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New Jersey State Library

Application for Permit.

APPLICATION TO THE TOWN ENGINEER FOR PERMIT
FOR THE
Construction of New Buildings by the Owner, Architect or Builder. 10

No. West Orange, N. J., June 15, 1926.

The undersigned, in compliance with the Building Ordinance files the following report of a new frame, brick, stone or concrete building.

Reported by Marlyn Realty Co.

The following information is required for the Construction of New Buildings: 20

1. Number of Buildings to be erected, One; Kind, Brick; Block No., 47; Lot No. 1.
2. Distance from property line, front 6 inches; North East side, 6 inches; South West side, 6 inches; Size of lot, 102 feet; Corner or interior lot.
3. Size of Main Building; Width 101 feet; Depth, 44 feet; No. of stories, One; Height of building, 14 feet. 30
4. Depth of foundation below sills 7 feet; thickness, 12 inches; materials, Cement Block.
5. If cement blocks are to be used, from whom to be purchased, National Concrete block.
6. Mortar for foundation, cement; cellar or trench wall, both.
7. Footing course; Width, 24 inches; thickness, 8 inches; material, stone and concrete. 40

8. If piers or iron columns are used, state what kind, 4 concrete lally columns.

9. Bond Cap Stones as per Code (12"x12" Bluestone under all columns in cellar) Yes.

10 10. Thickness of outside walls; 1st story, 12 inches and 8; 2nd,— Material, Brick, fire stops at each story—

11. Thickness of inside partition walls; 1st story 2x4 inches; 2nd,—

12. Are there any outside cellar entrances on street, at rear.

13. Material of roof and style, Slate and slag.

14. Material of timber, Fir.

20 15. Size of floor beams; 1st tier, 2x10 inches; 2nd—size of ceiling beams, 2x6 inches; roof beams or rafters, 2x10; centers 20 inches.

16. Girders; of what material and size to support floors, Fir, 6x10.

17. Iron Girders supporting walls;

18. Distance of wood work from inside of any flue, 8 inches; size of flue linings 8x8 inches.

30 19. Distance of beams or headers from outside of chimney, 2 inches; concrete cellar bottom, Yes.

20. Chimney, where started from, concrete foundation.

21. Size of bridging 2x2; rows in each tier, 1; interior finish, plaster.

22. Hearths, how supported.

23. Height of ceilings; 1st story, 10 feet.

40 24. Skylights? Yes.

Application for Permit.

25. Hall partitions.
26. Proposed use of building, Stores; how heated, Hot air; how lighted, electric.
27. Have you filed a contract in Essex County Court House— 10
28. Estimated cost (exclusive of lot) of each building separate, $21,000.00.

NOTES:

Footing Courses to be examined when excavated, also when filled.

When ready for Inspections call Orange 1627.

No projections such as bay windows, cellar steps or platforms allowed outside of property lines. 20

The Rate of Permits is $3 to $1,000 or fraction of $1,000.

June 18, 1926.

Permit refused on account of property be in one family district.

(Sgd.) HENRY C. WARNICK,
Building Inspector.

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Notice.

NEW JERSEY SUPREME COURT.

MARLYN REALTY CO., a corporation, *Prosecutor*, *v.* ZONING BOARD OF ADJUSTMENT OF THE TOWN OF WEST ORANGE, in the County of Essex; NORMAN L. BRUNDAGE, Secretary of said Board, and the TOWN OF WEST ORANGE, in the County of Essex, *Respondents.*	On Certiorari. Notice.

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To the Zoning Board of Adjustment of the Town of West Orange, in the County of Essex; Norman L. Brundage, Secretary of said Board; and the Town of West Orange, in the County of Essex:

TAKE NOTICE that on Saturday, the Twenty-third day of April, 1927, 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, on the attached petition and affidavit, for a writ of certiorari to review the proceedings of the above named respondent refusing to grant to the prosecutor a permit to erect a row of seven retail stores on the Southwest corner of Gregory avenue and Orange Heights avenue, West Orange, New Jersey.

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HOWE & DAVIS,
Attorneys for Prosecutor.

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Petition.

NEW JERSEY SUPREME COURT.

To the Honorable William S. Gummere, Chief Justice of the New Jersey Supreme Court:

The petition of Marlyn Realty Co., a corporation, of the City of East Orange, in the County of Essex and State of New Jersey, respectfully shows: 10

1. Petitioner is the owner in fee simple of a certain tract of land and premises in the Town of West Orange, in the County of Essex and State of New Jersey, and bounded and described as follows:

BEGINNING at a point formed by the intersection of the Northwesterly side of Gregory avenue and the Southwesterly side of Orange Heights avenue; 20 and running thence (1) along said Gregory avenue one hundred two and forty-one hundredths feet; thence (2) in a Northwesterly direction along the line of property, owned or formerly owned by Joseph Zanek one hundred feet; thence (3) Northeasterly parallel with Gregory avenue, one hundred two and forty-one hundredths feet to the Southwesterly line of Orange Heights avenue; thence (4) along said Southwesterly line of Orange 30 Heights avenue, one hundred feet to the point or place of BEGINNING. Being and intended to be part of Lot No. 1, Section No. 47, Plate No. 5, on the Tax Map of the Township of West Orange.

2. Petitioner was and is desirous of erecting upon said premises a one-story building containing seven retail stores, the said building to have a frontage on Gregory avenue of one hundred one feet and a frontage on Orange Heights avenue 40

of forty-four feet, and is to be built to a height of fourteen feet and to cost approximately Twenty-one Thousand Dollars ($21,000).

3. On the 15th day of June, 1926, petitioner applied to Frederick J. Wolf, Building Inspector 10 of the Town of West Orange, for a permit for the erection of said row of retail stores, 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 Town of West 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 20 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 regulating and restricting the volume height and area of buildings hereafter erected, and regulating and determining the minimum area of yards and other spaces, and regulating and restricting the location of trades and industries and the locations of buildings designed for specified use and 30 establishing the boundaries of districts for the said purpose," adopted October 20, 1921, and the various ordinances amendatory and supplementary thereto, forbids the erection of the building upon the premises owned by petitioner.

5. Following the refusal on the part of the Building Inspector of the Town of West Orange, petitioner made due application and appeal from the decision of the said Building Inspector to 40 the Zoning Board of Adjustment of the Town of West Orange and the said appeal came to a hear-

ing before the said Board of Adjustment after due notice to all interested parties in accordance with the rules and regulations made by said Zoning Board of Adjustment, on the 21st day of April, 1927.

6. At the said hearing objections were made by residents and property owners in the neighborhood against the erection of said proposed row of retail stores, but no reasons were offered by said objectors that would tend to show that the said building was detrimental to the public health, safety or welfare. 10

7. After duly hearing the said matter, the said Zoning Board of Adjustment refused to grant to petitioner the said building permit. 20

8. Petitioner is desirous that a writ of certiorari may issue to review the proceedings of the said Zoning Board of Adjustment of West Orange and therefore prays that a writ of certiorari may issue out of and under the seal of this Honorable Court directing the said Zoning Board of Adjustment of the Town of West Orange, in the County of Essex, and Norman L. Brundage, Secretary of said Board, and the Town of West Orange, of the County of Essex, to certify and send under their seal, to the justices of the Supreme Court of Judicature at Trenton, on the day of next, said order or determination made on the 21st day of April, 1927, in the matter of the petitioner's appeal. 30

Howe & Davis,
Attorneys for Petitioner.

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Affidavit.

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

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

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1. I am President of the Marlyn Realty Company, the petitioner mentioned in the foregoing petition, and the owner in fee simple of the premises described in paragraph 1 of the foregoing petition.

2. I desire to erect upon the said premises a one-story building containing seven retail stores, the said building to have a frontage on Gregory Avenue of one hundred one feet and a frontage on Orange Heights Avenue of forty-four feet, and

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is to be built to a height of fourteen feet and to cost approximately Twenty-one Thousand Dollars ($21,000.00).

3. On June 15th, 1926, Marlyn Realty Company applied to Frederick J. Wolf, Building Inspector of the Town of West Orange, for a permit for the erection of the said row of retail stores, by an application in writing duly submitted to said Building Inspector, accompanied by plans and

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specifications, in duplicate, as provided by the Building Code of the Town of West 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 for a period of time, the said Building Inspector notified Marlyn Realty Company that he would not issue the said permit, giving as his

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reason therefor that an ordinance entitled, "An ordinance regulating and restricting the volume, height and area of buildings hereafter erected, and regulating and determining the minimum area of yards and other spaces and regulating and restricting the location of trades and industries and the locations of buildings designed for specified use and establishing the boundaries of districts for the said purpose," adopted October 20, 1921, and various ordinances amendatory and supplementary thereto, forbids the erection of the building upon the premises owned by Marlyn Realty Company. 10

5. Following such refusal on the part of the Building Inspector of the Town of West Orange, Marlyn Realty Company made due application and appeal from the decision of the said Building Inspector to the Zoning Board of Adjustment of the Town of West Orange and the said appeal came to a hearing before the said Zoning Board of Adjustment after due notice to all interested parties in accordance with the rules and regulations made by said Zoning Board of Adjustment, on the 21st day of April, 1927. 20

6. At the said hearing objections were made by residents and property owners in the neighborhood against the erection of said proposed row of retail stores, but no reasons were offered by said objectors that would tend to show that the said building was detrimental to the public health, safety or welfare. 30

7. After duly hearing the said matter, the said Board of Adjustment refused to grant the Marlyn Realty Company the said building permit. 40

8. Marlyn Realty Company desires that a writ of certiorari may issue to review the proceedings of the said Zoning Board of Adjustment of West Orange and therefore prays that a writ of certiorari may issue out of and under the seal of this
10 Honorable Court directing the said Board of Adjustment of the Town of West Orange, in the County of Essex, and Norman L. Brundage, Secretary of said Board, and the Town of West Orange, of the County of Essex, to certify and send under their seal, to the Justices of the Supreme Court of Judicature at Trenton.

MAX MARGOLIS.

Subscribed and sworn to this 22nd
20 day of April, 1927, before me.

THOMAS A. DAVIS, JR.,
A Notary Public
of New Jersey.

Service of a copy of the within is hereby acknowledged this 23rd day of April, 1927.

ALFRED J. GROSSO,
Attorney for Respondents.

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Writ of Certiorari.

The State of New Jersey to the Zoning Board of Adjustment of the Town of
(L. S.) West Orange, in the County of Essex, and Norman L. Brundage, Secretary of said Board, GREETING:

We being willing, for certain reasons, to be certified of the order or determination of the Zoning
40 Board of Adjustment of the Town of West Orange,

in the County of Essex, made on the 21st day of April, 1927, in matter of the appeal of Marlyn Realty Company from the decision of the Inspector of Buildings of the Town of West Orange denying an application for a permit to erect a one-story building containing seven retail stores, on premises located on the southwest corner of Gregory avenue and Orange Heights avenue, in the Town of West Orange; we do command you that you certify and send under your seal to our Justices of our Supreme Court of Judicature, at Trenton, on the third day of May next, said order or determination made on the 21st day of April, 1927, in the matter of the appeal of Marlyn Realty Company from the decision of the Inspector of Buildings of the Town of West Orange denying an application for a permit to erect a row of seven retail stores, on premises located at the southwest corner of Gregory avenue and Orange Heights avenue, in the Town of West Orange, and all proceedings in said matter, together with all papers and things touching and concerning the same as fully and completely as they remain before you, together with this writ, that we may cause to be done thereupon what of right and justice and according to the laws of the State of New Jersey ought to be done.

