

Notice of Argument in Court Below, Served
July 20, 1927.

NEW JERSEY SUPREME COURT

HARRISON R. VAN DUYNÉ, Inc., Relator,	} In manda- mus. 10
vs.	
WM. H. SENIOR, Bdg. Inspec- tor, and TOWN OF MONTCLAIR, N. J., Respondents.	} Notice of argument for application for peremp- tory writ.

To Messrs. George R. Beach, and Albert C.
Wall, Attorney and Counsel for respondents: 20

Please take notice that on the first Tues-
day of October, 1927 (October, 1927, term), at
10 A. M. or as soon thereafter as counsel can
be heard, the undersigned will apply to the
Supreme Court of the State of New Jersey,
at the State House, Trenton, New Jersey, for
a peremptory writ of mandamus herein, pur-
suant to the alternative writ.

Such application for a peremptory writ of 30
mandamus will be made upon the alternative
writ issued herein, the return thereto, the tra-
verse to the return, and the reply to the tra-
verse, and upon the postea filed after the de-
termination by the Essex County jury of ques-
tions of fact.

Yours, etc.,
WM. H. OSBORNE,
Attorney for Relator, 40
790 Broad Street,
Newark, N. J.

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easterly side of Bloomfield Avenue, at the junction of Claremont Avenue, described as follows:

10 All that certain tract or parcel of land and premises situate, lying and being in the Town of Montclair, in the County of Essex, and State of New Jersey, bounded and described as follows:

20 Beginning at a point in the northerly line of Bloomfield Avenue where the same is intersected by the westerly line of land now or formerly of Cooper, said point being at the southerly corner of land herein described formerly owned by William Mortens; thence along said northerly line of Bloomfield Avenue on a curve to the left within a radius of four hundred feet the chord of which curve runs north forty-two degrees eight minutes west one hundred and sixteen feet and twenty-one hundredths of a foot to the intersection of the same with the northerly line of Claremont Avenue; thence along the northerly line of Claremont Avenue north forty-two degrees thirty eight minutes west one hundred and seventy four feet; thence north forty-nine degrees, thirteen minutes east one hundred and one and twenty-five hundredths feet, thence south forty two degrees forty-five minutes east fifty seven and thirty-three hundredths feet; thence north forty six degrees forty five minutes east, forty-one and twenty-five hundredths feet; thence south forty-five degrees thirty-four minutes east one hundred and twenty-three feet; thence north fifty-two degrees forty-four minutes

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east one hundred and fifty-seven and eight hundredths feet; thence south forty one degrees fifty-five minutes east seventy-six and fifty-four hundredths feet, thence south forty-four degrees forty-five minutes west three hundred and one feet to the northerly line of Bloomfield Avenue and the point or place of beginning

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That there are no building restriction covenants of any kind contained in any deed in the chain of title to said tract, and no restrictive covenants, reservations or exceptions of any kind which in any wise prevent relator from erecting the building hereinafter mentioned; and no restrictive covenants of any kind of record relating to such tract.

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That relator took title to said tract for the express purpose of erecting thereupon the apartment house building hereinafter referred to, and such tract is in what is known as the apartment house zone of Montclair. That said tract of land is situate in the northwesterly part of Montclair, near the Verona line, in open country. Said tract contains 55,000 square feet; the apartment house which relator proposes to erect has an area of 15,000 square feet, and will cover only 28 per cent of the tract.

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The Town of Montclair, within whose territorial limits the tract is situate, is a municipal corporation organized and created under appropriate acts of the legislature of New Jersey and as such has existed, and still exists. Said Town of Montclair December 27, 1921, adopted an ordinance, then and still effective, known as its Building Code, pursuant to which

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was created an Inspector of Buildings, whose duties are to inspect all plans and specifications for buildings, to determine whether they comply with the building code, or any other ordinance and with the laws of the State of New Jersey; to issue without any unnecessary delay permits for the erection, construction, alterations and repair of buildings where the plans and specifications comply with said Code, etc.; to file such plans and specifications in his office; which Building Code further provides that before the erection of any building, the party desiring or intending to erect the same shall first apply for and obtain from the said Inspector of Buildings a permit signed by said Inspector, and pay for such permit. That at all the times herein named, respondent William H. Senior has been and still is such Inspector of Buildings of the Town of Montclair, duly appointed by and representing said Town of Montclair.

That after the adoption of said Building Code, and on June 10, 1924, the Town of Montclair adopted a supplement to said Building Code, providing as follows:

Section 1. Every building in the Town of Montclair, in the County of Essex, hereinafter erected or altered to be used as an apartment house, or lodging house, designed or maintained to house more than six families living independent of one another, shall in no case be more than three living stories in height and shall be of fireproof construction as hereinafter set out, provided, nevertheless, that the provisions

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herein contained shall not in any way be construed to relate to buildings for which specifications and plans have been heretofore approved by the proper authorities.

Notwithstanding such supplement to the Building Code, the Town of Montclair, prior to the adoption of such supplement adopted a zoning ordinance, which zoning ordinance has been in force at all the times herein named, pursuant to which the district in which is located relator's tract of land, was, continuously has been and still is, zoned for the erection of apartment houses; that is to say the Town of Montclair, by ordinance, has designated and still does designate the section of town in which relator's tract is situate, as a section in which the erection of apartment houses is permitted; and such tract is in the apartment house district.

That all the laws and ordinances hereinabove referred to are subject to the laws of the State of New Jersey, the Constitution of the United States and of New Jersey, and to the decision of the Courts of New Jersey relating thereto. That there are no Town, State or other prohibitions against the erection of an apartment house upon relator's tract.

Heretofore, prior to December 2, 1925, relator, owner of said tract, duly caused plans and specifications of its proposed apartment house, maps of its tract, of the location of the apartment house thereon, to be duly prepared, and duly submitted them to the New Jersey State Tenement House Commission; and the said plans and specifications and maps and proposed

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erection of said apartment house upon such tract were all duly approved by said State Tenement House Commission; and such plans and specifications, and the proposed building to be built upon said tract complied duly with the laws of the State of New Jersey, and the rules and regulations of said Commission, whose approval was duly placed thereon before their submission to the Building Inspector of Montclair.

That the location of the proposed apartment house upon the said tract, and the relation of said building to the street frontage is shown on the blueprint annexed hereto, which blueprint is by this reference made part hereof, said blueprint being an accurate representation of the location of said building, its setback from the street, the lines of streets on which the tract fronts, and of converging streets and of street space in front of said building. That the building does not stand on any street, but is set back from the building line of the street 24 feet. That the height of the proposed building is 137 feet above the curb to the top of the parapet; but that a tower, located by the word "Tower" on the blueprint, rises above the parapet, so that from the curb to the top of the tower is 167 feet. It appears by the said blueprint and is the fact that various streets converge in front of the tract. The street widths are as shown on the blueprint. The center of the front facade is opposite the conjunction or intersection of two streets whose conjunction makes one street whose width is approximately 113 feet, fully justifying the erection of a

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building of the height in question even including the tower. That the said Tenement House Commission duly approved said building as to location and height, as well as in every other way.

That the plans and specifications submitted to the State Tenement House Commission were identical with those submitted to the Building Inspector of the Town of Montclair.

After obtaining the approval of said State Tenement House Commission, and on December 2, 1925, relator through its authorized agent and architect John B. Peterkin, duly applied in writing to relator William H. Senior, Inspector of Buildings of the Town of Montclair, for a building permit to erect upon said tract the said apartment house, for 34 families (said building to cost \$1,000,000.00 or over and of unusually ornate appearance) and also filed plans and specifications thereof and paid the required fee; that said plans and specifications provided for a completely fireproofed building, complying in every way with all the said Building Code of Montclair, its amendments and ordinances and supplements thereto; and relator duly paid the required fee for such permit.

That thereafter respondent William H. Senior, Building Inspector, by notification in writing, returned said fee, and denied relator's application for building permit, on the sole ground that plans did not comply with that section of the supplemental ordinance to the building code, adopted June 10, 1924, prohibiting apartment house in Montclair of more than 3 living stories

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in height; and both the respondents then and there refused a building permit to relator on the sole ground (and no other) that relator's proposed apartment house was more than 3 living stories in height; it being the fact that
 10 such proposed apartment house is 8 stories in height, plus the tower.

Upon such refusal, relator duly prepared petition of appeal to the Board of Adjustment of the Town of Montclair and presented the same to that body December 24, 1925, but such body declined to receive or file such petition of appeal, and declined in any way to consider the same, on the ground that the matter was not
 20 a zoning matter but was a matter involving a general ordinance applying to the entire territory of the Town of Montclair. Relator exhausted its remedy in this matter so far as any proper application to the Building Inspector, the Town of Montclair, and its Board of Adjustment is concerned, and now has no other remedy at law or otherwise, to enable it to
 30 build such apartment house upon its property, save by the state's writ of mandamus, for which application has been granted by the New Jersey Supreme Court.

