

INDEX

	PAGE
Notice	1
Petition	2
Affidavit of Frank B. Eaton	6
Affidavit of Michael Eaton.....	9
Application for Permit.....	12
Report of Inspector of Buildings.....	14
Order to Show Cause.....	16
Agreed State of Facts.....	18
Exhibit A	23
Case	26

TESTIMONY.

Respondents Witnesses.

Louis F. Bird,	
direct examination	26
cross "	30
redirect "	36
Harry A. Becker,	
direct examination	36
cross "	51
Matthew P. A. McDermit,	
direct examination	54
cross "	57
re-direct "	61
Patrick A. McGuire,	
direct examination	61
cross "	63
re-direct "	67

Relators' Witness.

Ira T. Redfern,	
direct examination	68
cross "	75

EXHIBITS.

Exhibit D. 1. Report of Chief Engineer, January, 1920	41
Exhibit D. 2. Report of Chief Engineer, January, 1921	44
Exhibit D. 3. Report of Chief Engineer, January, 1922	46
Exhibit D. 4. Report of Chief Engineer, January, 1924	49
Certificate of Commissioner	76
Opinion of Supreme Court	77
Order Moulding the Pleadings and Directing Judgment to be Entered Thereon.....	80
Alternative Writ	82
Return to Alternative Writ	85
Rejoinder	87
Notice and Grounds of Appeal	88
Demurrer to Return	89

Notice.

NOTICE.

New Jersey Supreme Court

FRANK B. EATON AND LILLIAN
EATON, *Relators,*

vs.

VILLAGE OF SOUTH ORANGE AND
IRA T. REDFERN, BUILDING
INSPECTOR OF THE VILLAGE OF
SOUTH ORANGE *Respondents.*

Notice.

10

To the above-named defendants:

TAKE NOTICE that on Saturday, the 11th day of April, 1925, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, we shall apply to the New Jersey Supreme Court at the Court House, Newark, for an alternative writ of mandamus should not issue in the above-entitled cause requiring the Village of South Orange to issue permit for the erection of the building as set forth in the attached petition and affidavits.

20

HOWE & DAVIS,
Attorneys for Relators.

30

40

Petition.

NEW JERSEY SUPREME COURT.

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

10 The petition of Frank B. Eaton and Lillian
Eaton, his wife, of the City of East Orange, in
the County of Essex and State of New Jersey,
respectfully shows:

1. Your petitioners are the owners in fee
simple of a certain tract of land and premises
in the Village of South Orange, County of Es-
sex and State of New Jersey, situate at the south-
west corner of South Orange Avenue and Pros-
pect Street and having a frontage on South
Orange Avenue of about one hundred and thirty
20 feet and on Prospect Street of about two hun-
dred feet.

2. Petitioners are desirous of erecting a two-
story building upon said premises, the first floor
to contain fourteen stores, fronting on South
Orange avenue and Prospect street, and also one
apartment for use of a janitor; and the second
floor to contain nine apartments to be rented to
tenants for dwelling purposes, the said build-
ing to cost approximately seventy-five thousand
30 dollars (\$75,000).

3. On the 28th day of March, 1925, petition-
ers applied to Ira T. Redfern, Building Inspector,
for a permit for the erection of a building, by
application in writing duly submitted to said
Building Inspector, accompanied by plans and
specifications in duplicate as provided by the
building code of the Village of South Orange and
also tendered and left with the said Inspector of
Buildings the legal fee fixed by said building
40 code.

Petition.

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

5. The said further objection to granting said permit was made by said Building Inspector on the ground that the zoning ordinance of the Village of South Orange forbade the erection of a building of the said type because the said zoning ordinance did not permit the use of said premises for retail stores and would also require this particular building to set back twenty-five feet from the front line of the property on Prospect street which is the minimum set-back permitted by said zoning ordinance and that the lot in question was not large enough to permit the erection of such building with the required set-back. The application of petitioners to the said Building Inspector shows the said building to be built on the property line without any set-back and it was and is the intention of petitioners to locate and construct said building in such manner. South Orange avenue upon which the

Petition.

said property fronts is a county road eighty feet in width and Prospect street on which the property has its depth is a street fifty feet in width. A two-track trolley line runs along South Orange avenue in front of the petitioners' premises. South Orange avenue is the main business thoroughfare of South Orange and is the leading highway going to and from the City of Newark. The business section of the Village of South Orange begins about three hundred feet west of the relators' property, and continues westerly for a distance of five or six blocks.

6. Petitioners charge and insist that said ordinance insofar as it purports to prevent Frank B. Eaton and Lillian Eaton, his wife, from erecting and constructing the said building as contemplated is illegal in that the reservation of the district in which the petitioners' said property is located, to the use prescribed by said ordinance is beyond the power of the Village of South Orange under the provisions of the statute and that the Village of South Orange under the statute has no power to prevent the erection of a building in said district; and that the restriction is not designed to promote the public health, safety and general welfare; and that the effect of enforcing the provisions of said ordinance to prevent the said petitioners from erecting the building which they seek to erect would be to deprive the said petitioners of a right to possess and protect property in violation of the first clause of the Article 1 of the Constitution of the State of New Jersey and would be a taking of the private property of the said petitioners for public use without just compensation in violation of the 16th paragraph of Article 1 of the Constitution of New Jersey; and would be in

Pétition.

effect a taking of private property for private purposes in violation of the right secured to the said petitioners by the Constitution of the State of New Jersey; and would likewise be a violation of the rights secured to the said petitioners by the Fourteenth Amendment to the Constitution of the United States in that it would be a deprivation of the petitioners of their property without due process of law and would be a denial to them of the equal protection of the law; and that the said ordinance is for other reasons illegal and invalid. 10

Petitioners therefore pray that a writ of mandamus may issue out of and under the seal of this honorable Court directed to the said Inspector of Buildings of the Village of South Orange to the Village of South Orange commanding and enjoining them to issue the building permit granting permission to petitioners to erect the building of the type above mentioned, upon the said lands and premises hereinbefore described in accordance with the plans and specifications tendered by them to said Building Inspector pursuant to the statute in such case made and provided. 20

And your petitioners will ever pray, etc. 30

HOWE & DAVIS,
Attorneys for Petitioners.

Affidavit of Frank B. Eaton.

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

10 FRANK B. EATON, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am the petitioner mentioned in the foregoing petition and the owner in fee simple of the premises at the southwesterly corner of South Orange avenue and Prospect street in the Village of South Orange, having a frontage of about one hundred thirty feet on South Orange avenue and about two hundred feet on Prospect street.

20 2. I desire to erect a two-story building upon said premises, the first floor to contain fourteen stores, fronting on South Orange avenue and Prospect street, and also one apartment for use by a janitor; and the second floor to contain nine apartments to be rented to tenants for dwelling purposes, the said building to cost approximately seventy-five thousand dollars (\$75,000).

30 3. On the 28th day of March, 1925, my father Michael Eaton on my behalf applied to Ira T. Redfern, Building Inspector, for a permit for the erection of said building, by application in writing duly submitted to said Building Inspector, accompanied by plans and specifications in duplicate as provided by the building code of the Village of South Orange and also tendered and left with the said Inspector of Buildings the legal fees fixed by said building code.

40 4. After retaining said application, plans, specifications and fees for a period of several days, the said Building Inspector notified me

Affidavit of Frank B. Eaton.

that he would not issue the said permit, giving as his reason therefor that an ordinance entitled "An ordinance to regulate and restrict the location hereafter of trades and industries and subsequent location of buildings designed for a specified use and in a designated area and to regulate and limit the height and bulk of buildings hereafter erected and to regulate and determine the area of yards, courts and other open spaces for that purpose to divide the Village of South Orange into districts," passed March 20th, 1922, and the various ordinances amendatory and supplementary thereto, forbids the erection of said building upon the premises which I own. 10

5. The said further objection to granting said permit was made by said Building Inspector on the ground that the zoning ordinance of the Village of South Orange forbade the erection of a building of the said type because the said zoning ordinance did not permit the use of said premises for retail stores and would also require this particular building to set back twenty-five feet from the front line of the property on Prospect street which is the minimum set-back permitted by said zoning ordinance and that the lot in question was not large enough to permit the erection of such building with the required set-back. The application which I made to the said Building Inspector shows the said building to be built on the property line without any set-back and it was and is the intention of myself to locate and construct said building in such manner. South Orange avenue upon which the property fronts is a county road eighty feet in width and Prospect street on which the property has its depth is a street fifty feet in width. 20
30
40

Affidavit of Frank B. Eaton.

A two-track trolley line runs along South Orange avenue in front of my premises. South Orange avenue is the main business thoroughfare of South Orange and is the leading highway going to and from the City of Newark. The
10 business section of the Village of South Orange begins about three hundred feet west of my property, and continues westerly for a distance of five or six blocks.

6. I charge and insist that said ordinance insofar as it purports to prevent me from erecting and constructing the said building as contemplated is illegal in that the reservation of the district in which my said property is located, to the use prescribed by said ordinance
20 is beyond the power of the Village of South Orange under the provisions of the statute and that the Village of South Orange under the statute has no power to prevent the erection of a building in said district; and that the restriction is not designed to promote the public health, safety and general welfare; and that the effect of enforcing the provisions of said ordinance to prevent me from erecting the building which I seek to erect would be to deprive me of a right to
30 possess and protect property in violation of the first clause of the Article 1 of the Constitution of the State of New Jersey and would be a taking of the private property which I own, for public use without just compensation in violation of the 16th paragraph of Article 1 of the Constitution of New Jersey and would be in effect a taking of private property for private purposes in violation of the right secured to me by the Fourteenth Amendment to the Constitution of the United States in that it would be a
40 deprivation of my property without due process of

Affidavit of Michael Eaton.

law and would be a denial to me of the equal protection of the law; and that the said ordinance is for other reasons illegal and invalid.

I therefore pray that a writ of mandamus may issue out of and under the seal of this honorable Court directed to the said Inspector of Buildings of the Village of South Orange to the Village of South Orange commanding and enjoining them to issue the building permit granting permission to me to erect the building of the type above-mentioned upon the said lands hereinbefore described in accordance with the plans and specifications tendered by me to said Building Inspector pursuant to the statute in such case made and provided.

FRANK B. EATON.

Subscribed and sworn to this
3rd day of April, 1925, before me,

FREDERICK NEUHAUS,
A Notary Public of New Jersey.

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

MICHAEL EATON, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am the father of Frank B. Eaton, one of the relators herein and one of the owners of the premises situated at the southwest corner of South Orange avenue and Prospect street in the Village of South Orange, Essex County, New Jersey.

Affidavit of Michael Eaton.

2. In behalf of the said Frank B. Eaton and Lillian Eaton, the relators herein, on March 28th, 1925, I applied to Ira T. Redfern, Building Inspector of the Village of South Orange, for a permit for the erection of a two-story building the first floor to contain fourteen stores, fronting on South Orange avenue and Prospect street, and also one apartment for use of a janitor; and the second floor to contain nine apartments to be rented to tenants for dwelling purposes, to be erected on said lands and premises, by an application in writing duly submitted to said Building Inspector, accompanied by plans and specifications in duplicate as provided by the Building Code of the Village of South Orange and also tendered and left with the said Inspector of Buildings the legal fees fixed by said building code for the erection of a building of that character.

3. The said Building Inspector retained said application, plans, specifications and fees for several days and I again called at his office and requested the said building permit and he refused to issue the said permit and said further objection to granting such permit was made by said Building Inspector on the ground that the zoning ordinance of the Village of South Orange forbade the erection of a building of the said type because the said zoning ordinance did not permit the use of said premises for retail stores and would also require this particular building to set back twenty-five feet from the front line of the property on Prospect street which is the minimum set-back permitted by said zoning ordinance and that the lot in question was not large enough to permit the erection of such building with the required set-back.

Affidavit of Michael Eaton.

4. South Orange avenue upon which the property fronts is a county road eighty feet in width and Prospect street on which the property has its depth is a street fifty feet in width. The application which I made to the said Building Inspector shows the said building to be built on the property line without any set-back and it was and is the intention to locate and construct said building in such manner. A two-track trolley line runs along South Orange avenue in front of said premises. South Orange avenue is the main business thoroughfare of South Orange and is the leading highway going to and from the City of Newark. The business section of the Village of South Orange begins about three hundred feet west of said property, and continues westerly for a distance of five or six blocks.

5. I have gone carefully over the plans and specifications aforesaid and the same conform in all respects with the Building Code of the Village of South Orange and the building laws of the State of New Jersey, and there is nothing whatsoever about the said building or any part of its construction in any wise detrimental to the public health, safety or general welfare of the Village of South Orange of the State of New Jersey.

MICHAEL EATON.

Subscribed and sworn to this
3rd day of April, 1925, be-
fore me,

FREDERICK NEUHAUS,
A Notary Public of New Jersey.

Application for Permit.

Service of a copy of the within notice is hereby acknowledged this 6th day of April, 1925.

RIKER & RIKER,
Attorneys of Defendants.

10

APPLICATION TO THE INSPECTOR
OF BUILDINGS

For Permit for the

Construction of New Buildings by the Owner,
Architect or Builder

South Orange, N. J., Mar. 26, 1925.

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

Reported by Frank B. Eaton.