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WITNESS, WILLIAM S. GUMMERE, Esquire, Chief Justice of our Supreme Court, at Newark, this 23rd day of April, 1927.

EDWARD J. KELLEHER,
Clerk.

HOWE & DAVIS,
Attorneys.

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Consent is hereby given to the allowance of the foregoing writ of certiorari.

ALFRED J. GROSSO,
Attorney for Respondents.

10 Allocation.
WM. S. GUMMERE,
C. J.

Service of a copy of the within is hereby acknowledged this 25th day of April, 1927.

ALFRED J. GROSSO,
Attorney of Defendants.

Application to Zoning Board.

20 To the Zoning Board of Adjustment of the Town of West Orange:

Gentlemen:

The undersigned, Marlyn Realty Company, is the owner of premises on the corner of Gregory avenue and Orange Heights avenue, in the Town of West Orange, State of New Jersey. It has applied to the Building Inspector of West Orange for 30 a permit to erect seven retail stores on said premises. The said permit was refused on the ground that the zoning ordinances of the Town of West Orange do not permit the erection of retail stores on said premises.

The undersigned, therefore, respectfully applies to your Honorable body for a modification or change of the said zoning ordinance or from the restriction so as to permit it to erect the retail stores above referred to on the said premises, and

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for that purpose asks that a time and place may be set so that a hearing may be given to it.

Very respectfully yours,

MARLYN REALTY CO.,
Max Margolis, Pres. 10

MARLYN REALTY COMPANY,
Prosecutor,

v.

WEST ORANGE ZONING BOARD OF ADJUSTMENT, *et al.,*
Respondents.

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Transcript of testimony of witnesses, taken in the above-entitled cause, before William E. Davenport, a Supreme Court Examiner of New Jersey, at the Council Chambers, Town of West Orange, New Jersey, on Thursday, April 21, 1927, at eight o'clock P. M.

APPEARANCES:

EDWARD L. DAVIS, Esq., for prosecutor; Messrs. FRANCIS J. BYRNE, Chairman; FREDERICK J. WOLF, NORMAN L. BRUNDAGE and BENJAMIN P. LAIDLAW, Members of West Orange Zoning Board of Adjustment. 30

MAX MARGOLIS, produced as a witness on behalf of prosecutor, testified as follows:

Direct examination by Mr. Davis:

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Q. Mr. Margolis, are you connected with the Marlyn Realty Company? A. Yes.

Q. In what capacity? A. President.

Q. Is that company the owner of a tract of land at the southwest corner of Gregory Avenue and Orange Heights Avenue, West Orange, N. J.? A. Yes, sir.

10 Q. What is the frontage on Gregory Avenue? A. 102 feet.

Q. And on Orange Heights Avenue? A. 100 feet.

Q. Does the company desire to erect a building on that land? A. Yes, sir.

Q. What sort of a building? A. Stores.

Q. How many stores? A. Seven.

Q. To front on what street A. Gregory Avenue.

Q. Is the building to be one story in height or more? A. One story.

20 Q. What is to be the character of those stores? What kind of stores are you putting up? A. Do you mean the size or the appearance of it? We drew plans for that particular building over a year ago of the character confined to a neighborhood of that kind. Sort of English style.

Q. Is there anything about the character of these stores that would be in any way to your knowledge detrimental to the morals of the community? A. No, sir.

30 Q. Is there anything detrimental to the health of the community? A. No, sir.

Q. Or to the general welfare of the community? A. No, sir.

Q. Are they to be erected in accordance with all sanitary building laws in force in the Town of West Orange? A. Yes, sir.

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HOBART A. WALKER, produced as a witness on behalf of prosecutor, testified as follows:

Direct examination by Mr. Davis:

Q. What is your business, Mr. Walker? A. Architect. 10

Q. How long have you been engaged in that business? A. About thirty-five years.

Q. Where? A. New York and Orange.

Q. Did you prepare the plans for the stores which the Marlyn Realty Co. desire to erect at the southwest corner of Gregory Avenue and Orange Heights Avenue? A. I did.

Q. What is to be the character of those stores? A. The idea was to keep away from a purely commercial character of stores and to make them as attractive as possible in a residential neighborhood. 20

Q. Are they to be just the ordinary brick front stores you see on so many streets nowadays? A. No, a combination of brick, stucco and timber work, with slate roofs.

Q. So far as you know, are these stores to be constructed in accordance with the Building Code of the Town of West Orange and according to the sanitary laws of that town? A. Yes, in every way. 30

Q. Is there anything about the erection, construction or existence of these stores that would be in any way detrimental to the public health? A. No.

Q. Would they be in any way detrimental to the public morals? A. No.

Q. Would they be in any way detrimental to the public safety? A. No.

Q. Would they be detrimental to the public in any way you know of? A. I don't think so. 40

Cross examination by Mr. Wolf:

Q. How far back from the street do you intend to locate these stores? A. As near as I can remember, they were to be on the building line.

10 Q. On the property line? A. I made those plans about a year ago and I haven't looked at them since, and I don't remember exactly. I think we were to come right up to the property line. The lots are 100 feet deep. I have forgotten how deep the stores are to be.

Q. In other words, you intended to build up the whole frontage on Gregory Avenue? A. That is the idea; taking the entire frontage on Gregory Avenue.

20 Mr. Davis: My client authorizes me to say to the Board it was planned to build right up to the line, but if a permit is issued, the building will be set back five feet or so. We would agree to that.

By Mr. Brundage:

Q. How does the appearance of these stores differ from the ordinary stores? You say it is different. A. Well, if the plans are here, you can see

30 at a glance.

Q. Have you the plans here? A. I am sorry the plans are not here. I think the plans are on file. The building is partly brick. Of course, the only brick are the piers in between the stores themselves, and naturally, the store fronts would be entirely in glass. The gables would be of stucco and half timber work and sloping roofs. The highest point is not more than sixteen feet in height

40 or something like that.

Mr. Brundage: The plans should be here for inspection by the Board. They have never seen them. The probability is, they are in your office.

Mr. Davis: No, I haven't them.

Mr. Brundage: Have the plans been filed? 10

Mr. Davis: Yes. They have been returned.

Mr. Brundage: The plans have been returned, have they?

Mr. Davis: I must have them down in my office, if returned.

Mr. Brundage: It was something over a year ago those plans were presented.

Mr. Davis: No, I think they were presented some time last summer. 20

Mr. Brundage: I was wondering if you could get those plans here tonight.

Mr. Margolis: I think we can get them tonight. I will telephone and see if I can get a set of plans here tonight.

Mr. Davis: I will offer the plans in evidence.

(Plans received in evidence and marked Exhibit P-1.) 30

Mr. Brundage: Have you any other witnesses?

Mr. Davis: No, that is all.

Mr. Brundage: Is there any citizen that cares to be heard?

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EDWARD F. KLENKE: I reside at 444 Gregory Avenue, West Orange, N. J. I am the owner of a piece of property on the corner of Orange Heights and Gregory Avenues. A minute ago Mr. Walker testified he did not believe that the erection of these stores would in any way hurt business. Perhaps he is right. Last winter I lost the sale of my house twice, due to the fact it had been rumored that stores were to be built on this plot or lot in question. I think that on its face shows sufficiently it would damage the owners of property in that neighborhood. Furthermore, I want to ask for a point of information. If a building line has been established on a street, is it not required of another builder putting a building on the same street to meet that building line?

Mr. Brundage: I think that is the rule.

Mr. Klenke: A building line has been established further back than five feet on Gregory Avenue on that particular side of the street. If that rule is in effect, I for one do not see how this permit for a building can possibly be granted. It is the intention of this builder to build on the building line or he might possibly go back five feet. We have quite a representation here this evening of people living pretty close to this very same property. I think a great many of them, either by actual experience or from their general knowledge as to what such things have done in their locality, agree it will immediately decrease property values of their individual properties in that section if these buildings are permitted to be built on Gregory Avenue. I for one do not think we have any need for stores in that neighborhood. I will grant the building is to be very picturesque, as far as architecture, but in a purely residential section, is that going to do the neighboring property owners any good?

Edward F. Klenke, cross.

Cross examination by Mr. Davis:

Q. You say the building line has been established. A. I asked that question, whether or not, if a building line has been established on the street, whether that did not require anybody putting up buildings on any of the vacant plots on that same street, to set back to that same building line.

10

Q. You don't know of any ordinance existing which requires a builder to set back from the building line? A. I don't know what it is in West Orange and that is the reason I asked the question. I do know if a deed restriction says a building must set back thirty feet, that if buildings already built on that street do set back thirty feet and you disregard the deed when it calls for thirty feet, you will have to go back to the building line established on that street. I am not familiar with the ordinance or ruling in West Orange, therefore I asked that question.

20

Q. Do you know whether the erection of these buildings would be a menace to the public morals of those residing on Gregory Avenue or the surrounding neighborhood? A. I think that would altogether depend upon what sort of tenants would occupy those buildings.

30

Q. You think the mere existence of those buildings would be a menace to the public morals, regardless of their occupancy? A. I can't say that I do.

Q. Do you think they would be against the public health in any way? A. I don't believe they would.

Q. Or against the public safety? A. I don't believe they would.

40

Q. You think they are undesirable because people in that neighborhood don't care to have stores in a residential district? A. I think so.

Mr. Brundage: Is there any other citizen that cares to be heard?

10

LEWIS M. GRAHAM: I reside at 484 Gregory Avenue, West Orange. Since the question of public safety, public morals and public welfare have been brought up, perhaps the question of public welfare is where we can give more thought than anything else, because it covers a broader field. Progress, of course, is bound to come as the population increases in any district. But as to public welfare, my thought is that stores should be concentrated in shopping centers, where one in making purchases can find a large variety of stores, where competition exists and prevents high prices. Such would serve the public welfare best. On Gregory Avenue near Orange Heights Avenue such a shopping center cannot exist for a long period of time. There is not sufficient vacant land at the present time to establish such a shopping center and the dwellings there—at least most of them—are very new. Therefore, it would be a long term of years before the land values would increase and the building value, through depreciation, decrease, until it would warrant tearing down existing residences to build different houses.

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If these stores are erected it will be for at least twenty years this section will neither be a first-class residential section nor a business section, because there is not sufficient land available to build a business section without tearing down present residences.

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Now, the question again of public welfare comes in. These few stores would add, of course, a certain amount of ratables for taxation, but there would be depreciation in the value of residential property along Gregory Avenue and the side streets would decrease in ratable values, so that the total taxation for at least twenty years would be reduced. 10

Why not wait for twenty years, or until the residences have served their useful life and the land values have increased to the point where it would warrant tearing down existing buildings to erect commercial buildings?

Mr. Davis: No questions.

Mr. Brundage: Are there any other citizens that care to be heard? 20

HAROLD A. TRABOLD: I want to call particular attention to the legal aspect of the case, in so far as it concerns public safety, which to me is the only legal criterion upon which the Board can decide this question.

