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Notice of Appeal and Grounds.

Filed Dec. 6, 1929.

New Jersey Supreme Court.

CHARLES G. COLE, Prosecutor, v. THOMAS J. DOWLING, Building Inspector, *et als.*, Respondents.	Notice of Appeal and Grounds.

To DANIEL J. BRENNAN, Esq.,
Attorney of Rudnevitz & Ruby;

and

WILLIAM A. CALHOUN, Esq.,
Attorney of Thomas J. Dowling, Building Inspector of the City of Orange and the Board of Assessment of the City of Orange.

SIRS:

TAKE NOTICE that the prosecutor appeals to the Court of Errors and Appeals from the whole of the judgment entered herein on the 21st day of November, 1929, upon the following grounds:

1. Because the said judgment is erroneous in that it affirmed the proceedings brought up by the writ of certiorari, and dismissed the writ of certiorari, whereas the said proceedings should have been set

aside, for one or more of the reasons filed by the prosecutor in the Supreme Court, that is to say:

(a) The writ of mandamus issuing out of the Supreme Court of the State of New Jersey, in compliance with the supposed binding force whereof said building permit was issued, ceased prior to the granting of said permit to have any further force or effect, for the following reasons:

(1) Said Rudnevitz and Ruby waived their rights under said writ by neglecting to apply for a building permit for an unreasonable length of time;

(2) The building sought to be erected under said building permit differs from that involved in said mandamus proceeding;

(3) The situation has, since the allowance of said writ of mandamus, been changed by virtue of the amendment to the Constitution of the State of New Jersey permitting zoning laws, and by virtue of the statutes of the State of New Jersey and the ordinances of the City of Orange in force and effect under the sanction of said amendment.

(b) The premises upon which it is proposed to erect said apartment dwelling are so close to premises owned by the City of Orange, upon which it is proposed to erect a public school, as to result in a condition detrimental to the use of the premises owned by the City of Orange for school purposes.

(c) If an apartment dwelling shall be erected pursuant to said building permit, the situation on the easterly side of Lincoln Ave-

nue in the City of Orange, New Jersey, at the premises in question will not be uniform with the situation which obtains on either side of said premises, contrary to the provisions of Chapter 274 of the Laws of 1928 of the State of New Jersey.

(d) The premises whereon it is proposed to erect said apartment building are within a residence "A" district, as established by the Building Zone Ordinance of the City of Orange, which prohibits the erection within said district of a dwelling for more than one family or for more than one housekeeping unit.

(e) The proposed apartment dwelling covered by said permit is proposed to be located eleven feet from the line of Lincoln Avenue, which is less than the set back line of Lincoln Avenue established by Ordinance of the Board of Commissioners of the City of Orange.

McCarter & English,
Attorneys of Prosecutor-Appellant.

Service of the foregoing notice of appeal and grounds is hereby acknowledged.

Dated: Nov. 30, 1929.

Daniel J. Brennan,
Attorney of Rudnevitz & Ruby.

Dated: Dec. 4/29.

William A. Calhoun,
Attorney of Thomas J. Dowling, Building Inspector, etc. and Board of Assessment of the City of Orange.

Writ of Certiorari.

Filed April 12, 1929.

New Jersey ss:

THE STATE OF NEW JERSEY to THOMAS J. DOWLING, Building Inspector of the City of Orange, THE BOARD OF ADJUSTMENT of the City of Orange; CHARLES B. STORRS, CORNELIUS O'DONOGHUE, [SEAL] W. BRADFORD SMITH, CLINTON J. EVERITT, JOSEPH AMOROSE, Constituting the the Board of Adjustment of the City of Orange, and A. RUDNEVITZ and J. RUBY, Copartners doing business as Rudnevitz & Ruby, Owners, GREETING:

We being willing, for certain reasons appearing in an affidavit filed on behalf of Charles G. Cole, Prosecutor in this cause, to be certified of the granting of a permit on the 8th day of February, 1929, by Thomas J. Dowling, Building Inspector of the City of Orange, to A. Rudnevitz and J. Ruby, copartners doing business as Rudnevitz & Ruby, to erect a four story brick apartment dwelling on property known as #664 Lincoln Avenue, Orange, New Jersey, and of the action taken by the Board of Adjustment of the City of Orange at a meeting of said Board held on the 14th day of March, 1929, affirming the action of said Building Inspector in granting such permit, do command you that the said resolution of said Board and said permit, together with all matters touching and concerning the same as they remain before you, you do certify and send together with this writ to our Justices of our Supreme Court of Judicatur, at Trenton, on the 12th day of April next, that therein may be done what of right and according to the laws and Constitution of this State ought to be done.

WITNESS, the Honorable WILLIAM S. GUMMERE, Chief Justice of our Supreme Court, at Trenton, this 23d day of March, 1929.

FRED L. BLOODGOOD
Clerk.

McCARTER & ENGLISH
Attorneys.

Return to Writ.

Filed April 12, 1929.

In obedience to the commands of this writ to Thomas J. Dowling, Building Inspector of the City of Orange, and the Board of Adjustment of the City of Orange, directed, we do hereby certify and send to the Honorable Justices of the Supreme Court of Judicature of the State of New Jersey within mentioned, a resolution of said Board affirming the action of said Building Inspector and granting the permit mentioned in said writ, together with the said permit, and all matters touching or concerning the same as remain before us, as fully and entirely as before us they remain in our offices.

IN WITNESS WHEREOF we have hereunto set our hands this 11th day of April, 1929.

THOMAS J. DOWLING
Building Inspector of the City of Orange.

J. ALEXANDER NEILL
Secretary of the Board of Adjustment of the City of Orange.

REPORT TO THE INSPECTOR OF BUILDINGS

OF THE

CONSTRUCTION OF NEW BUILDINGS BY THE OWNER, ARCHITECT OR BUILDER

ORANGE, N. J., Jan. 28th 1929

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

Reported by A. Rudnevitz & J. Ruby owners

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

1. Number of Buildings to be erected—one Location—664 Lincoln Avenue

2. Size of Main Building—81 x 67 x 71 feet; number of stories—Four

3. Depth of Foundation—9 x 7 feet; thickness—20″ inches; material—Brick

4. Footing or Base course; width—32″ inches; thickness 14″ inches; material—conc.

5. If piers, columns or posts are used, state what kind—Brick Piers & Lally Cols.

6. Thickness of outside wall: 1st story—16 inches; 2d—12 inches; 3d—12 inches; 4th—12 inches; 5th—....inches; 6th—....inches; 7th—....inches.