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

1. Number of Buildings to be erected 1. Location, S. W. Cor. South Orange Avenue and Prospect Street.
2. Size of Main Building 119' x 166' 7"; num-
30 of stories 2. Height of Building 25-0 feet.
3. Dept of foundation 7'-0; thickness 16 inches material Brick.
4. Mortar for foundation Cement and Sand; cellar or trench wall Cellar; Waterproofed below grade, Yes.
5. Footing course; width 28"; thickness 12"; material Concrete.
6. If piers, columns or posts are used, state
40 what kind H-Cols. and Lally Cols. & Piers, bond
stone 4".

Application for Permit.

7. Thickness of outside walls; 1st story 12"; 2d 12".
8. Thickness of inside partition walls; 1st story 6"; 2d 6".
9. Material of roof and style; also cornices and appendages, flat slag roof. 10
10. Material of timber Fir. bearing partition walls Hemlock 2x4—16".
11. Size of floor beam, 1st tier 2"x10"; 2d tier 2x10".
12. Girders; of what material and size to support floors 6x8—Spruce. How supported on Lally Cols.
13. Iron Girders supporting walls; depth several see plan; weight per yard; how supported Bush piers and Cols. 20
- 14.
15. Distance of wood work from inside of any flue 8"; size of flue linings 15".
16. Distance of beams or headers from outside of chimney or flue 4"; concrete cellar bottom, Yes.
17. Distance chimney projects inside of buildings ; Chimney, where started from, Base course.
18. Size of bridging 2x2 rows in each tier 2, material of lathing in cellar Plas. Boards. 30
- 19.
20. Height of ceilings; 1st story 11-3 feet; 2d 9'-0;
21. Skylight Yes; scuttle? Yes.
22. Size and number wood ceilings None; metal ceilings, Stores.
23. Openings for doors and windows. State whether arched, or lintels are to be used, Both. 40

Report of Inspector of Buildings.

If lintels are used, material Iron; size $4 \times 3\frac{1}{2} \times \frac{3}{8}$ and $5 \times 3\frac{1}{2} \times \frac{3}{8}$; corner of interior lot, Corner.

24. Hall partitions; how fireproofed Plas. or plaster boards.

10 33. Proposed use of building, Stores and apartments. How heated, Steam; How lighted El.

Estimated cost (exclusive of lot) of each building separate, \$75,000. Time of Commencement.

Remarks:

REPORT
OF
INSPECTOR OF BUILDINGS
SOUTH ORANGE, N. J.

20

of application for

NEW BRICK, STONE OR CONCRETE
BUILDING

Location, S. W. cor. So. Orange Ave. and Prospect St.

Owner, Frank B. Eaton.

Address, 10 S. Grove Street, E. O. N. J.

Carpenter,

Address

Mason,

30

Address,

Architect, John B. Acocella.

Address, 11 Clinton St., Newark, N. J.

Plumber,

Address.

Report of Inspector of Buildings.

Office of Inspector of Buildings.

Village of South Orange, March 28, 1925.

I have this day received and examined the building plan submitted with the application, and find that it is not in accordance with the zoning ordinance requirements of the Village of South Orange and permit is refused. 10

Ira T. Redfern,
Inspector of Buildings.

20

30

40

Order to Show Cause.

ORDER TO SHOW CAUSE

NEW JERSEY SUPREME COURT

10	FRANK B. EATON and LILLIAN EATON,	<i>Relators.</i>	}	<i>Order to Show Cause.</i>
	<i>vs.</i>	<i>Defendants.</i>		
	VILLAGE OF SOUTH ORANGE, <i>et al.</i> ,			

20 On reading the petition and affidavit filed in the above-entitled cause, it is on this 11th day of April, 1925, ORDERED, that the Village of South Orange and Ira T. Redfern, Inspector of Buildings of the Village of South Orange, in the County of Essex, do show cause before this honorable Court at the State House in the City of Trenton, on Tuesday, the 5th day of May, 1925, at eleven o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an alternative writ of mandamus should not issue out of and under the seal of this honorable Court commanding them and directing them, the said

30 Village of South Orange and Ira T. Redfern, Inspector of Buildings of the Village of South Orange, to issue a permit to said Frank B. Eaton and Lillian Eaton for the erection of a two-story building, the first floor to contain fourteen stores, fronting on South Orange avenue and Prospect street, and also one apartment for use by a janitor; and the second floor to contain nine apartments to be rented to tenants for dwelling purposes, on the property of said Frank B. Eaton

40

and Lillian Eaton at the corner of South Orange avenue and Prospect street in said Village of South Orange, and it is further ordered that both parties have leave to take depositions.

Let this rule be entered in the minutes.

WM. S. GUMMERE,

C. J. 10

Entered,

On motion of,

Howe & Davis,

Attorneys for Relators.

Service of a copy of the within order is hereby acknowledge this 15th day of April, 1925.

20

RIKER & RIKER,
Attorneys for Defendants.

30

40

Agreed State of Facts.

AGREED STATE OF FACTS

NEW JERSEY SUPREME COURT.

10	FRANK B. EATON and LILLIAN EATON, <div style="text-align: right;"><i>Relators.</i></div>
	<i>vs.</i>
	VILLAGE OF SOUTH ORANGE, <i>et al.</i> , <div style="text-align: right;"><i>Defendants.</i></div>

20 It is hereby stipulated by and between the parties hereto that the facts hereinafter set forth affecting the matters in controversy involved in these proceedings are to be taken as true. Neither party shall be precluded, however, by this stipulation from bringing in proof of additional facts should they so desire:

1. The relators, Frank B. Eaton and Lillian Eaton, are the owners in fee simple of a certain tract of land and premises in the Village of South Orange, County of Essex and State of New Jersey, and described as follows:

30 BEGINNING at the point of intersection of the Southerly line of South Orange avenue with the Westerly line of Prospect street; thence running along the said line of Prospect street South forty-five degrees forty-four minutes thirty seconds West one hundred and ninety-three feet and four one-hundredths of a foot to a point therein distant one hundred and eighty-nine feet and eighty-five one-hundredths of a foot from the line of Irvington avenue; thence North forty-five
 40 degrees thirty minutes thirty seconds West forty

Agreed State of Facts.

feet; thence North forty-five degrees forty-five minutes West nineteen feet and forty-four one-hundredths of a foot; thence North twenty-four degrees forty minutes East one hundred and forty-six feet and seventy-eight one hundredths of a foot to the said Southerly line of South Orange avenue which point is distant three hundred and nine feet and two one hundredths of a foot from the Easterly line of Academy street; thence running along the said line of South Orange avenue South seventy-one degrees twenty-five minutes East one hundred and twenty-five feet and sixty-five one-hundredths of a foot to the point or place of BEGINNING. 10

2. On March 28th, 1925, relators applied to Ira T. Redfern, Building Inspector of the Village of South Orange for a permit for the erection of a building having fourteen stores and one apartment for use of a janitor on the first floor and nine apartments on the second floor in accordance with certain plans and specifications herewith submitted, which application was in writing, a copy of same with the endorsements thereon being attached to the petition heretofore filed in this cause. The said plans and specifications had first been approved by the Board of Tenement House Commissioners of the State of New Jersey and the legal fee required by law to be paid, for the issuance of said permit, was thereupon tendered to said Building Inspector. 20 30

3. The said Building Inspector refused to issue said permit or accept such payment on the ground that by an ordinance entitled "An ordinance to regulate and restrict the location hereafter of trades and industries and the subsequent location of buildings designed for a specified use 40

Agreed State of Facts.

10 and in a designated area and to regulate and limit the height and bulk of buildings hereafter erected and to regulate and determine the area of yards, courts and other open spaces and for that purpose to divide the Village of South Orange into districts," passed March 20th, 1922, and the various ordinances amendatory and supplementary thereto, forbids the erection of an apartment house upon the area of the premises owned by petitioners to the extent contemplated, but does allow an apartment house to be built. The front line is to be set back ten feet from the street line of South Orange avenue and five feet from the street line of Prospect street.

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

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

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

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

8. The block upon which relators' property is situated is 440 feet long. On the premises next west of relators' lot is a two and one-half story frame dwelling house, the front line of which is 9 feet from the street line. Next west of that is a three-story frame dwelling house, the front
40 line of which is 20 feet from the street line. Next

Agreed State of Facts.

west of that is a church, one portion of which reaches to within $15\frac{1}{2}$ feet of the street line and another portion of which reaches to 17 feet from the street line. Opposite the relators' lot is a two and one-half story frame dwelling house, the front line of which is 19 feet from the street line. Next to that property on the west is a two and one-half story frame dwelling house, one corner of the front line of which is 11 feet from the street line and the other corner of which is six feet from the street line. Back of the lot owned by relators on Prospect street is a one and a half story frame dwelling house, the front line of which is nine feet from Prospect street.

10

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

1913.....	\$10,950,662.	
1914.....	11,784,851.	
1915.....	11,963,338.	
1916.....	12,675,689.	
1917.....	13,410,045.	
1918.....	13,784,037.	
1919.....	14,127,009.	
1920.....	14,863,526.	
1921.....	15,756,795.	30
1922.....	18,494,960.	
1923.....	20,663,754.	
1924.....	22,489,814.	

Agreed State of Facts.

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

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

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

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

	New Buildings		Additions and Alterations	
	Permits	Estimated Cost	Permits	Estim. Cost
1919	158	\$1,047,227	22	\$ 40,520
30 1920	166	916,918	40	67,976
1921	227	1,617,629	44	45,865
1922	285	2,087,435	46	101,958
1923	327	2,093,204	65	83,303
	<hr/>	<hr/>	<hr/>	<hr/>
	1,163	\$7,762,413	217	\$339,622

Exhibit A.

Total Estimated Cost		
\$1,087,747		1919
984,894		1920
1,663,494		1921
2,189,393		1922
2,176,507		1923
<hr/>		
\$8,102,035		10

12. South Orange avenue is the same street as that referred to in the case of State vs Bigelow, 2 N. J. Misc. page 711. The relators' property is about a mile and a quarter west of that property.

13. It is agreed that the testimony heretofore taken in a previous application in this matter shall again be used on the present application. 20

HOWE & DAVIS,
Attorneys for Relator.

RIKER & RIKER,
Attorneys for Respondent.

EXHIBIT A.**SCHEDULE I. 30**

Section 4.—General Height Limits and Set-back Front Yards.

(a) No building shall exceed three stories or 55 feet in height except that the provisions of this ordinance with regard to height shall not apply to church spires, cupolas, belfries, chimneys, flag poles or water towers; nor to bulk heads, hose towers, elevator enclosures, water tanks or scenery lofts, occupying an aggregate 40

Exhibit A.

area of not over 25 per cent. of the ground area of the building. A mezzanine story shall always be considered to be a full story.

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

20 Section 5.—District Height Limits and Setback Front Yards.

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

30 Sections 12.—Residence "C" "Use" Provisions.

(a) Within any Residence "C" District, as indicated on the Building Zone Map, no building or premises shall be used for other than one or more of the uses specified above in Section 10 as permitted in Residence "A" District or in Section 11 as permitted in Residence "B" District, or in addition:

- 40 (1) Apartment houses.
(2) Tenement houses.

Exhibit A.

(3) Hotels or lodging houses, provided that there is no display or advertising or conspicuous sign.

Section 5.—District Height Limits and Set-back Front Yards.

(c) In Business Districts, no part of a building shall be higher above the curb level than ten feet less than twice the distance it sets back from the center line of the street it faces. Parapet height and cornices may, however, extend above such height limit not more than five feet. 10

20

30

40

Louis F. Bird, direct.

NEW JERSEY SUPREME COURT

10	FRANK B. EATON and LILLIAN EATON, <div style="text-align: right;"><i>Relators.</i></div>
	<i>vs.</i>
	VILLAGE OF SOUTH ORANGE, <i>et al.</i> , <div style="text-align: right;"><i>Defendants.</i></div>

Transcript of testimony taken before Nicholas W. Bindseil, a Supreme Court Commissioner of New Jersey, at his office, Prudential Building, Newark, New Jersey, on Wednesday, October 1, 1924, at 2 P. M.

20 Appearances:

For relators, Howe & Davis, by Edward L. Davis, Esq.

For respondents, Thomas E. Fitzsimmons.

It is stipulated and agreed by and between the attorneys for the respective parties that the testimony may be taken stenographically by the commissioner and afterwards reduced to type-writing, the signing of the same being waived.

30 LOUIS F. BIRD, sworn for respondents.

Direct examination by Mr. Fitzsimmons.

Q Mr. Bird, where do you live? A I live in South Orange, 129 Prospect Place.

Q How long have you lived in South Orange?
 A Since 1905—, nineteen years.

40 Q Do you hold any official position in the Village of South Orange? A I am a member of the Board of Trustees.

Louis F. Bird, direct.

Q How long have you been a member of the Board of Trustees? A Since 1917.

Q Have you had any personal connection with the fire department of the Village of South Orange? A During my term of office I have been chairman of the fire committee. 10

Q You are still chairman of the fire committee? A Yes.