It has been repeatedly decided that stores are not a menace to the public health or morals by their existence as stores. There is a question about the class of tenants you put in there that might be a menace to the public morals, but that is an assumption we are not justified in taking now. 30

As I understand it, there is an approximate frontage on Gregory Avenue of 100 feet on which this company proposes to put up seven stores. That, of course, is an average of slightly over fifteen feet wide to each store, not allowing any deduction for intervening walls or anything of that 40

nature. Of course, a store of that size is not a large store. It is a store suitable for a small retail business, such as a grocery store, butcher store, drug store, perhaps, or things of that nature —small local retail stores.

10 What I would particularly like to call the Board's attention to is the fact that such a body of stores there would undoubtedly greatly increase the traffic hazard. That is all right for the grown-ups. This company owns 100 feet, approximately, on the corner. Immediately south of the land owned by this company is the property of Mr. Zednik, having a frontage of seventy-five feet, I should say. I do not want to be bound exactly to that number of feet, but I would say about sev-
20 enty-five feet. Immediately south of this holding is the Gregory Avenue school house with a school building on it, which extends from that point all the way south to Walker Road. It is only two or three years since there was an addition made to the Gregory Avenue School because of congested conditions there, and as it now stands, are only part-time classes, and a number of children who go to the Gregory Avenue School only attend part time, and the proposition is now before the Board
30 of Education, I believe, of building an addition, or at least have even gone so far as to have plans prepared or put into definite shape, or at least discussed it, and there is not any question but that within a couple of years the northernmost part of that land up to Mr. Zednik's property will be required for school purposes. Consequently, if you grant this application for stores on Gregory Avenue you are facing a heavy burden of traffic which is bound to congregate in a commercial sec-
40 tion—a section where there is at present continu-

ous automobile traffic—immediately or in juxtaposition to the school. Gregory Avenue School is a grade school, not an advanced school, but the lower grades from kindergarten up until, I think, about the fifth grade or thereabouts, where all the pupils are small pupils. By granting this sort of application you will be placing these children in danger of their life and limb continually from traffic. Gregory Avenue is a county road all the way across to South Orange Avenue, as you know, and traffic is heavy at any time. 10

I think on the ground of public safety this Board would be legally as well as morally justified in refusing this permit.

Mr. Brundage: Is that lot north of the school used as a playground for the school children? 20

Mr. Trabold: Yes.

Mr. Brundage: Gregory Avenue School is attended by children of what age?

Mr. Trabold: Anywhere from six to twelve. I do not think any child attending the school is over twelve years of age.

Mr. Brundage: Is there a fence on the easterly side? 30

Mr. Trabold: That is along the Gregory Avenue sidewalk?

Mr. Brundage: Yes.

Mr. Trabold: No; there is absolutely no fence along that lot.

Mr. Brundage: Is there any police protection afforded during the day?

Mr. Trabold: At the time of the opening of the school in the morning I know there is an officer on the corner of Gregory Avenue and Walker Road. 40

Mr. Brundage: Approximately, what is the length of that school lot?

Mr. Trabold: 350 feet to 400 feet, possibly more. I think that is a conservative guess.

10 Mr. Brundage: That is approximately seventy-five feet from the location of the proposed stores?

Mr. Trabold: Yes, seventy-five feet south of the southernmost line of the proposed store lots.

Mr. Brundage: How about traffic on Orange Heights Avenue? Is there any traffic to speak of?

Mr. Trabold: Little or none. It is a very

20 steep hill and there is no through traffic, because traffic which comes up Orange Heights Avenue mostly turns either north or south on Gregory Avenue. Orange Heights Avenue is an improved road to Gregory Avenue, and then west of Gregory there is a jog which begins about fifty feet south of the opening on the easterly side of Gregory Avenue. It is not straight through. They go around a jog and then up.

30 Mr. Brundage: How about Saturdays? Is that lot used Saturdays by the children?

Mr. Trabold: Yes, by all children in the neighborhood of the school and some that do not go to school.

Mr. Brundage: Is there a playground in the vicinity?

Mr. Trabold: None whatever. There was a proposition to establish one on the Austin tract, but it fell through. There is no public

40 playground nearer to them than at the fire-

house on Valley Road and Cameron Field, South Orange.

Mr. Brundage: On which corner is it they propose to build the stores?

Mr. Trabold: On the southwest corner, as I understand the application. 10

Mr. Brundage: That is on the same side of Gregory Avenue as the school?

Mr. Trabold: Yes.

By Mr. Brundage:

Q. How wide is Gregory Avenue at that point? A. Possibly fifty feet, not over that. It is not a particularly wide road or a narrow one. It is improved the full width. 20

Mr. Brundage: Are there sidewalks?

Mr. Trabold: In front of the school. There is a sidewalk in front of Mr. Zednik's house or the proposed site. There are sidewalks on the east side of Gregory Avenue the full length.

Cross examination by Mr. Davis:

Q. You are a lawyer, Mr. Trabold? A. Yes.

Q. Are you familiar with the decisions of the Supreme Court and the Court of Errors and Appeals that hold that the situation of traffic hazards is not sufficient reason for not granting a permit? A. No, I am not. As I recollect it, they have held that the Boards are justified in police powers to deny any application which would react against that public safety, regardless of what the condition may be, which reacts against the public safety. That, I understand, is the rule. 30

Q. Are you familiar with the case of Ingersoll *v.* the Village of South Orange? A. Generally fa- 40

miliar. That is the case of the Village's inability to cope with the fire hazard.

Q. Are you familiar with the case of Eaton *v.* the Village of South Orange, in which the traffic hazard of automobiles approaching one another on two intersecting busy streets was discussed? A. No, I don't recollect having read that particular decision.

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Q. As I understand it, your objection is not the mere existence of these stores would be dangerous, but that the traffic attracted by the occupancy of those stores would be heavy. Is that correct? A. Yes; I don't think the stores of themselves or the occupants of the stores would have any effect whatever on the question of public safety.

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Q. It is the manner in which they might be occupied which would draw traffic in front of them? A. Surely. I say the size of these stores would indicate, possibly, the occupancy of small retail stores.

Q. Assuming there was increased traffic, in what way is that dangerous? A. No more dangerous than any other traffic.

Q. How is any traffic dangerous if the drivers of various vehicles are themselves careful? A. If they are. That's the whole story, and the fact there are small children there who are incapable of using their ability to get out of the way of cars.

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Q. Then, I understand you to argue that the owners or occupants of these stores are to suffer because drivers passing by may not be careful? A. I don't say that. I say the very establishment of those stores predicates a condition which will inure to the damage of children using that particular property in that vicinity, because it will be dangerous traffic. That is my argument.

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Q. If the drivers of vehicles in that traffic are careless, is that it? A. That is true anywhere.

Q. If the drivers are careful there will not be any danger? A. That is true. But I also call attention to the fact that there isn't any doubt, if these be small retail stores, it will not only draw traffic by persons going to these stores for the purpose of making purchases, and the traffic drivers might be careful, but whoever heard of a careful truck driver? 10

By Mr. Brundage:

Q. You would say, even though traffic drivers were careful, there still might be some danger to children of kindergarten age? A. Oh, yes. They are all small children in this school. 20

Q. Approximately how many children go to that school? A. I don't know. I know it is overcrowded and it is a good-sized school.

Q. You say Gregory Avenue is a county road? A. Yes.

Q. And it connects with two other county roads? A. It starts at Mt. Pleasant Avenue and continues all the way over to South Orange Avenue.

Mr. Brundage: Is there any other citizen who cares to be heard? 30

MR. EDWARD F. KLENKE: Might I have one more word? It occurred to me when Mr. Trabold was speaking on this question of safety, how that might injure the lives of these children to a greater extent than at the present time. Everyone knows when an automobile drives up to a store for the occupant or occupants to make a purchase, the car naturally must be parked in front of that par- 40

ticular store. Gregory Avenue is none too wide at that particular point at the present time, and two cars coming in an opposite direction would result in almost an impossibility for the two cars to pass at that particular point where another car
10 was parked at the curb. The fact that cars would be parked at the curb in front of the stores would add to the danger at that point, especially to small children.

Mr. Brundage: Is there any other citizen who cares to be heard?

WILLIAM HECHT: I reside at 490 Gregory
20 Avenue. As you know, it is to the benefit of every community to have business concentrated, and right here in our own West Orange we have numerous stores right on Valley Road, which is but one or two blocks away from Gregory Avenue and which has been a commercialized resort. There have been a number of buildings put up. Some have not been successful in having the proper tenancy. However, I believe a great many still go down to shop in that vicinity. Right on Valley
30 Road is a business atmosphere, and speculation is gone to the extent of being overdone. To my knowledge—although I do not know exactly the number of stores that are vacant there—I dare say there is every bit of ten to twelve stores right in that vicinity within a radius of three blocks which are vacant at present. You know, gentlemen, vacancies do not do property nearby any good, and when a property owner does not make money on that particular building or investment, it does not
40 do the town any good. We have got to have cooperation with the town and the owner of the

building, and the owner to have the proper tenancy.

These prospective buildings—with due respect to Mr. Walker, the architect who tried to outline the fine points; including construction—after all are commercial business places. I do not believe the location can command a high rent from these stores, and when a store cannot command a certain rental they do not draw the proper type of tenant desirable to this section. We have several vacancies at the present time on Valley Road. There might be some excuse if this town felt all those stores would be well occupied and filled up and there was need for further room to expand, but that progress does not exist just now.

I don't know whether I am exactly in order or not. I walked into this place and my eye happened to catch that sign (indicating) "Boost West Orange." A very good motto. Build up your home town. We have tried to do it as taxpayers, with a very respectful residential section up on the hill, where these gentlemen to my knowledge are absolutely nothing and have no interest excepting the putting up of these stores with a speculative object in mind. They don't want to give us community people any consideration. We have built up your town; we have bought our respective homes to live in and take care of our children, and instead of holding up the moral point of our homes, right on top of us we have stores that do not do us any credit. Property is bound to depreciate as two gentlemen before me previously pointed out. Within one or two blocks of the proposed stores I believe we represent half a million dollars worth of property, conservatively speaking, against an investment of $30,000 to

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$35,000, possibly $50,000. I want your Board to take this into consideration.

Mr. Davis has mentioned some cases recently decided. I am not a lawyer and I am not a theorist on those topics. I am a real estate broker, and my object in business is to promote real estate matters. I have made one vow since I entered this business, that if I cannot promote a legitimate one I will keep my hands off.

If you gentlemen care to take these numerous property owners into consideration, I am quite sure you will turn this proposition down flat. If you decide otherwise, and we must all travel to the Supreme Court, we will happily do so alone or collectively with Mr. Davis.

Cross examination by Mr. Davis:

Q. I understand then, so far as your observation is concerned, there is no particular traffic danger down on Valley Road? A. Down on Valley Road?

Q. Yes. You mentioned a lot of idle stores on Valley Road? A. Yes.

Q. There is no particular traffic danger existing there because of the erection of those stores, is there? A. Why, there is traffic danger there as well as in other localities—what you term as traffic. There is a traffic hazard to a certain extent on account of more people being attracted to those stores.

Q. Those stores are occupied, are they not? A. Some are and some are not.

Q. Is there an increased traffic hazard by reason of the occupancy of those stores? A. I believe there is. Yes, indeed.

Q. To a great extent? A. If you want it in percentage terms, I would say possibly 50% more.

Q. Have you heard of anybody being hurt down there as a result of that traffic hazard? A. I didn't follow the question up as close as that in order to answer you. 10

Q. Have you heard of anybody being hurt on Valley Road? A. I am sorry I cannot answer you the way you put it to me.

Q. You can answer. If you heard of anyone being hurt you can say yes. If not, you can say no. I didn't ask you whether anybody had been hurt. I asked you if you ever heard of anybody being hurt. A. I desire to prepare myself.