7. Thickness of inside partition walls: 1st story—6 inches; 2d—6 inches; 3d—6 inches; 4th—6 inches; 5th—....inches; 6th—....inches; 7th—....inches.

8. Material of roof and style—Slag Roof—flat

9. Size of floor beams: 1st tier— $\frac{3 \times 10}{2 \times 10}$ inches; 2d tier— $\frac{3 \times 10}{2 \times 10}$ inches; 3rd tier— $\frac{3 \times 10}{2 \times 10}$ inches; 4th tier— $\frac{3 \times 10}{2 \times 10}$ inches; 5th tier— ...inches; 6th tier— ....inches; 7th tier— ....inches.

10. Girders; of what material and sizes to support the floors—9″ steel girders How supported—4 Lally Cols.

11. Distance of wood work from inside of any flue—12″ inches

12. Distance of beams or headers from outside of chimney or flue—4″ inches

13. Distance chimney projects inside of building Chimney, where started from—Foundation

14 Size of Chimney, flue lining—24″

15. Hearths, how supported—....

16. Height of ceiling: 1st story—9 feet; 2d—9 feet; 3d—9 feet; 4th—9 feet; 5th—....feet; 6th—....feet; 7th—....feet.

17. Openings for doors or windows. State whether arched, or lintels are to be used. If lintels are used, material—steel lintels 4 x 4 and 6 x 6 L S

EXTENSIONS OR WINGS

18. Size of extension or wings— ....; number of stories—....

19. Depth of foundation walls— ....feet; thickness— ....inches; material— ....

20. Footing or base course, width— ....inches; thickness— ....inches; material— ....

21. If piers, columns or posts are used, state what kind— ....

22. Thickness of outside wall: 1st floor— .... inches; 2nd— ....inches; 3d— ....inches; 4th—

....inches; 5th— ....inches; 6th— ....inches; 7th— ....inches.

23. Thickness of inside partition wall: 1st story— ....inches; 2nd— ....inches; 3d— ....inches; 4th— ....inches; 5th— ....inches; 6th— .... inches; 7th— ....inches.

24. Proposed use of building—26 aparts. (apartment Bldg.

Estimated cost of entire building—$90,000.00

Time of commencement—at once 1929

BUILDING DEPARTMENT

Orange City Hall, Orange, N. J.

PERMIT

This Card is issued with permit for New Building, Addition or Alteration. It must be fastened in a conspicuous place on such Building site before foundation or any Structural work is begun, and on building when raised.

Permit No. 10731 Issued Feb. 8, 1929.

For New Building, Addition or Alteration, Located at No. 664 Lincoln Avenue

THOMAS J. DOWLING
Inspector of Buildings

Telephone 4194

ORANGE, New Jersey, February 14, 1929.

Regular meeting of the Board of Adjustment of the City of Orange held in the office of the Mayor, Thursday, February 14, 1929, at 8:15 o'clock P. M.

ROLL CALL.

Present: Messrs. Smith, O'Donoghue, Everett, Amorose and Chairman Storrs. 5

Absent: None.

A petition of appeal filed by McCarter & English, Attorneys, in behalf of Charles G. Cole, 444 Heywood Avenue, requesting that a hearing may be heard for the setting aside of a permit granted by the Building Inspector to Rudnevitz & Ruby for the construction of an apartment house in Lincoln Avenue about 125 feet from the line of Heywood Avenue, was presented, read and ordered placed on file.

On motion of Mr. Everett, seconded by Mr. Amorose, the time of the hearing was set for February 28, 1929, at 8 o'clock P. M., all voting yea on a call for the yeas and nays.

ORANGE, New Jersey, February 28, 1929.

Special meeting of the Board of Adjustment of the City of Orange, held in the office of the City Clerk, Thursday, February 28, 1929, at 8 o'clock P. M.

ROLL CALL

Present: Messrs. Smith, Everett, Amorose and Chairman Storrs. 4

Absent: Mr. O'Donoghue (account of illness) 1.

The appeal of Charles G. Cole for the setting aside of a permit granted by the Building Inspector to Rudnevitz and Ruby for the construction of an apartment house in Lincoln Avenue about 125 feet from the line of Heywood Avenue, was taken up.

Arthur Egner, Esq. of McCarter and English, Attorneys, appeared in behalf of Mr. Cole.

Affidavits of service and publication of notice were presented and ordered placed on file.

Mr. Egner stated that no plans had been filed for this particular plot with the Building Inspector until recently; that the case was decided by the Supreme Court in May, 1926; that Ruby and Rudnevitz applied for permit after the Constitutional Amendment giving validity to existing zoning ordinances had been adopted; that a different building than that permitted by the Writ is applied for; that the plan does not show the set-back as required by the City Ordinance and that the Writ gave no vested property rights to Ruby and Rudnevitz.

Mr. Egner contended that it is no longer necessary or proper to obey the Writ; that it is against public policy to make a Writ indefinite and that the builders had slept on their rights. Mr. Egner could not quote any New Jersey cases showing the life of a Writ.

Daniel J. Brennan, Attorney, appeared in behalf of Rudnevitz and Ruby and stated that five permits had been applied for and that work had gone ahead in orderly fashion and that up to the present time three buildings had been erected.

Mr. Brennan questioned the right of the Board of Adjustment to pass judgment on this case and contended that the Board should hear appeals on permits that have been refused by the Building Inspector and that this case does not apply. Mr. Brennan quoted the City Counsel's opinion that the Building Inspector should grant the permit as directed by the Supreme Court and that the writ does not grow stale.

