. Spoerer, Superintendent of Buildings of Jersey City, commanding and directing them to issue to it a building permit for the erection of said apartment house in accordance with the plans prepared therefor by Carl Goldberg, architect, and filed with said Superintendent of Buildings of Jersey City.

NATHAN WEISMAN.

Sworn and subscribed to before me }  
this 19th day of September, 1927. }

HARRY WELTCHEK,  
Attorney at Law  
of New Jersey.

**Rule to Show Cause.**

NEW JERSEY SUPREME COURT,  
HUDSON COUNTY.

10 ADVANCE DEVELOPMENT CORPORATION,  
Relator,

v.

20 THE MAYOR AND ALDERMEN OF JERSEY CITY; FRANK HAGUE, ARTHUR POTTERTON, JOHN J. BEGGANS, MICHAEL I. FAGEN and WILLIAM B. QUINN, Board of Commissioners of Jersey City; and EDWARD J. SPOERER, Superintendent of Buildings of Jersey City,  
Respondents.

On Application for Mandamus.

30 Upon reading and filing the affidavit on the application of Advance Development Corporation, from which sufficient cause appears; it is, on this 21st day of September, 1927, on motion of Gross & Gross, attorneys of the relator:

40 ORDERED, that The Mayor and Aldermen of Jersey City; Frank Hague, Arthur Potterton, John J. Beggans, Michael I. Fagen and William B. Quinn, Board of Commissioners of the City of Jersey City; and Edward J. Spoerer, Superintendent of Buildings of Jersey City, show cause before this Court on the fourth day of October, 1927, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, at the

*Rule to Show Cause.*

State House in Trenton, why a writ of mandamus should not be allowed and awarded to the relator herein and issued out of and under the seal of this Court, commanding and directing the said The Mayor and Aldermen of Jersey City; Frank Hague, Arthur Potterton, John J. Beggans, Michael I. Fagen and William B. Quinn, Board of Commissioners of Jersey City; and Edward J. Spoerer, Superintendent of Buildings of Jersey City, to issue unto Advance Development Corporation, the relator herein, a building permit for the erection of a five-story apartment house on property situated at the southeasterly corner of West Side Avenue and Bentley Avenue, in the City of Jersey City, County of Hudson and State of New Jersey, being known as Lot 12 in Block 1811 on map of property of Peter Bentley, Hudson County, N. J., dated September 21, 1905, and filed in the Hudson County Register's office on October 23, 1905; the same consisting of a plot of land 50 feet in width along the southwesterly side of Bentley Avenue by about 117 feet in depth fronting on West Side Avenue; in accordance with the plans and specifications prepared therefor and duly filed herein with the said Building Inspector of the City of Jersey City. And it is further

ORDERED, that either party may take depositions to be used and read upon the return of this rule to show cause upon giving two days' notice to the other party. And it is further

ORDERED, that a copy of this order to show cause be served upon the respondents herein within six days from the date hereof.

Let this order be entered in the minutes.

JAMES F. MINTURN,  
J. S. C.

Case.  
IN THE  
NEW JERSEY SUPREME COURT,  
HUDSON COUNTY.

10

ADVANCE DEVELOPMENT CORPORATION,

*Relator,*

*v.*

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THE MAYOR AND ALDERMEN OF JERSEY CITY; FRANK HAGUE, ARTHUR POTTERTON, JOHN J. BEGGANS, MICHAEL I. FAGEN and WILLIAM B. QUINN, Board of Commissioners of Jersey City; and EDWARD J. SPOERER, Superintendent of Buildings of Jersey City,

*Respondents.*

15 Exchange Place, Jersey City, N. J.  
Friday, September 30th, 1927, at 3 P. M.

30

TESTIMONY taken in the above entitled action before me, JAMES J. MURPHY, a Supreme Court Commissioner, at my office, No. 15 Exchange Place, Jersey City, New Jersey, at the above time, pursuant to an order duly issued therein, and in the presence of:

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Messrs. GROSS & GROSS, Attorneys for the Relator; by ISAAC GROSS, Esq., and THOMAS J. BROGAN, Esq., Attorney for the Respondents; by CHARLES HERSHENSTEIN, Esq.

JAMES J. MURPHY,  
Supreme Court Commissioner.

*Carl I. Goldberg, direct.*

CARL I. GOLDBERG, a witness called on behalf of the relator, having been first duly sworn, testified as follows:

*Direct examination by Mr. Gross:*

Q. What is your address? A. Number 437 10  
Broadway, Bayonne, New Jersey.

Q. Are you a licensed practicing architect of this city? A. Yes.

Q. How long have you been practicing your profession? A. For fourteen years.

Q. In this county? A. Yes.

Q. And during your experience as an architect have you had occasion to draw plans for apartment houses to be erected in Jersey City? A. Yes, 20  
sir.

Q. Are you familiar with the Building Code of Jersey City? A. I am.

Q. Did you prepare the plans and specifications for the relator here, the Advance Development Corporation, for the erection of an apartment house at the southeasterly corner of Bentley Avenue and West Side Avenue? A. Yes, sir.

Q. After you prepared these plans and specifications, what did you do with them? A. I went to 30  
the Building Department.

Q. For what purpose? A. To ask for a permit.

Q. And what happened there? A. I was told that I would have to refer to the Board of Commissioners first before they could issue a permit.

Q. Do you remember what day it was that you went to the Building Department, as you have testified? A. On or about August 4th or 5th of this year.

Q. And did you have with you the plans and 40  
specifications on the occasion of your visit to the

*Carl I. Goldberg, direct.*

Building Department and offer to file them? A. I did.

Q. Did they accept them from you? A. No.

Q. Did you after that apply to the City Commission? A. I did.

10 Q. When did you make your application to the City Commission? A. August 9, 1927.

Q. Was that the first meeting of the City Commission after your visit to the Building Superintendent, as you have testified? A. Yes.

Q. Did you present your application to the City Commissioners? A. I did.

Q. In writing, or orally? A. Orally.

Q. Did you have with you your plans and specifications? A. I did.

20 Q. Did you exhibit them? A. I was ready to exhibit them.

Q. What did you say to the Commissioners, and what did they say to you? A. I said, "I am applying for a permit to erect an apartment house on the southeasterly corner of Bentley Avenue and West Side Avenue, a brick building containing twenty-seven apartments."