Q What does that department consist of at the present time; first, as to equipment, and second, as to man power? A As to equipment, we have a small city hook and ladder truck, motor driven; a 750-gallon combination pump and engine, hose wagon, chemical engine, and then a small rig, which is equipped with hose and chemical tank, but which we use mostly for fighting brush fires and small fires, the nature of which is known before the men start out. We don't regard that particularly as a first-class fire-fighting apparatus. It was purchased as a brush fire rig. 20

Q Do you know how many feet of hose the department has, approximately? A My statement will have to be very approximate on that. I should say we had in the neighborhood of about 2,500 feet of serviceable hose. We have some in reserve, the amount of which I cannot give. It is old hose, which is used on some occasions. 30

Q Have you any idea as to the number of ladders the department has, and the approximate height of those ladders? A The hook and ladder truck is equipped with an extension ladder, which I believe is about a fifty-foot ladder. I may be wrong in that. You are getting me into deep water. You will have to confirm that by the Chief. It has the ordinary ladder equipment 40

Louis F. Bird. cross.

—the hook and ladder equipment. How many small ladders we have, I cannot say.

Q How many paid men has the department?

A The department has all told, at this moment, six paid men, including the chief and assistant chief.

10 Q And how many volunteer firemen, known as call men, have you got? A We have, I think, on our roll of call men about twelve or possibly thirteen men, but I should say that two or three of those men, if not due for dismissal, will come along for that very soon, for the reason that they are employed in such a way as to make their service rather unreliable.

20 Q What is your opinion as to the ability of the fire department at the present time, having in mind the number of men in the department and the equipment, to cope with existing conditions where fires break out? A According to our record, we have been able to cope with existing conditions, but as a matter of fact we have no covering apparatus, and if we should have an unusual fire, that is to say, a case where one house might set fire to two or three others, I don't think we would have adequate equipment or the necessary number of men to take care of a situation like that.

30 Q Have you taken any step to remedy that situation and secure additional men for the department? A We have been continually trying, all during my term of office, to increase the personnel of our pay department. When I came in, eight years ago, we had five paid men; that number was increased to six, as soon as we got the available men, which I think was a matter of three or four years ago, possibly. The Board of Trustees has authorized as much of an increase as is necessary to make, but we have up

40

Louis F. Bird. cross.

to the present time been unable to secure men. The present number is six men.

Q In what way have you endeavored to obtain additional men? A By frequently applying to the Civil Service Commission for an eligible list.

Q Have they been able to provide that eligible list up to the present time? A They have not. 10

Q And you are under civil service regulations in South Orange, are you not? A Absolutely.

Q And that requires a member of the fire department to be a resident of the Village of South Orange, isn't that so? A Yes.

Q So that for the past several years you have endeavored to increase the department with regard to man power? A Yes, sir. 20

Q What is your opinion as to the ability of the existing fire department to take care of apartment houses, if they are promiscuously built throughout the territorial limits of the Village of South Orange? A I should say that we could not take care of such a situation.

Q And what do you think the erection of one or more apartment houses in the Village of South Orange would mean to the village with regard to increasing the fire department? A Well, frankly, I should say that one apartment house wouldn't seriously strain our ability beyond the present point; but, of course, one apartment house means two or three, and four and five and six and more, and from my present experience in getting men, we have the willingness, and to some extent we have the finance, but we cannot get the men, and I question very much whether we could in any way meet such a situation. 30 40

Louis F. Bird. cross.

Cross examination by Mr. Davis.

Q The principal failure of your fire department to meet the conditions is due, then, to your inability to get sufficient men, and not to their sufficiency of the apparatus, is that correct? A
 10 No, we have got plenty of apparatus; that is a case of paying for it.

Q You consider that the present apparatus is sufficient for your present needs? A Barely. If I might explain a step further; the situation at the present time is, we have just enough apparatus to meet one fire. We have been extremely fortunate in not having more than one alarm at a time. In my service I have no recollection of two alarms coming at the same time.
 20 If such a situation should come up, frankly, we would have to go outside and call for help. We have no covering apparatus, and if we did, we would have no crew to man the covering apparatus.

Q Is it possible, in case of an emergency, for you to call on the assistance of adjoining municipalities? A That has been the practice in the past, yes, sir; although we have never had to avail ourselves of that during my term of service.

30 Q That is reciprocal? A Yes.

Q Have you had any severe fires in South Orange during your residence there? A Yes. What do you mean by during my residence in South Orange?

Q During your residence in South Orange.
 A We had one quite severe fire on the occasion of the burning of a grain elevator near the railroad, on South Orange avenue, which took place about fifteen or sixteen years ago. That
 40 was before my time and days, when we had a

Louis F. Bird. cross.

very much inadequate fire department than we have at the present time. On that occasion I think we had to call for outside help.

Q Are you able to give me the average number of fires in the village for the past five years?

A I think the chief could supply that data exactly; I would have to depend on my recollection, which wouldn't be altogether accurate.

10

Q If you could go outside of the village for men, you might not have the difficulty in increasing your force? A Probably not, I don't know; we never have been able to do it.

Q Do the rules of the Civil Service Commission permit you to employ emergency men? A Yes.

Q Under what circumstances? A In the absence of an eligible list, if it is necessary to fill up our ranks, we are permitted to get emergency men. Frankly, that is the only situation that has arisen in my experience that emergency men have had to be employed for.

20

Q Have you any emergency men now? A We have one emergency man now.

Q You were explaining that the village authorities desired to increase the department. To such an extent as would be necessary.

Q And what, in your opinion, is necessary to make it adequate? A Put our department on such a basis as would make it possible to cope possibly with that dual alarm situation, if it ever arose.

30

Q And that would mean the putting on of additional men? A That would mean putting on additional men and possibly an apparatus—another piece of apparatus.

Q How many do you consider? A We, I should think, should have three more men, if we get another piece of apparatus.

40

Louis F. Bird. cross.

Q Are the village authorities authorized to go to that expense, if they were able to do so? A I should say they were.

Q They are authorized to purchase an additional apparatus, if they feel it necessary? A I should say so.

10 Q At the present time, then, they consider that they have sufficient apparatus for the number of men they have to use it? A Yes.

Q Do you consider the apparatus that you have sufficient to take care of any fires that might break out in your business section? A I should say so, yes, sir.

20 Q Do you consider your force of men sufficient to take care of any fires that might break out in the business section? A I can fairly say it would be advisable to have more men. I might add that we have no business building over three stories in height; most of them are built of more or less fire-resisting materials, as far as external attack goes.

Q You have one building of four stories; it is only a part of a story? A Possibly we have.

Q Up in the college—that is in the limits of South Orange, Seton Hall College? A Yes.

30 Q There is a four-story building there? A There may be; I am not very familiar with the college buildings.

Q The four apartment houses on South Orange avenue, the existing ones on the block next to the north of Mr. Eaton's property, aren't they four-story apartments? A No, I should say they could be better described as being three stories with rather a high basement.

40 Q That basement is practically all above the ground, isn't it? A To quite an extent; not entirely so. The basement stands up on a high terrace. The basement stands on a high terrace.

Louis F. Bird. cross.

Q Have there been increases in salaries in the fire department the last five years? A I think so. Just when our last increase began, I am just a little hazy on that; I think we made our last increase at least two years ago. The chief has the data for that. He has the budgets for the last few years. 10

Q Are examinations held for candidates? A Yes.

Q How often? A Whenever the Civil Service Commission see fit to hold them.

Q Are they held for other municipalities at the same time? A I believe so.

Q And your efforts to increase the department have been made by applying to the Civil Service Commission for eligible lists? A Yes, sir; that is the only course open. 20

Q And you have not been able to get men from such a list? A No, sir.

Q How about your water supply? Is that sufficient? A I should say it was quite sufficient. To explain that answer a little bit, I might say we are building a storage tank above the reservoir to give us a certain amount of head in the upper levels of the village where the reservoir level would be too low.

Q You mean up on the mountain? A Yes. 30

Q Is it a gravity system? A Yes.

Q Not pressure? A No.

Q Your present system is amply able to take care of anything east of the railway? A East of the railroad, yes.

Q Any existing condition? A Yes.

Q And deficiency in your fire system up there is not due to lack of water, except possibly on the upper levels of the mountain? A It never has been during my experience in connection with the fire department. 40

Louis F. Bird, cross.

Q There has never been any complaint made that the water pressure, whether due to gravity or any other system, is sufficient? A Not that I know of.

Q Do you own your water or do you buy it?

A Yes, we own it.

10 **Louis F. Bird, cross.**

Q Is it an ample supply, or scarce? A As far as that goes, we had a scarce two years or so ago, when it was thought that our wells were going dry, and we took steps, however, to change the condensing system of our pumps, so that there was a greater economy in the use of water, and a number of little savings were instituted, which has gotten us sufficiently past that. We believe we have ample water for some years to come.

20

Q That scare arose during a dry spell? A During the drought two summers ago.

Q During any fires that have occurred during your pendency of office on the board, has there been any complaint made of insufficiency of water? A None that I know anything about.

Q To your knowledge how many apartment houses are there in the village at the present time? A I should say we had four.

30 Q Aren't there five? A Regarding them as groups, you may be right; we have three groups of apartments, one next to the Methodist Church, although that is not strictly an apartment house.

Q On the block east of Mr. Eaton's property there are two apartment houses, each consisting of two buildings joined, isn't that correct? A Yes, that is true.

Q And across the street from those apartment houses is another apartment house consisting of two buildings joined? A In a group.

40 Q And there is another apartment house back? A Mr. Heller's apartment, corner of

Louis F. Bird, cross.

Turrell avenue and Centre street, which is also a group.

Q Two buildings joined? I think there were three; they form a compact group; it is practically one house.

A And those are all that you know of? A 10
That is all that I know of.

Q How larger an area do your fire limits cover? Say along South Orange avenue? A Do you want that in feet or acres?

Q In blocks, if you can give it to me, say in distance from the railroad, both ways. A Starting at Vose avenue and South Orange avenue, we run up South Orange avenue east to a point opposite Academy street, and along Academy street, running south to Second street, and down 20
Second street, going west, to Valley street; thence north on Valley street to approximately the point of beginning. That is about opposite Vose avenue.

Q Mr. Eaton's property is how far away from Academy street A One block.

Q In other words, it is the other end of the block which is bounded by Academy street on the west and Prospect street on the east? A Yes.

Q And Mr. Michael's property, which is at the corner of South Orange avenue and Turrell avenue, is how far away? A A distance of five blocks to the east. 30

Q Neither, then, the Eaton property nor the Michael property are within the fire limits? A No.

Q Have you ever had any requests from fire insurance companies to improve your fire department? A None that I recall within my terms of service. I believe we did have a survey, which 40

Harry A. Becker, direct.

I don't know very much about, sometime before that.

Q Do you know what classification under the insurance department the Village of South Orange is placed? A No, I do not.

10 *Re-direct examination by Mr. Fitzsimmons.*

Q When you have placed emergency men on the payroll of the fire department have you had any discussion with the Civil Service Commission about it? A They require us to notify them of the engagement or appointment of such emergency men, and while I don't recall having any discussion with the Civil Service Commission, I believe there has been some such discussion on the part of the chief, possibly.

20

Q The business section is very close to the fire house, is it not? A Yes, the fire house is not exactly in the middle of it; the fire house is on the edge of the business section.

Q And the majority of the business buildings are from one to one and one-half stories high, isn't that so? A Most of them; yes, sir.

30 HARRY A. BECKER, sworn for respondents.

Direct examination by Mr. Fitzsimmons.

Q Where do you live, Chief? A 152 Tichenor avenue, Village of South Orange.

Q How long have you lived in South Orange? A All my life, which is now fifty-one years.

Q You are connected with the fire department of the Village of South Orange? A I am.

40 Q In what capacity? A Chief engineer.

Harry A. Becker, direct.

Q How long have you been chief engineer?

A Paid man under the Civil Service since 1918.

Q Prior to that time did you have any connection with the fire department? A Yes; I joined the fire department way back in 1893 and served in a volunteer capacity as a private, for three years, and then became chief engineer and held that position for about seventeen years, as chief engineer, volunteer man.

10

Q So that for a period of about thirty years you have been connected with the fire department of South Orange? A Yes.

Q How many paid men have you got in that department at the present time, outside of yourself? A Five; let me take that back, I will say four, for I have a man who just submitted his resignation, to take effect today. Four and myself.

20

Q After today four men and yourself? A Yes.

Q How much apparatus have you got in the department? A I have three pieces of motor apparatus; one city service hook and ladder truck, and one triple combination motor driven car, and one-ton Ford truck—smaller equipment and Ford truck for handling smaller fires such as still alarms.

30

Q How much hose has the department got?

A In good condition, about 2,800 feet at the present time.

Q And how many ladders? A We have on our truck approximately about 220 feet—more closely 228 feet of ladder on our city service truck, made up in nine separate ladders.

Q How high are those separate ladders? A The shortest is ten feet and the longest extension is fifty-five.

40

Harry A. Becker, direct.

Q Have you made any efforts to have the Board of Trustees of the Village of South Orange secure additional men and equipment for your department? A Yes.

10 Q During the past few years? A Yes, at times some of it has been supplied, and others we are waiting for an opportunity on some of the other; in fact we have been looking for some help right along and asking for an eligible list from the Civil Service Commission, who seem to be unable to furnish it, and I know of a case where they have eligibles and at the time of appointment, they declined to accept.

Q The department is run under the Civil Service regulations, is it not? A Yes.