The sole reason for the refusal by the Town of Montclair, its Building Inspector and its agencies and boards, to issue a building permit for the erection of said apartment house, is that such proposed apartment house is more
 40 than three living stories in height, and for that reason alone violates the said supplemental ordinance, of June 10, 1924; and relator shows

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that such supplemental ordinance and such supplemental ordinance is, in fact, and always has been unconstitutional, invalid and of no effect and for that reason there was and is no warrant or authority for the refusal of such
 10 permit; such supplemental ordinance and such refusal being contrary to the provisions of the United States Constitution, and that of the state of New Jersey which confer the right to acquire, enjoy, and possess property, providing that property rights shall not be interfered with without due process of law; that such ordinance and refusal interfere with relator's
 20 ownership and exercise of its property rights in said tract of land; that said supplemental ordinance against apartment houses more than three living stories in height does not tend to promote, and is not necessary for, the health, morals, public safety or welfare of the Town of Montclair or its citizens, and that the proposed apartment house will not in any way endanger or threaten the public safety, morals, health or welfare of the community, but on
 30 the contrary will be of great benefit to the Town of Montclair in that it will greatly enhance the ratable values of the town for taxation purposes, and will be an ornamental and valuable addition to the town and will aid in the increase of desirable population, and the prosperity of its business interests; that such supplemental ordinance and refusal are an invasion of relator's rights in its private prop-
 40 erty; that they interfere with the approval of the State Tenement House Commission and

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the state laws; that they amount to a confiscation of relator's property rights and violate in particular Article 1, Sections 1 and 16, and Article 4, Section 7, Paragraph 9; Article 4, Section 7, Paragraph 3; Article 4, Section 7, Paragraph 8 of the Constitution of New Jersey in that they interfere with relator's right to have and enjoy his land without interference and that they attempt to take from relator, the exercise by relator of its property rights in such tract; and they further violate the provisions of Section 1 of the 14th amendment to the Constitution of the United States, in that they deprive petitioner of its property without due process of law; and the power, if any, attempted to be vested in said Building Inspector to refuse to issue a building permit for such reason or under the section quoted, of the supplemental ordinance, is *ultra vires*, and neither the Town of Montclair nor said Building Inspector, the respondents, have any right, warrant, or authority in law to prevent relator from erecting such apartment house upon the stated ground of refusal.

That apartment houses of the proposed height, size and character are modes of habitation specially recognized by the laws of the State of New Jersey, and that apartment houses of more than three living stories in height are recognized by the laws of the state; that the Town of Montclair is a suburban city within a twenty-mile radius of the Borough of Manhattan, and is in what is known as the metropolitan district; that there are in Montclair, eighteen or more apartment houses ex-

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ceeding three living stories in height, one of them 8 living stories in height, four of them 5 living stories in height, thirteen of them four living stories in height; that apartment houses, both in Montclair and in the neighboring towns and cities of the size and general characteristics of Montclair, are in existence, of more than three living stories in height, and of the size, height and characteristics of relator's proposed apartment house; that such apartment houses are also found in nearby cities of larger size; and are generally recognized as a necessity to relieve congestion, and because of convenience, and the necessity of present economic and domestic life;

NEVERTHELESS, and notwithstanding all the foregoing, you, William H. Senior, Inspector of Buildings of the Town of Montclair, and you, Town of Montclair, N. J., have refused and still do refuse to issue a building permit for the erection of, and refuse to permit building upon his said tract of land;

WE, therefore, willing that due and speedy justice should be done in this behalf, command and strictly enjoin you, that immediately after the receipt of this writ, you do forthwith issue to Harrison R. Van Duyne, Inc., the relator, a building permit for the erection of its said proposed apartment house upon its said tract in Montclair, N. J., or cause to us to the contrary thereof signify lest in your default complaint should come to us repeated; and how you shall execute this, our command, certify to our Justices of our Supreme Court of Judi-

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capture, at Trenton, within twenty days after service of this writ upon you, together with this, our Writ, and this in no wise omit at your peril.

10 WITNESS, William S. Gummere, Esquire, Chief Justice of our Supreme Court at Trenton this 6th day of July, 1926.

EDWARD J. KELLEHER,
Clerk.

Wm. H. Osborne,
Attorney.

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NEW JERSEY SUPREME COURT.

HARRISON R. VAN DUYN, Inc.,
Relator,
vs.

30 WILLIAM H. SENIOR, Inspector
of Buildings, and TOWN OF
MONTCLAIR,
Respondents.

In Mandamus.
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Alternative
Writ.

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

40 We, William H. Senior, Inspector of Buildings of the Town of Montclair, and the Town of Montclair, to whom the said writ is directed, do herewith make return thereto to your Hon-

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ors and assert and certify that all the statements set forth in said writ are not true; that we have no knowledge whether the relator is the owner of the tract of land described in the writ nor of the contents of the deeds in the chain of title to said tract nor the purpose of the relator in taking title thereto. 10

It is true that the tract described in the writ lies within what is known as the "Apartment House Zone" of Montclair, in the northwesterly portion thereof. It is not true that the tract lies in open country.

It is true that said Town is an existing municipal corporation and also that it adopted an ordinance known as its "Building Code" at the date set forth in said writ, to which Building Code it refers for a more accurate statement as to the duties of the officers created thereunder and the procedure incumbent upon parties desiring to erect buildings and secure permits therefor in said Town. 20

It is true that the respondent Senior was, and still is, Inspector of Buildings for the Town of Montclair during the period stated in said writ. 30

It is true that on June 10, 1924, said Town adopted a supplement to said Building Code providing substantially as set forth in said writ, but for greater accuracy these respondents refer to the said ordinance providing for said supplement.

It is true that prior to December 2, 1925, relator caused plans and specifications of its proposed apartment house and maps of said tract and of the location of the apartment house 40

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thereon to be submitted to the New Jersey State Tenement House Commission. It is not true that said plans, specifications and maps were all duly approved by said Commission. The alleged approval was subject to the local requirements of the Town of Montclair in so far as said requirements were supplementary to the State Tenement House Law, and such approval was, therefore, conditioned upon and subject to an ordinance by way of supplement to the Building Code of said Town of Montclair, adopted June 10, 1924, which provided, in substance, that every building in the Town of Montclair thereafter erected or altered to be used as an apartment house, designed or maintained to house more than six families living independent of one another should in no case be more than three living stories in height, and should be of fireproof construction, as in said Code as supplemented was thereafter set out.

Such plans and specifications and the proposed building to be built upon said tract did not comply with the laws of the State of New Jersey and the rules and regulations of said Commission, in that the proposed apartment house was higher than the Tenement House Act permits. Said Tenement House Act, being Chapter 61 of the Laws of 1904, Article 111, Section 1, paragraph 90, provides:

“The height of a tenement house hereafter erected shall not by more than one-half exceed the width of the widest street on which it stands.”

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The street on which the proposed apartment house would stand is Bloomfield Avenue. Bloomfield Avenue is 80 feet wide. Said proposed building, being 137 feet in height exclusive of the tower and 167 feet in height inclusive of the tower, exceeds the height permitted by the Tenement House Act.

It is not true that the proposed building does not stand on any street, but it is true that it is set back from the building line of the street 24 feet. It is not true that the conjunction or intersection of two streets makes one street, whose width is approximately 113 feet; nor does said conjunction or intersection justify the erection of said building with or without the tower.

It is not true that the Tenement House Commission approved said building as to location and height, as well as in every other way. Said approval was subject and conditional, as above set forth.

It is true that on December 2, 1925, relator applied to respondent, William H. Senior, Inspector of Buildings, for a building permit to erect upon said tract the said apartment house, and also filed plans and specifications thereof, and tendered the required fee.

It is not true that said plans and specifications provided for a completely fireproof building complying in every way with the Building Code of Montclair, its amendments, ordinances and supplements thereto. As heretofore stated, said building did not comply with the Building Code of Montclair and said supplement thereto of June 10, 1924.

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It is true that on or about December 21, 1925, respondent Senior did deny said application for a building permit, assigning as a reason that the plans did not comply with Chapter 16, Section 1 of the supplemental ordinance of June 10, 1924; but said respondent did not deny said application on said ground as a sole ground, and did in fact deny said application on the ground stated and on every other ground of illegality under then existing law. This statement applies equally to the respondent the Town of Montclair.

It is not true that said proposed apartment house is eight stories in height. It is ten stories in height. It is true that relator attempted to appeal to the Board of Adjustment of the Town of Montclair, and that such body declined to receive relator's petition of appeal; but these respondents say that the Board of Adjustment is a board created in connection with a zoning ordinance of said town, which has no materiality in respect of this action, and that said Board of Adjustment so notified the relator. It is true that the matter here involved has to do with the Building Code of the Town of Montclair, applying to all citizens alike throughout the entire territorial area of the Town.

It is not true that the sole reason for the refusal by the Town of Montclair, its Building Inspector and its agencies and boards, to issue a building permit for the erection of said apartment house is that the said proposed apartment house is more than three living stories in height, and for that reason violative of the supplemental ordinance of June 10, 1924. The re-

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spondents herein and said boards and agencies refused, and still refuse, said permit for every valid legal reason, among which are its violation of said ordinance of June 10, 1924; its violation of the provisions of the Tenement House Act, as heretofore stated; and its approval conditioned, as it was, upon the requirements of the respondents.

It is not true that such supplemental ordinance is contrary to the State and United States Constitutions, nor is it true that said ordinance does not tend to promote and is not necessary for the health, morals, public safety or welfare of said Town or its citizens, and that the proposed apartment house will not in any way endanger or threaten the public safety, morals, health or welfare of the community, but will be of great benefit to said Town; nor is it true that such supplemental ordinance and refusal are an invasion of relator's rights in its private property, or that they interfere with the approval of the State Tenement House Commission and the State laws, or that they are violative of the sections and paragraphs of the Constitution of New Jersey or of the Constitution of the United States, in the manner set forth in said alternative writ, nor is it true that the power vested under the Building Code of Montclair in said Building Inspector is *ultra vires*, and that the respondents have no right, warrant or authority in law to prevent relator from erecting such apartment house. It is true that there are in Montclair eighteen or more apartment houses exceeding three living stories in height, one of them eight living stories in

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height, four of them five living stories in height, thirteen of them four living stories in height; but every one of said apartment houses were either erected before said supplement to the Building Code of June 10, 1924, or the plans and specifications for said buildings were approved by the proper authorities prior to the adoption of said supplement in other words, each of said apartment houses referred to by relator fell within the scope of the proviso of said supplement to the Building Code.