Q. To be used for what? A. To be used as an apartment house for dwelling purposes.

30 Q. The apartment house that you had designed, was that to be used exclusively for dwelling purposes? A. Yes, sir.

Q. Did you mention the number of stories this apartment house was to have, on that occasion? A. I believe I did.

Q. How many stories was it to be? A. Five.

40 Q. What was done with your application? A. It was deferred until September 13th, at the suggestion of Mayor Hague, and the reason for it was that he wanted that the occupants of the street

*Carl I. Goldberg, direct.*

should be given an opportunity to state their feelings in the matter and voice their objections if they had any, and that a reasonable time would be around September 13th, when people had returned from their vacations.

10 Q. Did you at this meeting that you have just spoken of—at this meeting was any member of the relator, the Advance Development Corporation, with you? A. Yes, sir.

Q. Who? A. Mr. Weisman.

Q. Then on September 13th, did you attend a meeting of the City Commission? A. I did.

Q. Was this application brought up at this meeting? A. It was.

20 Q. And what took place? A. There were quite a number of people present who raised their objections to the erection of the building on their block, and as a result of their objections the Mayor or the Board of Commissioners, to be exact, decided to hold the matter over for three weeks further.

30 Q. What were the objections they urged to the building of this apartment house? A. As well as I could hear—and I had to be quite a distance away because of the number of people who were close to the desk—the objection was nothing more than that they did not want to have an apartment on the block.

Q. Was that the only objection? A. The only objection that I know of.

Q. Prior to this meeting of September 13th, did you go to the office of the Superintendent of Buildings? A. I did.

Q. For what purpose? A. To file my plans.

40 Q. At whose suggestion did you do that? A. By the advice of counsel.

*Carl I. Goldberg, cross.*

Q. And what did you do there? A. I presented my plans and specifications and application in regular form.

Q. Were they filed then with the Superintendent of Buildings? A. Yes.

10 Q. Has there been any action taken on this application, either by the Superintendent of Buildings or the Board of Commissioners of Jersey City since this last meeting, that you know of? A. No.

Q. Did the Board of Commissioners assign any reason for this last adjournment on September 13th? A. The only reason I know of is that it would give them an opportunity to decide the matter after the Zoning Act has been passed.

20 Q. Is that all? A. That is the only reason that I know of.

Mr. Gross: You may examine.

*Cross examination by Mr. Hershenstein:*

Q. Mr. Goldberg, these plans which you have prepared for the Advance Development Corporation contemplate the erection of a five-story apartment house on the southeast corner of Bentley and West Side Avenues, Jersey City? A. They do.

30 Q. Are there to be any stores in that building? A. None.

Q. Is that building to be erected on the lot line of Bentley Avenue? A. No.

Q. Is there going to be a setback? A. Yes.

Q. Is that setback going to correspond to the setback which now exists of the private houses on that street? A. I don't know what the setback of the private houses is.

40 Q. How much setback have you provided? A. About four feet nine.

*Carl I. Goldberg, cross.*

Q. About four feet nine from the building line on Bentley Avenue? A. Yes.

Q. Do you know the character of this neighborhood? A. Yes.

Q. You know that Bentley Avenue is strictly a residential street? A. There are residences on it. 10

Q. Don't you know that Bentley Avenue is strictly a residential street? A. I do.

Q. And on that street there is now erected only one-family houses, as far as you know? A. As far as I know.

Q. These houses all have a setback of considerably more than four feet nine from the building line? A. To the best of my knowledge, they have.

Q. And from your experience as an architect, would you say that the buildings—that the architecture and the residences on Bentley Avenue are of a high-class nature? A. Some are and some are not. 20

Q. But the general character, you would say, was high class? That the general character is that of a high-class residential street? A. Fair, as an average.

Q. As fair as can be found in Jersey City? A. Yes. 30

Q. And knowing Jersey City as you do, would you say that Bentley Avenue, between the Boulevard and West Side Avenue, is as fine a residential street we have today? A. No, I would not say that.

Q. Are there many streets very much better in character than that? A. Yes, I believe that Gifford Avenue has a higher class of residences than Bentley.

Q. That is one block north of Bentley? A. Yes, 40

*Carl I. Goldberg, cross.*

sir, and I believe there are other streets east of the Boulevard that have.

Q. But you would consider Bentley Avenue between the Boulevard and West Side Avenue as one of the few really residential streets of Jersey City?

10 A. It is a residential street, yes, sir.

Q. The application, as I understand you, was first made to the Building Inspector on August 9th, 1927? A. No, it was made to the City Commission on August 9th.

Q. What was the first step after you prepared the plans and specifications? You presented them to the Building Department? A. I went to the Building Department, yes, sir.

20 Q. Did you have the specifications with you when you first went to the Building Department? A. Yes.

Q. And they said you would have to make application to the City Commission? A. Yes, sir.

Q. That has been the usual practice in Jersey City for the erection of any apartment houses on residential streets, or the erection of stores, as far as you know? A. Not up until 1927.

Q. I mean recently. A. Well, within the last

30 Q. After you were informed by the Building Department that you would have to make your application directly to the City Commission, as I understand your testimony, you brought it before the City Commission on August 9th, 1927; at that time did you have a written application for this permit? A. No, sir.

40 Q. You simply went there and said to them that you had prepared plans and specifications and desired a permit? A. I did.

*Carl I. Goldberg, cross.*

Q. There was no application on file anywhere? A. No, sir.

Q. This was during a summer month, and by reason of the general policy of the City Commission, the matter was adjourned to give the surrounding residents a chance to come and protest, if they so desired? A. That is right. 10

Q. And the matter was then laid off until September 13th, 1927? A. Correct.

Q. And then there was another hearing before the City Commission? A. Yes.

Q. And a great many people attended? A. Yes.

Q. And the City Commission heard everything that was said either in favor of or against the granting of this permit? A. Yes, sir.

20 Q. Were you heard on that day again? A. No, sir.

Q. Was anybody on behalf of the relator in this case? A. Yes.

Q. Who? A. The attorneys.

Q. And were some of the officers of this company present at that time? A. They were.

Q. And the conference of the City Commissioners was held right out in open session? A. It was. 30

Q. And at that time the City Commission again deferred this application to September 13th, 1927; now, had you at that time as yet filed a written application for this permit? A. I did, with the Building Department.

Q. On what date? A. On the 12th.

Q. So that one day prior to this hearing, on September 12th, 1927, you filed your formal written application? A. Yes.

40 Q. Of course you know that according to the Building Code of our City it is necessary to file a

*Carl I. Goldberg, redirect.*

written application before a permit is granted? A. With the Building Department, yes, sir.