Q. Answer the question yes or no. A. I don't know. 20

Mr. Brundage: Is there any other citizen that cares to be heard?

MRS. WILLIAM C. MEYERS: I reside at 486 Gregory Avenue, West Orange. One question which the Board asked was as to the number of children attending the Gregory Avenue School at the present time. It has been stated we are discussing the possibility in the very near future of providing for perhaps over one thousand children eventually at that particular school. 30

At the present time there are no sidewalks on the west side of Gregory Avenue, and it seems every child coming from the direction of Orange Heights Avenue has to cross the street. Already there has been one child killed on Gregory Avenue, due to traffic. I cannot quite agree with the Supreme Court it is not a menace to the health. Of 40

course, these kind of stores being erected does not mean anything unless the stores are occupied. They bring rats. If you want to go to the very extreme you might say that rats bring bubonic plague.

10 Another question Judge Davis asked: Has anyone heard of a child being injured on Valley Road, due to traffic? A child was very badly injured on Valley Road, due to traffic. The child was hurt by an automobile. Then again I think stores discard their boxes and barrels to the back, and the fire hazard is increased.

I do not think there is any more to be said about the decrease in the valuation of property. For the safety of the children I certainly think the 20 Board would do well to reduce this risk by voting against the erection of these stores.

By Mr. Brundage:

Q. Mrs. Meyers, how long have you lived on Gregory Avenue? A. Over four years.

Q. How many children are going to that school? A. Over 300.

Q. And some are going part time? A. Some 30 are going only part time. In the very near future there no doubt will be an addition to the school.

Q. From what direction do the greater majority of these children come from, east or west? A. Pretty evenly divided. As far as police protection, there is only one policeman, and he stands down at the corner of Walker Road and Gregory Avenue, and all the children coming from the opposite direction do not pass there. There is no police protection for the children towards Orange Heights 40 Avenue.

Mrs. William C. Meyers, cross.

Q. This school and playground tract covers a frontage of about how many feet, would you say? A. I should say about 350 to 400 feet.

Q. Along which there is no sidewalk? A. There is a sidewalk in front of the school, but there is no sidewalk in front of the property owned by Mr. Zednik or the property on which these proposed stores are to be erected, and the children have to cross the street coming from the direction of Orange Heights Avenue. 10

Cross examination by Mr. Davis:

Q. I understood you to say a boy was seriously hurt on Valley Road? A. Yes.

Q. Do you know whether it was in the vicinity of a store where he was hit? A. I am quite certain that it was. 20

Q. You don't know? A. I don't know where you would go on Valley Road and not find a store right there.

Q. Did I understand you to say a boy was killed on Gregory Avenue? A. Yes.

Q. Where there were no stores? Is that correct? A. It was at the corner of Orange Heights Avenue and Gregory Avenue. 30

Q. So traffic danger seems to be just as bad on Gregory Avenue where there are no stores at the present time, as on Valley Road where there are many stores? Is that correct? A. But if a boy is hurt with traffic as it is, how many more boys would be hurt with increased traffic?

By Mr. Brundage:

Q. Can you say from your observation that stores attract traffic ? A. They certainly do. 40

Q. Can you say they do? A. Yes. Not only direct traffic going past, but cars are invariably

parked there, and you know how most cars are parked? Cars are parked half way out in the street, and a child may come around the corner of Orange Heights Avenue and could not possibly see what was coming down Gregory Avenue if
10 they came around trucks that were parked.

Q. Did I understand you to say probably half of the 300 pupils going to Gregory Avenue school come from west of Gregory Avenue? A. I would say they do.

Q. That tract until recently has been rather an undeveloped country and is developing up rapidly now, is it not? A. Very rapidly.

Mr. Davis: I think perhaps the Board
20 would like to have those opposed to the permit to raise their hands.

Mr. Brundage: I will first hear every citizen that cares to be heard. Is there any other citizen that cares to be heard?

EDWARD L. THOMPSON: I reside at 447 Gregory Avenue. I purchased a house at 447 Gregory Avenue last fall. I had heard the rumor of stores being built in the vicinity. I liked the
30 house I purchased because of the fact of its location and the location of the school. I have a daughter five years old, and bought the property solely with the idea in mind that the Zoning Board would prevent any desecration of property in that neighborhood. I go further in stating I would hesitate in sending my daughter to school if stores were built where planned. Where there are stores around schools, they are generally stationery and candy stores, and generally in such stores there
40 are games of chance. Also because of her health, there are things that a child might buy in stores that do not add to their health.

Mrs. Lemcke, direct.

By Mr. Brundage:

Q. How far do you live from the present site in question? A. Two hundred feet north of Orange Heights Avenue.

Q. On Orange Heights Avenue? A. No, on Gregory Avenue. 10

Mr. Davis: No cross examination.

Mr. Brundage: Is there any other citizen that cares to be heard?

MRS. LEMCKE: I reside at 480 Gregory Avenue. I bought the property right opposite this vacant lot where stores are proposed. I bought it four months ago with the understanding it was strictly a residential neighborhood, and there is 20 another property purchased recently with the same understanding, that it was strictly a residential neighborhood.

The child that was killed used to live in my house. That happened before I was there. I think that stores would increase the danger there very much. So far there have been no stores on that avenue, and all the people living there expect that neighborhood to stay as a residential neighborhood. 30

By Mr. Brundage:

Q. Mrs. Lemcke, you feel that the erection of these stores would depreciate the value of property? A. Yes. It is an open country and a very nice place. I never would have bought the property had I known small stores were going to be built opposite. I have an open porch, and the erection of stores would be a great loss in value to my home. 40

Q. Is your property vacant now? A. No, I live there. I bought it about four months ago.

Q. Are there any children in your household? A. I have grandchildren that stay a great deal with me, but they don't live there.

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Mr. Brundage: Does the applicant wish to offer anything in rebuttal?

Mr. Davis: I have no rebuttal to offer, I simply advance the argument that no legal reasons have so far been presented to this Board that would justify the refusal of this permit. It has not been shown that the proposed buildings are contrary to public health, safety or morals. Objections have been advanced because of traffic danger, but

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that question as to traffic danger has already been disposed of by the Supreme Court.

Mr. Harold Trabold: On the question of legal decisions, if the Board cares to consider them, I would be very glad to furnish them to the Board. I can not recall the decisions by name now, but there have been any number of decisions in recent cases where the Zoning Boards have refused to issue permits for public ga-

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rages in the vicinities of both churches, schools and playgrounds, or any place where large bodies of people, particularly children of tender age, congregate. Those refusals have gone up on appeal and the courts in those cases have upheld the power of the Board to refuse permission on the ground of public safety. I will be glad to furnish this Board with a brief, if they so

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desire. There is no doubt about that particular point. I think there is a very close analogy between a garage.

Discussion.

Mr. Davis: Those were all cases in which the statute specifically says garages should not be built within 200 feet of a church, school house or any other building. It is within the power of the Zoning Board, and does not definitely state the erection of retail stores, all of which Mr. Trabold knows. 10

Mr. James H. Williamson: I reside at 125 Walker Road. I would like to know about the question of setting back from the property line. In other words, whether a building line which has been established by existing buildings, must be maintained in the erection of new buildings.

Mr. Wolf: I will answer that question. In residential buildings, yes. But they are applying for a change of zone from a one-family residence district to a business zone, and when changed to a business zone they can build right out to the street line. 20

Mr. Williamson: That is the ordinance?

Mr. Wolf: If changed to a business zone.

Mr. Margolis: We would be willing to go back ten feet if that would please you.

Mr. S. Blum: Has the Board of Education been notified about this matter, that stores are proposed to be erected in that vicinity? 30

Mr. Brundage: That I do not know.

Mr. S. Blum: Don't you think it would be proper for the Board of Education to be notified, so they may have their representative at the meeting? These stores as proposed will be close to their property.

Mr. Brundage: The rules of the Board do not require service of notice upon anybody but adjacent property owners. 40

Discussion.

Mr. S. Blum: The Board of Education is practically an adjacent owner.

Mr. Brundage: I say, the rules of the Board do not require the service of notice excepting to those adjacent and in front.
10 As far as that is concerned, any citizen here can voice his dissent just as strongly as the Board of Education could, on the ground it would be a hazard to school children.

Mr. S. Blum: Don't you think it would be wise to notify the Board of Education before rendering a decision, to learn what they have to say about this?

Mr. Brundage: We do not have to pass upon that question, therefore I will not pass
20 upon it.

Mrs. Meyers: Some time ago a petition was circulated against the erection of these stores. I might say over 200 owners living on the hill think stores are not necessary.

Mr. Brundage: What became of that petition?

Mrs. Meyers: Mr. Grosso has it. It was given to him.

A Voice: If a change in the building
30 zone is allowed, how much of an area will that affect?

Mr. Wolf: Just this particular lot. That is all they are applying for.

A Voice: Isn't it within the power of the Board to make that as large an area as they wish, and not necessarily locate it to just this one small lot?

Mr. Brundage: The power of the Board is to merely pass upon cases as presented.
40 Our jurisdiction is limited to this particular petition only.

A Voice: Would the Board consider it any danger?

Mr. Brundage: No, the Board would not. All citizens opposed to the changing of the zoning ordinance so as to permit the erection of stores at the southwest corner of Gregory Avenue and Orange Heights Avenue, raise their right hands. All those in favor will raise their right hand. 10

(Approximately fifty hands were raised in opposition to the change; two hands were raised in favor of the change.)

(Decision reserved.)

Finding of Facts and Determination. 20

WEST ORANGE BOARD OF ZONING APPEALS.

In the Matter of The Application of MARLYN REALTY COMPANY.	Finding of Facts and Determination.

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The petitioner, Marlyn Realty Company, is the owner of premises on the southwest corner of Gregory Avenue and Orange Heights Avenue, in the Town of West Orange. It applied to the building inspector of the Town of West Orange for a permit to erect seven retail stores on the said premises. The building inspector refused to issue the permit, on the ground that the Zoning Ordinance of the Town of West Orange does not permit the erection of retail stores on the said premises. The petitioner seeks a modification of the 40

zoning ordinance, so as to permit the erection of the retail stores above referred to on the said premises. Notice of hearing on the petition was served upon the adjacent land owners, and the same was duly published, as required by the rules
10 of the Board, and satisfactory proof thereof has been filed with the Secretary of the Board.

On April 21, 1927, the matter came on for hearing before the Board, pursuant to Chapter 315, P. L. 1926, page 526. Hon. Edward L. Davis appeared for the petitioner. Witnesses were called and testified for and against the petition and the following matters of fact were brought out by the witnesses.