Mr. Brennan questioned that Mr. Cole lived or owned property within 200 feet of the property in question. Mr. Cole replied that his property was 189 feet on an air line to that of Ruby and Rudnevitz.

Mr. John Steinhardt, owner of property within 100 feet, announced that he is in favor of the building of the apartment and stated that at a previous hearing this Board claimed that it had no jurisdiction in the granting of a permit to erect an apartment at Lincoln and Highland Avenues and he felt that the Board had no jurisdiction in the present matter and that the appellant is asking this Board to supercede the Supreme Court by indirection.

Mr. Egner asked that the work on this building should not proceed and stated that the appeal acts as a stay.

Mr. Brennan replied that he would advise his clients to withhold all work and would not represent them if his advice were not obeyed.

Chairman Storrs requested the Attorneys to submit cases showing the life of a Writ.

Mr. Brennan was directed to submit a Brief relative to his cases before the next meeting, which will be March 14, 1929, and Mr. Egner requested that he be given at least three days to answer.

ORANGE, New Jersey, March 14, 1929.

Regular meeting of the Board of Adjustment of the City of Orange, held in the office of the City Clerk, Thursday, March 14, 1929, at 8:15 o'clock P. M.

ROLL CALL

Present: Messrs. Smith, O'Donoghue, Everett, Amorose and Chairman Storrs. 5

Absent: None.

Mr. Smith presented the following resolution and moved for its adoption, seconded by Mr. Amorose:

RESOLVED, That in the judgment of this Board, the Building Inspector properly issued a permit for the erection of an apartment upon the Easterly side of Lincoln Avenue distant about 125 feet North from Heywood Avenue, as he was directed and commanded to do by a peremptory writ of mandamus, issuing out of the Supreme Court of the State, and this Board is unwilling to set its opinion up on opposition to such act of the Building Inspector, particularly as he was advised by our City Counsel to issue the permit and for these reasons the application of Charles G. Cole is denied.

Charles B. Storrs
W. Bradford Smith
Cornelius O'Donoghue
Clinton J. Everett
Joseph E. Amorose

The roll being called, the resolution was adopted, all voting yea on a call for the yeas and nays.

Zoning Ordinance of the City of Orange was annexed to return, but is not printed because printing is unnecessary in view of the stipulation as to facts.

Amended Reasons.

Filed April 18, 1929.

NEW JERSEY SUPREME COURT.

CHARLES G. COLE, Prosecutor, v. THOMAS J. DOWLING, Building Inspector, *et als.*, Respondents.	On Writ of Certiorari. Amended Reasons.

The following are the reasons upon which the prosecutor will rely for the reversal of the action of Thomas J. Dowling, Building Inspector of the City of Orange, and the Board of Adjustment of the City of Orange in granting a permit to A. Rudnevitz and J. Ruby, copartners doing business as Rudnevitz & Ruby, owners, to erect a four story apartment house upon premises on Lincoln Avenue, Orange, New Jersey, which said permit and resolution of said Board are brought up by the writ of certiorari in said cause:

1. The writ of mandamus issuing out of the Supreme Court of the State of New Jersey, in compliance with the supposed binding force whereof said building permit was issued, ceased prior to the granting of said permit to have any further force or effect, for the following reasons:

(a) Said Rudnevitz and Ruby waived their rights under said writ by neglecting to apply for a building permit for an unreasonable length of time;

(b) The building sought to be erected under said building permit differs from that involved in said mandamus proceeding:

(c) The situation has, since the allowance of said writ of mandamus, been changed by virtue of the amendment to the Constitution of the State of New Jersey permitting zoning laws, and by virtue of the statutes of the State of New Jersey and the ordinances of the City of Orange in force and effect under the sanction of said amendment.

2. The premises upon which it is proposed to erect said apartment dwelling are so close to premises owned by the City of Orange, upon which it is proposed to erect a public school, as to result in a condition detrimental to the use of the premises owned by the City of Orange for school purposes.

3. If an apartment dwelling shall be erected pursuant to said building permit, the situation on the easterly side of Lincoln Avenue in the City of Orange, New Jersey, at the premises in question will not be uniform with the situation which obtains on either side of said premises, contrary to the provisions of Chapter 274 of the Laws of 1928 of the State of New Jersey.

4. The premises whereon it is proposed to erect said apartment building are within a residence "A" district, as established by the Building Zone Ordinance of the City of Orange, which prohibits the erection within said district of a dwelling for more than one family or for more than one housekeeping unit.

5. The proposed apartment dwelling covered by said permit is proposed to be located eleven feet from the line of Lincoln Avenue, which is less than the set back line of Lincoln Avenue established by Ordinance of the Board of Commissioners of the City of Orange.

McCarter & English,
Attorneys of Prosecutor.

Stipulation.

Filed May 2, 1929.

NEW JERSEY SUPREME COURT.

Charles G. Cole, Prosecutor, vs. Thomas J. Dowling, Building Inspector, *et als.*, Respondents.	On Writ of Certiorari. Stipulation.

It is hereby stipulated and agreed by and between the parties hereto that the following facts shall be considered as proven herein:

1. Abraham Rudnevitz and Jacob Ruby, co-partners doing business as Rudnevitz and Ruby, are the owners of premises #664 Lincoln Avenue, Orange, New Jersey, consisting of a plot on the Easterly side of said Avenue, beginning 125 feet more or less from the Northerly line of Heywood

Avenue, and running thence Northward along Lincoln Avenue, a distance of approximately 84 feet.

2. Charles G. Cole, the prosecutor, is the owner of premises #444 Heywood Avenue, Orange, New Jersey, which said premises are within 200 feet of the premises of Rudnevitz and Ruby, referred to in the foregoing paragraph.

3. The City of Orange is the owner of a tract of land on the Northerly side of Heywood Avenue, distant therein Easterly 125 feet from the Easterly line of Lincoln Avenue. The City of Orange purchased these premises in order to erect a school thereon, but no building operations have as yet been begun thereon.