10 Q. So that the Building Department, for the first time received your formal written application pursuant to the Building Code of Jersey City on September 12th, 1927. A. Yes, sir.

Q. And then followed the hearing of September 13, 1927? A. Yes.

Q. That was the very next day? A. Yes.

Q. And upon that hearing, which was a day after you had filed your written application to the City Commissioners, the City Commissioners decided to put the matter off for three weeks longer? A. Yes.

Q. That is correct? A. Yes.

20 Q. Did you go back to ascertain whether or not the City Commission would give you a permit, after the hearing of September 13, 1927? A. No, sir.

Q. Did you make any further demand upon the Building Inspector or the City Commission after that date? A. I was up at the Building Department office to find out what had been done with the plans, and as yet nothing had been done.

30 Q. Did they tell you that the matter was still under consideration by the City Commissioners? A. Yes, sir.

Q. Then so far as you personally know, the only reason which the Building Department assigned to you for the delay in granting this permit was that the matter was still under consideration by the City Commission of Jersey City? A. That is true.

*Redirect examination by Mr. Gross:*

40 Q. When did they tell you that the matter was

*Carl I. Goldberg, redirect.*

under further consideration? A. When I went to the Building Department to find out if they had checked their plans and were prepared to issue a permit.

Q. When was that? A. That was on the 28th; that was Wednesday, the 28th of this month. 10

Q. Wednesday of this week? A. Yes, sir, Wednesday of this week.

Q. Did they tell you that the matter was still under consideration, or that they would not issue a permit? A. That they would not issue a permit until final decision was made by the City Commission in favor of it.

Q. That is what you mean by saying that they still had it under consideration? A. Yes.

Q. Whom did you talk with at the office of the Superintendent of Buildings last Wednesday? A. With Mr. Coleman. 20

Q. Are you familiar with the Zoning Ordinance of Jersey City? A. Somewhat.

Q. Do you know how this property of the relator is zoned? A. As residential.

Q. Is it zoned against the erection of apartment houses? A. No.

Q. Mr. Goldberg, I show you a plan; I think the specifications are in there, too. I show you the plans and specifications produced here by the Superintendent of Buildings upon notice, and also the application for the building permit, and I ask you whether those are the papers which you say you filed on September 12th. A. (Looking at papers.) Well, my signature is attached there, and the street and avenue are correct; these are the plans and these are the specifications (indicating). 30

Q. Produced from the files of the Superintendent of Buildings? A. Yes. 40

*Isaac Gross, direct.*

Q. And were those plans approved by the Board of Tenement House Supervision of New Jersey?

A. Yes.

Q. Are they stamped "approved" by that Board?

A. Yes, sir.

10 Mr. Gross: I offer the plans, specifications and application in evidence.  
(Marked Exhibit R-1.)

ISAAC GROSS, called and sworn as a witness on behalf of the relator, testified as follows:

20 Mr. Gross: I am one of the attorneys of the relator in this matter, and attended the meeting of the City Commission on this application for a building permit on September 13th.

30 There were a number of people present who were invited there by the City and who objected to the erection of the building in question, because they did not want an apartment house on the block, and the City Commission, through the Mayor, stated that in view of the fact that the property was not affected by any zoning ordinance, that the City had better defer any action on this application until after September 20th, when they expected and hoped that a constitutional amendment would be adopted and that they could thereafter deal with the property as they saw fit.

With that in view the City Commission voted to defer any action on this application for three weeks after that date.

40 The plans and specifications, as well as the written applications for the permit,

*Isaac Gross, cross.*

10 which have been offered and marked Exhibit R-1, were then before the Commission, and there was no question raised about the regularity of the matter being then before the Commission. I personally know the neighborhood in which this building is proposed to be erected. The block on Bentley Avenue, as far as anyone can observe, is confined to private residences, but the West Side Avenue side is entirely different. The West Side Avenue block frontage is vacant land up to Harrison Avenue, the street parallel with and immediately south of Bentley Avenue. On the block on West Side Avenue, south of Harrison Avenue, are stores—  
20 in fact, that block, and the block south of that, are all built up with stores; and there is a moving picture theatre on the block south of Harrison Avenue on West Side Avenue.

I know that there is no provision of the Zoning Ordinance of Jersey City against the erection of the apartment house in question.

*Cross examination by Mr. Hershenstein:*

30 Q. I see, Mr. Gross, that you do not qualify as an expert, but only as the attorney in this case. A. Expert as to what?

Q. As to the character of the neighborhood. A. No, I am not testifying as an expert. I am giving you the exact facts as they appear to the eye of anybody.

Q. As a matter of fact, you know the neighborhood very well? A. I think so. I live only two blocks away from there.

40 Q. And knowing the neighborhood as you know

Isaac Gross, cross.

10 it, you know that Bentley Avenue, between the Boulevard and West Side Avenue and Gifford Avenue, are about the only two streets in the whole of Jersey City which as yet are free from apartment houses,—the only two residential streets? A. I wouldn't say the only ones; there are quite a number of streets in Jersey City that are free from apartment houses; even in the lower part of Jersey City.

Q. In that immediate neighborhood, I mean. A. In that immediate neighborhood?

Q. Yes. A. No, I don't think so.

Q. Can you name any other? A. Not offhand. But I know that there are quite a number of them.

20 Q. I doubt that; but, as a matter of fact, Bentley Avenue, between the Boulevard and West Side Avenue, is today free from apartment houses? A. I know that that block is free from apartment houses, yes.

Q. And is at least limited, in its present condition, to private dwellings? A. Yes.

30 Q. Each house of which has a setback from the building line of considerably more than four feet nine inches, which is the proposed setback of this apartment house? A. I think that is true; but I don't think that all of them are very considerably beyond four feet nine inches. I think that some of the houses on the best part of the block up near the Boulevard are not set back more than nine or ten feet.

Q. A great majority, however, are set back fifteen or twenty feet? A. It may be.

40 Q. Now, the fond hopes of the Mayor of Jersey City and the City Commissioners were realized at the election on September 20th by the adoption of

Isaac Gross, cross.

the so-called Constitutional Amendment relating to zoning? A. Well, we ought to take judicial notice of that, whether we like it or not.