Petitioner is the owner of a tract of land hav-
20 ing a frontage on Gregory Avenue, of one hundred and two feet and on Orange Heights Avenue, of one hundred feet, upon which it is proposed to erect, seven retail stores. Gregory Avenue, at and near its intersection with Orange Heights Avenue, is approximately fifty feet in width, paved for its entire length. Orange Heights Avenue enters Gregory Avenue, from the east, at a point about fifty feet north of petitioner's property;
30 at about twenty feet south of its intersection with Gregory Avenue, Orange Heights Avenue continues to the west. Petitioner's property is about seventy-five feet from property of the Board of Education of the Town of West Orange, upon which is situate, a grammar school and playground. The school accommodates about three hundred pupils from the kindergarten age to about twelve years of age. Adjoining the school building to the north is a lot owned by the Board of
40 Education of the Town of West Orange, which is used at all times as a playground for children

of the community, the northerly line of which is about seventy-five feet from the petitioner's property. The only sidewalk on the westerly side of Gregory Avenue is immediately in front of the school building. No part of the Board of Education's property is enclosed by fence or otherwise. Gregory Avenue is a much traveled highway, connecting Mt. Pleasant Avenue, Northfield Road and South Orange Avenue, all county roads. It is presently being continued to connect with Springfield Avenue. There are no stores within a radius of one-half mile of petitioner's property. It also appeared that with cars parked on either side of Gregory Avenue, it would be impossible for two cars going in the opposite direction to pass. Witnesses who testified against the petition were of the opinion that the proposed seven stores would attract not only the customer's automobiles, but also the trucks supplying the stores, which would create a condition which would be hazardous to the school children.

Under the West Orange Zoning Ordinance, the site of the proposed buildings is within "Residence A" district and that ordinance prohibits the erection of stores in "Residence A" district.

The Board is of the opinion that the petition in this case should be denied. The concentration of seven stores at one place, on a heavily traveled highway, at a point seventy-five feet removed from the school and playground used daily by children of from four to twelve years of age, would greatly increase the danger of injury to the children. Seven stores, undoubtedly, would attract a large number of trucks to supply the stores and also a large number of automobiles operated by customers of the stores. The parking of automobiles

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would be increased, thereby shutting off the view of the children crossing the street. According to the testimony, if cars were parked on either side of the street, cars traveling in an opposite direction would experience some difficulty in passing.
10 This, too, would tend to increase the hazard to children of tender age. These conditions would also be an inconvenience to the traveling public, as well as a source of annoyance to property owners living in the vicinity of the proposed stores.

The increase in automobile and truck traffic in such close proximity to the school, would necessarily mean an increase in the disturbing noises incidental to such traffic and would deprive the
20 children of the inestimable advantage of quiet and peace while at school and play.

The danger from traffic and the inconvenience to the traveling public would be augmented by the fact that Orange Heights Avenue does not pass directly over Gregory Avenue, but rather, according to the testimony, that part lying west of Gregory Avenue begins at a point about twenty feet south of that part which lies east of Gregory Ave-
30 nue. It will be borne in mind that this intersection is not over one hundred and seventy-five feet from that part of the Board of Education property which is used by the children as a playground. The Board is of the opinion that the danger to children from traffic could not be entirely obviated by police protection. We think that the West Orange Zoning Ordinance, as applied to the instant case, is a reasonable exercise of the police power. For the reasons given above, it is hereby ordered
40 that the petition be and the same hereby is dismissed.

Norman L. Brundage,
Secretary.

Opinion.

NEW JERSEY SUPREME COURT.
No. 266, May Term, 1927.

Marlyn Realty Co.,
Prosecutor,
v.
Zoning Board of Adjustment of the Town of West Orange, *et al.,*
Respondents.

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Submitted May 13th, 1927; decided May 1st, 1928. On writ of certiorari.

Before Justices Trenchard, Kalisch and Katzenbach.

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For the Prosecutor: Howe & Davis, Esqs.

For the Respondents: Alfred J. Grosso, Esq.

Per Curiam:

This is a zoning case. It is before this court on a writ of certiorari to review the decision of the Zoning Board of Adjustment of the Town of West Orange. The prosecutor is the owner of a tract of land on the southwest corner of Gregory Avenue and Orange Heights Avenue in the Town of West Orange. The lot has a frontage on Gregory Avenue of 100 feet and a frontage on Orange Heights Avenue of 44 feet. The prosecutor desires to erect a one-story building containing seven retail stores on this tract of land. The prosecutor made application to the building inspector of the

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Town of West Orange, submitting an application in writing, plans, specifications, and tendering the amount of the legal fee for the issuing of the said permit. The Building Inspector notified the prosecutor that he would not issue the permit. The
10 reason assigned for this refusal was that the zoning ordinance in force in the Town of West Orange forbade the erection of stores on said premises. The property was zoned as a one family district. This is conceded. The prosecutor then took an appeal to the Zoning Board of Adjustment. This Board heard the appeal. The prosecutor offered testimony to show that the buildings would be constructed in accordance with the building code of the municipality. The architect who prepared the
20 plans testified that in his opinion the construction and existence of these stores woud be in no way detrimental to the public health, morals or safety of the community. Citizens attended the meeting and made various statements with reference to the situation. Various objections were advanced by those speaking against the granting of the building permit. The Zoning Board of Adjustment denied the prosecutor's application. The finding of facts and determination as set forth in the record
30 is elaborate and mentions most of the matters which have been the subject of litigation in zoning cases during the past few years. The prosecutor then applied for and obtained the present writ of certiorari.

The constitutional amendment respecting zoning, which was approved and ratified on September 20, 1927, and took effect October 18, 1927, and the statute of April 3, 1928, known as Chapter 274
40 of the Laws of 1928, have been reviewed in a recent decision of this court in the case of Koplin.

relator, *v.* Village of South Orange, *et al.*, filed May 14, 1928. In the present case we consider that in the proceedings before the Board of Adjustment there was no testimony to the effect that the provisions of the ordinance are unreasonable. The presumption is that they are reasonable. Burg *v.* Ackerman, 135 Atl. Rep. 672. There is also a presumption that the action of the Board of Adjustment was right. Silvester *v.* Princeton, 5 Adv. Rep. 1801. This court will not disturb the action of the Board of Adjustment unless its action is shown by evidence to be wrong. Osford Construction Co. *v.* Orange, 137 Atl. Rep. 545.

The decision of the Board of Adjustment of the Town of West Orange is accordingly affirmed. The writ of certiorari will be dismissed without costs.

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Notice of Appeal.

NEW JERSEY SUPREME COURT.

MARLYN REALTY CO., *Prosecutor-Appellant,* *v.* ZONING BOARD OF ADJUSTMENT OF THE TOWN OF WEST ORANGE, *et al.,* *Respondents-Appellees.*	On Certiorari.

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To

ALFRED J. GROSSO, Esq.,
Attorney of Respondents-Appellees:

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TAKE NOTICE, that the Prosecutor appeals from the whole of the judgment entered in this cause to the Court of Errors and Appeals on the following ground:

The Supreme Court of the State of New Jersey erred in dismissing the writ of certiorari and in refusing to review the proceedings of the said Zoning Board of Adjustment of the Town of West Orange, and refusing to find that the said Zoning Board of Adjustment of the Town of West Orange improperly denied the application to the Marlyn Realty Co. for a permit to erect a row of seven retail stores on premises referred to in said writ of certiorari.

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Dated, August 10th, 1928.

Respectfully,

HOWE & DAVIS,
Attorneys of Prosecutor-Appellant.

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Notice of Appeal.

NEW JERSEY SUPREME COURT.

MARLYN REALTY CO., *Prosecutor-Appellant,* *v.* ZONING BOARD OF ADJUSTMENT OF THE TOWN OF WEST ORANGE, *et al.,* *Defendants-Appellees.*	On Certiorari.

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To

ALFRED J. GROSSO, Esq.,
Attorney of Respondents-Appellees:

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TAKE NOTICE, that the Prosecutor appeals from the whole of the judgment entered in this cause to the Court of Errors and Appeals on the following grounds:

1. The Supreme Court of the State of New Jersey erred in dismissing the writ of certiorari.

2. The Supreme Court of the State of New Jersey erred in refusing to review the proceedings of the said Zoning Board of Adjustment of the Town of West Orange.

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3. The Supreme Court of the State of New Jersey erred in refusing to find that the said Zoning Board of Adjustment of the Town of West Orange improperly denied the application of the Marlyn Realty Co. for a permit to erect a row of seven retail stores on premises referred to in said writ of certiorari.

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4. The Supreme Court of the State of New Jersey erred in finding that there was no testimony before it to the effect that the provisions of the ordinances of the Town of West Orange were unreasonable.

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5. The Supreme Court of the State of New Jersey erred in affirming the decision of the Board of Adjustment of the Town of West Orange in refusing to grant the application of the Marlyn Realty Co. for a permit to erect a row of seven retail stores on Gregory Avenue, West Orange.

6. The Supreme Court of the State of New Jersey erred in refusing to set aside the decision of the Board of Adjustment of the Town of West

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Orange in refusing to grant the application of the Marlyn Realty Co. for a permit to erect a row of seven retail stores on Gregory Avenue, West Orange.

Dated, August 10th, 1928.

Respectfully,

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Attorneys of Prosecutor-Appellant.

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144OCT.T.1928

Court of Errors and Appeals

MARLYN REALTY CO., a corporation,
Prosecutor-Appellant,

v.

ZONING BOARD OF ADJUSTMENT OF THE TOWN OF WEST ORANGE, *et al.,*
Respondents-Appellees.

BRIEF FOR APPELLANT.

Statement of Facts.

This is an appeal from a judgment of the New Jersey Supreme Court affirming a decision of the Board of Adjustment of the Town of West Orange and dismissing the writ of certiorari which issued in that cause.

The prosecutor is the owner of a tract of land on the southwest corner of Gregory Avenue and Orange Heights Avenue, in the Town of West Orange, having a frontage on Gregory Avenue of one hundred one feet and a frontage on Orange Heights Avenue of forty-four feet. On this property it is desired to erect a one-story building containing seven retail stores. The prosecutor made application to the Building Inspector of the Town of West Orange, submitting an application in writing, plans, specifications and tendering the legal fee required. After retaining said application,

plans and specifications for a period of time, the said Building Inspector notified prosecutor that he would not issue the said permit. The reason for the refusal was that the zoning ordinance in force forbids the erection of stores on said premises, the property being located in a one-family district.

An appeal was thereupon taken to the Zoning Board of Adjustment of the Town of West Orange, which heard the matter on the 21st day of April, 1927. Testimony was produced on the part of the prosecutor to show that the building would be constructed in accordance with the Building Code of the Town of West Orange and in a sanitary manner and that there would be nothing about the construction that would be detrimental to the public health, safety, welfare or morals of the Town of West Orange. A number of objectors were heard in reply. It was not alleged that there was anything contrary to the public health or morals. Some of the objectors, however, considered that a situation of traffic danger was created by reason of the fact that automobiles would be attracted to the stores when erected and that these automobiles would be a menace to children attending the Gregory Avenue school, which is situated on the same block as petitioner's property, but which is more than two hundred feet away. There is in the West Orange ordinance no prohibition against the erection of stores within two hundred feet of a schoolhouse. The Board of Adjustment declined to issue the permit for the following reasons:

1. That seven stores concentrated at one point on Gregory Avenue, a now much-frequented county highway, in close proximity to a grammar school and the school playground, would greatly increase the traffic hazard to the very young children who attend the school and playground.

2. That the increase of traffic resulting from the concentration of seven stores at one point would necessarily increase the amount of noise in the vicinity of the school, which would be disturbing to the children at school.

3. That the increased traffic would be an inconvenience not only to people living in the vicinity of the building, but also of the travelling public in general.