4. There was originally, in the month of December, 1925, presented by Messrs. Rudnevitz and Ruby, to the Building Inspector of the City of Orange, a plan embracing five proposed buildings on as many lots of ground owned by them on the East and West sides of Lincoln Avenue, at the intersection of this street with the Northerly side of Heywood Avenue, in said City of Orange. The Building Inspector refused to accept said proposed plans, assigning as his reason the prohibition of the Zoning Ordinance of the City, which forbade other than single family residences in this district in which Messrs. Rudnevitz and Ruby proposed to erect apartment houses and stores.

5. On the 9th day of January, 1926, said Rudnevitz and Ruby, being the owners of premises referred to in the first paragraph and of four other tracts of land fronting upon Lincoln Avenue in the

immediate vicinity and having been refused permits by the Building Inspector of the City of Orange for the erection of stores and apartment houses upon said premises, made an application to the Supreme Court of the State of New Jersey for a Writ of Mandamus to compel said Building Inspector to issue such permits. The premises referred to in Paragraph 1 hereof, were referred to in said Mandamus proceedings as Tract 4.

6. Although no plans and specifications had, in fact, been filed with the Building Inspector of the City of Orange with respect to said Tract #4 prior to the institution of said Mandamus proceedings, counsel for Rudnevitz and Ruby and the City of Orange, in order to determine the legal question involved, stipulated that plans and specifications for an apartment building on said Tract #4 had been filed with the Building Inspector.

7. After argument the Supreme Court decided said Mandamus proceedings on May 4, 1926, under the name of Rudnevitz and Ruby *v.* Dowling, 4 Misc. Rep. 483. Pursuant to said opinion a peremptory Writ of Mandamus was at once issued directing said Thomas J. Dowling, Building Inspector of the City of Orange, to issue to Rudnevitz and Ruby, a permit covering the erection of a three story apartment house upon said Tract #4, being the premises described in Paragraph 1 of this Stipulation, as well as for the other premises embraced in the Writ.

8. After the issuance of the peremptory Writ of Mandamus, Messrs. Rudnevitz and Ruby filed plans and specifications and applied for a permit for the erection and construction of apartment houses on

two of the tracts embraced in the Writ, to wit: the first and second respectively. Permits were granted in due course; one on June 17th, 1926, for a three story brick apartment house, to house twenty-five families, costing $124,000.00. This structure was completed in February 1927. One at #661 Lincoln Avenue, for which application was made on November 16th, 1926, and permit duly granted, for a four story brick apartment to house thirty-three families, costing $140,000.00. This apartment was completed in May 1927. One at #679 Lincoln Avenue, for which application was made and permit duly granted on June 25th, 1927, for a four story brick apartment to house forty-five families, costing $200,000.00, completed July 9th, 1928. All of these structures are on the West side of the street on the plots designated as Tracts 1 and 2 in the Writ of Mandamus. A short time prior to February 8th, 1929, Messrs. Rudnevitz and Ruby made application for a permit for the erection of a four story apartment house on the tract known as Tract #4 in the Writ of Mandamus.

9. On February 8th, 1929, said Thomas J. Dowling, as Building Inspector of the City of Orange, issued a permit to said Rudnevitz and Ruby, covering the erection, upon the premises described in Paragraph 1 hereof, of a four story brick building containing apartments for the residence of twenty-six families; said permit was issued by said Building Inspector after advice from the Law Department of the City of Orange that he was required to issue the same because of the mandate of said peremptory Writ of Mandamus.

10. Charles G. Cole, the prosecutor herein, appealed to the Board of Adjustment of the City of

Orange from the allowance of said permit and, after a hearing, said Board of Adjustment, under date of March 14th, 1929, denied the application of said prosecutor and affirmed the issuance of such permit, because of the mandate of said peremptory Writ of Mandamus.

11. The premises described in Paragraph 1 are in Residence "A" District of the Zoning Ordinance of the City of Orange, which is restricted to dwellings for the residence of one family or for one housekeeping unit. Apartment houses containing residences for more than one family have been erected on the Westerly side of Lincoln Avenue, but no apartment houses have been erected on the Easterly side of Lincoln Avenue.

12. The set back line provided for said four story apartment house, to wit, eleven feet, is less than the set back line required at the time of the application for said permit for buildings to be erected in the locality where said premises described in Paragraph 1 are located. The Ordinance establishing the set back line was not passed by the Board of Commissioners of the City of Orange, until after the issuance by the Supreme Court of the State of New Jersey, of the peremptory Writ of Mandamus.

McCarter & English
Attorneys of Procesutor.

Daniel J. Brennan
Attorney of Rudnevitz and Ruby.

Wm. A. Calhoun
Attorney for the City of Orange.

Opinion of Supreme Court.

Filed Nov. 7, 1929

NEW JERSEY SUPREME COURT

244 MAY TERM 1929.

CHARLES G. COLE,
Prosecutor,

vs.

THOMAS J. DOWLING, Building Inspector of the City of Orange, *et als.*,
Respondents.

Submitted May Term, 1929 Decided October , 1929
On Certiorari.

For the Prosecutor: McCarter & English,
For the Respondents: William A. Calhoun,
Daniel J. Brennan.

Before JUSTICES TRENCHARD, LLOYD and CASE.

PER CURIAM:

Under the writ in this case the prosecutor seeks to review the action of the building inspector granting a permit to respondents Rudnevitz & Ruby to erect an apartment house on premises 664 Lincoln Avenue, Orange. The prosecutor is the owner of premises located in the vicinity of the proposed structure and distant 198 feet therefrom. The

status of the prosecutor in the case is challenged, but we deem it unnecessary to consider this question.

From the return it appears that the respondents made application for a permit for this construction in July 1925, and upon refusal obtained a peremptory writ of mandamus from this court to compel the issuance of the permit. The writ was issued on June 4, 1926, but, for some reason which does not appear, was not brought to the attention of respondents until February 1927, when its mandate was complied with by the issuance of the permit. It is contended by the prosecutor that the writ had lost its force, and that the municipal authorities were not obliged to observe it. We think otherwise. The writ was in the nature of an execution and unless and until set aside or withdrawn by legal proceedings it was binding on the parties and could not be disregarded.

The writ will be dismissed.