These respondents further say that the reasons for the adoption of said supplement to the Building Code and for the denial of the permit to the relator were, in addition to the causes above set forth, in brief, as follows:

In March, 1924, there was a break in the outlet sewer of the Town, below the centre of the Town of Bloomfield. The main sanitary sewer of the Town runs down Washington Street in Montclair, through Bloomfield Centre, down Franklin Street to Orange Street, where it hooks up with the Union Outlet Sewer, controlled by the City of Orange and the Towns of Bloomfield, Glen Ridge and Montclair.

At that time and since said sewer has been overloaded. Its outlet is at the Passaic Valley Sewage Commission Works. The responsibility for the maintenance of the Montclair outlet sewer, notwithstanding the fact that it shares the capacity of said sewer with Glen Ridge and Bloomfield, rests on Montclair. When the break took place below Bloomfield Centre, the cellars

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of the houses in that neighborhood were flooded as a result of the break, and the cost to the Town of Montclair incident to the repair of the break was upwards of \$100,000.

The natural water outlet of the Town of Montclair for storm waters is Tony's Brook, which rises in the northerly part of the Town, as far north as Belleville Avenue, flows southerly to Chestnut Street, and then southeasterly, and leaves the Town near Bloomfield Avenue, and runs thence through Glen Ridge and Bloomfield. By reason of the break, it was necessary to open the main sewer of Bloomfield at Washington Street and divert the sewage into Tony's Brook. It was also to divert other sewage in Montclair into said brook. Complaints were made by Glen Ridge and Bloomfield against the pollution of Tony's Brook, and the Passaic Valley Sewage Commission ordered the Town of Montclair to cease polluting the brook. Said Town made strenuous efforts to remedy the situation and repair the sewerage system. These efforts continued during the year 1925, and, in order to remedy the whole situation, the Town took steps to construct a relief sewer about four and one-half miles long, with the purpose of diverting from 60 to 65% of the sewage of the Town into the new line. The completion of this relief sewer will take between two and three years.

The Town has grown rapidly, and the density of population is such that the sewage facilities were in 1924 strained beyond the breaking point, and that condition exists today.

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It, therefore, became necessary for the Town, in the exercise of its police power for the welfare of its citizens, to adopt means by which the density of population could be controlled temporarily and until adequate sewage facilities could be furnished. To that end, the supplement to the Building Code, limiting the height of buildings to be used as apartment houses, designed to house more than six families, so that such buildings should not exceed three living stories in height and should be of fireproof construction, was adopted; and so respondents say that such supplement was a reasonable exercise of the authority of the governing body of said Town, and was not arbitrary, in that it applied to all persons and corporations alike throughout the entire territorial area of the Town.

And, further, these respondents say that, under the law, said Town of Montclair has the right and authority, in the interests of the health, morals, safety and welfare of the general public of Montclair and its citizens, to limit the height of buildings in the manner in which said height is limited by said supplement for each and every reason which is not clearly unreasonable and arbitrary, and has the right, authority and duty to protect its citizens and their general welfare from the evils that will fall upon the Town by permitting relator to construct its said apartment house without regard to the welfare and necessities of the citizens and inhabitants of said Town.

And these respondents further say that the existing conditions in said Town as to den-

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sity of population and the facilities for furnishing the said Town with proper sewerage system have not come about nor do they exist as a result of any neglect in the performance of a public duty by the governing body of said Town, either at the time of the adoption of said supplement or at any time since the adoption thereof, and that to grant the prayer of the alternative writ would be a hardship upon the Town of Montclair and its inhabitants, and these respondents only pray that said alternative writ may be dismissed, and that they be relieved from obeying the command therein given.

Dated, July 27th, 1926.

TOWN OF MONTCLAIR, NEW JERSEY,
By GEORGE S. HARRIS,
Its Attorney.

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Traverse to Return, Filed Feb. 4, 1927.

NEW JERSEY SUPREME COURT.

10	HARRISON R. VAN DUYNÉ, Inc., Relator,	}	In Mandamus. Traverse to Return to Alternative Writ.
vs.			
20	WILLIAM H. SENIOR, Building Inspector, and TOWN OF MONTCLAIR, N. J., Respondents.		

Harrison R. Van Dwyne, Inc., relator for its traverse to the Return (to the alternative writ of mandamus) filed by respondents, alleges:

- 20 1. Relator joins issue on all the denials contained in the return of facts set forth in the alternative writ of mandamus herein.
- 30 2. It denies the allegation that the approval of the plans and specifications by the N. J. State Tenement House Commission was subject to the local requirements of the Town of Montclair, or subject to the Montclair ordinance of June 10, 1924; and relator further says its plans and specifications wholly complied with the Montclair Building Code and also with the said supplement of June 10, 1924, with the sole exception of height; and further says that as to height said last named ordinance is unconstitutional and void, and contrary to the statute of the state of New Jersey, relating to height of apartment houses, and relator further says that
- 40 relator's proposed building according to its plans and specifications calls for full fireproofing in accordance with the last named ordinance

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and the building code of Montclair, and for fire-proof construction as required thereby.

3. As to height, relator denies that the plans and specifications and the proposed building do not comply with the State Tenement House Law and the rules and regulations of the State Tenement House Commission, and alleges that said Commission duly approved said building as to height, and relator says that the width of the widest street on which the apartment house stands is 113 feet; and relator denies that the street on which the proposed apartment house would stand is only Bloomfield Avenue, but alleges that it is a street made up of the width of Bloomfield and Claremont Avenues and other parallel or converging streets or avenues immediate in front of the property.

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4. As to the allegations in the return relating to the broken down condition of the Montclair sewers, relator objects as matter of law thereto, on the ground that such allegations do not constitute any defense to the alternative writ, inasmuch as it is the duty of the Town of Montclair to keep its sewage system in such condition that it will be adequate for the purposes of the Town, and that it must keep its sewage system up, to keep pace with the progress and population of the Town; and the failure of the Town in this respect cannot interfere with the rights of a property owner to use his land for any lawful purpose; and as to such allegations relator further says that the gist of said alleged defense is that any increase in the population of Montclair further threatens the sewage sys-

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tem, and alleges that relator's proposed building will house only 34 families and is to be built on a tract of 55,000 square feet and such building will take up only 28% of the tract; and relator's tract is so large that relator, under the ordinance of 1924 limiting apartment houses to three living stories in height, relator could, by complying with said ordinance, put up a building or buildings on its tract which would house 106 families, thus putting a burden approved by the Town of Montclair, of three times (so far as sewage is concerned) that contemplated by its building for 34 families; as to said allegations as to sewer incapacity and inadequacy, relator says it has no knowledge sufficient to form a belief, and therefore denies the same.

5. Relator has no knowledge or information sufficient to form a belief as to whether the town has grown rapidly or the density of its population is such that the sewage facilities were strained, or whether that condition exists today and therefore denies the same; and objects to such allegation as matter of law on the ground that the same does not constitute a defense to the allegations of the writ, on the same grounds as set forth in paragraph 4 of this traverse; and it denies that it became necessary for the town in the exercise of its police power for the welfare of its citizens to adopt means by which the density of the population could be controlled temporarily and until adequate sewage facilities could be furnished; and denies that it was therefore necessary to adopt the ordinance of June 10, 1924, limiting the height of apartment

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houses; and denies that such supplement was a reasonable exercise of the authority of the governing body of the town, and denies that it was not arbitrary; and says that it objects to all such allegations as matter of law on all the grounds set forth in paragraph 4 of this answer.

6. Relator further alleges as to said sewer that the break or breakdown, if any there was, occurred as early as March, 1924, which is three years ago, and that such break and the inadequate condition described in the return, could, with the exercise of ordinary diligence, have been fully cured long before the present time; and relator alleges that such condition has been cured.

7. Relator denies that the Town of Montclair has the right to limit the height of buildings as per said ordinance of June 10, 1924, or the right to protect its citizens by such an ordinance, and relator objects to any and all such allegations contained in the return on all the grounds set forth in paragraph 4 of this answer; and further on all the grounds stated in the alternative writ of mandamus.

8. As to the responsibility of the governing body of the town for such sewage conditions, relator says that such condition has come about as the result of neglect in the performance of a public duty on the part of the town and its governing body; and relator denies that to grant the writ herein would be a hardship upon the Town of Montclair and its inhabitants; and alleges that relator has the right, under the

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ordinance of June 10, 1924, to build on its land, a building or a number of buildings to house 106 families or three times the contemplated number, using three times the amount of sewage; and relator objects as matter of law that the al-
 10 legations in the return referred to in this paragraph do not constitute a defense, on all the grounds set forth in the writ, and on all the grounds set forth in paragraph 4 of this answer; and reiterates that it is the duty of the Town of Montclair, situate in the metropolitan district to keep its facilities, sewage or otherwise, apace with its population, growth and progress.

20 9. Relator objects as matter of law that the allegations in the return that the ordinance of June 10, 1924, is a general ordinance and not a zoning ordinance, do not constitute any defense to the writ for the reason that the Town of Montclair has no right to restrict the right of owners of real estate to use their lands for any lawful purpose, throughout the entire territory, any more than it has the right to do so in one
 30 section of the town; and has no right to restrict any apartment house building to a height of three living stories.

10. That the proposed building of relator not only complies as to height with the former Tenement House Law, but also complies with Chapter 285, Laws of 1926, being an amendment to the Tenement House Law now in force and in force at the time of the issuance of the writ, which
 40 permits an apartment house to be twice the width of the street and includes in the street width the set back, which set back in this case is 24 feet.