The following is a chronological statement of the developments in the case:

June 15th, 1926, application for permit.

April 21st, 1927, hearing before West Orange Zoning Board of Adjustment.

April 23rd, 1927, application for writ of certiorari to Supreme Court.

April 23rd, 1927, writ of certiorari issued.

May 13th, 1927, submission of case to New Jersey Supreme Court on State of the Case and Brief.

September 20th, 1927, approval and ratification of Constitutional amendment.

April 3rd, 1928, Statute enforcing Constitutional amendment.

May 1st, 1928, decision of Supreme Court.

It will be noted that the decision was not handed down until almost a year after its submission to the Court and not until toward the end of the third term after the submission of the case.

On the question of the reasonableness or unreasonableness of the action of the Board, testimony was taken before them. Mr. Margolis, the President of the Marlyn Realty Co., testified as follows (p. 15, State of the Case):

"Q. Is there anything about the character of these that would be in any way to your knowl-

edge detrimental to the morals of the community? A. No, sir.

"Q. Is there anything detrimental to the health of the community? A. No, sir.

"Q. Or to the general welfare of the community? A. No, sir.

"Q. Are they to be erected in accordance with all sanitary building laws in force in the Town of West Orange? A. Yes, sir."

Mr. Hobart A. Walker, an architect of thirty-five years' standing, testified as follows (State of the Case, p. 16):

> "Q. Is there anything about the erection, construction or existence of these stores that would be in any way detrimental to the public health? A. No.
>
> "Q. Would they be in any way detrimental to the public morals? A. No.
>
> "Q. Would they be in any way detrimental to the public safety? A. No.
>
> "Q. Would they be detrimental to the public in any way you know of? A. I don't think so."

Mr. Edward F. Klenke, the owner of a piece of property near the property in question, on cross examination testified as follows (State of the Case, pp. 20-21):

> "Q. Do you know whether the erection of these buildings would be a menace to the public morals of those residing on Gregory Avenue or the surrounding neighborhood? A. I think that would altogether depend upon what sort of tenants would occupy those buildings.
>
> "Q. You think the mere existence of those buildings would be a menace to the public morals, regardless of their occupancy? A. I can't say that I do.
>
> "Q. Do you think they would be against the public health in any way? A. I don't believe they would.

"Q. Or against the public safety? A. I don't believe they would.

"Q. You think they are undesirable because people in that neighborhood don't care to have stores in a residential district? A. I think so."

Mr. Harold A. Trabold, on cross examination, testified as follows (State of the Case, p. 27):

"Q. As I understand it, your objection is not the mere existence of these stores would be dangerous, but that the traffic attracted by the occupancy of those stores would be heavy. Is that correct? A. Yes; I don't think the stores of themselves or the occupants of the stores would have any effect whatever on the question of public safety."

Objections were raised on the part of several persons present based on an alleged decrease in property values in that neighborhood (testimony of Mr. Klenke, State of the Case, p. 19, line 25, etc.):

"We have quite a representation here this evening of people living pretty close to this very same property. I think a great many of them, either by actual experience or from their general knowledge as to what such things have done in their locality, agree it will immediately decrease property values of their individual properties in that section if these buildings are permitted to be built on Gregory Avenue. I for one do not think we have any need for stores in that neighborhood. I will grant the building is to be very picturesque, as far as architecture, but in a purely residential section is that going to do the neighboring property owners any good?"

Mr. Graham (State of the Case, p. 21, line 32, etc.):

"Therefore, it would be long term of years before the land values would increase and the building value, through depreciation, decrease,

until it would warrant tearing down existing residences to build different houses.

"If these stores are erected it will be for at least twenty years this section will neither be a first-class residential section nor a business section, because there is not sufficient land available to build a business section without tearing down present residences."

Also that a situation of traffic danger would be created (testimony of Mr. Trabold, State of the Case, p. 24, line 9, etc.):

"Consequently, if you grant this application for stores on Gregory Avenue you are facing a heavy burden of traffic which is bound to congregate in a commercial section—a section where there is at present continuous automobile traffic—immediately or in juxtaposition to the school. Gregory Avenue School is a grade school, not an advanced school, but the lower grades from kindergarten up until, I think, about the fifth grade or thereabouts, where all the pupils are small pupils. By granting this sort of application you will be placing these children in danger of their life and limb continually from traffic. Gregory Avenue is a county road all the way across to South Orange Avenue, as you know, and traffic is heavy at any time.

"I think on the ground of public safety this Board would be legally as well as morally justified in refusing this permit."

Argument.

The basis of the decision in the Supreme Court (now reported in 142 Atlantic, p. 438—No. VI) is contained in the following statement:

"The constitutional amendment respecting zoning, which was approved and ratified on September 20, 1927 (Const. Amend., Art. 4, Sec. 6, Par. 5), and took effect October 18, 192 , and the statute of April 3, 1928, known as

> Chapter 274 of the Laws of 1928, have been reviewed in a recent decision of this court in the case of Koplin, Relator *v.* Village of South Orange, *et al.*, 142 Atl. 235, filed May 14, 1928. In the present case we consider that in the proceedings before the board of adjustment there was no testimony to the effect that the provisions of the ordinance are unreasonable. The presumption is that they are reasonable. Burg *v.* Ackerman (N. J. Sup.), 135 A. 672. There is also a presumption that the action of the board of adjustment was right. Silvester *v.* Princeton (N. J. Sup.), 139 A. 517. This court will not disturb the action of the board of adjustment, unless its action is shown by evidence to be wrong. Oxford Construction Co. *v.* Orange (N. J. Err. & App.), 137 A. 545."

All the testimony on the reasonableness or unreasonableness of the action of the Board is before the Court, a stenographic report of the proceedings being presented.

A zoning board of adjustment is a judicial body. It was held in the case of *Bellofatto* v. *Montclair,* 141 A. 781, as follows:

> "The powers of the board of adjustment were defined by chapter 146, p. 324, P. L. 1924, and chapter 315, p. 526, P. L. 1926. Thereunder the board had power, among other things, to make special exceptions to, and in specific cases make such variance from, the terms of the ordinance as would not be contrary to public interest, where, owing to special conditions, a literal enforcement would result in unnecessary hardship, and so that the spirit of the ordinance should be observed and substantial justice done, and, further, to determine whether the ordinance, so far as it affected the use of the property in question tended to promote the public morals, health, safety, or welfare, and, if it did not in such instance, it might modify or vary any requirement thereof. The board was also given

> power to administer oaths and compel attendance of witnesses. Such board, when it acts, acts judicially on a lawful ascertainment of facts. Biltwel Co. *v.* Dowling (N. J. Sup.), 135 A. 798."

To the same effect is the case of *Ewald* v. *Board of Adjustment of Leonia,* 142 A. 42.

The Chief Justice in the case of *The Chancellor Development Corp.* v. *Senior,* 4 Mis. 633, made this statement:

> "The legislature, by this amendatory statute of 1926, has created this board of adjustment a tribunal of review, and has vested in it the power to determine on the appeal of the property owner whether this particular building, located in this particular place, is a public menace to the health, welfare or safety of the community. That is a fact which it is to determine, after hearing testimony. It has heard testimony and has determined that it is, according to the reading of the report made by the board, its decision not being based solely upon the ground that it violates the ordinance, but that this building, located in this place, will be a public menace. Now, whether that finding is justified by the proofs before it is a question of fact. If there is no evidence to sustain it, it cannot stand. If it is justified by the proofs before the board, that would be the end of the relator's alleged right to a permit."

It would appear from this latter statement that the finding of the Board of Adjustment must be made on testimony produced before it at the hearing. All the testimony presented at the hearing was before the Supreme Court and is now before this Court for review. While it may be true that the presumption is that the Board of Adjustment acted reasonably, such action must be derived from the matters before it.

It is respectfully submitted that the finding of the Board of Adjustment was not justified by the evidence before it *at the time* of the hearing. The purpose of the present writ of certiorari is only to review the findings of the Board. The findings of the Board can only be examined with reference to the matters before it at the time.

We call the attention of the Court to the fact that this is not an application for a writ of mandamus but a review of proceedings of a lower court by a writ of certiorari.

In the present case the writ of certiorari is not a writ at the discretion of the Court, but is in the nature of a writ of error, directed to an inferior tribunal commanding the latter to certify and return the record of the proceedings had before it, in order that the reviewing Court may inquire into and control the exercise of such inferior jurisdiction.

It was held in the case of *Crawford* v. *Hendee,* 95 N. J. L. 372; 112 A. 668, as follows:

> "There seems to be some confusion when in point of time the writ of certiorari may be used. When its function is that in the nature of a common law writ of error it will not lie before judgment in cases which cannot be continued and completed by this court. Drake *v.* Berry, 42 N. J. L. 60; Elder *v.* District Medical Society, 35 *Id.* 200; Mowery *v.* City of Camden, 49 *Id.* 106.
>
> "*But in other cases* it is a discretionary writ, in the absence of any statute requiring it to be granted, and the time for its allowance, as well as other circumstances, is subject to that legal discretion."

From this decision, it would appear that the writ to review the proceedings of the Board of Adjustment was a writ of right and not a discretionary writ.

We, therefore, contend that the only question before the Supreme Court and now before this Court is not whether the zoning amendment to the Constitution has any present effect, but whether the action of the Board of Adjustment, made in April, 1927, was or was not correct in accordance with the facts in existence at that time.

Careful examination of the testimony before the Board, quoted above, will show that no evidence of any sort was produced to show that the construction of the proposed building would affect adversely the public safety, morals, health or welfare. Arguments urged against it were increased traffic hazard and increased noise in the vicinity of a school.

The question of increased traffic hazard was disposed of by the Supreme Court in the case of *Michel* v. *South Orange,* 4 N. J. Mis. R. 302, as follows:

> "The enforced set back of buildings we also deem to be an unlawful invasion of the private right of the owner in the use of his property. This provision of the ordinance is sought to be justified by reason of an alleged danger in the use of the highway which would result from construction of buildings nearer to the street line. This we consider an insufficient reason. Twenty years ago the Court of Errors and Appeals in the case of Passaic *v.* Paterson Bill Posting Co., 72 N. J. L. 285, held that the placing of signs or billboards could not be restricted on the ground of public safety, although it was claimed that such construction in times of storm or by reason of decay might become a source of danger to users of the highway. In the present case we think the reasoning in support of the limitation is even less forceful. The highways are for the use of the traveling public in reasonable manner. This use implies a recognition of the conditions of the highways and of their

> surroundings. If streets are too narrow for safe use they should be widened by lawful means, and these means have been accorded the various municipalities by the exercise of the right of eminent domain through condemnation proceedings. In the present case, to impose on the owner of abutting property the duty of making the street safe, is to transfer a public obligation to the individual and to impose it to such a degree that he is deprived of the use of a large portion of his property without the just compensation which the constitution secures to him."

It is very plain from this decision that the possible existence of an increased traffic hazard due to the erection of a proposed building was not such an element as to have justified the Board of Adjustment in refusing to issue the permit.