10 Q. As a matter of fact, you also know from your experience in these cases that the City Commission in all cases which involve the granting of permits where there are objections by the surrounding property owners, give the matter a thorough investigation and hearing? A. No, sir, I know the contrary. I know that when there are objectors, or objections, invariably the City Commission refuses the building permit, and after delivering to the public speeches showing that they are acting *pro bono publico* force the applicant to go to the Court. In fact, the City Commission, when I appeared before it, said that they knew the applicant would get it by order of the Court, but that they would not act in favor of the application. 20

Q. And you know from your experience of the City Commission that the City Commission uniformly endeavors at all times to carry out the letter and spirit of the Zoning Ordinance now in effect in Jersey City? A. No, sir; what I know is to the contrary; and they have not done it in this case. I know that they have not done it in any case. 30

Q. In this case they have not done it, as far as you know, because of the numerous objections which were raised by the surrounding owners of the property,—residents on Bentley Avenue? A. No, they invited these objectors to come down, and I have no recollection of a single case where, after there appeared any objector or objectors,—of the City's granting the building permit; they would not grant it merely to satisfy the caprice 40

*Joseph C. Glavin, direct.*

of the people in the neighborhood whom they had invited down.

Q. But from your own knowledge you know that where objections were raised, the City Commission withheld the granting of the permit? A. They have refused them. 10

Q. You have no doubt, have you, that if there had been no objection, the City Commission would probably have issued this permit? A. I don't know what they would have done. I know that in view of the objections, whether they were well founded or not, or were merely capricious, they refused the permit; and the deed which we hold to that property contains no restrictions whatsoever, nor is there any restriction in the chain of title. 20

JOSEPH C. GLAVIN, a witness called on behalf of the respondents, having been first duly sworn, testified as follows:

*Direct examination by Mr. Hershenstein:*

Q. Where do you reside? A. Number 150 Jewett Avenue, Jersey City.

Q. You are connected with the Building Department of the City of Jersey City? A. Yes. 30

Q. And in the capacity of Custodian of Records? A. Yes, sir.

Q. And in the performance of your duties you have charge of all the plans, specifications, applications, and other data which are filed with your department for the purpose of securing building permits? A. That is correct.

Q. Have you examined the files of your office, by request, for the purpose of ascertaining what there is on file at this time with regard to any 40

*Joseph C. Glavin, direct.*

application, or alleged application, of the relator in this case, the Advance Development Corporation, for a permit? A. I have.

Q. To erect an apartment on the southeast corner of Bentley Avenue and West Side Avenue? A. Yes, sir. 10

Q. And what have you ascertained? A. I find that the applicant has filed plans for a proposed apartment house and building application and specifications.

Q. And on what date were these papers filed in your office? A. They were filed on September 12th, 1927.

Q. Was that the first time that any papers of any sort were filed in your department for the erection of this contemplated apartment house? A. Yes, sir. 20

Q. You know that there was a hearing before the City Commission at the request—or because of the fact that some application was made to the City Commission by Mr. Goldberg for a building permit? A. I know that fact, and I was present at the hearing.

Q. Was that the meeting of September 13th, 1927? A. Yes, I believe it was. 30

Q. Did the applicant make a formal written application to the Board of Commissioners of Jersey City for this permit? A. No, sir, not to my knowledge.

Q. Is there any formal written application on file with your department for this permit? A. No application other than the regular building form applications which are filed with all plans.

Q. Now, on September 13th, 1927, you say you were present before the City Commission meeting? A. I was present, yes, sir. 40

Joseph C. Glavin, redirect.

of those streets left in Jersey City, especially in the Bergen section; is not that true? A. That is right.

10 Q. And as far as you know, is it not the policy of the City Commission and of your department to preserve the strictly residential character of this street and the other two or three streets which are left in the Bergen section unmolested by the building of apartment houses?

Mr. Gross: I object to that question, on the ground that the witness is not qualified to testify to any such thing.

20 A. I have noticed, in my capacity in the Building Department, that the City Commission and the Building Department have endeavored, since the Zoning Ordinance was created, to keep the residential streets in Jersey City as strictly residential as possible, but with not very great success, in some cases.

Q. And the action of your department and the Commission in this case is to carry out this policy which the Commission has endeavored to institute?

30 Mr. Gross: I object; this is clearly incompetent.

A. That is true.

Mr. Hershenstein: That is all.

40 Mr. Gross: This application, Exhibit R-1, is stamped on the back, "Office of the Superintendent of Buildings, City Hall. Called for plans 9-27-27; owner, Advance Development Company; address, 147 Bentley Avenue, application No. 3780, received 9/12/27."

(Testimony Closed.)

Opinion.

(Filed February 28, 1928.)

NEW JERSEY SUPREME COURT,

No. 261, OCTOBER TERM, 1927.

10 THE ADVANCE DEVELOPMENT CORPORATION, Relator,  
v.  
20 THE MAYOR AND ALDERMEN OF JERSEY CITY, et als., Respondents.

Submitted October 14th, 1927; decided January 27th, 1928. 20

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

Before—Justices TRENCHARD, KALISCH and KATZENBACH.

For the Relator: GROSS & GROSS, Esqs.

For the Respondents: THOMAS J. BROGAN, Esq. and CHARLES HERSHENSTEIN, Esq. 30

PER CURIAM:

This case is presented to us on a rule to show cause why a writ of mandamus should not issue commanding the municipal corporation, The Mayor and Aldermen of Jersey City, its Board of Commissioners, and its Superintendent of Buildings to issue to the relator, The Advance Development Corporation, a corporation, a building permit

40

*Opinion.*

for the erection of a five-story Apartment House at the southeast corner of West Side Avenue and Bentley Avenue, in the City of Jersey City. The relator is the owner of the land upon which the proposed building is desired to be erected. The  
 10 lot fronts 50 feet on Bentley Avenue and 117 feet on West Side Avenue. There is no ordinance of the City of Jersey City, either by way of a zoning ordinance or otherwise, which prohibits the erection of the proposed building. The case, therefore, is not a zoning case.

The plans for the proposed building were prepared by a duly licensed architect. They were drafted in accordance with the requirements of the Building Code of Jersey City. The architect  
 20 applied on August 9th, 1927, to the Superintendent of Buildings for a building permit for the relator and submitted the plans and specifications. The architect was instructed by the Superintendent of Buildings to make the application to the Board of Commissioners. The reason for such an instruction does not clearly appear. The Board of Commissioners deferred the hearing of the application until September 13th, 1927. On September 12th,  
 30 1927, the plans and specifications previously submitted to the Superintendent of Buildings were filed. On September 13th, 1927, a number of persons appeared before the Board of Commissioners and objected to the granting of the building permit on the ground that they did not desire to have an Apartment House erected on the block, as the block was now occupied by residences. This was the only reason advanced. The Apartment House was strictly residential in character. It was to be set back five feet from the building line. After  
 40 hearing the objectors the Board deferred action in

*Opinion.*

the matter in the hope that the proposed zoning amendment to the Constitution would be adopted at the special election on September 20th, 1927. There was no question as to the violation of any zoning restriction raised by the application.