Traverse to Return, Filed Feb. 4, 1927

11. Relator denies any and all allegations of the return to the effect that the erection of relator's apartment house, or of any apartment house over three living stories in height would in any way be inimical to the welfare, health,
 10 safety or interests of the town or its inhabitants or citizens; and any and all allegations that the passage of the ordinance of June 10, 1924, was justified by any such reasons, or that said ordinance is in any way reasonable; and objects to any such allegations for all the reasons herein and in the writ set forth; and relator further says that its apartment house will be a distinct benefit to the town, inasmuch as it will
 20 be a structure of handsome and artistic appearance, wholly fireproof, composed of 34 high class apartments, to be erected on what is known as the Mountain House site, near the Verona line; that it will increase ratables in that vicinity; that it will increase the value of surrounding properties; that its own value will be a distinct increase by way of taxation to the town's treasury; that it will be of such a class that its 34
 30 families and their trade will directly and immediately benefit the tradesmen of the town; that it is to be a co-operative apartment, in which each apartment holder will be financially interested, tending toward solidity and responsibility and respectability of its inhabitants.

WM. HAMILTON OSBORNE,
 Attorney for Relator.

Reply to Traverse, Filed Feb. 23, 1927.

NEW JERSEY SUPREME COURT.

10	HARRISON R. VAN DUYNE, Inc., Relator,	}	On Manda- mus.
	vs.		
	WILLIAM H. SENIOR, Building Inspector, and THE TOWN OF MONTCLAIR, Respondents.	}	Reply to Relator's Traverse.

The respondents, for reply to relator's traverse to return to alternative writ, say that they join issue on each and every allegation of fact set forth in said traverse; and as to each and every allegation of law, they hereby notify the relator that on the call of the cause for trial or at such other appropriate time during the pendency thereof as the Court may fix, they will move to strike out each of said allegations of law.

GEORGE R. BEACH,
Attorney of Respondents.

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Postea After Jury Trial, Filed June 16, 1927.

NEW JERSEY SUPREME COURT.

10	HARRISON R. VAN DUYNE, Inc., Relator,	}	On Manda- mus.
	vs.		
	WILLIAM H. SENIOR, Building Inspector, and TOWN OF MONTCLAIR, Respondents.	}	Postea after verdict on is- sues of fact.

Pursuant to order of this Court dated and entered March 17, 1927, the issues of fact set up and arising under the alternative writ of mandamus, the return thereto, the traverse to the return, and the reply, were regularly brought on for trial and duly tried in the ordinary manner, at Essex circuit, before the undersigned Circuit Court Judge assigned to the trial of Supreme Court issues, and a jury, at the County Court House, Newark, Essex County, New Jersey, on May 18, 1927, whereupon the Court directed the jury to find, and the jury thereupon duly found, the following facts and rendered the following verdict:

FIRST: That the relator has title, right of possession and possession of the tract of land set forth in the writ, and had such title, right of possession and possession when it applied for the building permit.

SECOND: That the plans and specifications for the building in question provide for fire-proofing required by the Montclair Building

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Postea After Jury Trial, Filed June 16, 1927

Code, and that the plans and specifications were in correct form and unobjectionable, except as to the height of the building as to living stories, under the Montclair ordinance which limits the height of buildings in Montclair to three living stories, being the ordinance of June 10, 1924. 10

THIRD: That in March, 1924, there was a break in the outlet sewer of the Town of Montclair, below the center of the Town of Bloomfield. The main sanitary sewer of the town runs down Washington Street in Montclair, through Bloomfield Center, down Franklin Street to Orange Street, where it hooks up with the union outlet sewer, controlled by the City of Orange and the Towns of Bloomfield, Glen Ridge and Montclair. At that time and since, said sewer has been overloaded. Its outlet is at the Passaic Valley Sewage Commission Works. The responsibility for the maintenance of the Montclair outlet sewer, notwithstanding the fact that it shares the capacity of said sewer with Glen Ridge and Bloomfield, rests on Montclair. When the break took place below Bloomfield Center, the cellars of the houses in that neighborhood were flooded as a result of the break, and the cost to the Town of Montclair incident to the repair of the break was upwards of \$100,000. The natural water outlet of the Town of Montclair for storm waters is Tony's Brook, which rises in the northerly part of the town, as far north as Belleville Avenue, flows southerly to Chestnut Street, and then southeasterly, and leaves the town near Bloomfield Avenue, and runs thence through Glen Ridge 20 30 40

Postea After Jury Trial, Filed June 16, 1927

and Bloomfield. By reason of the break, it was necessary to open the main sewer of Bloomfield at Washington Street and divert the sewage into Tony's Brook. It was necessary also to divert other sewage in Montclair into said brook. Complainants were made by Glen Ridge and Bloomfield against the pollution of Tony's Brook and the Passaic Valley Sewage Commission ordered the Town of Montclair to cease polluting the brook. Said town made strenuous efforts to remedy the situation and repair the sewerage system. These efforts continued during the year 1925, and, in order to remedy the whole situation, the town took steps to construct a relief sewer about four and one-half miles long, with the purpose of diverting from 60 to 65 per cent of the sewage of the town into the new line. The completion of this relief sewer will take between two and three years. The town has grown rapidly and the density of population is such that the sewage facilities were in 1924 strained beyond the breaking point, and that condition exists today. And, in addition, that the purpose and reason of the governing body of the town for taking the action with reference to sewage which it did by its action on June 10, 1924, was to adopt means by which the density of population could be controlled temporarily and until adequate sewage facilities could be furnished. 10 20 30

FOURTH: The grounds of denial of the relator's request for a building permit are stated in the refusal of such building permit by William H. Senior, the inspector of buildings, as follows: "For the reason that the plans do not 40

Postea After Jury Trial, Filed June 16, 1927

comply with Chapter 16, Section 1 of an ordinance 'To supplement an ordinance entitled "An ordinance to regulate and control the inspection, construction, alteration and repair of buildings in the Town of Montclair" ' ' ' approved June 10, 1924, which ordinance is attached to the refusal, which refusal is dated December 21, 1925, and is in evidence, the first section of which supplement provides that: "Every building in the Town of Montclair, in the County of Essex, hereafter erected or altered to be used as an apartment house or lodging house, designed and maintained to house more than six families living independent of each other, shall, in no case, be more than three living stories in height and shall be of fireproof construction as hereinafter set out, provided, nevertheless, that the provisions herein contained shall not in any way be construed to relate to buildings for which plans and specifications have been heretofore approved by the proper authorities." There was no other reason for the refusal of such permit except that relating to sewage conditions of the Town of Montclair, as stated in the above finding numbered Third of these directions by the Court.

FIFTH: That the lot on which this apartment house was to be erected, is upon two streets, Claremont Avenue which is thirty-three feet wide and Bloomfield Avenue which is eighty feet wide, the boundary line between which appears by the red pencil line drawn upon the map Exhibit R6, and that these two streets together form a plaza in front of the building proposed to be erected upon this plot of land, which is

Postea After Jury Trial, Filed June 16, 1927

112 feet in width at the intersection of the southerly line of Claremont Avenue with the northerly line of Bloomfield Avenue, and 80 feet in width opposite the easterly boundary of such lot, all of which is shown on the map R6.

SIXTH: That application was made to the Board of Tenement House Supervision of the State of New Jersey for the approval of the plans and specifications and location for this building, filed with said Tenement House Commission or Board, December 2, 1925, and approved by the said State Tenement House Commission, December 11, 1925, the approval being unconditional except for the notation upon the plans in these words: "This approval does not supersede any local requirement supplementary to the tenement house law."

SEVENTH: That by the zoning ordinance of the Town of Montclair, it is provided that no building shall be erected in the Town of Montclair which shall house more than one hundred and five families to every acre of ground; that the area of the lot upon which the relator proposed to erect its apartment house is 1.26 acres, and that in proportion to one hundred and five families per acre, one hundred and thirty-two families could, under the provisions of that ordinance, be housed upon the ground of that area; and that the same ordinance states that no house can be erected above fifty feet in height.

NELSON Y. DUNGAN,
Circuit Court Judge.

Approved:
Albert C. Wall,
Of Counsel with Respondents.

Judgment, Entered Feb. 14, 1928

This seems to us to be dispositive of the application before us and the peremptory writ of mandamus is refused and respondents may enter judgment in its favor under the alternative writ.

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Judgment, Entered Feb. 14, 1928.

NEW JERSEY SUPREME COURT.

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WILLIAM H. SENIOR, Building
Inspector and TOWN OF MONT-
CLAIR, NEW JERSEY,
Respondents,
ads.

HARRISON R. VAN DUYNE, Inc.,
Relator.

On Mandamus. On
Postea.
Judgment
for Re-
spondents.

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An Alternative Writ of Mandamus having been heretofore allowed by the Court, and a return having been filed thereto by the Respondents, and motion having been made to strike out the return and a Demurrer having been filed to said return, and said motion having been denied and said Demurrer overruled with leave to Relator to plead to and traverse the return, and the Relator having filed a traverse to said return, and issue having been joined thereon, and the Court by its order having directed the issues joined to be tried before a jury at the Essex Circuit, and that upon the filing of the Postea the matter be then brought on before a regular term of

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Judgment, Entered Feb. 14, 1928

the Court at Trenton for further disposition by the Court, and the Postea having been duly filed with the Clerk on June 16, 1927, setting forth the findings of the jury and its verdict in favor of Respondents, and the Relator having thereafter at the October Term 1927 applied to the Court for a Peremptory Writ of Mandamus, and the Court having heard the arguments of respective Counsel and duly considered the same, and being of opinion that the application for a Peremptory Writ of Mandamus should be denied and that the Respondents have leave to enter judgment in their favor under the Alternative Writ of Mandamus—

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It is Therefore Ordered that the application for said Peremptory Writ of Mandamus be refused and that judgment be and hereby is entered in favor of the above named Respondents and against the above named Relator under the Alternative Writ and that said Alternative Writ be and hereby is dismissed and that the Return thereto be and hereby is sustained, with costs to said Respondents to be taxed.

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Entered February 14, 1928.

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On motion of

GEORGE R. BEACH,
Attorney for Respondents.