Rule Dismissing Writ.

Filed Nov. 21, 1929.

NEW JERSEY SUPREME COURT

244 MAY TERM 1929.

CHARLES G. COLE, Prosecutor, vs. THOMAS J. DOWLING, Building Inspector of the City of Orange, *et als.*, Respondents.	On Certiorari. Rule Dismissing Writ.

The court having inspected the transcript and the decision of Thomas J. Dowling, Building Inspector of the City of Orange, returned with the certiorari in this cause, and the reasons for reversing the said decision of the said Thomas J. Dowling, Building Inspector of the City of Orange, and heard the argument of counsel therein, and having duly considered the same, it is on this 21st day of November, 1929,

ORDERED, that the action of Thomas J. Dowling, Building Inspector of the City of Orange, be in all things affirmed and the writ of certiorari dismissed.

Let the above order be entered on the minutes.

On Motion of

DANIEL J. BRENNAN
Attorney of Respondents
Rudnevitz & Ruby.

By the Court

THOMAS W. TRENCHARD
J. S. C.

New Jersey Court of Errors and Appeals.

CHARLES G. COLE, Prosecutor, v. THOMAS J. DOWLING, Building Inspector, etc., *et als.*, Respondents.	On Appeal from Supreme Court. On Writ of Certiorari

BRIEF FOR PROSECUTOR.

This is an appeal from a judgment of the Supreme Court dismissing a writ of certiorari allowed to review the issuance of a building permit by the Building Inspector of the City of Orange to a co-partnership doing business as Rudnevitz & Ruby, and covering the erection of a four story apartment house on premises No. 664 Lincoln Avenue, Orange, New Jersey.

The facts are not disputed and are covered by stipulation of the parties (see p. 12).

The permit was issued under date of February 8, 1929, and was based upon an application therefor filed on January 28, 1929.

The premises in question are in the Residence "A" District established by the Zoning Ordinance of the City of Orange, which is restricted to dwellings for the residence of one family or one housekeeping unit (p. 16).

Although apartment houses, containing residences for more than one family, have been erected on the westerly side of Lincoln Avenue, no apart-

ment houses have been erected upon the easterly side where the premises in question are located. Hence, if this permit is sustained and an apartment house is erected upon the premises in question, the uniformity, which has existed up to the present time on the easterly side of Lincoln Avenue, will be destroyed.

The building proposed to be erected by the respondents not only offends against the Zoning Ordinance in the respect above stated, but is proposed to be set back from the street line a less distance than the amount of eleven feet established by the Orange ordinance (p. 16).

The Building Inspector of the City of Orange deemed himself obligated to grant this permit, notwithstanding these plain violations of the ordinance, because of what he believed to be the binding force of a writ of mandamus issued by the Supreme Court in May, 1926, pursuant to an opinion filed on May 4, 1926 in the case of *Rudnevitz & Ruby* v. *Dowling,* 4 Misc. Rep. 483.

The present prosecutor was, of course, not a party to the mandamus proceedings. His residence is located within two hundred feet of the premises in question and he undoubtedly has the standing to prosecute this writ (*Gaston* v. *Ackerman,* 6 N. J. Misc. Rep. 696).

In *Rudnevitz & Ruby* v. *Dowling, supra,* it appeared that the relators had requested the issuance of a permit, by the Building Inspector of the City of Orange, covering the erection of five different buildings on five different tracts of land, all located in the vicinity of the corner of Heywood and Lincoln Avenues, in the City of Orange. Three of the tracts were on the westerly side of Lincoln Avenue, and two of the tracts on the easterly side of Lincoln Avenue. The premises involved in the present proceedings were tract No. 4 involved in the mandamus proceedings. It appeared that the Building In-

spector had refused the permit on the sole ground that the buildings in question were to be located in a residential zone.

This being the only question involved, the Court held that a writ of mandamus should issue under the authority of *Ignaciunas* v. *Risley,* 98 N. J. L. 712, affirmed 99 *Id.* 389. The writ was accordingly at once issued and commanded the Building Inspector to issue a permit covering the erection of *a three story apartment house* upon the premises in question. Notwithstanding this command of the writ, the Building Inspector could not have issued a permit at once for the reason that no plans and specifications had been filed with him (p. 14, line 12).

It was necessary for the applicants to take another step, namely, file the plans and specifications of the building which they proposed to erect. This step they did not take until January 28, 1929, almost three years after the issuance of the writ and then they filed plans and specifications and requested the permit not for a three story apartment building, as commanded in the writ, but for a four story apartment building containing residences for twenty-six families.

It cannot be argued that by reason of the fact that five tracts were involved in the mandamus proceedings, the erection of buildings upon the other tracts involved constituted such a building program as to make the five tracts one venture. The tracts were separate. The buildings had no relation one to the other, and the only building that has been done by the respondents has been upon the other side of the street.

Pending this long delay by the respondents and before any plans were filed or permit requested and before, of course, any construction work had been started, the Constitution of the State was amended so as to permit zoning regulations of this character

and Chapter 274 of the Laws of 1928 had been enacted (Laws of 1928, p. 696).

It is thus perfectly clear that under the state of the law, as it existed on February 8, 1929, it was the duty of the Building Inspector to refuse the permit, unless the respondents had, by reason of the writ of mandamus, secured such a vested right as to render nugatory, as far as the premises in question are concerned, the sovereign will of the State, as expressed in the Constitutional amendment and the legislation and ordinances effective thereunder.

We submit that it must be entirely clear that the permit in question should not have been issued. This, for the following reasons:

1. The respondents waived their rights under the writ by neglecting to file plans and apply for a building permit for an unreasonable length of time;

2. The permit relates to a different building than that to which the writ was directed; and;

3. Different facts had come into existence at the time of the application for the permit, which, had they been involved in the mandamus proceedings, would have required a different conclusion therein.

The respondents offer no reason or excuse for their long delay in filing plans and applying for the permit. We must assume, therefore, that the only reason for the delay was their own convenience. We must also assume that when they applied for the writ they had no present intention of proceeding with the erection of a building upon the premises in question.