20 Q And the only way you can obtain men is through an eligible list submitted by the Civil Service Commission, is that right? A Yes, that is the idea.

Q In your opinion have you sufficient men and apparatus to cope with existing conditions in the Village of South Orange in regard to fires? A At the present time?

Q Yes. A No, I think not; in my opinion, we have not.

30 Q How many more men and how much more apparatus do you think would be necessary to bring the department up to a standard that would take care of existing conditions, at the present time? A By the addition of three extra permanently employed men, and either the addition of one more combination piece of apparatus or increasing the capacity of the smaller piece of apparatus that I referred to as the Ford car.

40 Q How many call men have you in the department at the present time, whom you can count on to assist you in fighting fires? A If I

Harry A. Becker, direct.

remember right, I have about ten on the list now, and I can not say that—safely, that I have more than six, out of those ten, appear at an alarm; that is, call men.

Q Those men respond when they hear an alarm of fire? A When a general alarm is sent out, either fire bell or whistle. 10

Q And they may be at a point far distant from the fire when they hear that alarm? A They may not be able to hear it; they may be on the outskirts of the village.

Q In your opinion, if two fires started in South Orange at the same time, with your present equipment, both as to man power and apparatus, are you in a position to take care of those fires; have you covering apparatus and covering men to take care of that situation? A If I got a call for a fire from any section of the village and went out and answered that call, I would answer it with what apparatus I have now, with the exception of this small piece of apparatus that I use for emergency calls, still alarms. Upon arrival, if I found it was a working job—a working fire, I would use what men and apparatus I had on that one. If a second one come in, one or the other would have to suffer; I wouldn't be able to handle them both, with the equipment I have at the present time. 20 30

Q In your opinion would you be able to take care of the situation, if apartment houses—additional apartment houses of the type already constructed in the Village of South Orange were erected? A I certainly could not guarantee it, with the present equipment.

Q Do you think the erection of additional apartment houses in the Village of South Orange would greatly increase the fire hazard to the 40

Harry A. Becker, direct.

community? A I do, to the extent that it will require more fire protection in the way of more apparatus and man power to operate the same.

Q And at the present time, you are not in a position to take care of any such situation as that? A Not safely carry any more of a load
10 than I have at the present time.

Q In your opinion, would the erection of a four-story building 52 feet high, housing from 15 to 20 families, under existing conditions, be a menace to the safety of the inhabitants of the Village of South Orange? A It would be to the extent that I wouldn't have men enough to cover the different sections or parts of that particular building, to ascertain where the fire was
20 spreading to, in order to lay my plans to check it.

Q What arrangement is made for the paid men to go to their lunch? A They are allowed three hours daily, an hour for each meal.

Q How many men go at the same time? A At the present time two men go off one hour; two on the second hour, so that I have two men with myself, making three, to cover it during the meal hours.

Q So that if a fire broke out while two men were at lunch, at the present time, you wouldn't
30 have sufficient men to operate all of the apparatus, would you? A No. I would not.

Q Have you had any difficulty in the past in obtaining men to fill in, in case of emergency? A I have; I have been quite unable to get dependable men to fill in an emergency; that is, men that are qualified to cover a position, whether to drive or take any part of their duties as they are called upon to do.

Q If a fire broke out in one of the existing
40 apartment houses in South Orange, upon arrival

Harry A. Becker, direct.

at the fire what would be your method of procedure with the men that you have? A I would want to cover different floors and sides of the building, to have a man that could report to me if the fire was spreading to any distant point that was beyond my observation, on account of taking a stand myself, to follow it up, I wouldn't have enough to go round. 10

Q Even at the present time, you haven't sufficient men to cover the existing apartment houses in case of fire and to fight that fire as it should be fought? A I have not.

Q I show you a report, dated January 19, 1910, addressed to the chairman of the fire committee, signed by you, and ask you if that is a copy of the report sent in by you on that date? 20

A Yes, sir.

Mr. Fitzsimmons: I offer that in evidence.

(Marked Exhibit D. 1.)

January 19, 1920.

To the Fire Committee
Board of Trustees,
South Orange, New Jersey.
Mr. Louis F. Bird, Chairman.

Dear Sirs:— 30

I hereby submit for the consideration of your Honorable Body the annual report of the Chief Engineer of the Fire Department for the year ending December 31st, 1919.

The present working force and equipment of the Fire Department consists of Five (5) permanently employed Firemen and Seventeen (17) Callmen, one horse drawn hose wagon, one motor driven Hook and Ladder truck, one exercise wagon, two 40

Harry A. Becker, direct.

10 horses, 2700 feet of 2½" Fire Hose, 250 feet ¾" Chemical hose, 300 feet of 1" Fire Hose, Five (5) Nozzles, Eight (8) 2½ Gal-
 20 lon Fire extinguishers all in good condition. The department answered Fifty Five (55) alarms during the year of which Forty One (41) were still alarms and Fourteen (14) regular alarms received as follows: Four (4) box alarms and Fifty One (51) tele-
 30 phone calls. The fire loss as near as could be ascertained amounted to \$415.00 covered by insurance. A banner year for this de-
 40 partment I believe this is to be the lowest fire loss ever reported for one year in the history of this department. It also gives me great pleasure to report that John Loughran, a paid Fireman and Joseph Masi, Mathew Reynolds, Richard Farrell and David Penn, Callmen of this department, as reported last year absent and doing war services are back home and ready to answer fire alarms when called. Attendance of callmen during the year on an average was good. One Hundred One (101) permits for burning brush and other refuse were issued by this department during the year.

30 Recommendations that I had in mind to improve on the apparatus had been taken up by your committee and is now under co-
 40 sideration and I believe the result of their investigation and adoption of their recommendations will prove very satisfactory to all. I would very strongly recommend the appointment of One (1) additional permanently employed Fireman to relieve the shortage of help experienced principally during meal hours and on days off. To get

Harry A. Becker, direct.

on the job quick is the main point of advantage, the apparatus alone is not sufficient, we must have enough men to operate such apparatus that we have at our command in order to gain quick control of a fire. I would also recommend that the allowance of \$37.50 per year to callmen be increased to \$50.00 per year.

10

In conclusion I wish to thank your honorable Body on behalf of the members of the Fire Department and myself for the generous support you have given us in the past and hope we shall continue to merit the same. I also wish to thank those representing the different branches of the Village Government for the valuable assistance and the unvarying courtesy extended to me in the discharge of my duties.

20

Very respectfully submitted,

(Signed) HARRY J. BECKER,
Chief Engineer

The Village of South Orange
Fire Department."

Q. I show you a copy of a report, dated January 5, 1921, addressed to the chairman of the fire committee of the Village of South Orange, signed by you as chief engineer, and ask you if that is a copy of a report which you sent in? A Yes, sir.

30

Mr. Fitzsimmons: I offer that in evidence.
(Marked Exhibit D. 2.)

40

Harry A. Becker, direct.

“South Orange, N. J.,
January 5th, 1921.

10 To the Fire Committee,
The Board of Trustees
The Village of South Orange.
Mr. Louis F. Bird, Chairman.

Dear Sir:—

I hereby submit for the consideration of your honorable body the annual report of the Chief Engineer of the Fire Department for the year ending December 31, 1920.

20 The present working force and equipment of the Fire Department consists of Five (5) permanently employed Firemen and Fifteen (15) Callmen, One (1) horse drawn Hose wagon, One (1) motor driven Hook and Ladder Truck, One (1) ton Ford Truck combination Hose, Chemical used for answering still alarms and as an emergency car. One (1) exercise wagon, Two (2) horses, 2250 feet of 2½” Fire Hose, 450 ¾” Chemical hose, 600 feet 1” hose, Five (5) nozzles, Ten (10) 2½ gallons Fire Extinguishers all in good conditions. The Department answered
30 Sixty (60) alarms during the year of which Forty Seven (47) still alarms and Thirteen (13) were regular alarms, received as follows Seven (7) street box alarms and Fifty-Three (53) alarms received over the telephone. The Fire loss as near as could be ascertained amounted to \$11,290 loss on this amount where no insurance was carried \$1000.00. One Hundred Eighteen (118) permits for burning brush and other refuse were issued by this department during the
40 year 1920.

Harry A. Becker, direct.

Recommendations that I wish to offer and trust they will receive the approval of your committee, I would very strongly recommend the appointment of One (1) additional permanently employed firemen which would overcome the shortage of men that now exists on days off and at meal hours. The shortage has also been noticed at a fire in getting the apparatus and equipment in operation that we have at our command and before the arrival of the callmen.

10

In conclusion I wish to thank your honorable body on behalf of the members of the Fire Department and myself for the generous support you have given to us in the past and hope we shall continue to merit the same. I also wish to thank those representing the different branches of the Village Government for the valuable assistance and the unvarying courtesy extended to me in the discharge of my duties.

20

Very respectfully submitted,

(Signed) HARRY J. BECKER,

Chief Engineer.

Village of South Orange,
Fire Department "

30

Q I show you a copy of a report, dated, January 5, 1922, addressed to the chairman of the fire committee, signed by you, and ask you if that is a copy of the report sent in by you at that time? A Yes, sir.

Mr. Fitzsimmons: I offer it in evidence.
(Marked Exhibit D. 3.)

40

Harry A. Becker, direct.

"January 5th, 1922.

To the Fire Committee of the
Board of Trustees
The Village of South Orange.

Mr. Louis F. Bird, Chairman.

10

Gentlemen:—

I hereby submit for the consideration of your honorable body the annual report of the Chief Engineer of the Fire Department for the year ending December 31st, 1921.

20

The present working forces and equipment of the Fire Department consists of Five (5) permanently employed Firemen and Sixteen (16) callmen, One (1) horse-drawn hose wagon, One (1) motor driven Hook and Ladder truck, One (1) one-ton Ford Truck combination Hose and Chemical used for answering still alarms and as an emergency car. One (1) exercise wagon, Two (2) horses, 2100 feet 2½" Fire Hose, 450 feet ¾" Chemical Hose, 800 feet of 1" Hose, Five (5) standard 2½" Fire hose nozzles, Ten (10) 2½ gallon Fire extinguishers all in good condition except 2½" Fire Hose of 2100 feet in service about 300 feet is in poor condition.

30

The department answered 91 alarms during the year of which 87 were still alarms and Ten (10) were regular alarms received as follows: One (1) from street box and 90 were over the telephone. The Fire loss as near as could be ascertained amounted to \$3,160. Loss on this amount where no insurance was carried was \$1500. Seventy Nine (79) permits for burning brush and

40

Harry A. Becker, direct.

other refuse were issued by this department during the year 1921.

Recommendations that I wish to offer and trust they will receive the approval of your Committee, respecting my recommendations made in my last report January 1921, I again very strongly recommend the apointment of One (1) additional permanently employed firemen to overcome the shortage of a sufficient number of men to convey and operate the apparatus and equipment we have at our command at a fire and which is likely to result in a serious handicap at any time to render and expect good results from our service it is absolutely necessary that we respond promptly to a fire call with sufficient man power to prevent the spread of the fire before the arrival of the Callmen. I also wish to recommend that the necessary repairs be made to the floor in apparatus room location where Hook and Ladder truck stands which has sagged considerably and shows signs of weakness and to avoid any possible damage resulting from floor giving way under apparatus I would further recommend that a new whistle be provided for sounding Fire alarms and located at Pumping Station, the present whistle known Diaphone type appears to be worn out and has given very poor service during the past two years. I wish also to call the attention to the condition regarding water pressure on mountain side of Village along and above Wyoming Avenue. At the request of the Fire Committee I made a test of drawing water on Wyoming Avenue from a hydrant located in front of the Hoskier property on Wyoming Avenue, laid single line of 300

10

20

30

40

Harry A. Becker, direct.

10 feet of 2½" Hose to a point in line with the rear of the Hoskier house and found that there was not enough force to stream to reach second story of building a condition that would be a serious handicap to this department which might result in the total destruction of the building due to a shortage of water and pressure. As a beginner to combat with and avoid an experience as above mentioned I very strongly recommend the purchase of a first class triple combination motor driven car (pumper-hose and chemical) and which I have every reason to believe will provide the necessary water pressure in this and any other part of the Village when required.

20 In conclusion I wish to thank your honorable Body on behalf of the members of the Fire Department and myself for the generous support you have given us in the past and hope we shall continue to merit the same I also wish to thank those representing the different branches of the Village Government for the valuable assistance and the unvarying courtesy extended to me in the discharging of my duties.

30 Very respectfully submitted,
(Signed) HARRY J. BECKER,
Chief Engineer Fire Department."

Q I show you a copy of a report, dated January 9, 1924, addressed to the Chairman of the Fire Committee, signed by you, and ask you if that is a copy of the report sent in by you on that date? A Yes.

40 Mr. Fitzsimmons: I offer it in evidence.
(Marked Exhibit D. 4.)

Harry A. Becker, direct.

“South Orange, N. J.,
January 9th, 1924.

To the Fire Committee of the
Board of Trustees of the
Village of South Orange,
Mr. Louis F. Bird, Chairman.

10

Dear Mr. Bird:—

I hereby submit for the consideration of your Honorable Body the annual report of the Chief Engineer of the Fire Department for the year 1923.

The presented working force and equipment of the Fire department consists of:

Seven (7) permantely employed firemen.