If an increased traffic hazard, dangerous to children, is not such an element, neither would "an increase in the disturbing noises, incidental to such traffic, which would deprive the children of the inestimable advantage of quiet and peace while at school and play" (so reads the finding of the Board) constitute such an element. It has not been our observation that "quiet and peace" are particularly desired by children at play. As to whether it is an inconvenience to them at school, we would point to the fact that our larger cities have schools erected on busy streets on which the traffic is much heavier than that in rural communities, such as West Orange, and in which the alleged annoyance does not constitute an interference. It is not as a matter of fact true that the mere passage of automobiles past a building is accompanied by any great increase in noise. It is obviously not true that the existence of the alleged traffic hazard and increased noise is the reason for the finding of the Board, but the unwillingness of the neighborhood to have stores in a residential district.

It is respectfully submitted that the finding of the Board is not in accordance with the facts produced before it, and the presumption that their action was reasonable is overcome by the evidence. The opinion of the Supreme Court stated that it would not disturb the action of the Board of Adjustment unless their action is shown by the evidence to be wrong. It is urged that all the evidence in the case points conclusively to the fact that the action of the Board was wrong.

H. & R. Realty Co. v. *Quigley*, 2 N. J. Misc. 73;
Plaza Apartment Hotel Corp. v. *Hague*, 2 N. J. Misc. 75;
State v. *Brennan*, 2 N. J. Misc. 260;
H. & R. Realty & Construction Co. v. *Jelleme*, 2 N. J. Misc. 358;
White v. *Bower*, 2 N. J. Misc. 357;
Keene v. *Favier*, 2 N. J. Misc. 358;
Huppert v. *Hague*, 2 N. J. Misc. 348;
Hayes v. *Blake*, 2 N. J. Misc. 959;
Pink v. *Jelleme*, 2 N. J. Misc. 1103;
Criterion Construction Co. v. *East Orange*, 2 N. J. Misc. 1055;
Andrew v. *East Orange*, 2 N. J. Misc. 884;
Eaton v. *South Orange*, 130 Atl. 362;
Ingersoll v. *South Orange* (E. & A.), 130 Atl. 721.

It will be recollected that in the *Nutley* case the relator had applied to the Building Inspector for permission to erect a store and dwelling on a lot which he owned. The zoning ordinance passed in Nutley forbade the erection of a store building upon relator's property, but the Supreme Court and later the Court of Errors held that the relator could not be deprived of the use of his property. The Court of Errors' opinion said in part as follows:

"The narrow question, accordingly, which we are called upon to consider in the determination of this case is, Will the erection and use of a combined store and dwelling house upon the lot of the respondent constitute a menace to the health or the safety of the people of the Town of Nutley, or to the general welfare of the municipality? That the mere erection of this building, regardless of the use to which it may afterward be put, is likely to be injurious to the health and safety of the residents of the town is asserted, but, practically, not argued by counsel. And, as we see it, no well-grounded argument can be made in support of the assertion. The owner or the occupier of the store, after it is erected, might attempt to conduct therein a business which threatened the public health or public safety; but the right of the municipality to restrain the carrying on of such a business (which may be conceded) is not involved in the present case. The bald assertion of counsel is that the mere presence of a store building in the so-called residence district of Nutley is in itself a menace to the public health and the public safety, notwithstanding that the business carried on therein will not constitute such a menace. Both common experience and common sense demonstrate the unsoundness of such an assertion.

"On what theory can it be said that the restraining of the respondent from erecting a combined store and dwelling house upon his property will tend to promote the general welfare of the community? It is probably that its presence there, without regard to its use, would be objectionable to other property owners in the immediate neighborhood, who would prefer that business places should not be established in that part of the town. But that is quite immaterial, for such property owners have not acquired the right to impose upon owners of other property in the vicinity any restrictions upon the lawful use thereof. The

ordinary use of property is not authorized by the general welfare clause of the statute, to be prohibited because repugnant to the sentiments or desires of a particular class residing in the immediate neighborhood thereof, but only because such use is detrimental to the interests of the public at large. In other words, the restriction authorized by this provision of the statute upon the untrammeled use of property for the promotion of the general welfare of the community must be such as will tend in some degree to prevent harm to the public generally or to promote the common good of the whole of the people of such community. That the prohibition by the Town of Nutley against the erection of such a building as is contemplated by the respondent upon the lot owned by him will not have any such effect seems to us to be manifested."

As the question is so definitely settled by these authorities, no further time will be taken up by the prosecutor in discussing it. The point will be made that a situation of traffic danger will be created by reason of the attraction of automobiles to the property of prosecutor if stores are built. The situation of traffic danger was considered in the case of *Eaton* v. *South Orange,* 3 Misc., page 956, a Court of Errors' opinion and decided adversely to the contention of respondents. It is not the existence of these stores that would constitute the menace to the neighborhood but the possible misconduct of people doing business in these stores.

It is further respectfully submitted that the case of *Koplin* v. *South Orange,* 142 Atl. 235, has no bearing on the situation, even if it is to be admitted that that decision is a proper one, which admission is not made. We are unable to see how the effect of a subsequent constitutional amendment and a later statute passed in pursuance of it can have any effect on the question of whether or not the

action of the Board of Adjustment, taken some time prior to the passage of such laws, was correct.

It is, therefore, respectfully submitted that the Supreme Court erred in affirming the decision of the Board of Adjustment of the Town of West Orange, and that the decision of the said Board of Adjustment should be reversed.

Respectfully submitted,

Howe & Davis,
Attorneys for Prosecutor-Appellant.

Edward L. Davis,
Of Counsel.

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[9677]

New Jersey Court of Errors and Appeals

MARLYN REALTY CO., a corporation,
Prosecutor-Appellant,

v.

ZONING BOARD OF ADJUSTMENT OF THE TOWN OF WEST ORANGE, IN THE COUNTY OF ESSEX; NORMAN L. BRUNDAGE, Secretary of said Board, and the TOWN OF WEST ORANGE, IN THE COUNTY OF ESSEX,
Respondents-Appellees.

BRIEF FOR APPELLEES.

Facts.

This is an appeal from the judgment of the Supreme Court, affirming the determination of the Zoning Board of Adjustment of the Town of West Orange. The Board of Adjustment denied appellant's petition for a modification of the zoning ordinance of the Town of West Orange, so as to permit the erection of a building containing seven retail stores by appellant, upon land owned by it at the southwest corner of Gregory Avenue and Orange Heights Avenue, in that Town.

Appellant made application to the Building Inspector of the Town of West Orange, for a permit to erect the said stores, which permit was refused on the ground that the zoning ordinance forbade the erection of stores upon the said premises, the property being located within the "Residence A" district. The zoning ordinance prohibited the erection of stores in a "Residence A" district. An

appeal from the decision of the Building Inspector was taken to the Zoning Board of Adjustment of the Town of West Orange, which Board heard the matter on the twenty-first day of April, 1927, at which hearing testimony in behalf of the appellant was adduced, to show that the building would be constructed in accordance with the building code of the Town, and in a sanitary manner. A number of people living in the vicinity of the site of the proposed building, testified to the effect that the erection of a building containing seven retail stores on Gregory Avenue, a much travelled county highway, would create a situation of danger to the young people who attended the Gregory Avenue school and used the playground adjoining the school, which is only seventy-five feet away from the site of the proposed building. The Zoning Board of Adjustment, after hearing the testimony, and having fully considered the same, denied prosecutor's petition to modify the zoning ordinance, so as to permit the erection of the proposed building, for the following reasons:

1. That seven stores concentrated at one point on Gregory Avenue, a now much-frequented county highway, in close proximity to a grammar school and the school playground, would greatly increase the traffic hazard to the very young children who attend the school and playground.

2. That the increase of traffic resulting from the concentration of seven stores at one point would necessarily increase the amount of noise in the vicinity of the school, which would be disturbing to the children at school.

3. That the increased traffic would be an inconvenience not only to people living in the vicinity of the building but also of the travelling public in general.

BRIEF OF ARGUMENT.

I.

The West Orange zoning ordinance is a valid exercise of the police power.

The question presented is whether the zoning ordinance, as applied to this particular case, is a valid exercise of the police power. In *Hench* v. *City of East Orange,* 2 N. J. Mis. R. 510, 130 Atl. 363, it appeared that the relator desired to construct two automobile garages on a lot of land owned by him, in the City of East Orange, and applied to the building inspector of that city for the necessary permit, which was refused on the ground that the construction proposed would violate the zoning ordinance of that city. The Supreme Court said:

> "It is contended on the part of the relator that under the doctrine contained in some of our decisions, the zoning ordinance is invalid. We are not, however, upon this application, concerned with the question of the validity of the entire ordinance. *The question presented substantially, is reduced to the inquiry whether the ordinance is invalid so far as it prohibits the relator from erecting on this property sixteen separate garages to be erected under two roofs;* such is the proposal, as stated in the brief of counsel." (Italics ours.)

This case was cited with approval in *A. G. Construction Company* v. *Scott,* 136 Atl. 207. To the same effect is *Long, et al.* v. *Scott,* 4 N. J. Mis. R. 587, 133 Atl. 767.

In considering the question of the validity of the ordinance, as applied to this particular case, it is to be noted that the presumption is in favor of the construction that the zoning ordinance is a valid exercise of the police power, and the burden

of proof of the contrary is upon the appellant. In *Hench* v. *City of East Orange, supra,* the Court said:

> "The statute under which the zoning ordinance was passed authorizes the municipalities to pass such ordinances as may be reasonably required for the protection of the health, safety or general welfare of the public. The presumption is in favor of the construction that the purpose of the governing body was that indicated in the statute, and, so far as the ordinance affects the rights of the owner of a given piece of property, the burden rests solely upon him to show that the ordinance is not justified on any such theory, so far as the property is concerned. If it should appear from the ordinance, plus the admitted facts in a given case, that the ordinance has no such effect, the passage cannot be justified under the statute."

In *Portoff* v. *Bigelow,* 4 N. J. Mis. R. 539, 133 Atl., page 544, the Supreme Court said:

> "We think they have failed to show sufficient ground for such a writ. Mandamus is not awarded, except where the legal obligation to perform the act is clear. (Cited cases.) Relator's claim is and must be that the provisions of the zoning ordinance, so far as the same affect the property in question, are an unreasonable exercise of the police power. The zoning ordinance, like other ordinances, may be reasonable in some aspects and unreasonable in others. The presumption is that it is reasonable and the burden of proving it otherwise is upon the prosecutor."

A. G. Construction Company v. *Scott, supra; Long* v. *Scott, supra; Jersey Land Company* v. *Scott,* 4 N. J. Mis. R. 461, 135 Atl. 462; *The Chancellor Development Corporation* v. *Senior,* 4 N. J. Mis. R. 663; *Burg, et al.* v. *Ackerman,* 5 N. J. Mis. R. 96, are to the same effect.

Appellant nowhere attempts to show wherein the zoning ordinance, as applied to the particular case under consideration, is an unreasonable exercise of the police power. The case of *Ignaciunas* v. *Nutley,* relied upon by appellant, and the other cases cited in appellant's brief, deal with a situation where the permit applied for was refused on the sole ground that the proposed construction was in violation of a zoning ordinance. In the case *sub judice,* however, the situation is put upon a different ground, viz.: that the erection of a building, consisting of seven stores at a point on a much frequented county highway, in close proximity to a school and playground, attended by children of tender years, would not only create a situation of danger to the children, but would also, as a necessary concomitant thereof, increase noises disturbing to children at school and incidental to such increased traffic, and would tend to create a traffic condition of inconvenience to the travelling public, and to persons living in the vicinity. There is thus presented a question involving public safety and the general welfare, which takes the case out of the rule laid down in the case of *Ignaciunas* v. *Nutley,* 98 N. J. L. 712, affd. 99 N. J. L. 389 and the line of cases following that decision. As was said in *Bower, et al.* v. *Board,* 102 N. J. L. 235, at page 516:

> "In this connection, the relators say that 'the case of *Scheckt* v. *Senior* was practically overruled in the *Nutley* case.' But we think that is not so. The latter case held the zoning ordinance there under consideration to be ineffective to deprive one of the use of his property, where no question of public health, safety, or general welfare was involved. *Ignaciunas* v. *Risley,* 121 Atl. 783; 98 N. J. L. 712, affirmed *Ignaciunas* v. *Town of Nutley,* 99 N. J. L. 389, 125 At. 121."