Nor can it be disputed that the building covered by the permit is different from the building in-

volved in the mandamus proceedings. That was a three story building. The permit covers a four story building.

The variance between the building involved in the mandamus proceedings and that for which a permit was asked was pointed out early in these proceedings. Thus, before the Board of Adjustment counsel said (p. 7, line 13):

> "A different building than that permitted by the writ is applied for."

As the stipulation of facts shows clearly (p. 14, paragraph 6) no plans and specifications were, in fact, ever filed prior to the application for the writ of mandamus with respect to the parcel of land involved in these proceedings, and it is equally clear that the writ of mandamus (stipulation, paragraph 7) was directed to the issuance of a permit "covering the erection of a three story apartment house".

During this lapse of time the Constitution of the State was changed, the Act of 1928 was passed, and the ordinance of the City of Orange was changed so as to require a greater set back line than that in force at the time of the mandamus proceedings. In addition, it now appears that the City of Orange is the owner of a tract of land in the immediate vicinity of the premises in question purchased for school purposes, so that it would now be proper to consider the effect of the erection of an apartment dwelling upon the premises in question upon the use of the school premises—a circumstance adverted to by the Supreme Court in *Concord Development Co.* v. *Dowling,* 6 Misc. Rep. 552.

Even if we assume that the respondents secured a vested right under their writ of mandamus, it was a vested right to a permit for a three story building, and not a vested right to a permit for a four story

building. But, we submit, the respondents had no vested right, and so the authorities hold.

There can be no question that a change in the law, pursuant to which a mandamus was issued, justifies non-compliance with the writ.

In 38 *Corpus Juris,* 937, it is said:

> "A repeal of the law under which the relator's right to the performance of a duty by respondent accrued justifies respondent's refusal further to obey the writ, and where there is a question as to whether the law is repealed or modified, and respondent in good faith, under a claim that it is, refuses further obedience, the court will not punish him by attachment, but will require the relator to make a new application."

19 *Am. & Eng. Encyc. of Law,* 903:

> "Effect of repeal of law under which writ was granted.—A repeal of the law under which the relator's right to the performance of a duty by the respondent accrued justifies the respondent's refusal further to obey the writ, and where there is a question as to whether the law is repealed or modified, and the respondent in good faith, under a claim that it is, refuses further obedience, the court will not punish the respondent by attachment but will require the relator to make a new application."

See also

1 *High Extraordinary Legal Remedies,* 556.

In *State* v. *Harvey,* 14 Wis. 151, the Court said:

> "A decision requiring an officer to perform some act which the law then enjoins upon him, cannot have the effect of compelling him to continue to perform that act, after the law has ceased to require it. It is true that a question is made here, whether the repeal of section 17 changes in any respect the rights of the relators. But assuming that it did, so that

> if the writ should now be asked for the first time it must be refused; the position certainly cannot be correct that the court is required by its former decision, awarding the writ when the relators were entitled to copies, to continue to compel the secretary to furnish them, though the relators no longer have any right to them."

We submit that the case at bar is governed by the reasoning of this Court in *Koplin* v. *South Orange,* 142 Atl. 235; affirmed 144 Atl. 920.

There a building permit was applied for at a time when, under the authority of *Ignaciunas* v. *Risley, supra,* the permit should have been granted. Before the decision of the Supreme Court the zoning amendment had been adopted and Chapter 274 of the Laws of 1928 enacted. The Court held that, notwithstanding the condition at the time the permit was applied for and the rule to show cause issued, the Court would take cognizance of the state of the law at the time of the argument and that, by requesting the permit, the relator had acquired no vested right. This Court said:

> "Of course, we take judicial notice of that statute.
>
> "We have made no reference to other provisions of the statute because, for present purposes, we do not deem it essential so to do. But we make pointed reference to the provisions contained in section 7, to the effect that ordinances adopted prior to the adoption of the act, for the purposes set forth in the act, shall con tinue in effect as if they had been adopted under the provisions of this act and shall remain in full force and effect, except in so far as they are inconsistent with the provisions of this act, until they shall have been amended or repealed.
>
> "The effect of that provision of the statute, adopted pursuant to the constitutional amendment, would seem to be that the provisions of the ordinance of the village of South Orange

> (now in question) as to zoning for residential purposes, and as to the height of buildings and setbacks, are deemed to be within the police powers of the state, if made with reasonable consideration 'to the character of the district and its peculiar suitability for particular use, with a view of conserving the value of property and encouraging the most appropriate use of land throughout such municipality' and not otherwise unreasonable."

Referring to *Rohrs* v. *Zabriskie,* 133 Atl. 65, this Court continued in the *Koplin* case:

> "Under the authority of the *Zabriskie* case, the writ of mandamus being discretionary, there can be no vested rights that control the exercise of that discretion, unless a permit is issued and the work actually commenced thereunder."

In *Lehmann* v. *Hersh,* 142 Atl. 556, this Court said:

> "The prosecutor relies upon the case of *Ignaciunas* v. *Risley,* 98 N. J. Law, 712, 121 A. 783, and the cases which followed this case. Since these decisions were rendered, the constitutional amendment with reference to zoning has been adopted, and the Legislature has exercised the power conferred upon it by the constitutional amendment to legislate on this subject. The effect of the constitutional amendment and the legislation enacted in pursuance thereof has been fully considered by this court in the case of *Koplin* v. *Village of South Orange,* 142 A. 235."

Such, also, is the rule elsewhere.

In *Spector* v. *Building Inspector,* 145 N. E. 256, Chief Justice Rugg, speaking for the Supreme Court of Massachusetts, said:

> "The fact that the petitioner filed his application for a permit before the zoning bylaw was enacted is no reason why it should not be

> held applicable to him from and after it became operative. The petitioner held his property subject at all times to every valid exercise of the police power. The filing of his application gave him no vested rights. *Salem* v. *Maynes,* 123 Mass. 372; *Cherry* v. *Isbister,* 201 App. Div. 856, 193 N. Y. Supp. 57, affirmed in 234 N. Y. 607, 138 N. E. 465; *DesMoines* v. *Manhattan Oil Co.,* 193 Iowa 1096, 1102, 184 N. W. 823, 188 N. W. 921; *Ware* v. *Wichita,* 113 Kan. 153, 214 Pac. 99."