Fifteen (15) Callmen

One (1) horse drawn hose wagon

20

One (1) motor driven Hook & Ladder truck

One (1) one-ton Ford truck combination Hose and Chemical used for answering still alarms, and as an emergency car.

One (1) exercise wagon.

Two(2) horses,

Twenty-nine hundred (2900) feet of 2½” standard fire hose,

Four hundred fifty (450) feet of ¾” Chemical hose,

30

Seven hundred fifty (750) feet 1” fire hose,

Six (6) standard 2½” nozzles,

Ten (10) 2½ gallon soda and acid type fire extinguishers, all in good condition with the exception of three 2½” nozzles of an old type, about 15 years old. These should be re-placed with new ones of Standard type.

The department answered one hundred and five (105) alarms of fire for the year

40

Harry A. Becker, direct.

1923 of which eighty-five (85) were still alarms and twenty (20) were regular alarms received as follows:

One (1) from street box,

One (1) by messenger.

10 One hundred three (103) by telephone calls.

The fire loss for the year ending December 1923 as near as could be ascertained amounted to \$15,070.00 covered by insurance.

Seventy one (71) permits for burning brush and other refuse were issued by this department during the year 1923.

Recommendations.

20 Chief Engineer would like to make following recommendations.

1. That one (1) additional permanently employed fireman be added to our list and in view of the fact that we are about to install more motor driven apparatus, I would suggest that you consider the advisability of appointing a man, if possible who is a qualified automobile mechanic to examine and report the service condition of all motor apparatus used in the department and to make such minor repairs as time and shop equipment would allow.

30

2. The purchase of 500 feet of 2½" Fire Hose, two (2) 2½" nozzles.

Three hundred (300) feet of 1" hose to be used in connection with the new apparatus.

In conclusion I wish to thank your honorable Body on behalf of the members of the Fire department and myself for the generous support you have given us in the past and hope we shall continue to merit the same.

40

Harry A. Becker, cross.

I also wish to thank those representing the different branches of the Village Government for the valuable assistance and in the invaring courtesy extended to me in the discharge of my duties.

Very respectfully submitted,

10

(Signed) HARRY J. BECKER,
Chief Engineer,
Fire Department."

Q In all those requests you have requested the board of trustees, through the fire committee, to increase the number of men in the department, is that right? A Yes.

Q What salary have you received as chief of the fire department? A \$3,000 per year. 20

Q What salary do the other paid men in the department receive? A The permanently employed men, they begin with \$1,700 the first year, \$1,800 the second, \$1,900 the third, and \$2,000 the fourth and thereafter.

Q When was the last increase? A I cannot recall the date off hand.

Q Approximately; was it within the last year or the year before, or when? A I think about eighteen months ago. 30

Q And that increase was granted by the vote of the people at a referendum, was it not, and not by the board of trustees? A By the board of trustees.

Cross examination by Mr. Davis—Italic

Q How many times during the last five years has the pay been increased? A I think twice.

Q Twice during the last five years? A Yes.

Q Is there any trouble with your water supply, chief? A No. 40

Harry A. Becker, cross.

Q The pressure and the amount of water and everything is perfectly sufficient? A It has been right along; there are some improvements being made at the present time.

10 Q There has never been any trouble at a fire on account of lack of water? A I haven't experienced any.

Q Or insufficient pressure? A No.

Q The reports that you have turned in, show the number of fires and the approximate loss and the details during the years that are covered? A Yes.

20 Q Do you know whether or not any of the fire insurance companies made any request to improve the department? A Not in the last six years, to my knowledge.

Q Previous to that time they had? A I am not sure about it, but I think I recall that there was something done around 1914, and there was a report came in from the underwriters suggesting some improvements.

Q Since then there has been none? A None to my recollection.

30 Q Do you know what classification the Village of South Orange is placed in? A I do not.

Q Do you know the property that Mr. Eaton wants to build his apartment house on? A Corner South Orange and Prospect street?

Q Yes. A I do.

Q How far away from your fire house is that property? A Inside of a thousand feet.

Q Two blocks away, about? A Not over a block and a half.

40 Q How many fire stations have you in South Orange? You only have the one fire house? A One fire house and I have got four telegraph

Harry A. Becker, cross.

alarm boxes in operation; the rest are just imaginary stations, giving the location by a blast on the whistle or ringing of the bell; those are imaginary stations, but our telegraph system covers but four street boxes.

Q Do you know how often examinations are held for candidates for firemen? A Yes, sir. Nothing more than whenever the Civil Service calls for them. We might say, to an extent, we have been asking right along for an eligible list, and some times the answer comes that no one appeared. I recall in the spring where an examination was called for, two men took the examination, both passed and were certified to, and when we asked them if they were ready to appear, they declined to accept the appointments.

10

Q Then the failure to increase the size of your force is due to your failure to get a large enough eligible list? A Yes.

20

Q If you had an eligible list that you could pick men from, would you get the consent of the village authorities to increase the size of your force, do you think? A I cannot answer that, whether the village would take the same view of it that I would.

Q Whether they would or not, the eligible list hasn't given you any material to draw from? A We haven't been furnished with an eligible list, certifying to an eligible list that we could make appointments from.

30

Q The extra men, the emergency men, do you insist on their living in the village, too? A The law calls for that, the village ordinance and Civil Service ordinance.

Q So you cannot get any emergency men who live outside of the village. A They would not be recognized by the Civil Service Commission on the pay-roll.

40

Matthew P. A. McDermit, direct.

Q I mean extra emergency men? A When I ask to put on emergency men, I have to see that he has been a resident of the village for two years.

10 Q The men who go to lunch, in case of a fire alarm being sent out, aren't they supposed to return to duty immediately? A Exactly; answer that alarm, if they hear it.

Q Do they all live within the sound of the alarm? A Yes.

Q Have you up to date been hampered in the fighting of any fire by your insufficient apparatus or lack of men? A I felt the want of some, you mean?

20 Q Yes, has it caused any real situation of danger? A No, sir; I haven't had a fire that extended to that extent yet, where I wasn't able to handle it; nothing has got beyond my control, if that is what you mean.

MATTHEW P. A. McDERMIT, sworn for respondents.

30 *Direct examination* by Mr. Fitzsimmons.

Q Where do you live, chief? A 141 South Eighth street, Newark.

Q How long have you lived in Newark? A All my life.

Q And you are connected with the fire department of the City of Newark? A Yes.

40 Q In what capacity? A In the capacity of deputy chief, acting as chief engineer, at the present time.

Patrick A. McGuire, direct.

Q You have taken the examination for chief engineer of the department? A I have; yes, sir.

Q How long have you been deputy chief? A For twelve years.

Q How long have you been connected with the fire department of the City of Newark? A Drawing money forty-one years. 10

Q Have you made a survey of conditions existing in South Orange with regard to fire-fighting apparatus and man power and general conditions? A I have.

Q In your opinion, do you think that the department in the Village of South Orange, both as to apparatus and to man power, is sufficient to take care of existing conditions at the present time. A Well, it is about able to take care of it at the present time. 20

Q Do you know how many men are in the department? A I do; five permanent men—that includes the chief, and ten men on call.

Q And how about the apparatus? A South Orange has three pieces of apparatus; one is a small city truck; one is known as a 750-gallon triple combination apparatus; I mean she carries her own hose, has her own pump to draw water from the hydrants or cisterns, and has a chemical attachment of a 60-gallon tank. 30

Q In your opinion, if two fires were to break out in South Orange at one time, would the department as it exists now be able to handle the situation? A They would not.

Q In your opinion, if a fire broke out in one of the existing apartment houses and got a fairly good headway, would the department be able to take care of it? A It wouldn't be no more than able to take care of it at the present time. 40

Matthew P. A. McDermit, direct.

Q In your opinion, if apartment houses were built at several points in the Village of South Orange, would the department as it now is constituted, be able to cope with the situation? A No, sir; it would not, because of the hazard that is produced by all apartment houses. The hazard is greater with apartment houses than it is with a normal one or two or three-family houses.

Q In what respect? A The amount of lives, in the first place, that is confined in the house, and that is the biggest item that there could be. The apartment house is usually built of semi-fireproof material, under the care of a janitor or janitress; they become careless and the tenants become careless, and thereby create a hazard greater than any hazard that could be created in a one, two or three-family house.

Q In your opinion, would you say that the building of further apartment houses in South Orange will increase the hazard which already exists to such an extent that it will be dangerous to the safety of the community? A Exactly so; yes, sir.

Q Would you say that the department at the present time, in order to bring it up to a finished standard whereby it could take care of existing conditions properly, should have a reserve company? A I would, yes. They should have reserve men, men on reserve.

Q And also reserve equipment? A Yes.

Q What is the salary of the chief engineer of the City of Newark? A The chief engineer of Newark, \$5,400 a year.

Q What is the salary of the paid men, the ordinary paid men; I don't mean the sergeant and lieutenants. A The private?

Matthew P. A. McDermit, direct.

Q The private. A It runs from \$1,800 to \$2,000 a year.

Q One thousand eight hundred is for the first year? A Yes.

Q And what is the next increase? A \$100 a year, \$1,900 for the second, and third year, until it gets to \$2,000 a year. 10

Cross examination by Mr. Davis.

Q If the fire department was increased as to apparatus and force as the village developed, it would be easily be able to keep pace with new buildings, wouldn't it? A As it was developed, yes.

Q As the municipality increases, it is always necessary to increase the apparatus and the size of the force from time to time, isn't it? A Not necessarily; it depends upon conditions. 20

Q How long have you been conected with the fire department of the City of Newark? A Altogether for fifty years, but drawing pay from the citizens of Newark for forty years.

Q And during that period how has the force of the City of Newark increase as to men; about what per cent? A Pretty near four hundred per cent.

Q That is to say, in actual service at the present time, there are only four times as many men now as there were forty years ago? A Yes. 30

Q And in apparatus? A Apparatus, we went over four about four times the amount; we had ten engines and two trucks at that time, and now we have thirty-three engines and ten trucks.

Q Do you happen to know what the development of Newark has been as to population 40

Matthew P. A. McDermit, cross.

during that period? A I think when I joined the Newark Fire Department, we had something like 125,000 people in Newark; that is a guess.

Q What is it now? A It is supposed to be 455,000.

10 Q Assuming that only one fire were to break out in the business section of South Orange, is the apparatus and the force sufficient to take care of it, under normal circumstances? A At the present time; yes, sir.

Q And it is even able to take care of the apartment houses now existing there? A If there was only one at a time.

Q But if there should be two fires at a time, the department would be hampered just as much with existing conditions, without any change? A That is, regarding your apartment houses yes, sir.

Q How about one-family houses. A That would be altogether different. He could lighten his load; he could use one apparatus, and send one back home to take care of it.

Q How about two fires in the business section? A Then I guess if he had two good fires in the business section, he would want the help of Newark and Orange and East Orange.

30 Q He would have to call for help from the other municipalities? A Yes.

Q Do you think the erection of one additional apartment house would alter the existing conditions? A Yes, sir; I do; any more apartment houses erected in South Orange would alter the condition—the hazard, rather, so that the department would be unable to cope with it.

Q But why? A The reason is that a fire occurs when you least expect it; the building of an apartment house means at least three companies; in case of fire occurring in that par-

40

Matthew P. A. McDermit, cross.

ticular building, no less than three companies could take care of it.

Q Then that danger already exists, whether one other apartment house was to go up or not?

A It is already there, but I wouldn't like to see the Township of South Orange create a greater risk than what is already existing. I think that it would be, and I say that frankly—that it would be wrong on the part of the controlling powers of South Orange to allow any more apartment houses in there under the present conditions. 10

Q Unless they increase their force and their apparatus? A After that then they could think about apartment houses, but not before.

Q In what respect would the situation be altered by the addition of one more apartment house? A The hazard of at least ten families—I will say ten-family apartment; that ten-family means twenty people; there is twenty lives stuck right in that house, in that building; and a fire breaking out in any one of those apartments would create a panic and cause the loss of life, and that is something we want to prevent. We are here today in a prevention era. Anybody can put out fires; the Township of South Orange can put out fires; but we want to prevent the cause of those fires; we want to prevent the hazard. The Township of South Orange, at this time, under the present conditions, should do everything in their power to keep out any more apartment houses. 20 30

Q You know that there are apartment houses in South Orange at the present time? A Yes, I have seen them.

Q And the fire department is just about ample to take care of a fire breaking out in any one of those apartments now? A Yes. 40

Matthew P. A. McDermit, cross.

Q What would be the difference between taking care of a fire in a new apartment house and taking care of a fire in one of the existing apartment houses? A That is a question, as you give it to me; I think I answered it a moment ago, that you are creating another hazard, and the department of South Orange is not able to cope with another hazard.

10 Q It is the same sort of a hazard as already exists? A There is a hazard already there.

Q You think because it is an additional hazard, it creates a situation of greater danger? A Exactly so; that is what I said a moment ago.

Q Do you know from your observation of fires in the City of Newark, whether a fire is more apt to occur in apartments than in another sort of a dwelling house? A Yes, we have more apartment house fires in the city than we have private.

20 Q Taking the fires in the rooms occupied by families, and not as to the buildings concerned are there more fires in families occupying apartment houses than in other families? A Yes, there is.