No decision was arrived at by the Board. Application for the present rule was then made. The relator insists that the refusal of the respondents to act upon his application is tantamount to a denial of it. We think this position well taken. The case of *Cleveland v. Board of Finance of Jersey City*, 38 N. J. L. 259, supports the relator's contention. The respondents claim that the application has never been acted upon and until action has been had mandamus proceedings are premature. This argument is answered by the case of *Cleveland v. Board of Finance, etc., supra*, in which it was held that there need not be a positive refusal on the part of public officers or municipal bodies to perform a duty enjoined upon them to authorize the interposition of the court by mandamus. It is sufficient if there is unreasonable delay and a manifest intention not to perform it. We think the intention not to act is clearly proven. The delay for this reason seems to us unreasonable.

The respondents urge in the second place that in view of the passage of the zoning amendments to the Constitution opportunity should be given to the Legislature to enforce the will of the people. This argument presumably means that no action should be taken upon the relator's application until the Legislature has passed further statutes on the subject of zoning. The status of the relator is, we think, fixed at the time it made its application

*Opinion.*

10 for the building permit. We see no reason why the inaction of the Superintendent of Buildings should be sanctioned until legislation is enacted and ordinances passed which would perchance act retroactively and adversely upon the use to which the relator is now entitled to put its property. Some consideration should be shown the owner who desires to change an unimproved property into an improved property which will yield an income to the owner and increase by taxation the city's revenues. Taxes on the property are not suspended during an application of this nature. Interest on liens, if any, is running. Often by delay which is unjustified and litigation which is unnecessarily prolonged an owner may suffer

20 severe financial loss.

A refusal to perform a clear duty cannot be justified because owners of adjacent properties may object to the erection in the locality of a building which does not conform to their ideas.

30 We see nothing in the record presented to us which warrants the refusal to grant the building permit applied for. A peremptory writ of mandamus is allowed. If the respondents desire to appeal this decision consent to the moulding of the pleadings is given.

40

**New Jersey Court of Errors and Appeals**

ADVANCE DEVELOPMENT CORPORATION,  
*Relator-Appellee.*

*v.*

THE MAYOR AND ALDERMEN OF JERSEY CITY; FRANK HAGUE, ARTHUR POTTERTON, JOHN J. BEGGANS, MICHAEL I. FAGEN and WILLIAM B. QUINN, Board of Commissioners of Jersey City; and EDWARD J. SPOERER, Superintendent of Buildings of Jersey City,  
*Respondents-Appellants.*

On Mandamus.

On Appeal from  
New Jersey  
Supreme Court.

**BRIEF OF RESPONDENTS-APPELLANTS.****Statement of Fact.**

The relator is the owner of a plot of land on the southeast corner of West Side Avenue and Bentley Avenue, in Jersey City, and being desirous of erecting thereon a five-story apartment house, made a written application on August 12th, 1927, to the Superintendent of Buildings of Jersey City for a building permit. The application was referred to the Board of Commissioners of Jersey City. A public hearing was had thereon on September 13th, 1927, at which hearing the residents on Bentley Avenue appeared and objected to the erection of the apartment house, because said street has erected upon it strictly private residences only, each of which has a set-back of considerably more than four feet nine inches. There are no apartment houses on either side of Bentley Avenue be-

tween the Boulevard and West Side Avenue, between which streets the *locus in quo* is situated.

The Board of Commissioners of Jersey City made no findings nor any determination as to whether or not a building permit should or should not be granted at that time, and informed the relator that a conference of the City Commissioners would be had, at which time some definite decision would be reached as to what policy the City Commissioners would pursue in view of the imminent election which was to be held on September 20th, 1927, affording the people of New Jersey an opportunity of either passing or rejecting the proposed Constitutional Amendment which would legalize zoning (Case, p. 26, lines 14-24).

The matter was then deferred with no action taken nor was any action taken at the time the relator procured its rule to show cause, which as appears of record, was procured on September 21st, 1927, a day after the Constitutional Amendment legalizing zoning was adopted. Depositions were taken and the matter presented to the Supreme Court, which Court directed a peremptory writ to issue, permitting the pleadings to be moulded as if an alternative writ was issued in the first instance so as to permit an appeal by the respondents. In accordance with the permission granted by the Supreme Court the parties entered into a stipulation as to the moulding of the pleadings, and further stipulated that all of the testimony and depositions heretofore taken should be regarded as taken upon and under the alternative writ (Case, pp. 3-4). The Supreme Court determined that the refusal of the respondents to act upon the application is tantamount to a denial, and that the status of the relator is fixed as of the time it made its application, and the application having been made prior to the passage of the Con-

stitutional Amendment, the relator's status remains unchanged, irrespective of the passage of said amendment.

The testimony conclusively establishes that Bentley Avenue is not only strictly residential in character, but has built upon it only private single family houses.

We respectfully urge in this brief:

1. That the application having been made on September 12th, 1927, and no action having been taken on the very next day, September 13th, 1927, it is not such a delay as can be considered tantamount to a denial of the same, and it therefore follows that if there has been no refusal upon the part of the Building Superintendent or the City Commission to grant a permit, mandamus proceedings are premature.

2. In view of the passage of the Constitutional Amendment, opportunity should be given to the municipality to enforce the will of the people and the passage of the amendment affects and is applicable to an application made immediately prior to the adoption of the amendment.

#### POINT I.

**There has been no refusal upon the part of the Building Superintendent or City Commission to grant a permit in this case, and therefore, mandamus proceedings are premature.**

The written application was made by the relator on September 12th, 1927, and a hearing had the next day, to wit, September 13th, 1927, at which time the City Commissioners, because of the vigorous protests of the residents of Bentley Avenue, deferred the matter until they could deter-

mine what action they would take upon this application. No action was taken by the City Commission, nor was this application granted nor denied. Yet, though no action was taken and no refusal to grant a permit either on the part of the Building Department or the Board of Commissioners or Jersey City, the relator proceeded to obtain a rule to show cause why a writ of mandamus should not issue, which rule to show cause was obtained September 21st, 1927, only two weeks having elapsed between the making of the formal application and the procuring of the rule.