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Notice of Appeal and Grounds, Filed Feb. 23,
1928.

NEW JERSEY SUPREME COURT.

10	HARRISON R. VAN DUYNÉ, Inc., Relator-Appellant, vs. WM. H. SENIOR, Bdg. Inspector, and TOWN OF MONTCLAIR, N. J., Respdt.-Respdt.	}	In manda- mus. On Appeal. Notice of Appeal, and Grounds of Appeal.
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20 To The Clerk of New Jersey Supreme Court,
George R. Beach, Esq., Attorney for Re-
spondents:

Take Notice that Harrison R. Van Dwyne, Inc.,
Relator hereby appeals to the Court of Errors
and Appeals of the State of New Jersey from
the Judgment final entered herein in favor of
Respondents against the Relator, and from every
part of said Judgment.

30 The Grounds of appeal upon which this appeal
is based, are as follows:

1. That said Judgment was in favor of Re-
spondents and should have been in favor of
Relator, and a Peremptory writ of mandamus
according to the alternative writ should have
issued in favor of the relator.

40 2. The judgment was based upon an opinion
filed herein by this court, which opinion was the
basis of the judgment, which opinion erroneously

Notice of Appeal and Grounds, Filed Feb. 23,
1928

found that upon the trial at Circuit the jury
found as a fact that the so-called "three story"
supplement to the building Code of Montclair,
was necessary, and that its reasonableness was
justified by a sewage condition in Montclair, 10
whereas what the jury found was that that
merely was the purpose and reason given and ad-
vanced by the governing body of the town; the
jury never found that the ordinance was reason-
able, nor that it was necessary, nor that it was
justified. Since such misconception of the verdict
of the jury was the sole basis for the judgment,
the judgment should be reversed. 20

3. The judgment should have found that the
so-called "three story" ordinance was void as
to Relator, since Relator's proposed apartment
house is in an apartment house zone, in which
zone, on Relator's property, relator might and
could, under the Montclair zoning ordinance,
build an apartment house housing 134 families,
thus legally straining the sewage system four
times over; its contemplated apartment house
being for only 34 families. 30

4. The judgment should have found the "three
story" ordinance void, since inadequate sewage
conditions and a break in the sewer, do not jus-
tify an ordinance which prevents a property
owner from building a building more than three
living stories in height.

5. The "three-story" ordinance is void, since it
prevents a property owner from building a four-
story building; if bad in that respect, it is bad 40

*Notice of Appeal and Grounds, Filed Feb. 23,
1928*

for all purposes. The judgment should have so found, and should have awarded a writ of peremptory mandamus.

10 6. It is unreasonable that a property owner may not build a building housing only 34 families, when he is allowed by the ordinances of Montclair to build one housing 134 families; if the sewage condition is inadequate, and if the reason for support by the judgment, of such ordinance, is the sewage condition, then the unreasonableness of such three-story ordinance is manifest.

20 7. The judgment was error because it appears that the break in the sewer occurred in March, 1924, four years ago, and that to build a new sewer would take only two or three years, hence the Town of Montclair has had ample time to build a new sewer.

30 8. The judgment is error because under it, if the sewage system never becomes adequate, no apartment house with more than three living stories can ever be built in Montclair.

9. The judgment is error because it prevents any apartment house more than three living stories in height from being ever built in the Town of Montclair.

40 10. The judgment is error because it leaves to the Town of Montclair the decision as to when, if ever, the sewage facilities will become adequate.

11. The judgment is error because based upon

*Notice of Appeal and Grounds, Filed Feb. 23,
1928*

a conclusion not justified by the facts, that the Town of Montclair is making every effort to remedy the situation.

10 12. The judgment is error because based upon an opinion which states that the building of the sewer "would require some two or three years," whereas such two or three years has already expired.

20 13. The judgment is error, because the lack of sewage facilities (and the break in the sewer) is no good reason for interfering with the use of property; it is the duty of Montclair to keep pace with its increase in population.

14. The judgment is error because the burden of proof to show that the ordinance was reasonable was upon respondents and they failed to sustain the burden.

30 15. The judgment is error because it appears as a fact in the case that apartment houses of large size are consistent with the welfare, safety and health of the community; such fact is undisputed in the case.

16. The judgment is error, because an apartment house of the height proposed by Relator, is permitted by the State Law, and its height was approved by the Tenement House Commission.

40 17. The judgment is error because height and size of an apartment house are not properly the subject of a town ordinance such as the three story ordinance in question.

Notice of Appeal and Grounds, Filed Feb. 23,
1928

18. The judgment is error because the Court
below should have awarded a writ of peremptory
mandamus to Relator in accord with the alter-
native writ, with costs to Relator against the
10 respondents, instead of awarding judgment with
costs to respondent against the Relator.

19. The judgment should be reversed on all
points.

W. H. OSBORNE,
Attorney and Counsel for Harrison
R. Van Duyne, Inc., Relator and Ap-
pellant.

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62 MAY.T.1928

To be argued by
Wm. Hamilton Osborne.

**NEW JERSEY COURT OF ERRORS AND
APPEALS**

HARRISON R. VAN DUYNÉ, Inc.,
Relator-Appellant,

vs.

WM. H. SENIOR, Building In-
specter, and TOWN OF MONT-
CLAIR, N. J.,
Respondents-Appellees.

On Mandamus.
On Appeal
from Supreme
Court.

BRIEF FOR RELATOR-APPELLANT.

Relator-appellant, Harrison R. Van Duyne, Inc., of Newark, N. J., desires peremptory writ of mandamus permitting the erection of 8-story million dollar co-operative apartment house in Montclair on old Mountain House site, northwest corner of town, on mountain, *in district zoned for apartment houses*, but has been met by general building ordinance *prohibiting* erection of apartment houses anywhere in town, *over three living stories in height* (state of case, pp. 6-7).

The Supreme Court, per Justices Parker, Minturn and Campbell (opinion, pp. 36 and 37), refused to grant peremptory writ, *upon the sole ground*, as stated in the opinion, *that a jury had found*:

“* * * that the reasonableness (of the ordinance) was justified by a sewage condition.”

As will be hereafter demonstrated, *the jury did not find* any such thing. Relator-appellant relies not only upon that error, but also upon all the grounds set forth in the notice of appeal and grounds (pp. 40-44). For procedure already had, see opinion, page 37, folios 10-20.

POINTS.

1.

The Supreme Court erred in concluding that the jury found that the objectionable ordinance was justified by sewage or any other condition (see Ground of Appeal 2, p. 40).

The Supreme Court *did not conclude* that the ordinance was justified. It merely said that, as the jury had so found, there was nothing for the Court to decide (opinion, p. 37, fols. 20-40).

What the jury found appears on pages 32, 33, state of case, in Paragraph Third of the *postea*. It will be seen that that paragraph merely finds a sewage condition *beginning over four years ago*, sets forth the efforts of the town to remedy the situation, and then says, only (p. 33, fol. 30):

“* * * *the purpose and reason of the governing body of the town* for taking the action with reference to sewage which it did by its action on June 10, 1924 (the three-story ordinance), was to adopt means by which the density of population could

be controlled temporarily and until adequate sewage facilities could be furnished.”

Now, that is all the jury found. And that at all times has been cheerfully conceded. It is a proven fact in the case and an admitted fact in the case that that was the purpose and reason of the governing body of the town. *That might also have been the purpose and reason of the governing body of the town for passing an ordinance that its surplus population should be taken out and shot at sunrise.*

Nowhere does the jury find that that reason and purpose was a good reason and purpose; nowhere do they find that that reason and purpose justified the passage of an ordinance limiting the height of apartment houses to three stories.

Whether the ordinance was justified or not *was a question of law* thoroughly argued by counsel before the Supreme Court after the jury had found the facts. Before the Supreme Court the relator argued that the “purpose and reason of the governing body” was a bad purpose and reason; and respondent argued that such purpose and reason justified the ordinance. Nobody ever claimed that the jury had ever found that the ordinance was justified.

2.

Is the sewage situation perpetual (Grounds of Appeal 7-12, pp. 42-43)?

While this point is merely by the way, it is interesting to note that (according to the jury, pp. 32 and 33) the break occurred March, 1924:

"The town has grown rapidly and the density of population is such that the sewage facilities were in 1924 strained beyond the breaking point, *and that condition exists today*" (May 18, 1927) (p. 31, date of trial; p. 33, fols. 20-30).

The jury also said (p. 33, fol. 20):

"The completion of this relief sewer will take between two and three years."

If, in that connection, the jury meant exactly what it said, then, since the date of trial was May, 1927, the chances then were that the completion of the relief sewer, begun 1925 (p. 33, fols. 10-20), would take until 1930, *or six years after the break occurred.*

Suppose, for instance, that the relief sewer was not completed in 1930, and not until 1935, or suppose it broke again during the remedial period, so that the situation could not be remedied until 1935. Does this mean that under this ordinance, *now held valid by the Supreme Court, nobody can build a four-story apartment house in the whole Town of Montclair, beginning with the date of the ordinance, June, 1924, and ending 1934, or so?*

Suppose the water gives out, what then? Is the ordinance to be extended? Suppose the

fire department, the health board facilities, the school system, the police department break down one after the other or all at once, is the ordinance to be a perpetual restriction? It has now been on the statute books of Montclair for four years. It has been held valid by the Supreme Court.

At what time in the future can this ordinance be held invalid? During what year in the 1930's may we come back to the Supreme Court and ask that they permit someone to build a four-story apartment house instead of a three-story apartment house within the Town of Montclair?

3.

Contentions on this argument, on the merits.