Not only did the respondents acquire no vested rights, *but they deliberately chose to ask for a permit covering the erection of a different building than that involved in the mandamus proceedings.* Their application, hence, assumed the status of an entirely new application, and the Building Inspector, therefore, was under a plain duty to apply the law as it existed at the time the application was made.

Nor is there anything to the contrary in *Frank J. Durkin Lumber Co.* v. *Fitzsimmons,* 7 N. J. Adv. Rep. 1127. This Court, by Justice Case, thus stated the question at issue:

> "But if use is an attribute of the property may a municipality, without making compensation, estop an owner from continuing a use that is in actuality, that was begun and continued lawfully, and that becomes unlawful only because the municipality has so ordained?"

The Court referred with approval to *Koplin* v. *South Orange,* holding:

> * * * "that a writ of mandamus being discretionary, there can be no vested rights that control the exercise of that discretion, unless a permit is issued and work is actually commenced thereunder."

and continued:

> "It seems that a logical application of the same principle is to recognize the right to con-

> tinue, as against subsequent zoning interference, a use that was actually instituted, that was lawful when instituted, and that has been actively and constantly maintained."

The Court concluded:

> "In so finding we in no way impair the principle stated in *Koplin* v. *South Orange, supra.* That proceeding was on rule to show cause why a writ of mandamus should not issue commanding the issue of a building permit. It was held that because the writ of mandamus was discretionary, and no vested rights were involved, the court did not deem it a proper exercise of discretion to compel the building inspector to issue a certificate that, under the law as it then was, he was justified in refusing. The question now before us is the legality of a conviction that involves a penalty and the termination of property rights actually and lawfully in use. We perceive a sharp distinction between the issues."

The learned Justices below (p. 17) based their conclusion entirely upon the consideration that the writ of mandamus was in the nature of a writ of execution and binding upon the parties until set aside or withdrawn by legal proceedings. In reaching this conclusion the Court stated that the application for a permit "for this construction", was made in July, 1925. This overlooks entirely the very significant point that the mandamus referred to a three story building, whereas the construction, to which the permit here in issue relates, is for a four story building. The Court was also in error as to the time which elapsed between the issue of the original writ and the application for the permit. The Court stated that the permit was issued in February of 1927, whereas, in fact, the permit was not applied for until January 28, 1929 (p. 3) and the permit was issued on February 8, 1929.

If we ignore all of the considerations expressed

in this brief and adopt the narrow view that the writ of mandamus was in the nature of a writ of execution to be obeyed notwithstanding the lapse of time and the change of the law, it must nevertheless be obvious that the respondents could in no event be entitled to other than exact compliance with the command of the writ, namely, the issuance of a permit for the erection of a three story apartment building which was alone involved in the mandamus proceedings. A writ of execution to the Sheriff commanding him to sell black acre, would scarcely be considered due authority for the sale of white acre.

The plans, specifications and particulars of the four-story apartment house were not filed until January 28, 1929, and they contemplate an entirely different structure than that to which the writ of mandamus was directed. The situation is analogous to the granting of a permit conditioned upon the revision of plans and a change of the law thereafter and a consequent refusal to approve the revised plans. A situation of this kind was discussed by the Supreme Court in *Progress Improvement Club* v. *Williams*, 147 Atl. 649. After citing the *Koplin* case, the Court said:

> "It is to be noted that there never has been any unconditional action by way of granting a permit by the board of adjustment. Their action was conditioned upon their approval of revised plans and they were never approved."

We very respectfully submit that the judgment below should be reversed and the permit in question set aside and for nothing holden.

Respectfully submitted,

ARTHUR F. EGNER,
Of counsel with Prosecutor-Appellant.

New Jersey Court of Errors and Appeals

CHARLES G. COLE, *Prosecutor,* *v.* THOMAS J. DOWLING, Building Inspector, etc., *et als.*, *Respondents.*	On Appeal from Supreme Court. On Writ of Certiorari.

BRIEF FOR RESPONDENTS RUDNEVITZ & RUBY.

This is an appeal from the judgment of the Supreme Court dismissing a writ of certiorari allowed to review the issuance of a building permit by the Building Inspector of the City of Orange, to the co-partnership doing business as Rudnevitz & Ruby. The permit was for a four-story apartment house to house twenty-six families on premises No. 664 Lincoln Avenue, Orange, New Jersey.

The facts have been stipulated (Case, p. 12).

The permit was applied for a few days prior to February 8, 1929, and the permit granted on that day.

The premises in question are in a district designated as Residence "A" by the Zoning Ordinance of the City of Orange. This ordinance contains a prohibition against the erection of any other than a single family dwelling or a dwelling for one housekeeping unit in a Residence "A" district. It was passed by the Board of Commissioners of the City of Orange, on May 11th, 1922.

Apartment houses have been erected on the westerly side of Lincoln Avenue, but none on the easterly side.

The permit was issued to the respondents upon the authority of *Rudnevitz & Ruby* v. *Dowling,* 4 Misc. Rep. 183.

In *Rudnevitz & Ruby* v. *Dowling, supra,* the relators had requested the issuance of a permit by the Building Inspector of the City of Orange, covering the erection of five buildings on as many tracts of land at the northeast and northwest corners of Lincoln Avenue and Heywood Avenue, and immediately contiguous thereto in the City of Orange. The Building Inspector refused the permit on the ground that the buildings were to be located in a residential zone.

Upon application for a writ of mandamus the Supreme Court directed that it issue and the writ issued on June 4, 1926, commanding among other things the grant of a permit for a three-story apartment-house structure on the premises in question.

POINT I.

The writ of mandamus directing the Building Inspector to do as was done, is conclusive upon him and the world and no lapse of time impairs the validity of the writ.