The only testimony adduced by the appellant is that of Max Margolis, the president of the appellant company, and Hobart A. Walker, architect for the same company. Margolis testified as follows:

> "Q. Is there anything about the character of these stores that would be in any way to your knowledge detrimental to the morals of the community? A. No, sir.
> "Q. Is there anything detrimental to the health of the community? A. No, sir.
> "Q. Or to the general welfare of the community? A. No, sir.
> "Q. Are they to be erected in accordance with all sanitary building laws in force in the Town of West Orange? A. Yes, sir" (p. 14, lines 27 to 37).

Mr. Walker testified as follows:

> "Q. Is there anything about the erection, construction or existence of these stores that would be in any way detrimental to the public health? A. No.
> "Q. Would they be in any way detrimental to the public morals? A. No.
> "Q. Would they be in any way detrimental to the public safety? A. No.
> "Q. Would they be detrimental to the public in any way you know of? A. I don't think so."

This is the only testimony adduced by appellant to prove the unreasonableness of the ordinance. It will be observed that the testimony is that of two interested parties, and also that it is opinion evidence. No facts are given by either witness to support or illustrate the opinion held by them.

On the other hand, testimony of the several witnesses opposed to the modification of the zoning ordinance, so as to permit the erection of the stores in question, tended to show that the erection of said stores involved a question of public safety and general welfare. Gregory Avenue is a county road,

connecting two other county roads, viz., Mr. Pleasant Avenue, and South Orange Avenue (p. 47, lines 22 to 30). The traffic is heavy on Gregory Avenue, at any time (p. 23, lines 12 to 14). Gregory Avenue is fifty feet in width and is paved for its full width. Seventy-five feet from the site of the proposed building is the school playground used by most of the children of the neighborhood, and adjacent to the playground is the Gregory Avenue School (p. 22, lines 10 to 30). Gregory Avenue School is a grade school, from the kindergarten up to the fifth grade or thereabouts (p. 23, lines 1 to 10). The children attending this school are from six to twelve years of age (p. 23, lines 24 to 30). About three hundred children attend this school (p. 32, lines 23 to 27).

The Gregory Avenue School is so crowded that pupils now attend only part time and the Board of Education plans to build an addition to accommodate the increased demand (p. 22, lines 23 to 35). Several witnesses testified that the erection of seven stores would tend greatly to increase the traffic hazard to the young children attending the school and the playfield adjacent to the school (p. 22, lines 10 to 14; p. 22, lines 38 to 40; p. 23, lines 1 to 15). The traffic hazard is due largely to the fact that the children attending the school and playground are so young (p. 26, lines 28 to 34). It was thought by one witness that the parking of cars along the curb, in view of the narrowness of Gregory Avenue, and the tender years of the children, would create an additional hazard to the young children (p. 27, lines 40 to 42; p. 33, lines 37 to 40; p. 34, lines 1 to 10). Seven stores concentrated at one point undoubtedly would attract a large number of automobiles, particularly in view of the fact that there is no other store within a radius of one-half mile of appellant's lands; more-

over, traffic would be considerably increased by trucks supplying the stores.

It is submitted that this testimony amply supported the finding of the Board of Adjustment that the concentration of seven stores at a point on a heavily travelled highway, seventy-five feet removed from the school and playground used daily by children of from six to twelve years of age, would greatly increase the danger to the children. The increase in traffic would increase the amount of noise incidental thereto and would be distracting to the children while in school and also while at play. The stopping and starting of cars at or near the stores, would be a source of disturbing the quiet of the school and the safety of its children.

The argument of appellant that the stopping and starting of cars at and near the proposed stores would not be a source of distraction to the children at school, for the reason that in large cities, schools are found on streets much more heavily travelled than on Gregory Avenue, is not tenable. The fact is that in large cities, there is no escape from street noises. Where it is possible to secure the peace and quiet of children at school, in suburban communities, it should unquestionably be done. In large cities, churches are frequently found on streets much more heavily travelled than is Gregory Avenue, but in this state, the refusal of a municipality to issue a building permit to garages within a reasonable distance from such churches, has been upheld. It would seem too, that if it is desirable to prevent the distraction, due to automobile noises, of attendants at church, it is equally desirable and reasonable to use similar measures to protect young children at school. It is a recognized fact that traffic noises are a source of fatigue.

Moreover, it needs no argument to demonstrate that increased traffic at this point would greatly

tend to increase the hazard to the very young children. Cars parked along the highway on either side would obstruct the view of approaching vehicles, and no matter how careful the driver of an automobile might be, the danger to children of such young years would still exist; moreover, according to the testimony, with cars parked on either side of Gregory Avenue, cars passing in an opposite direction would experience some difficulty in passing, thus creating a condition of inconvenience to the travelling public. Nor is it plain how the traffic hazard to the school children would be reduced by widening the street, as is suggested in appellant's brief.

The case under consideration is not unlike in principle, *Bower, et al.* v. *Board of Fire and Police Commissioners of Paterson, supra,* wherein it was held that an ordinance prohibiting the erection of a motor vehicle station within two hundred feet of a church, was a reasonable exercise of the police power. The Court there said:

> "The contention that the language in question merely prohibits a service station for repairs to motor vehicles, not only reads in a qualification which is not there, but the argument based thereon is fallacious in its assumption that a place for repairs is the only kind of a place that can disturb the quiet of a church and the safety of its congregation. It ignores the fact that a place which draws to it, motor vehicles, for gasoline, oil and automobile accessories, with the consequent and frequent stopping and starting of cars, can also disturb the quiet of a church and the safety of its congregation. * * * Whereas in the case at bar, the question is whether the language of the ordinance prohibits the erection of a motor vehicle service station on any road situate within a radius of two hundred and fifty feet of the church, as measured along the public street, is a reasonable regulation touch-

> ing public health, safety and public welfare, and within the scope of the police power of the city. We think that it is, and that it is consequently valid. *It is a reasonable regulation, in view of the obvious and recognized possibilities of danger and disturbance to church congregations in the erection and maintenance of a motor vehicle service station as unduly near churches where large bodies of people habitually congregate.* A regulation preventing the erection of the said type of construction or business within two hundred feet from any building might well be deemed unreasonable interference with property rights; *but where, as here, the building is a church or the like, at which large numbers of children or adults are accustomed to gather for study or devotion, it is well within the police power to provide for them as much safety and freedom from disturbance as may be possible and reasonable.*"

It is certainly reasonable that seven stores concentrated at one point would attract a large number of automobiles and trucks. It will be remembered that these stores are but approximately seventy-five feet removed from the school premises. The starting and stopping of automobiles at the several stores and in the vicinity thereof, will produce sounds disturbing to the children, while at school and at play, and as pointed out above, will create a dangerous traffic condition to the very young children who attend the school.

The reasoning in the *Bowers* case is equally applicable to the case *sub judice,* for the reason that the question for determination is whether the zoning ordinance, as applied to this particular case, is a valid exercise of the police power. The *Bowers* case has been followed in *Long* v. *Scott, supra,* in which a permit was sought to erect and install a gasoline station on the northeast corner of Park Avenue and Tompkins Street, East Orange, directly opposite the end of the East Orange Park-

way, and on an important avenue, separated into two roadways by a central planting strip. The Supreme Court said:

> "Taking the physical situation into consideration, the prosecutor has altogether failed to satisfy us that the application of the ordinance in the case before us is an unreasonable exercise of the police power."

In *Ninth Street Improvement Company* v. *Ocean City,* 90 N. J. L. 106, affd. 91 N. J. L. 703, the Supreme Court said:

> "In our judgment, the erection and management of a garage with all its incidental dangers and inconveniences to adjoining property and public travel are manifestly matters cognizable by the municipal governing body as a subject for regulation in the public interest, under the police power expressly conferred as in this instance, or, reasonably implied exnecessitate in aid of the general welfare against dangers recognized and obvious to persons and property."

To the same effect are the cases of *Hench* v. *East Orange, Portoff* v. *Bigelow, supra, Long* v. *Scott, supra,* and *A. G. Construction Company* v. *Scott, supra.*

In *Village of Euclid* v. *Ambler Realty Co.,* No. 31, filed November 22nd, 1926, the U. S. Supreme Court, in treating with the application of a zoning ordinance somewhat similar to the provisions of the local ordinance, said:

> "The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business and industrial buildings will make it easier to provide fire apparatus suitable for the char-

acter and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to rear children, etc.

"With particular reference to apartment houses, it is pointed out that the development of detached house sections greatly retarded the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite constructed to take advantage of the open spaces and attractive surroundings created by the residential character of the district.

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

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

"If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least,

> the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare. Cusack Co. *v.* City of Chicago, *supra*, pp. 530-531; Jacobson *v.* Massachusetts, 197 U. S. 11, 30-31."

Appellees submit the West Orange zoning ordinance, as applied to the particular building, at the particular site in the case under consideration is not so clearly arbitrary and unreasonable and has such substantial relation to public safety and general welfare that it should be held a valid exercise of the police power.

II.

The findings of the Supreme Court were justified by the record.

It is well settled that this Court will not review findings of fact made by the Supreme Court, if there is any evidence justifying the said findings.

> *Collingswood* v. *Water Supply Commission*, 85 N. J. L. 678;
> *Sisters of Charity*, 73 N. J. L. 699;
> *Lundy* v. *George Brown and Company*, 93 N. J. L. 469;
> *Ryer* v. *Turkel*, 75 N. J. L. 677.

The Supreme Court found that the zoning ordinance, as applied to this particular case, was a reasonable exercise of the police power. The pertinent part of the opinion of the Supreme Court is as follows:

> "In the present case we consider that in the proceedings before the Board of Adjustment there was no testimony to the effect that the

> provisions of the ordinance are unreasonable. The presumption is that they are reasonable. Burg *v.* Ackerman, 135 Atl. Rep. 672. There is also a presumption that the action of the Board of Adjustment was right. Silvester *v.* Princeton, 5 Adv. Rep. 1801. This court will not disturb the action of the Board of Adjustment unless its action is shown by evidence to be wrong. Oxford Construction Co. *v.* Orange, 137 Atl. Rep. 545."

The testimony of the several property owners before the Board of Adjustment is ample to justify the finding that the zoning ordinance as applied to this particular case, is a valid exercise of the police power, for the reason that the erection of the proposed building, containing seven stores would be against the public safety and the general welfare. The argument under Point One is equally applicable here.

It is respecfully submitted that the finding of the Supreme Court that the zoning ordinance in question is not unreasonable, should be sustained.

CONCLUSION.

For the reasons set forth above, the judgment of the Supreme Court should be affirmed, with costs.

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