Montclair claims that its ordinance of 1924 (p. 6, fol. 30), prohibiting erection of apartment houses of more than three living stories in height, is valid because (a) (p. 21, fol. 30) "the town has grown rapidly and the density of population is such that the sewage facilities were in 1924 strained beyond the breaking point, and that condition exists today," and there was a break in the sewer in 1924 due to its overloading (p. 20, fol. 20); and (b) because the proposed apartment house is higher than allowed by the State Tenement House Law (p. 16, fol. 30). Montclair's arguments are necessarily reduced to those two propositions.

Relator claims (a) that an ordinance which prohibits a property owner in Montclair from

building an apartment house four living stories in height in an apartment house zone, is invalid and must fall; (b) that the break in the sewer and the increase in population do not constitute sufficient justification for such a prohibition; (c) that the height of this particular apartment house of 10 stories is justified both by the old tenement house act which limited the height to 1 1/2 times the street, and the new tenement house act in force when the alternative writ was issued, which includes in the street the setback, and including that, allows a height twice the width of the street; (d) that the sewer breakage is not to be classed with catastrophes and sudden emergencies such as the act of God in floods, fire devastation and the like.

4.

Relator's apartment house will house 34 families and violates the ordinance. By observing the ordinance, it could house 134 families and strain the sewage system four times over. This makes the prohibitive ordinance ridiculous (Grounds of Appeal 3, 6, pp. 41, 42).

This is an important point. The plans submitted to Montclair, and the blueprint attached to the writ (not denied) show that relator intends to use only 28 per cent or 15,000 square feet out of 55,000 square feet, for this enterprise (p. 5, fol. 20); one apartment house, housing only 34 families. Now, Montclair bases its ordinance of 1924, or its support thereof, on

the defective sewage system. That ordinance prohibits apartment houses of more than three living stories in height. The *postea* filed shows that under the zoning law, an apartment or apartment houses may be built on this tract housing 132 families, thus subjecting the sewage system to four times as many people as proposed (p. 35, fol. 30). Counsel for respondents claim that this zoning law, though in full force, is not in point. We say that it reflects upon the unreasonable character of the 1924 building ordinance. *We are in an apartment house zone*; all (under both laws) we have to do to comply with the building ordinance is to build an apartment house or apartment houses three living stories in height housing 132 families and Montclair must give us a permit. If the defect in the sewer is justification for their support of the general prohibitive ordinance of 1924, then their sewer can be severely overtaxed by our complying with their ordinances, but as it is, we do not intend to overtax it, because we are going to house only one-fourth the number of families that we might house on our tract. We say that this fact found by the *postea* is not irrelevant, nor immaterial, nor incompetent; it is most material, for it shows the unreasonableness of a town which refuses us to build so as to save their sewer, while it would permit us to build so as to ruin their sewer.

5.

The break in the sewer, the rapid growth of the town, the density of population, and the strain on the sewer, do not justify an ordinance which would prevent a property owner from building an apartment house four stories in height in the apartment house zone (Grounds of Appeal 1, 3, 4, 5, 13, 14, 15, 17).

This is argued more fully later in this brief. The point now is that respondents here claim that here is a sudden temporary emergency, not under anybody's control, wholly unforeseen, which justifies the town passing an ordinance of 1924 "by which the density of population could be controlled temporarily and until adequate sewage facilities could be furnished" (p. 33, fols. 1-10).

If this proposition is sound then any town or city may hide behind any inadequacy in any of its facilities because of its rapid growth. The sewer was inadequate, otherwise it would not have broken. Three policemen suddenly became unable to cope with crime because population has doubled in a village. One schoolhouse in a village is crammed to bursting because of the growth of the vicinity and there is no appropriation to build a new one and it will take years. Meantime crime becomes rampant; people are shot down by thugs and thieves; school children remain ignorant; and it is nobody's fault; therefore clamp down the lid on growth. Relator's counsel will point out that a break in the sewer is a dire calamity, and that it af-

fects the health of the inhabitants of the town. And that it takes time to remedy the situation. And if it takes ten years to remedy it, then no man can build upon his property a four-story apartment house for the ten years. And if the sewer breakage should occur again five years afterwards, then property owners still must be held up. Note that Montclair is in the *metropolitan* district (p. 12, fol. 30). Note that rapid growth of these closein suburban cities has been the rule and not the exception. Note that apartment houses, built with sufficient stories to make them a paying proposition, have come to stay (p. 12, fol. 30). This Court has settled the question in decisions cited under another point of this brief, that municipalities must keep up with the march of progress. It is a duty the performance of which they cannot in any wise escape (see Point 9 of this brief).

6.

The three-story ordinance would prevent erection of a four-story building: If bad in that respect, it is bad for all purposes (Grounds of Appeal 5, 8, 9, 17).

It is difficult to separate one contention of the respondents from another but, sifted down, their real point is that the lack of sewage facilities and the breakdown of the sewage system in Montclair, is responsible for this June, 1924, supplement to the Building Code (p. 6, fol. 30). The erection of a building in Montclair of four living stories or more in height was permissible under the Building Code prior to

June, 1924; there was no state or local law against it. Montclair has eighteen or more apartment houses exceeding three living stories in height (p. 12, fol. 40). It must be remembered that this ordinance is not one prohibiting eight-story or ten-story buildings; it prohibits four-story buildings. If it is bad as to a four-story building, it is bad for all purposes. We are not considering an ordinance that prohibits the erection of a building of the kind, size and height as relator's building. We are considering an ordinance which prevents every property owner in Montclair from going above three living stories in height. If the ordinance is bad from the standpoint of a four-story building, then it is bad for all purposes and must fall.

7.

In the absence of reasonable grounds, a general ordinance applying to the entire town is no more effective than a zoning ordinance which discriminates (Grounds 8, 9, 15, 16, 17).

Respondents say that the evil of the zoning ordinance is that it is discriminatory, and that none of the zoning decisions can apply to a general ordinance effective throughout the town. It is possible that respondents will cite *Oxford Construction Company vs. Orange*, reported in Vol. IV, N. J. Miscellaneous Reports, page 515, decided by Justices Trenchard and Katzenbach, in which they say (as to ordinance governing setback and height):

"If these provisions are general provisions applying throughout the City of Orange, then, *if reasonable*, they would be a valid exercise of the police power. If the provisions are merely designed to assist in carrying out the purpose of segregating different classes of buildings in different zones, then such provisions are unreasonable, discriminatory and ineffective to effectuate the purpose intended." (Italics are mine.)

That decision did not decide the question involved in that case but merely awarded an alternative writ of mandamus. It is to be noted that the opinion just quoted insists that *any* ordinance must be reasonable. Even under that opinion, respondents are put on their proof to demonstrate that the three-story ordinance is reasonable, even though a general ordinance.

But the *basis* of the zoning decisions in this state is not discrimination, but an absolute interference with an absolute property right.

Krumgold vs. Jersey City, 130 Atlantic Reporter 635. This is a zoning case decided by the Court of Errors and Appeals. The Court says:

"A legislature cannot confer upon a municipality any power, the exercise of which will deprive one of the rights guaranteed him by the constitution. *Every owner of property* (italics mine) has guaranteed to him the right of holding, using, enjoying and disposing of his property. It is true that every owner holds his property subject to the implied condition that it will not be used to the injury of others. Within proper limits, his use thereof will be controlled for the promotion of safety, health, morals or general welfare of the community. But when

the state or any agency thereof seeks to restrict the use of private property under the guise of the police power, the restriction must bear some definite and substantial relation to the public welfare."

Justices Trenchard, Katzenbach and Lloyd, in the case of *Michel vs. South Orange*, Vol. IV, N. J. Miscellaneous Reports, pages 302 and 303, in a zoning case, lay down the reason for the rule:

"Enforcement of the provisions of the ordinance (setback) against the relator would result in *depriving him* of a building space comprising a large part of his ground, and can only be justified if it be a proper exercise of the police power as defined by the Court of Errors and Appeals in *Ignaciunas vs. Risley*."

Note that two of the Justices enunciating this principle are the two who may be claimed to have differentiated between a zoning and a general ordinance in the case first above cited; but analysis of each opinion shows that the interference with a property right is the gist of both.

Ignaciunas vs. Risley, 98 N. J. L. 712 (Supreme Court), 99 N. J. L. 389 (Ct. Errors), settles the principle upon which all these cases rest. The Supreme Court

"assumed that the ordinance (a zoning ordinance prohibiting stores in residential section) was authorized by the statute, and held that the legislation was void so far as it permitted the Town of Nutley to prohibit relator from erecting a combined store and dwelling, *for the reason that it was violative of the rights of private property guaranteed to him by the*

federal and state constitutions and consequently was not justified by an exercise of the police power of the state."

The Court of Errors was not willing to say that the statute was void, because it said the legislature provided that municipal regulation must "*be designed to promote the public health, safety and general welfare.*" And it said the question was:

"Will the erection and use of a combined store and dwelling house constitute a menace to the health, or the safety of the people of the Town of Nutley, or to the general welfare of the community. As we see it, no well-grounded argument can be made in support of the assertion. The ordinary use of property is *not* authorized by the general welfare clause of the statute to be prohibited *because repugnant to the sentiment or desires of a particular class* residing in the immediate neighborhood thereof, *but only because such use is detrimental to the interest of the public at large.*"

It is manifest from the above utterances that there is no difference in principle between a zoning ordinance and a general ordinance. If a zoning ordinance can be shown by the municipality to be necessary for the health, welfare or safety of the general public, it is a good ordinance; if a general ordinance may be so supported, it is a good ordinance; if either cannot be so supported, then both are bad. The vice of bad zoning ordinances lies not in their discrimination, but their prevention of the use of private property without sound reason; the vice of a general ordinance is demonstrated by the application of the same test.

8.

The burden is on respondents to show that an ordinance which would prohibit an apartment house of four living stories in height is necessary for the health, safety or welfare of the general public: If they fail, the ordinance must fall (Ground of Appeal 14).