It is elementary, before a writ of mandamus can be procured, there must be a refusal to do the act complained of, which refusal is entirely missing in this case. We are aware that neither the City Commissioners nor the Building Superintendent would have a right to unreasonably delay its determination to refuse the granting of a permit. We respectfully allege, however, that fourteen days is not such unreasonable time that this Court can say that the City Commissioners or the Building Superintendent should, as a matter of law, have acted upon this application.

The Supreme Court in its opinion held that:

"It is sufficient if there is unreasonable delay and a manifest intention not to perform it. We think the intention not to act is clearly proven. The delay for this reason seems to us unreasonable" (Case, p. 31, lines 26-30).

It may very well be the City Commissioners may determine, as a matter of public policy, to withhold the granting of this permit, but such an action cannot be anticipated nor can such anticipated action be used for the basis of procuring a peremptory writ of mandamus. The fact, however, remains that only one day elapsed between the making of the application and the hearing

thereon, and two weeks elapsed between the making of the application and the procuring of the rule to show cause. A period of two weeks cannot be construed as an unreasonable delay in acting.

#### POINT II.

**In view of the passage of the Constitutional Amendment, opportunity should be given to the municipality to enforce the will of the people, and the passage of the amendment affects and is applicable to an application made immediately prior to the adoption of the amendment.**

On September 20, 1927, the people of the State of New Jersey passed a Constitutional Amendment giving the Legislature of New Jersey the power to authorize municipalities to pass Zoning Ordinances and such ordinances are hereafter to be deemed within the police power of such municipality. The Legislature at the time of the presentation of this case to the Supreme Court had not as yet convened, enabling municipalities to pass such ordinances, but we respectfully submit that the municipality should be given an opportunity to carry out the will of the people. The amendment is now part of the Constitution and it should be given the force and effect which the people intended that it should have, to wit, to legalize zoning in the State of New Jersey.

Particularly should the City Commissioners be permitted to put into force the zoning legislation which it contemplates with regard to strictly residential neighborhoods. Jersey City has left to it very few strictly residential streets limited to private houses only. Everywhere the best streets of our City have been spotted with apartment

houses or stores. Where residents of a street protest against the building of an apartment house which, no doubt, ruins the street for strictly private residential purposes, the City Commission would be justified in listening to the wants and welfare of the inhabitants of a particular street and, if it so determines, to pass a zoning law which would zone streets of the character of Bentley Avenue for private dwellings only. It could accomplish this object as soon as the Legislature has had an opportunity to carry out the Constitutional Amendment relating to zoning.

The Supreme Court in its opinion held that the inaction of the Superintendent of Buildings should not be sanctioned until legislation is enacted and ordinances passed which would affect the use of the property to which the relator was entitled at the time it made its application.

But we respectfully urge that the relator made its application about eight days prior to the Constitutional Amendment election, anticipating that the result of the election would affect the legality of zoning in the State of New Jersey. The relator is charged with the knowledge of the coming election, and when the application was made, it must be held that the applicant made it knowingly, and had full knowledge that the people of New Jersey were about to pass upon whether or not the municipality shall have the right to adopt zoning ordinances which would thereafter be considered within the police power of a municipality. Being charged with that knowledge, the date of the making of the application should not determine the status of the applicant. The Constitutional Amendment involved a question of public policy, and the City Commission of Jersey City, knowing that a question of public policy is to be determined, should be permitted to decline to act until

that question has been determined by all of the people of the State.

We, therefore, respectfully urge that until the municipality has been given an opportunity to put into effect the objects of the Constitutional Amendment, a peremptory writ should not be granted, for by the granting of same it will nullify the will of the people of a particular locality. Zoning legislation will avail them nothing if an apartment house such as relator wishes to construct is commenced before zoning legislation goes into effect.

Respectfully submitted,

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

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**New Jersey Court of Errors and Appeals**

ADVANCE DEVELOPMENT CORPORATION,  
*Relator-Respondent,*

*v.*

THE MAYOR AND ALDERMEN OF  
JERSEY CITY, *et als.,*  
*Defendants-Appellants.*

On Appeal from  
Supreme Court.

**BRIEF ON BEHALF OF RESPONDENT.**

**Preliminary Statement.**

The appellants have not brought up on this appeal any judgment of the Supreme Court for review. All that the state of the case shows is the opinion of the Supreme Court, from which, of course, no appeal lies.

*Ahlemeyer v. Miller* (Err. and App.), 133  
Atl. Rep. 880, not yet officially reported.

Under the circumstances, the appeal should be dismissed.

*Salmons v. Ruggeri* (Err. and App.), 137  
Atl. Rep. 568, not yet officially reported.  
*State v. Moore*, 139 Atl. Rep. 246, not yet  
officially reported.

The grounds for reversal printed in the state of the case are all likewise directed to the opinion of the Supreme Court.

### The Facts.

The respondent is the owner of a tract of unimproved land situated on the southeasterly corner of Bentley and West Side Avenues, Jersey City, N. J., fronting approximately 50 feet on Bentley Avenue, and 117 feet on West Side Avenue, and proposed to erect thereon an apartment house to be used exclusively for dwelling or residential purposes. West Side Avenue, having the principal frontage of the lot, is a commercial and traffic street with a double track car line, while the Bentley Avenue lot is residential. There is no ordinance in the City of Jersey City either by way of a zoning ordinance or otherwise, under which the proposed building could be prohibited. This is not a zoning case.

Plans for the proposed building were prepared by Carl Goldberg, a duly licensed and practicing architect of many years' standing in the community. These were prepared strictly in accordance with the requirements of the building code of Jersey City. The architect, representing the owner of the property, the respondent, upon applying to the Superintendent of Buildings of the City for a building permit, and having with him the plans and specifications therefor, was instructed to make application to the Board of Commissioners of the City of Jersey City, appellants, but since there was no written form of application in use or applicable to apartment or dwelling houses, as these are not zoned, he made his application to the Board of Commissioners orally, on August 9th, 1927. He then and there had with him the plans and specifications which he offered to submit; but was told by the appellants that the application would be deferred until September 13, 1927, so that persons in the neighborhood might be invited to attend the

meeting and urge their objections to the erection of the proposed building, if any they had.