Q Do you know what proportion that bears? A I might say that about five to one.

30 Q Have you any official figures on that? A Not at the present time, but I could readily get them.

Q Isn't that because Newark is largely made up of apartment houses? A Yes, sir.

Q And tenement houses? A Yes. We term all buildings of the character where they house more than three families or over six, apartment houses; we have them four stories high, with double apartments, that is to say, four apartments on a floor, an apartment in the rear and front.

40

Patrick A. McGuire, direct.

Re-direct examination by Mr. Fitzsimmons.

Q When you say that as South Orange develops it would have to increase the department, that would depend entirely upon the type of development, would it not? A Yes, my answer was in line with the fire feature that the counsel was talking about, about apartment houses. I said if they were to develop that type of buildings in South Orange, the fire department would have to be increased considerably. 10

Q And if the Village of South Orange developed along the lines that ninety-seven per cent. of the community exists at the present time, namely, one and two-family houses, principally one-family dwellings, in your opinion, would the department that is there now be able, with the addition of one or two men, to take care of that development? A It would, yes. 20

PATRICK MCGUIRE, sworn for respondents.
Direct examination by Mr. Fitzsimmons.

Q Where do you live? A 109 South Orange avenue, South Orange.

Q How long have you lived in South Orange? A Forty-eight years. 30

Q And you are connected with the Village of South Orange in any official capacity? A I am.

What? A Marshal of police.

Q How long have you held that position? A About a year.

Q How long have you been connected with the police department in any other capacity? A About eighteen years. 40

Patrick A. McGuire, direct.

10 Q You are familiar with the corner of Prospect street and South Orange avenue, where Mr. Eaton has applied for a permit to erect a two-story building, the first floor to contain fourteen stores fronting on South Orange avenue and Prospect street, and also one apartment for use of a janitor, and the second floor to contain nine apartments. A On the corner of Prospect street and South Orange avenue you mean?

Q Yes, you are familiar with that property?
A I am.

20 Q What is the condition of the corner of Prospect street and South Orange avenue with regard to safety of the inhabitants in the Village of South Orange? A I don't know what you mean.

Q What are the conditions there; what condition exists? A The street is narrow there and there is a trolley passing the street all day long, South Orange and Newark trolley, and there is no obstruction there that will interfere with traffic at all, only a fence; at least, there was a fence the last time I noticed it.

Q South Orange avenue is a main highway
A Yes, it is a main highway.

30 Q Prospect street is a main artery of traffic?
A Yes.

Q And is considerable traffic on both of those street? A Yes.

Q Automobile and otherwise? A Yes.

40 Q In your opinion, would the erection of a row of fourteen stores on South Orange avenue and Prospect street, and built on the property line not twenty-five feet back from each street, be dangerous to the safety of the inhabitants of the Village of South Orange and inhabitants of other communities who use South Orange ave-

Patrick A. McGuire, cross.

nue and Prospect street? A I think it would be dangerous.

Q In what respect? A Because it would obstruct the view of people coming up South Orange avenue, to see any motorist or any vehicle coming up Prospect street on South Orange avenue. 10

Q And the same condition would exist on Prospect street, people coming up Prospect street to South Orange avenue? A Yes.

Q Are you familiar with the property at the corner of South Orange avenue and Turrell avenue? A I am.

Q Would the erection of an apartment house, in your opinion, on that corner, three stories high, and about forty feet high, affect the safety of the inhabitants of the Village of South Orange and other communities using Center street, South Orange avenue and Turrell avenue? A I think the same applies there as it does on Prospect street. 20

Q For the same reason? A For the same reason.

Cross examination by Mr. Davis.

Q The safety of people walking on the sidewalk wouldn't be affected by that building? A I don't think so, no. 30

Q It would be the safety of people driving in automobiles on either side of those streets, that might be endangered? A Automobiles or any other vehicles.

Q And that danger would be due to the fact that on one of the streets, one of the automobilists might be driving rapidly? A Not that, no; their view would be obstructed. 40

Patrick A. McGuire, cross

Q You know that the automobile law requires vehicles approaching a cross street to drive at the rate of one mile in seven minutes?

A I do, yes.

10 Q And do you think that any vehicle approaching that crossing at that rate would be any danger? A I wouldn't say.

Q South Orange avenue, at Prospect street, is how wide? A About thirty-five or forty feet, I should judge. The width of the avenue, you mean?

Q The width of the avenue from curb to curb? A That is only approximate; I don't know the exact width.

20 Q The trolley track is laid down on each side of the avenue, isn't that correct? A Yes.

Q So that the main part of the roadway is in the center, between the two tracks? A Yes.

Q And automobiles and the average vehicle use that portion of the roadway that lies between the trolley tracks? A They usually do.

Q How much distance do you think there is from the inner rail of each track to the curb of the same side of the street? A About nine feet.

30 Q And what do you think is the distance from the curb of South Orange avenue to the street line inside the sidewalk? A About nine or ten feet.

Q So that there is a distance of from eighteen to twenty feet from the portion of the roadway used in general by automobiles and the line to which buildings might be built, if there were no zoning ordinance? A The automobile men use any part of the area; they are not compelled to use the center of the road.

40 Q As a general rule, they don't? A I don't know as a rule; they are not compelled to; they

Patrick A. McGuire, cross.

are not supposed to go off the center of the road at all, only turning in and out.

Q How wide is Prospect street where it comes out on South Orange avenue? A About thirty feet.

Q Isn't South Orange avenue quite a little bit wider than Prospect street, at that corner? 10

A Not much.

Q There are no trolleys on Prospect street? A No.

Q And what is the width of the portion that is covered by the sidewalk and out to the curb on Prospect street? A You mean from the curb to the—

Q From the curb to what would be the street line, the building line? A I think about eight or nine feet, the same as South Orange avenue. 20

Q And a similar situation exists at the corner of Turrell avenue and South Orange avenue?

A I don't think so; I think the curb line is closer to the building line on South Orange avenue and Turrell avenue.

Q You don't think the situation would be quite as dangerous? A Turrell avenue and South Orange avenue and Centre street come together almost; Turrell avenue runs into Centre street and then into South Orange avenue at the same point. 30

Q Do you consider Turrell avenue—the situation at Turrell avenue a more dangerous one or less dangerous than at Prospect street? A I would say less.

Q But the distances from the building line to the trolley track would be about the same? A Inner side of the sidewalk?

Q Yes. A I cannot say that; Turrell avenue and Centre street, it kind of turns around in a kind of a loop at the corner; I think the trolley 40

Patrick A. McGuire, cross.

tracks are closer to the curb there than they are on Prospect street.

Q But the trolley line runs along South Orange avenue at that place in about the same manner as it does up at Prospect street? A Just about the same.

10 Q On both sides of the road, rather than in the middle of the road? A Yes.

Q Across the street from the property at the corner of Turrell avenue and South Orange avenue there are apartment houses, aren't there, at the corner of Centre street? A There are two apartment houses, I believe.

Q And those apartment houses are built practically up to the street line? A They are.

20 Q Do you know whether there has been any particular increase in accidents at that particular location on account of that building having been erected there? A I don't know; we only had two accidents there, to my knowledge, as long as I can remember.

Q Covering how much of a period? A Ten or fifteen years.

Q There have been two accidents at that corner? A Yes.

30 Q Automobile accidents? A I think they were, yes.

Q Serious ones? A Not serious, no; nobody seriously hurt.

Q On the block east of the property owned by Mr. Eaton there are two large apartment houses, aren't there, or what might be two groups of apartment houses? A I guess there are apartment houses; they look like two apartments.

Q Those apartment houses are set up on a terrace? A They are.

40 Q The terrace is about how high? A Eight or nine feet.

Patrick A. McGuire, Redirect.

Q And isn't that terrace just as much of an obstruction to the view from the street corner on which one of those apartment houses is located as the erection of a building would have?

A I don't think so—yes, it is; you cannot see into Cottage street.

10

Q And that is not on account of the nearness of the building to the street as it is the height of the embankment that hides your view? A The embankment will block the view of people coming along the left of Cottage street.

Mr. Fitzsimmons: The traffic conditions on Cottage street do not compare in any way to the traffic conditions on Prospect street and Centre street, do they?

20

The Witness: No.

Q Down in the business section of the town nearly all the buildings and stores are built right up to the building line at the corner, aren't they?

A They are.

Q Is there any particular difficulty, or have there been any increases in the number of accidents at those streets, by reason of building up to the street line? A I don't know whether they would be the cause of the accidents or not, but there have been accidents at those streets; anything that blocks the view is dangerous.

30

Q Does not the danger really come from the carelessness of the drivers, rather than the blocking of the view? A I wouldn't say that, no.

Re-direct examination by Mr. Fitzsimmons.

Q In the business section, such as the corner of Scotland Road and South Orange avenue, . 40

Ira T. Redfern, direct.

Valley street and South Orange avenue, Ridgewood Road and South Orange avenue, there is practically a clear view of the side streets? A
A clear view of the side streets.

10 Q And those streets are fairly wide? A
Scotland street and South Orange avenue, yes.

20 Continuation of testimony in the foregoing cause, before Nicholas W. Bindseil, Supreme Court Commissioner, at his office, Prudential Building, Newark, New Jersey, on Thursday, October 2nd, 1924, in the presence of Mr. Edward L. Davis, for Relators, and Mr. Thomas E. Fitzsimmons, for Respondents.

IRA T. REDFERN, sworn for relators.

Direct examination by Mr. Davis.

Q What is your business? A Civil engineering and surveying.

Q Have you any official connection with the Village of South Orange? A Yes, a whole lot.

30 Q In what capacity? A Why, I am the engineer of the village, building inspector, member of the Board of Tax Assessors, secretary of the Board of Assessments.

Q And how long have you been building inspector of the village? A Since November, 1918.

40 Q In your capacity as building inspector have you made an annual report of the affairs of your department? A Yes, but not complete. Those are the reports which I submit. It is a report that is made part of the official proceedings of the Board.

Ira T. Redfern, direct.

Mr. Davis: Can I say now I offer those reports in evidence,—the last five annual reports?

Mr. Fitzsimmons: Yes.

Q Do these reports show the number of buildings erected in South Orange for the period covered by them? A No. 10

Q They don't show the number of buildings? A The number of permits issued; they may or may not have been erected.

Q Are you able to tell me how many buildings have been erected in South Orange during the past five years? A No.

Q Have you any record of it? A No, I have a record of the number of permits issued. I can tell you how many permits have been issued. 20

Q Can you tell me now? A No, that shows in the reports.

Mr. Fitzsimmons: I want that stated, that the reports which you have introduced in evidence will merely show the number of permits granted, but do not show the number of buildings erected.

That is correct, isn't it, Mr. Redfern? 30

The Witness: That is correct.

Q Do you know whether all of those permits were used? A Unquestionably they have been.

Q There were, you think, very few permits issued that were not followed out? A Comparatively few.

Q Do you know what proportion of the number of buildings erected were business buildings? A I don't know. 40

Ira T. Redfern, direct.

Q Can you give me, approximately, the proportion of the buildings erected during the past five years that have been business buildings? A I cannot give it to you correctly, but I would guess it at less than one per cent.

10 Q Can you give me approximately your opinion as to the valuation of buildings in the Village of South Orange that were business buildings erected during that period? A This covers a period of five years?

Q Yes. A I should say approximately \$400,000.

Q For business buildings? A Yes.

Q And what percentage does that bear to the total value, in your opinion? A Less than ten per cent.

20 Q At Prospect street, how wide is South Orange avenue? A 80 feet.

Q Is that from street line to street line? A Property line to property line.

Q And how wide is it from curb to curb? A 50 feet.

Q The distance, then, from curb to property line is 15 feet on each side? A Yes.

Q On South Orange avenue, there are two trolley tracks? A Yes.

30 Q These tracks are not built in the center of the street, are they? A No.

Q They are toward the curb on each side? A Yes.

Q Between the two trolley tracks what is the distance of the roadway? A I don't know, but it is somewhere around 18 to 20 feet.

Q And the character of that roadway is what? A It is a Telford construction, ten-inch Telford construction, with about three inches of Amosite on the top.

40

Ira T. Redfern, direct.

Q Approximately what distance is there from the curb to the trolley track nearest to the curb? A Ten or eleven feet.

Q Just about room enough to park a car? A Ample room to park a car.

Q Do you know of your own personal knowl- 10
edge whether the portion covered by the tracks is used very much for vehicular traffic? A It is not used except when you have to. Vehicles don't use it, unless they are forced into it.

Q The main body of automobile traffic uses the road between the trolley tracks? A Yes.

Q The road is not one smooth even surface from curb to curb, is it? A No.

Q From the portion of the trolley tracks 20
nearest to the road, to the curb, the roadway is rather poor? A Yes.

Q What is the width of Prospect street at that point? A 50 feet at South Orange avenue.

Q And what proportion of that is taken up by the sidewalks? A 10 feet on each side.

Q From curb to property line? A Yes.

Q Leaving a 30-foot roadway? A Yes, sir.

Q And the relative position of the trolley 30
tracks and the curbs and sidewalks are the same as you have stated above? A Yes.

Q What is the width of Turrell avenue? A 60 feet.

Q With how much taken up by sidewalks? A 12 feet.

Q On each side? Yes.