This is a self-evident proposition, since it is clear that, in the absence of restrictive laws, a property owner originally has the right to use his property for any legitimate purpose and since the state law permits it, but it is also evident from the decided cases in New Jersey, including those which are cited hereafter in this brief.

9.

The lack of sewage facilities (and the break in a sewer) is no good reason for interfering with the use of property; it is the duty of Montclair to keep pace with its increase in population.

In *Ingersoll vs. Village of South Orange*, 128 Atl. 393, at page 394, the Supreme Court held, affd. 130 Atl. 721:

“Upon the question of the lack of fire fighting forces and *inability to secure firemen* to supplement and increase the present strength of that municipal department as a justification for the prohibition in zoning ordinances against the erection of apartment houses, we are inclined to

look with disfavor. We think it is a plain duty resting upon the municipal authorities of the village to furnish and provide to its inhabitants reasonably proper and adequate fire protection. *We think that it would be unreasonable to hold that the adequacy of such a department should be maintained by restricting building and construction, but that, on the contrary, such adequacy should be maintained and keep step with increases in buildings and resulting increase of fire hazards, by increasing and enlarging the fire department in men, apparatus and efficiency.*”

It is clear from an examination of the return that Montclair has fallen down lamentably on the sewage question. But its failure to keep abreast of demands upon sewage facilities is no different from a failure to keep fire fighting facilities up to the mark. The question has been settled in New Jersey.

See as to lack of *sewage facilities*, both as to burden of proof and the meritorious question:

Pumo vs. Fort Lee, 134 Atl. 122.

E. & M. Land Co. vs. Newark, 133 Atl. 413, affd. 134 Atl. 917.

As to lack of fire fighting facilities:

Michel vs. South Orange, 4 N. J. Misc. Rep. 302, at p. 304.

Eaton vs. South Orange, 3 Misc. 957.

The *E. & M. Land Co.* case involved the question of *height*, as well as *sewage*.

10.

It is not denied by respondents that apartment houses of large size are consistent with welfare, safety and health of the community (Grounds 15, 16).

As stated, Montclair has eighteen apartment houses over three living stories in height. The asserted fact set forth in the writ that other like nearby communities have large and high apartment houses and that such apartment houses are necessary in districts of this kind, is not denied (p. 12, fol. 30). The assertion in the writ that apartment houses of the proposed height, size and character are modes of habitation specially recognized by the laws of the State of New Jersey, and that apartment houses of more than three living stories in height are recognized by the laws of the state; that the Town of Montclair is within a radius of twenty miles of the Borough of Manhattan and is in what is known as the metropolitan district—none of these assertions of fact are denied by respondents.

This Court in *Jersey Land Co. vs. Scott*, 126 Atl. 173:

“Application was for a permit to erect a four-story building to be occupied by twenty-four families and a janitor; inspector refused permit on ground that the proposed building violated the ordinance prohibiting erection of apartment houses of this type and size within the prescribed zone. * * * An apartment house is a mode of habitation specially recognized by the laws of the state, as

a necessary method of meeting the social congestion of our cities. It is a method of supplying in compact form accommodation to numbers of families under a common roof. Such structures are not only recognized, but seem to have become *ex necessitate* a part of our economic and domestic life. They are found in large numbers in all our large cities and afford convenient access to workers and business men in congested centers who otherwise probably could not be adequately supplied with the conveniences of modern life, and with our modern systems of transportation. The height of the structure contemplated here is four stories. The ordinance in question forbidding the construction of such a building seems to be wholly unnecessary within the comprehension of the statute for the public safety, public health or the general welfare of this particular community. The height of the building cannot in any sense be regarded as endangering the public safety, nor can it be reasonably contended that the health of the community could be injuriously affected thereby.”

11.

An apartment house of the height proposed is not prohibited by the state law, is permitted by the state law and was approved by the Tenement House Commission (Grounds 16, 17).

It is asserted in the writ (p. 8, fol. 30) that this apartment house from curb to roof is 137 feet, and including a tower above the roof, 167 feet over all. This is not denied by the

return. The facts stated in the writ, to wit, that the street space in front is of an average of 113 feet, and that in addition there is a setback of 24 feet, making average space of 137 feet street and setback—these are not denied. The situation as shown by the blueprint is not denied (but see *postea*, p. 34, fol. 40). The fact that the Tenement House Commission approved this building as to height and in all other respects, is denied only argumentatively, by the assertion in the return that the approval of the State Tenement House Commission as made expressly subject to any local regulations—a denial must assume that the local regulations are valid and not void.

The alternative writ in this case was issued July 6, 1926. On July 4, 1926, there went into effect in this state, Chapter 285, Laws 1926, which provides that apartment houses or tenement houses may be as high as twice the width of the widest street on which they front, and that the setback shall be deemed as part of the street width. There are further provisions for greater height if top stories are set back behind lower stories.

It is claimed by respondents that, notwithstanding the street width is 113 feet average (owing to the convergence of several streets at that point, particularly two parallel streets between which there is no visible border line) yet that technically Bloomfield Avenue is the widest street and is only 80 feet wide, and that we must be bound by that width. On *their* assumption, which we do not concede, we have then, under the new act twice 80 feet, or 160 feet, plus 24 feet setback multiplied by two, or

48 feet more, making 208 feet in height allowed by the new statute.

This new statute governs, although the old statute, to which reference will be made later, also permits of a building 167 feet over all.

While it may be immaterial whether writ was issued after the new statute went into effect, it is clear that this new statute is now in effect, that this building has not yet begun to be erected, and that what this relator seeks is permission to build this building, which clearly is within the new statute, with plenty to spare.

The effect of a *new* and reasonable piece of legislation *after refusal* of building permit, is considered in:

Rohrs vs. Ridgewood, Vol. IV, N. J. Advance Reports, 786, 787, a Supreme Court decision by Chief Justice Gummere, Justices Kalisch and Campbell, decided May 5, 1926. The Court says (*italics* are mine):

“*Subsequent* to the *refusal* of the permit, the municipality passed an amendment to its building code ordinance and thereby prohibited the erection of an apartment house of more than three stories anywhere within the municipal limits, *unless* it should be of fireproof construction. The building of relator did not comply. The question necessary to be considered is, then, whether it is a bar to the alleged right of Mrs. Rohrs to compel the issuance of a permit because passed *subsequent* to her application therefor. * * * *Assuming* that the ground upon which the superintendent refused the permit *was unsubstantial*, and that the action was not justified under

the statute, will this Court, when confronted with an ordinance passed in the valid exercise of power conferred upon the municipality, disregard its existence and direct a permit to be granted to erect a building, although its erection will be a menace to the public safety, *merely* for the reason that such ordinance was not passed *until after* the conclusion of the hearing before the board of adjustment and its action thereon. We have no doubt but that this *question should be answered in the negative. Admitting that the ordinance does not have a retroactive effect, so far as buildings in the course of erection are concerned, it is clearly applicable where the process of construction has not yet begun.*"

Now, for the purposes of this point, our alternative writ on July 6, 1926, after the new law had gone into effect, commanded the Town of Montclair to grant us a permit, or show cause. The Town of Montclair on July 26, 1926 (*after the new state law had gone into effect*), attempts to show cause by saying among other things, that we are prohibited by the state law. They must speak as of the date when they show cause. At that date the new state law permitted us to build a building 167 feet because we could have built one of 208 feet. Certainly the new state law permitted a certain height as safe. Our building is not under construction. We come clearly within the provisions of the *Ridge-wood* case.

But even under the old law, we were within the legal height. Again, our main height is 137 feet augmented by a tower shown on the blueprint so that our total height is 167 feet. The old law (Comp. Stat. N. J., p. 5334, Par. 90;

the 1911-1924 Cumulative Supplement: Tenement Houses 210-90, Laws 1919, Chap. 228, p. 545) provided that the height of an apartment house should not by more than one-half exceed the width of the widest street on which it stands. Now the Tenement House Commission approved our height. We have stated in the writ and it is not denied, that the street space in front of us is 112 feet wide; and our blueprint, not denied, bears us out. This gives us permission to build an apartment house of 168 feet in height. Respondents contend that because one of the streets making up the peculiar street space formation, to wit, Bloomfield Avenue, has a width of only 80 feet, we cannot build an apartment house under the old law, exceeding 120 feet in height. But the purpose of the act must be to relate to *street space* no matter by what *name* such street space may be called. The term "width of the widest street on which it fronts," in the act, meant plainly to cover the usual case of an apartment house fronting on two streets. The act says you are not bound to take the narrow street as a guide, but you may take the width of the widest street as a guide. The act can have no other meaning. In this particular case several streets converge, two in particular, Bloomfield Avenue and Claremont Avenue (see blueprint) being practically parallel and constituting, without separating line, one very wide street whose width justifies the height of our apartment house. *We claim that the new law governs, but that the old law also permits.* Taken into consideration that our apartment house is to be fully fire proofed in accordance with the Montclair Building Code, its amendments and supplements, it is clear that

our height is not forbidden, but permitted by the state law, and is not inimical to health, welfare or safety. No claim is made by Montclair of any inadequacy in fire fighting facilities, nor does it give any reason other than the inadequacy of the sewage facilities, as to which inadequacy the oral opinion of Chief Justice Gummere is quoted by the "Newark Evening News" of January 2, 1925, as follows:

"Chief Justice Gummere, in granting the order, said the failure of Montclair to provide adequate sewerage is the fault of the governing body alone, and that the condition cannot be eradicated at the expense of property owners. He did not suppose that it is the function of government to tell citizens they may not come to live in a place. The town has no power to tell a property owner, he declared, that he can build a house of a certain height, but that he may not add to it another story."

12.

Height and size of an apartment house do not constitute a proper objection thereto.