There is no ordinance in the City of Jersey City, either by way of a zoning ordinance or otherwise, against the erection of an apartment house to be used exclusively for dwelling purposes applicable to the premises in question. In fact, under the ordinances of Jersey City, the erection of an apartment house upon these premises is permissible, and the respondent, a building corporation, purchased the same for the purpose of erecting an apartment house thereon. In order to strictly bring itself within the technical provisions of the building code of Jersey City, the respondent did on September 12, 1927, actually file with the Superintendent of Buildings its plans and specifications for the proposed building, together with a written application therefor, which said plans and specifications had been produced before the Board of Commissioners as aforesaid, on August 9th, 1927. Said plans, application and specifications were before the Board of Commissioners of the City on September 13, 1927, to which date the application had by said Board been deferred.

On said last mentioned date, several persons appeared before said Board of Commissioners and objected to the granting to respondent of said building permit, for the sole reason that they did not desire to have an apartment house erected on that block, the same being now occupied by residences. That was the only reason urged against the granting to respondent of said building permit.

The building proposed to be erected by the respondent is to be of a strictly residential character, and is to be set back for a distance of approximately five feet from the building line; is to have a frontage of less than fifty feet on Bentley Ave-

nue, and approximately one hundred feet on West Side Avenue. West Side Avenue is devoted almost entirely to business, a car and bus lines are operated thereon, and within a block of respondent's property stands erected a large motion picture theatre.

After hearing the objectors, the Board of Commissioners refused to grant to respondent the building permit applied for, but instead of then and there denying the application, declared that the same would be deferred for three weeks, and that by that time the amendment to the Constitution of the State, permitting zoning legislation would be adopted, and that thereupon measures could be taken to more efficaciously enforce its denial of said application. There was, however, not then, nor is there now any zoning restriction whatever against the erection of the proposed building on respondent's property and it was with such conditions in view that it purchased the same and paid a substantial price for it. On the contrary the zoning ordinance makes this land available for apartments.

Up to the time of the writing of this brief, May 21, 1928, the said appellants have taken no action on respondent's application, excepting that it was by appellants deferred indefinitely; nor have they even attempted to adopt any ordinances or ordinance which might affect the building of said structure on respondent's property.

The respondent thereupon applied for and obtained a rule to show cause why a writ of mandamus should not issue to compel appellants to issue to respondent said building permit, in accordance with its application.

## THE LAW.

### POINT ONE.

**The Supreme Court did not err in finding that the appellants have under the circumstances unreasonably delayed action upon respondent's application for building permit, and that such delay, under the circumstances disclosed in this case, was tantamount to a denial of it.**

The review on this appeal is tantamount to a review under a writ of error, and the findings of fact of the Supreme Court sitting as the Court of original jurisdiction and tryer of the facts is conclusive.

*Suburban Land Co. v. Vailsburgh*, 68 N. J. L. 311;

*Borough v. State Water Supply*, 85 N. J. L. 673;

*Yellow Pine v. State Board*, 72 N. J. L. 182.

Appellants' brief seems bent upon creating the impression in this Court that the hearing before the Board of Commissioners took place but one day after the application for the permit was made, and that therefore, it could not be held that the delay beyond the one day period was an unreasonable one. If that were all, we would have no quarrel with its contention. Very important elements of the situation are, however, omitted.

The building permit-granting authority of Jersey City is the Superintendent of Buildings, one of the appellants herein. Application was made to said Superintendent of Buildings for the building permit in question on August 4th or 5th (p. 11, line

35, etc.). The plans and specifications were then likewise offered, but the application was directed to be made to the Board of Commissioners of Jersey City, which was done at its then next meeting, to wit, on August 9th, 1927 (p. 12). The plans and specifications were likewise submitted at said meeting. No action was taken upon said application, but the same was thereafter adjourned from week to week until September 13, 1927 (p. 5, line 3, etc.).

There is no written form of application required in the City of Jersey City where the proposed building does not come within the prohibition of any ordinance or restriction, and therefore the application for this building permit had to be made orally, and was properly regarded as pending before the Commissioners. In order, however, to avoid any question about the character or nature of the application, and of the nature of the plans and specifications, a written application was filed with the plans and specifications on September 12, 1927, all of which were before the Board of Commissioners at its meeting on September 13, 1927.

On the last mentioned date, several persons appeared, residents of Bentley Avenue, and objected to the erection of an apartment house on the respondent's plot at the corner of said street and West Side Avenue, and merely because of such objection, was any action on the application again deferred for three weeks, so that if the zoning amendment to the Constitution were adopted on September 20, 1927, the Board of Commissioners would then be fully empowered to deny the permit. The attitude of the Commission was that they knew that the applicant would get the permit by order of Court, but that the Commission would not act in favor of the application (p. 23, line 19, etc.). It is therefore manifest that the appellants

had this application pending before them from August 9, 1927, to September 13, 1927, and then clearly evinced an intention not to grant the permit, but to defer further action upon the application until they found themselves vested with sufficient legal power to deny it.

In other words, the City Commission then knew, in view of the many rulings of the Supreme Court and of this Court in similar cases, that they then had no legal power to deny this application, but that if they could delay action on the application for a sufficiently long period of time, they could then deny the application effectively. If delay under such circumstances is not tantamount to a refusal, we respectfully submit that we do not know what would be.

The appellants' position is analogous to that of a debtor who keeps on putting his creditor off from time to time indefinitely, and claims that that is not tantamount to a refusal to pay the debt. A withholding of the right is a refusal to grant it.

Where a municipal body, without reasonable ground, delays action upon a building application, and particularly where it evinces an intention ultimately to refuse it, it must be tantamount to a refusal of the application, particularly where private rights may be destroyed by the delay, for otherwise the action on the part of the municipal body might be deferred *ad infinitum*. The delay in granting the application means withholding of the permit or a refusal of it. We take it that it is not necessary to have it said in so many words that the application is refused, for otherwise the Supreme Court would be by the non-action of the municipal board, deprived of its jurisdiction by its writ of mandamus to compel the granting to a citizen of his legal rights. There are several cases dealing with this question, but we find the most

apt language used by Justice SCUDDER, sitting with Justice DIXON, in the case of *Cleveland v. The Board of Finance of Jersey City*, 38 N. J. Law 259, at p. 262:

"There need not be a positive refusal on part of the public officers of municipal bodies to perform a duty enjoined upon them to authorize the interposition of this court by mandamus. It is sufficient if there is a manifest intention not to perform it. Where the rights of others are concerned they cannot delay to act for an unreasonable time. When called upon to use their discretion, it must not be withheld or exercised capriciously; and when required to agree with another they must show a willingness to confer and meet the mind of such person, without which there can be no agreement. If they object to act for reasons satisfactory to themselves and to their counsel, they should say so decidedly and promptly, that the parties adversely interested may seek their remedy. If they are silent and delay unreasonably to act, this is constructively a refusal. *State v. Common Council of Rahway*, 4 Vroom 110."