Q What is the width of Centre street? A 50 feet, excepting at the flared intersection, where it comes into South Orange avenue. 40

Ira T. Redfern, direct.

Q As Centre street approaches South Orange avenue, it widens out? A Yes.

Q Is there a delta at the intersection of South Orange avenue and Centre street? A Yes, a little park?

10 Q A little triangular park? A Yes.

Q Is your building code, in so far as it applies to apartment houses, more stringent than other building codes? A It is more stringent than some and less stringent than others. In my opinion, the existing building code, in so far as it affects apartment house construction, would not be considered as stringent.

Q Do you know of any other municipalities in which the building code affecting apartment houses is more stringent than in South Orange?

20 A Not that I know of, but it is my opinion that both East Orange and Newark are more stringent.

Q You are not able to state that definitely to be a fact? A No.

Q Is it more stringent than the requirements of the State Tenement House Board? A Yes.

Q Very much more stringent, isn't it? A I would say considerably more.

Q Is any set-back required in the business district? A Not for the first story.

30 Q So that if a building is only one story high, the entire area of the property may be used? A Yes.

Q And even if it is more than one story high, the first story may still cover the entire area of the lot? A Yes.

Q And in the business section are there actually a number of corners in which the entire

Not any.

area of the property is used for buildings? A

40 Q None in which the entire area of the property is used? A No.

Ira T. Redfern, direct.

Q How about the corner of Valley street and South Orange avenue; aren't there buildings on each of those corners? A Yes.

Q Aren't they built right up to the property line? A In the front only.

Q Not to the side? A On the street line only; not at the side or rear; neither of those corners cover the lot area by quite a bit. 10

Q How much of the side line on the west side of Valley street is unoccupied by buildings? A Let me have that question.

Q The property at the southwest corner of Valley street and South Orange avenue is built up, as I understand you to say, to the edge of the property line, so far as South Orange avenue frontage is concerned; is that correct? A It is all built up to the South Orange avenue line. 20

Q It is not built up to the property line of Valley street? A No.

Q What distance back is it set? A It varies from 3 to 15 feet.

Q And on the corner east of that property it is built up to the extreme front on South Orange avenue? A No.

Q How far back does it set? A At the corner about 6 feet and at the easterly end of the building about 10 feet. 30

Q And it is how far back from Valley street? A It is on the street line at the corner of Valley street, and at the southerly end of the building it is about 5 feet off the line.

Q The property at the west corner of Vose avenue and South Orange avenue, is that built up to the property line on South Orange avenue? A It is four feet from the line of South Orange avenue, but on the line of Vose avenue. 40

Ira T. Redfern, direct.

Q In other words, they could have used four feet more of the South Orange avenue frontage, if they had wanted to? A Yes.

Q And the opposite corner of Vose avenue?
A The same thing applies.

10 Q Back four feet? A Four feet from the line of South Orange avenue, and on the line of Vose avenue.

Q The average set-back, then, for a business building on South Orange avenue is actually about 4 feet, is it? A Yes, except that they are not all.

Q Some of them come out to the line? A Some of them come out to the line.

20 Q There is a movie house about opposite Academy street, on South Orange Avenue, isn't there? A Yes.

Q Does that come right out to the property line? A Yes.

Q That is on no corner? A No, interior lot.

Q That is how far west of the Eaton property? A About 300 feet.

Q About what is the distance from the Eaton property to the Newark line on South Orange avenue? A A little less than a mile.

30 Q And about what was the distance from the Michael property, at the corner of South Orange avenue and Turrell avenue to the Newark line, along South Orange avenue? A A little less than 1,000 feet.

Q South Orange avenue is a main thoroughfare that continues down to Newark? A Yes.

Q And continues through a part of Newark?
A To Springfield avenue.

40 Q The trolley lines running along South Orange avenue go down to Newark as far as Market and Broad street? A Yes, and then some.

Ira T. Redfern, cross.

Q And beyond? A And beyond.

Q And westerly, South Orange avenue continues over the mountain? A Yes.

Q And passes out of South Orange into what is known as Maplewood? A Yes.

Q Commencing about with the movie house that we mentioned a little while ago, the business section of South Orange begins? A Yes 10

Q And moves westerly for five or six blocks? A Yes.

Q The fire house is near the corner of South Orange avenue and Scotland Road? A Part of the building located on the corner.

Q The Lackawanna Railroad crosses South Orange avenue about a little over three blocks to the west of the Eaton property? A Yes. 20

Q And the South Orange station is located at about that point? A At that point.

Q Do you know what the set-back is of the apartment house on the block next east of the Eaton property? A No, I don't

Cross examination by Mr. Fitzsimmons.

Q These buildings referred to by you in your testimony as being near the various corners mentioned, have been erected for a number of years, have they not, with the exception of Scotland Road and South Orange avenue? A All but one, yes. 30

Certificate of Commissioner.

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

10 I Hereby Certify that the foregoing testimony
 was taken before me as Supreme Court Com-
 missioner, at my office, Prudential Building, New-
 ark, New Jersey, at the times therein specified, in
 the presence of Mr. Edward L. Davis, of Howe
 & Davis, for relators, and Mr. Thomas E. Fitz-
 simmons for respondents; that it was stipulated
 and agreed by and between the attorneys for the
 respective parties, that the testimony should be
 taken stenographically and afterwards reduced
 to typewriting, the signatures of the witnesses to
 their said testimony being waived; and I fur-
 20 ther certify that the foregoing is a true and cor-
 rect transcript of the short-hand notes of the
 testimony given by the witnesses before me.

NICHOLAS W. BINDSEIL,
 Supreme Court Commissioner,
 of New Jersey.

30

40

New Jersey Supreme Court

No. 218, May Term, 1925

FRANK B. EATON AND LILLIAN
EATON, *Relators,*

vs.

VILLAGE OF SOUTH ORANGE AND
IRA T. REDFERN, BUILDING
INSPECTOR OF THE VILLAGE OF
SOUTH ORANGE, *Defendants.*

*Opinion of Supreme
Court*

10

Submitted June 9, 1925;

Decided October 1, 1925.

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

Before Justices Trenchard, Katzenbach
and Lloyd. 20

For the relators, Howe & Davis (Edward
L. Davis of Counsel).

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

PER CURIAM:

The relators, Frank B. Eaton and Lillian Eaton, his wife, are the owners of a tract of land at the corner of South Orange Avenue and Prospect Street, in the Village of South Orange. The frontage on South Orange Avenue is about 125 feet and on Prospect Street about 193 feet, but the corner of the street is not a right angle, but an acute angle of about 65 degrees, so that the southerly side line of the lot is only 60 feet and the westerly side line 147 feet. 30

The relators desire to erect upon this lot a two-story building having fourteen stores and one apartment for the use of a janitor on the 40

Opinion of Supreme Court

first floor and nine apartments on the second floor, at a cost of approximately \$75,000.

10 On March 28, 1925, application was made for a permit for the erection of such building, which application was accompanied by plans and specifications and a tender was made of the legal fee. The plans and specifications complied with the Building Code of South Orange and have been approved by the Tenement House Commission of New Jersey.

20 The permit was refused by the Building Inspector on the ground that while the zoning ordinance in force in South Orange permitted the erection of an apartment house on this property, it did not permit the erection of stores, and it also required that the front line of the building would have to be set back twenty-five feet from the property line on South Orange Avenue and fifteen feet from the property line on Prospect Street. Prospect Street at this point is 50 feet wide, and South Orange Avenue is 80 feet wide.

30 The legal question presented is whether the restriction of the use of the property by the regulators imposed upon them by the terms of the ordinance, without making compensation to them, is valid.

40 So far as the right to forbid the erection of retail stores is concerned, the question is settled by the case of *Ignaciunas vs. Risley*, 98 N. J. L. 712; *affd.* 2 N. J. Adv. Rep. 853. With respect to the contention that the restriction is justified by the fact (assuming it to be a fact for present purposes) "that the present fire department is inadequate to take care of apartment houses of the type proposed," a sufficient answer is found in

Opinion of Supreme Court

the decision of this court in *Ingersoll vs. South Orange*, 3 N. J. Mis. Rep. 335.

The remaining question is whether or not the provision for a set-back from the street or property line is a valid exercise of the police power. That provision is:

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

10

We think that there is nothing in the circumstances of the present case as presented from which we would be justified in finding any valid exercise of the police power in the exactment of the provisions of the ordinance in question.

20

Such we think to be the result of a consideration of the principles laid down in the case of *Passaic vs. Paterson Bill Posting Co.*, 72 N. J. L. 285, which held that a city ordinance requiring that sign or bill boards shall be constructed not less than ten feet from the street line is a regulation not reasonably necessary for the public safety, and cannot be justified as an exercise of the police power.

30

The fact that there is “considerable traffic,”—“automobile and otherwise,”—at the intersection of the streets on which the property in question fronts does not justify the restriction in question.

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

40

New Jersey Supreme Court

	FRANK B. EATON AND LILLIAN EATON, <i>Relators,</i> <p style="text-align: center;"><i>vs.</i></p> VILLAGE OF SOUTH ORANGE AND IRA T. REDFERN, BUILDING INSPECTOR OF THE VILLAGE OF SOUTH ORANGE <i>Respondents.</i>	<i>On Alternative Writ of Mandamus Order Moulding the Pleadings and Directing Judgment to be Entered Thereon.</i>
10		

The above named relators having presented their petition and secured an order to show cause why a peremptory writ of mandamus should not issue as prayed for in said petition and the matter having been argued before, considered and decided by this Court in favor of the relator, and having concluded and ordered the issuance of a peremptory writ; and the respondents desiring to appeal from said judgment.

It is now ORDERED by the Court that the pleadings in said cause be moulded by filing an alternative writ of mandamus, a return thereto in which papers the issues decided by this Court shall be plainly expressed, and a demurrer to said return upon which demurrer judgment be and it is hereby ordered sustaining the demurrer, and directing the issuance of the peremptory writ of mandamus against the Village of South Orange and Ira T. Redfern, Building Inspector, forthwith do issue to the said Frank B. Eaton and Lillian Eaton a building permit authorizing the erection and construction of the building described in said petition upon the payment of the license fee required by law.

Dated: October 26th, 1925. By the Court.

Entered October 27, 1925. Samuel Kalisch,

J. S. C.

Order Moulding

On motion of Riker & Riker,
Attorneys for Respondents.

A true copy. Edward J. Kelleher, Clerk.

10

20

30

40

Alternative Writ

NEW JERSEY SUPREME COURT

New Jersey, ss.

The State of New Jersey to the Village
of South Orange and Ira T. Redfern,
Inspector of Buildings of the Village
10 (L. S.) of South Orange and State of New
Jersey: GREETING: Whereas,
Frank B. Eaton and Lillian Eaton
have applied to the Inspector of
Buildings of the Village of South Orange for a
permit to erect a two-story building, the first
floor to contain fourteen stores, fronting on
South Orange Avenue and Prospect Street, and
also one apartment for use by a janitor; and
20 the second floor to contain nine apartments to be
rented to tenants for dwelling purposes, to be
constructed upon the premises of said Frank B.
Eaton and Lillian Eaton at the Southwest corner
of South Orange Avenue and Prospect Street,
South Orange, New Jersey, the said plot of land
having a frontage on South Orange Avenue of
approximately one hundred thirty feet and a
frontage on Prospect Street of approximately
two hundred feet and whereas the said Building
Inspector of the Village of South Orange refused
30 to issue said permit upon the sole ground that
under an ordinance adopted by the Village of
South Orange approved March 20th, 1922, and
entitled "An ordinance to regulate and restrict
the location hereafter of trades and industries
and the subsequent location of buildings designed
for a specified use and in a designated area and
to regulate and limit the height and bulk of build-
ings hereafter erected and to regulate and deter-
mine the area of yards, courts and other open
spaces and for that purpose to divide the Village
40 of South Orange into districts," and the various

Alternative Writ

ordinances amendatory and supplementary thereto, said building could not be erected because the said ordinance forbids its erection in what is called residence A district, the said property being located in residence A district; and whereas it is charged and insisted before us that said ordinance insofar as it purports to prevent the said Frank B. Eaton and Lillian Eaton from erecting and constructing the said building as contemplated, is illegal in that the reservation of the district in which the relators said property is located, to the use prescribed by said ordinance is beyond the power of the Village of South Orange under the provisions of the statute and that the Village of South Orange under the statute has no power to prevent the erection of said building in said district, and that the restriction is not designed to promote the public health, safety and general welfare; and whereas it has also been represented to us that the effect of enforcing the provisions of said ordinance to prevent the said Frank B. Eaton and Lillian Eaton from the erection and building which they seek to erect would be to deprive the said Frank B. Eaton and Lillian Eaton of the right to possess and protect property in violation of the first clause of the Article 1 of the Constitution of the State of New Jersey, and would be a taking of the private property of the said Frank B. Eaton and Lillian Eaton for public use without just compensation, in violation of the 16th paragraph of article 1 of the Constitution of New Jersey and would be in effect a taking of private property for private purposes in violation of the right secured to the said Frank B. Eaton and Lillian Eaton by the Constitution of the State of New Jersey and would likewise be a violation of the rights secured to the said Frank B. Eaton and

10

20

30

40

Alternative Writ

10 Lillian Eaton by the 14th Amendment to the Constitution of the United States in that it would be a deprivation of Frank B. Eaton and Lillian Eaton of their property without due process of law and would be a denial to them of the equal protection of the law; all as by the complaint of the said Frank B. Eaton and Lillian Eaton we have understood;

20 We, therefore, willing that due and speedy justice should be done in this behalf command and strictly enjoin you, that immediately after the receipt of this writ you do issue to the said Frank B. Eaton and Lillian Eaton, a permit to erect the building aforesaid or cause to us to the contrary thereof signify, lest in your default complaint should come to us repeated; and how you shall execute this our command certify to our Justices of our Supreme Court of Judicature, at Trenton, upon the 4th day of May, 1926, together with this our writ, and this in no wise omit at your peril.