Handy vs. South Orange, 118 Atl. 838, held:

"A village zoning ordinance, providing that 'hereafter no building shall be erected, altered or used as a residence for more than one family,' but not regulating the size of the lot or specifying how far buildings must be separated, and which does not ascribe such regulation to the promotion of the public health—is not on compliance with the Act of April

20, 1920 (*P. L.*, 455), authorizing municipalities to regulate the location of industries and buildings with a view to promote the public health, safety and general welfare."

Jersey Land Company vs. Scott, 126 Atl. 173, held:

Application to erect four-story apartment house with 24 families. Court says:

"The height of the structure contemplated here is four stories. The ordinance in question forbidding the construction of such a building seems to be wholly unnecessary within the comprehension of the statute for public safety, public health, or the general welfare of this particular community; *the height of the building cannot in any sense be regarded as endangering the public safety, nor can it reasonably be contended that the health of the community could be injuriously affected thereby.*"

To same effect see:

Rudnevitz vs. Bigelow, 4 N. J. Misc. 480, 481.

E. M. Land Co. vs. Newark, 4 Misc. 467, 468.

Michel vs. South Orange, 4 Misc. 302, 304.

Relator-appellant submits that the judgment should be reversed and that a peremptory writ should issue.

Respectfully submitted,

WM. HAMILTON OSBORNE,
Counsel with Relator-Appellant.

62 MAY.T.1928

New Jersey Court of Errors and Appeals

HARRISON R. VAN DUYNE, INC.,
Relator-Appellant,

v.

WM. H. SENIOR, Building Inspec-
tor, and TOWN OF MONTCLAIR,
N. J.,

Respondents-Appellees.

On Mandamus.

On Appeal from
Supreme Court.

BRIEF FOR RESPONDENTS.

This case is before the Court on appeal from a judgment of the Supreme Court entered February 14, 1928, refusing peremptory writ of mandamus and entering judgment in favor of respondents, the Town of Montclair and its building inspector, and against the relator, dismissing the alternative writ and sustaining the return thereto (Case, p. 38).

The question involved is whether the Supreme Court should have granted a peremptory writ of mandamus when the postea showed that the jury had found that the supplement to the Building Code of Montclair, under attack, was made necessary and its reasonableness justified by a sewage condition which the Town of Montclair was making every effort to remedy and which would require some three years to accomplish, and that until it was accomplished the sewage facilities of the municipality were, and would be, highly inadequate and a menace to the health and safety of its inhabitants (Opinion, p. 37, lines 23-39).

Facts.

The facts are set forth in the opinion (Case, pp. 36 and 37). We do not agree with counsel's statement on page 2 of his brief, that the jury did not find what the Court said it did in its opinion (Case, p. 37). The Court said:

"One of the issues of fact raised by the return to the alternative writ was that the supplement to the Building Code was made necessary and its reasonableness was justified by a sewage condition, which the Town of Montclair was making every effort to remedy and which would require some two or three years to accomplish and that until accomplished the sewage facilities of the municipality were and would be highly inadequate and a menace to the health and safety of its inhabitants.

"Upon the trial at Circuit this fact was found and established in favor of respondent, Town of Montclair.

"We must conclude, therefore, that the provisions of the supplement to the Building Code are reasonable and rest upon a substantial necessity.

"This seems to us to be dispositive of the application before us and the peremptory writ of mandamus is refused and respondent may enter judgment in its favor under the alternative writ."

The postea (p. 32 of the printed book, paragraphs 3rd and 4th) sets forth the situation with particularity. The concluding sentence shows that the purpose of the governing body of the town was to adopt means by which the density of population could be controlled temporarily and until adequate sewage facilities could be furnished.

I.

On the merits a peremptory writ should have been denied.

The issues of fact which constrained the Supreme Court on March 17th, 1927, to refer them to a jury for trial have been determined by the jury in favor of respondents. The postea (p. 31) shows as follows:

1. That relator has and had title to the land.

2. That the plans and specifications were unobjectionable except as to the height of the building as to living stories under the Montclair Building Ordinance of June 10, 1924, which limits the height of buildings to three living stories.

3. That in March, 1924, there was a break in the outlet sewer. That at that time and since the sewer has been overloaded. Cellars were flooded as a result of the break and the cost to the town incident to its repairs was more than \$100,000. The town made strenuous efforts to remedy the situation and repair the sewage system. These efforts continued during 1925. In order to remedy the whole situation the town took steps to construct a relief sewer four and one-half miles long with the purpose of diverting 60% to 65% of the sewage of the town into a new line, viz., the completion of this relief sewer will take between two and three years. The town has grown rapidly and the density of the population is such that the sewage facilities were in 1924 strained beyond the breaking point, and that condition exists today.

4. That the purpose and reason of the governing body of the town for taking the action with reference to sewage, which it did by the Ordinance of June 10, 1924, was to adopt means by which

the density of population could be controlled temporarily and until adequate sewage facilities could be furnished. A fuller statement in regard to this issue is made in the third paragraph of the postea.

5. The grounds of denial of relator's request for a building permit were that the plans did not comply with Chapter 16, Section 1 of the Ordinance—"To supplement an Ordinance entitled An Ordinance to Regulate and Control the Inspection, Construction, Alteration and Repair to Buildings in the Town of Montclair," approved June 10, 1924. The refusal was dated December 21, 1925, and the first section is set out in full in the latter part of the 4th paragraph of the postea. There was no other reason for the refusal of the permit except that relating to sewage conditions of the Town of Montclair as stated in the third paragraph of the postea.

From the foregoing it appears, therefore, that the amendment to the Building Ordinance of June 10, 1924, was adopted about eighteen months before relator applied for a permit; that the ordinance was adopted to restrict density of population in view of an imperious but temporary necessity in respect to the sewage situation which the town has diligently sought to remedy; and that the ordinance applied throughout the town and affected all alike.

Appellant will be unable to find cases that hold a building ordinance operating on everyone alike throughout the territorial area of a municipality designed to limit density of population in view of temporary and imperious necessity with respect to sewage, is bad.

Appellant cites *Ingersoll v. South Orange*, 128 Atl. 393. That case set up lack of fire fighting

forces and inability to increase the then present strength of the fire department. The Court said it looked on that defense with disfavor. That case dealt with a zoning ordinance. The Court was of the opinion that the town should bring its fire department up to a point demanded by the situation. Such a case is not fairly comparable with the present.

A different situation in respect to sewage is set forth in paragraph 3 of the postea. Relator submitted no evidence to the jury to question the diligence or temporary situation of the town in respect to the steps it has taken to protect itself against the menace of not properly taking care of the sewage situation.

Appellant admits the purpose and reason of the supplement which it attacks (Brief for Appellant, top of p. 3).

II.

The presumption is that the Ordinance of June 10, 1924, is reasonable and such presumption must be rebutted by proof which is absent in this case.

In *Oxford Construction Company v. City of Orange*, 137 Atl., page 545, the Court of Errors (the Chief Justice reading the opinion) pointed out that on the authority of cases cited, an ordinance is presumed to be reasonable and the presumption of reasonableness must be rebutted by proof. In that case, as in the present, there was no rebuttal by proof. In the present case there is a positive finding of the jury which can be fairly characterized as a meritorious exercise of the police power to further the welfare of the citizens of the town, and the *Oxford* case held that zoning ordinances are valid under the statute so far as they prohibit erec-

tion of building in zone where its presence might fairly be considered as constituting a menace to safety, health or welfare of the community. While the ordinance in the present case is not a zoning ordinance naturally the same rule applies.

In *Dorison v. Saul*, 98 N. J. Law 112 decided in 1922, Justice KATZENBACH dealt with an act to enable cities to regulate and limit the height of buildings. He said:

"It seems to us that this act confers on municipalities only the power to limit the height of buildings, and not to compel the erection of buildings of a prescribed height. The height of buildings in cities increases the fire hazard, especially if the Fire Department of the city is inadequately equipped to reach fires in high buildings."

Dillon on Municipal Corporations, 5th Edition, page 1062, paragraph 696, says:

"Statutory restrictions upon the height of buildings having been before the Courts incidentally, and the opinion having been expressed that statutes regulating the height of buildings, are a proper and valid exercise of the police power, * * *"

In *Rohrs v. Ridgewood*, Vol. 4, N. J. Advance Reports, 786 and 787 (May 5, 1926), Chief Justice GUMMERE read the opinion for the Supreme Court. That case dealt with an application to erect a five-story apartment house. It was refused by the municipality because within the prohibited zone. There was an appeal to the Board of Adjustment which refused to modify the decision of the Superintendent of Buildings. Ridgewood then adopted an ordinance by amendment to the building code prohibiting the erection of apartment houses of more than three stories unless fireproof.

The question was:

1. Is the ordinance a valid exercise of the police power? The Court held it was—citing *Manning v. Hague*, 128 Atl. 375.

The Court upheld the ordinance as a reasonable exercise of the police power in the interests of safety, in prohibition against fire, and the reduction of the fire hazard. What is the difference in principle between the reduction of the sewage hazard and the fire hazard?

III.

Relator does not show that the ordinance was unreasonable, and the burden is on it so to do.

The admitted fact that there were eighteen apartment houses already in Montclair at the time of the adoption of the ordinance, and that the proposed apartment house is in a locality zoned for apartment houses, shows that the ordinance was not directed against apartment houses as such, but was, as the return avers and the postea finds, adopted to control density of population pending an emergency which the town was making strenuous efforts to overcome.

Relator's argument that it could build a building in accordance with the ordinance, which would create greater density of population than the one it proposed to build is without merit. Would any sane man build such a building?

It is fair to suppose that the framers of the ordinance knew that, but it is no argument against the ordinance to say that ingenuity can evade it. There is no principle as yet which says that a rule of action to stand must be 100% effective.

IV.

**The judgment of the Supreme Court should
be affirmed.**

Respectfully submitted,

GEORGE R. BEACH,
ALBERT C. WALL,
Of Counsel with Respondents.