That the writ is conclusive, appears well settled. See 26 Cyc 496, as follows:

> "The rule of res judicata applies to the judgment for a peremptory writ of mandamus, and all questions raised or which could have been raised in opposition to granting the writ are concluded by the issue of the writ and can not be raised again in resisting obedience or in justification of disobedience."

The mere lapse of time does not operate to invalidate in any way the mandate of the writ. It has been held that even after as long a period as seven years the members of a board or body directed by a writ of mandamus to do a specific thing may be attached for contempt for failure to obey the writ:

> *Commonwealth* v. *Schmidt*, 287 Pa. 150; 134 Atl. 478. To the same general effect is *York Co.* v. *Schmeiser*, 72 Pa. 124.

If it be argued that the so-called Zoning Amendment to the Constitution of the State of New Jersey had any retrospective effect, there is ample answer to such argument in *Robert Realty Co.* v. *Orange*, 103 N. J. L. 711. The language of the Court in that case is strikingly significant where it says (p. 712):

> "We deem it proper to point out that the judgment now before us was rendered some nine months prior to the adoption by the people of our state of the amendment to our constitution, which declares that zoning ordinances similar to that involved in the present case, shall, when legally adopted, be deemed to be within the police power of the state, and that consequently, its validity is not affected by the subsequent change in our fundamental law."

The writ in favor of these respondents issued out of our Supreme Court some fifteen months before the adoption of the Zoning Amendment to our Constitution. The writ, as has been indicated, is dated June 4, 1926; the amendment to the constitution was approved and ratified by the voters on September 20, 1927, and took effect October 18th, 1927.

The pronouncement of our Court of Errors in

the *Robert Realty Co.* case, *supra,* is recognized and reaffirmed in

Margolis v. *Maplewood,* 5 N. J. Adv. Rep. 1530; 134 Atl. 56.

The instant case is readily distinguishable from both *Koplin* v. *South Orange,* 6 Misc. 489, and *Rohrs* v. *Zabriskie,* 102 N. J. L. 473. In the *Koplin* case the amendment to the constitution extending the police power had been approved and ratified by the voters and the Court took notice of that fact. In the *Rohrs* case there was an amendment to a building code clearly in the interest of public safety and as such upheld. It is significant to observe that in the *Koplin* case, *supra,* the Court by implication indicates that there is a vested right in a permit where it has been issued and work commenced thereunder. Such is our case.

These respondents since the grant of the writ as will appear from the stipulation of facts (Case, p. 15) have taken out permits for and actually built three apartment houses on the tracts embraced in the writ, aggregating in value nearly one half million dollars, housing in all one hundred and twenty-three families. Is it to be argued that by the fact of the grant of a writ they must proceed with all their buildings at once? Construction has gone forward in orderly fashion in accordance with sound building practice and common experience. Can it be contended that the arbitrary adoption of the west instead of the east side of the street as the first area in which to begin building defeats their rights?

Learned counsel for the prosecutor in his brief attacks the good faith of the respondents in the matter of their application for permits. While the property is treated as five tracts, we think it important to point out that it is, in point of geograph-

ical fact, two corner parcels: the northwest and the northeast corners of Lincoln Avenue and Heywood Avenue respectively; that the northwest corner contained land sufficient for the erection of three building units of a certain size in the judgment of the respondents and the northeast corner sufficient for two. The three structures on the northwest corner have been entirely completed as has been stipulated (Case, p. 15). If the respondents instead of adopting an orderly course of procedure had proceeded with one building on each side of the street instead of three buildings in succession on the one side, this question of good faith would not even be open to the prosecutor.

POINT II.

The adoption of the zoning ordinance and the amendment thereof providing for a uniform setback can not affect these respondents.

That the original ordinance had no effect as regards these respondents is settled by *Rudnevitz & Ruby* v. *Dowling, supra.* An amendment to this ordinance was adopted by the Board of Commissioners of the City of Orange on August 21, 1928, providing a uniform setback for buildings. For buildings on streets sixty feet wide or over the setback is fixed at thirty feet; for buildings on streets less than sixty feet wide the setback is twenty feet. The amendment can not be binding on these respondents in view of the opinion of the Court in *Robert Realty Co.* v. *Orange, supra,* and *Margolis* v. *Maplewood, supra.* Point has been made of the fact that the City of Orange has lately acquired property for a school on Heywood Avenue. This property was not acquired until August 27, 1928. It does not appear, though we think it will be conceded, that the present site of Tremont Avenue

School, which will be replaced by the school on Heywood Avenue if and when such is built, is within two hundred and fifty feet of the three buildings of these respondents already erected on the west side of Lincoln Avenue and no increased hazard is observed or observable. If a school is built on Heywood Avenue there will be even less possibility of hazard by reason of the fact that Lincoln Avenue is a through artery of travel from the centre of Orange and Heywood Avenue a short street with not anything like the normal traffic density of Lincoln. Even the probabilities of hazard are purely speculative. The Board of Education of the City of Orange may, by reason of changes in educational policy, decide upon the acquisition of property less remote from the centres of school population and may, as a result of such determination, put the Heywood Avenue property in the market.

That the zoning statute itself can of course have no retrospective effect is clearly indicated in *Durkin Lumber Co.* v. *Fitzsimmons*, 7 N. J. Advance Reports 1127 at 1132. The Court said:

> "Did the 1928 statute by retrospective application make them unlawful?"

The Court was referring to Chapter 274 of the Laws of 1928 and to alleged violations of the Zoning Ordinance occurring in March, 1928. The Court in answering such question in the negative said:

> "It is a familiar and important principle, always to be kept in mind in the construction of statutes, that they are not to be given a retrospective effect or operation if their language reasonably admits of another construction."
>
> Citing *Frelinghuysen* v. *Morristown*, 77 Law 493.

The fact that a permit was granted for a four and not a three-story apartment is immaterial. The Court in passing upon the original application of Rudnevitz & Ruby was concerned with a legal principle and this was decided in their favor and against the Building Inspector. The fact that the application was for a three-story building or a ten-story building could have had no significance except possibly upon the probability of fire hazard, which was not there and is not here attempted to be raised.

It is respectfully urged that the judgment below should be affirmed.

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