The delay of the municipal board to act in that case was for a period much less than in the instant case, yet the writ of mandamus was allowed.

The logic and reason of the thing is unanswerable. In the instant case the respondent had purchased and paid for its plot of land a very considerable sum of money in reliance upon the law and the municipal ordinances, under which an apartment house to be used for residential purposes exclusively may be built thereon, and the delay, especially now that appellants have made it indefinite, results in irreparable loss.

It is testified by every witness in the case, including Mr. Glavin, a representative of the Building Department of the City, that the respondent's

property is not zoned against the construction of apartment houses thereon. The respondent's plans are prepared strictly in accordance with the building code of the city, and although there is no conceivable ground upon which the respondent's application should not have been granted, the appellants refuse to give it the building permit to which it is lawfully entitled, just because some people owning property on the block are averse to the construction of an apartment house thereon. This apartment house would front only 50 feet on the block on which such objectors are interested, and 117 feet on West Side Avenue, which is entirely a commercial thoroughfare, and upon which a car line and bus lines operate.

While the respondents have, as a matter of form only, at their meeting of September 13, 1927, deferred action on respondent's application for three weeks, until October 4, 1927, on the latter date the only action taken on the application was to again defer action thereon indefinitely. The appellants have also at their meeting of September 13th clearly intimated that they would not grant the application. There was nothing further for appellants to consider. If this, together with the indefinite postponement of action upon this application, is not tantamount to a denial of it, and of the rights of the respondent, we must confess that we do not know what is.

#### POINT TWO.

**The Supreme Court did not err in determining that respondent was entitled to a peremptory writ of mandamus.**

As above stated, the respondent's property is not zoned against the erection of an apartment house thereon. This is conceded by the appellants.

Its plans for the proposed building are strictly in accordance with the building code of the city. It has complied with all of the requirements of City Ordinances, and no ordinance or regulation of any character is even attempted to be interposed on the part of the appellants to the respondent's rights. The only reason for the refusal to grant the respondent's application is because others would not enjoy the exercise by the respondent of its right to construct the apartment house in question, although they themselves possess the same right and might exercise it at any time. There is no restriction in the respondent's deed or in its chain of title against the erection of such apartment house.

The language of the Supreme Court in the case of *Williams v. Gage*, 130 Atl. Rep. 721 (not yet officially reported), at page 722 (affirmed by this Court on the opinion of the Supreme Court) is very appropriate, and is to this effect:

"The respondent further contends that the refusal to grant the permit was justified because a gasoline station in the locality would tend to lower real estate values. There is in the record opinion evidence to this effect. This is no defense. There is probably some property owner in every locality who entertains a belief that the erection of any new building in the vicinity of his property will tend to lower the value of his property. The owner of property is not required to conform to the ideas, aesthetic or otherwise, of other property owners as to the use he may make of his property, provided he uses it in a manner which is not detrimental to the public health, safety or general welfare. If property owners were obliged to conform to the opinions of others as to the use their property should be put few communities would ever emerge from their primitiveness."

The objectors against the granting of respondent's permit merely urged as the ground of their objection a mere capricious reason—that they would not like to see an apartment house on the block,—when every one of them has the right to build such an apartment house on his land, and the City has not seen fit to zone the property against the erection of apartment houses. The respondent purchased its property well knowing that there was no legal or other impediment to their erecting such building, and have parted with their money upon the faith thereof, and now to permit the caprice of others, who have the undoubted legal right to build the same character of structure on their own property, to in fact deprive the relator of the beneficial use of its property acquired under such circumstances, would seem to be the height of injustice.

The Court can well understand that property chased for apartment house sites commands much higher prices than that sold for either a one or two family structure, and it must be assumed that the relator paid for its property on the basis of apartment house use.

It must also not be overlooked that by far the largest portion of respondent's lot fronts on West Side Avenue, a commercial thoroughfare.

The appellants may argue, as grasping the last straw, that the respondent had not filed any written application for a building permit with the Board of Commissioners of the City. The testimony in the case is clear and uncontradicted that the respondent's architect, armed with plans and specifications, in the early part of August, appeared at the office of the Superintendent of Buildings of Jersey City, which is the permit granting authority of the municipality, to make application for a building permit, but that under a policy adopted

by that office and by the Board of Commissioners of the City since the early part of this year (but without any ordinance or legal provision therefor), was referred to the Board of Commissioners, there to urge his application; that there are no forms of application to the Board of Commissioners of Jersey City upon which such written application may be made to that body, excepting where commercial or industrial properties are involved; that where the proposed structure does not come within the prohibition of any zoning ordinance, such as an apartment house, no written application to the Commissioners is in use; that pursuant to the direction of the Superintendent of Buildings said architect did in fact appear before the Board of Commissioners of the City, at its meeting held on August 9th, and there did urge its application and present its plans and specifications. The application was then deferred until September 13th. In order to, however, strictly comply with every technical requirement, before the matter again came on before the said Board of Commissioners, the respondent was advised to and did actually file with the Superintendent of Buildings its plans and specifications, together with a written application for the permit, all of which were before the Board of Commissioners at its meeting held on September 13th. The Commissioners were fully familiarized with all the details of the application and the nature of the proposed building even before the written application was so filed, and there is no pretense even in the testimony that the appellants were in the slightest degree in the dark concerning the nature of the application or of the building proposed to be erected under the permit to be granted pursuant thereto, and no objection whatever was made thereto, and is not now made, although the application, plans and specifications

have been in the possession of the appellants for about ten months.

Another objection which may be urged by the appellants—and this is also by way of anticipation—is that the respondent had made no further demand for the building permit, but the evidence of Mr. Goldberg, the architect, stands uncontradicted that he again, on September 28th, appeared at the office of the Superintendent of Buildings, to ask whether he would receive the permit, and was told that they would not issue it until ordered to do so by the appellants, the Board of Commissioners of Jersey City.

Such objections, if urged by the appellants, and each of them, we respectfully submit, are frivolous.

**It is respectfully submitted that the appeal herein should be dismissed or the opinion of the Supreme Court affirmed, with costs.**

Respectfully submitted,

GROSS & GROSS,  
Attorneys and of Counsel  
with the Respondent.

ISAAC GROSS,  
Of Counsel.

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