WITNESS, the Honorable William S. Gum-
mere, Chief Justice of the Supreme Court at
Trenton, the 16th day of March, 1926.

30 EDWARD J. KELLEHER,
Clerk.

HOWE & DAVIS,
Attorneys for Relator.
Approved as to form.

RIKER & RIKER,
Attorneys for Defendants.
A true copy. Edward J. Kelleher, Clerk.

NEW JERSEY SUPREME COURT

FRANK B. EATON AND LILLIAN EATON,	<i>Relators,</i>
--------------------------------------	------------------

vs.

VILLAGE OF SOUTH ORANGE, <i>et</i> <i>al.</i> ,	<i>Defendants.</i>
--	--------------------

*On Mandamus
Return to Alternative
Writ of Mandamus*

10

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF NEW JERSEY:

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

20

30

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

40

Return to Alternate Write

Village of South Orange has a superadded power in its charter to prevent the erection of the type of building proposed.

Therefore, we humbly pray that said writ may be dismissed and that we be relieved from obey-
10 ing the command therein given.

VILLAGE OF SOUTH ORANGE,

By George H. Becker, President.

Ira T. Redfern, Building Inspector.

20

30

40

NEW JERSEY SUPREME COURT

FRANK B. EATON AND LILLIAN
EATON, *Relators,*

vs.

VILLAGE OF SOUTH ORANGE, *et*
al., Defendants-Respondents.

*On Alternative Writ of
Mandamus*

REJOINDER

10

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

RIKER & RIKER,
Attorneys for Respondents.

20

30

40

NEW JERSEY SUPREME COURT

FRANK B. EATON AND LILLIAN
EATON, *Relators-Appellees,*

vs.

VILLAGE OF SOUTH ORANGE AND
IRA T. REDFERN, BUILDING
INSPECTOR OF THE VILLAGE OF
SOUTH ORANGE,
Defendants-Appellants.

*On Mandamus
Notice and Grounds of
Appeal*

10

TO MESSRS. HOWE & DAVIS,
Attorneys for Appellees.

TAKE NOTICE that the appellants, Village
of South Orange and Ira T. Redfern, Building
Inspector of the Village of South Orange, appeal
from the order of the Supreme Court of the State
of New Jersey entered on the twentieth day of
October, 1925, granting to the relators-appellees
a peremptory writ of mandamus to the New
Jersey Court of Errors and Appeals upon the
following grounds:

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

Dated: February 19, 1926.

30

RIKER & RIKER,
Attorneys for Defendants-Appellants.

40

NEW JERSEY SUPREME COURT

FRANK B. EATON and LILLIAN
EATON,

Relators.

Demurrer to Return

vs.

VILLAGE OF SOUTH ORANGE, *et al.*,

Defendants.

10

Frank B. Eaton, the relator, demurs to the return of the defendants upon the following grounds:

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

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

20

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

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

30

HOWE & DAVIS,
Attorneys for Relator.

40

1. The first part of the book
 is devoted to a general
 introduction of the subject
 and a description of the
 various methods of
 investigation.



New Jersey Court of Errors and Appeals

FRANK B. EATON and LILLIAN
EATON,

Relators,

vs.

VILLAGE OF SOUTH ORANGE, *et*
al.,

Defendants.

BRIEF FOR RELATORS.

FACTS.

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

The relators, Frank B. Eaton and Lillian Eaton, his wife, are the owners of a tract of land at the northwest corner of South Orange avenue and Prospect street, in the Village of South Orange. The frontage on South Orange avenue is about 125 feet and on Prospect street about 193 feet, but the corner of the street is not a right but an acute angle of about 65 degrees, so that the southerly side line of the lot is only 60 feet and the westerly side line 147 feet.

The relators desire to erect upon this lot a two-story building having fourteen stores and one apartment for the use of a janitor on the first floor and nine apartments on the second floor, at a cost of approximately \$75,000.

On March 28th, 1925, application was made for a permit for the erection of said building, which application was accompanied by plans and

specifications and a tender was made of the legal fee. Said plans and specifications complied with the Building Code of South Orange and have been approved by the Tenement House Commission of New Jersey.

The Building Inspector refused the permit because the South Orange Zoning Ordinance did not permit the erection of stores and also required a set-back of twenty-five feet from the property line of South Orange avenue and fifteen feet from Prospect street. The property is situate in Residence "C" District. The pertinent section of the ordinance is as follows:

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

trolley tracks, the remainder of the road not being level or in good shape for such traffic.

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

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

LAW.

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

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

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

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

“In Residence ‘A’ and Residence ‘C’ Districts, no part of a building shall be higher above the curb level than the distance it sets back from the

street line of the street on which it faces and the front yard set-back distance to the main front wall shall not be less than 25 feet, except that on a corner lot the set-back distance from one street line may be reduced to not less than 15 feet."

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

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

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

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

exercise of the police power. In part, the opinion of the Court written by Swayze, *J.*, says:

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

The Supreme Court held that because the erection of such signs might be attended with danger to the public at times of severe storms, or by the decay of their supports, the ordinance was not without legal authority.

In our opinion the legality of the ordinance does not depend upon the possibility of danger thus suggested, but upon whether such a regulation is reasonably necessary for the public safety. There must always be a possibility of danger from the erection of any structure and from its decay, but such a possibility is not sufficient to justify the municipal authorities in depriving a man of the ordinary use of his land. In all our cities and towns fences and buildings are erected upon the street line, involving the same or even greater possibility of danger from severe storms or natural decay, but it would hardly be maintained that a municipality could be authorized by the legislature to compel the owners of buildings already erected to take them down or move them back ten feet from the street line. Yet the danger to the public from bricks or slates,

ice and snow, falling from a building is much greater than any possible danger from a billboard. *In determining whether a regulation is reasonably necessary to secure the public safety, and therefore within the legitimate exercise of the police power, existing habits and customs are of great weight, and the universal custom of building upon the street line is cogent evidence that the public safety does not require that structures like billboards should be set back from the line.* The very fact that this ordinance is directed against signs and billboards only, and not against fences, indicates that some consideration other than the public safety led to its passage. It is obvious from the face of the ordinance that the object of the first section was not to secure the public safety; that section contains no reference to a dangerous condition of billboards, while the second section expressly undertakes to deal with those that become dangerous.

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

That case quoted with approval the case of *St. Louis v. Hill* (Mo.), 21 L. R. A., page 226, which held that there is a taking of property within the meaning of the Constitution when the owner of a lot fronting on a boulevard is, by authority of a statute or ordinance, prohibited from

building upon a certain portion of it between a building line thereby established and the street. That case said:

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

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

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

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

“One of the essential elements of property is the right to its unrestricted use and enjoyment; and, as we have seen, that use cannot be interfered with beyond what is necessary to provide for the welfare and general security of the public. Enforcing the provisions of the ordinances in question does not deprive the petitioner of title to his lots. He would not be ousted of possession. He would still have the power to dispose of them; but, although there would be no actual or physical invasion of his possession, he would be deprived of the right to put them to a legitimate use, which does not injure the public, and this without compensation, and with due process of law, which our Federal and State Constitutions not only inhibit, but which would be repugnant to justice, independent of constitutional provisions on the subject. *St. Louis v. Hill*, 116 Mo. 527, 21 L. R. A. 226, 22 S. W. 861; *Bill Posting Signs Co. v. Atlantic City*, 71 N. J. L. 72, 58 Atl. 342; *Com. v. Boston Advertising Co.*, *supra*; *Denver v. Rogers*, 46 Colo. 479, 25 L. R. A. (N. S.) 247, 104 Pac. 1042. For these reasons, the provisions of the ordinances involved are also invalid.”

Presbyterian Church v. Edgcomb, 27 A. L. R. 437, holds that “Chapter 213, Laws of 1915, as amended by Chapter 185, Laws 1919, empowers cities of the metropolitan class to impose regulations by ordinance, ‘designed to secure the safety from fire and other dangers, and to pro-

mote the public health and welfare, including, so far as conditions may permit, provisions for adequate light, air and convenience of access.' Held, that, under the act in question, it is not permissible for such cities to impose unreasonable regulations upon the owners of property with respect to the area of such real estate that they may cover by a proposed building."

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

"I do not at all question the desirability of suitable building lines. Nor do I question the power of the state constitutionally to establish them under the eminent domain doctrine. The repeated argument in the opinion as to the desirability of building lines may be all admitted. It by no means follows that the establishment of such a line is not a taking of property. The question in the case is not at all the desirability of such a line, but its effect, when established upon property rights. Upon this point the United States Supreme Court said, in *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 50 L. Ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175: 'The validity of a police regulation, whether established directly by the state or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose. Private property cannot be taken * * * for public use under a police regulation relating strictly to the public health, the public morals or the public safety, any more than under a police regulation having no relation

to such matters, but only to the general welfare. * * * The constitutional requirement of due process of law, which embraces compensation for private property taken for public use, applies in every case of the exertion of governmental power. If in the execution of any power, no matter what it is, the government, Federal or state, finds it necessary to take private property for public use, it must obey the constitutional injunction to make or secure just compensation to the owner.'

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

By the opinion in this case, if the owner sustains such damage as matter of fact, he is yet compelled to contribute that as a private owner, and not as a member of the public at large. He is not even allowed to raise the question of damage. But this is a taking of property without compensation. Calling what in fact is an exercise of the right of eminent domain an exercise of the police power does not avoid the constitutional question. Building lines are ancillary to highways, and in effect extend the width of highways for the purpose, not indeed of liberal travel, but of light, air, and freedom of view. A somewhat similar case is that of *Re Clinton Ave.*, 57 App. Div. 166, 68 N. Y. Supp. 196; the court says: 'Conceding that the legislature has the power to increase the width of Clinton avenue that it would be justified in taking possession of private property for this purpose upon the payment of just compensation, we are of opinion that it has a right to take a lesser estate in the property than would be necessary for a complete dedication to the use of the public, and that the use is none the less public to the extent to which the property is taken be-

cause it is left in the partial control of the present owners. The right that is proposed to be taken is not the right to walk or ride over these particular additions to the width of the avenue, but to afford "ample space for the access of light and air, and also to beautify and adorn." Re Curran, 38 App. Div. 82, 55 N. Y. Supp. 1018, 'A street may,' to quote the same case, 'in part unite the two purposes—one to furnish a way for travel, and the other as a park or public place.' It may hardly be questioned that the legislature may authorize the taking of any part of this right which it may deem advantageous to the public, on the payment of just compensation. 10 Am. & Eng. Enc. Law, 2d ed. 1088, and authorities there cited. This is in harmony with the opinion of the court in *Re Bushwick Ave.*, 48 Barb. 9, which is very similar to the case at bar, where the court below held (p. 12) that 'the taking of 20 feet on each side of the avenue, and the appropriation of the same as courtyards only, is such a taking as will justify an appraisal of damages therefor. A dominion is asserted over this land by the public, to the extent of depriving the owner of his right to use and enjoy the same for any other purpose than a courtyard. It is so far taking for public use, and is subject for compensation.' "

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

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

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

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

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

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

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

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

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

The Central Law Journal of February 25, 1916 (Vol. 82, p. 142), reports the case of *Lavery v. Board of Commissioners of Jersey City* in the Supreme Court of New Jersey, holding an ordinance unconstitutional as transcending the limits of the police power which provided that, for the purpose of protecting property in residential streets, etc., no building of any kind shall be constructed, built, erected or moved upon any land in Jersey City so as to be in front of the whole or any part of any private dwelling house situated upon such land, or in any way that will cut off the frontage of the same, unless a permit is obtained from the Superintendent of Buildings. (This case was reported in the advance sheets of Vol. 96 Atl., page 292, but was not reported in the bound volume, and has not been reported in the New Jersey official reports.

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

“The right to acquire property, to own it, to deal with it, and to use it, as the owner chooses, so long as the use harms nobody, is a natural right. This does not owe its origin to constitutions. It existed before them. *Spann v. Dallas*, 111 Tex. 350, 235 S. W. 513, 19 A. L. R. 1387. It is, however, a right guaranteed by our Constitution. It is a right necessary to the existence of organized society. The protection of this natural right is one of the reasons which prompted men to form governments. The protection of private property is the aim of every well-considered form of government. The right of private property has been called the keystone of the arch of civilization. A government which fails to protect the right of private property cannot endure. Men will not undergo the labor and hardships necessary to the acquisition of property if they find that the ownership and the enjoyment thereof is not to be protected. With the right of ownership and possession goes the right to use, enjoy and dispose of the property owned. The substantial value of property lies in its use. If the right of use be denied, the value of the property is lessened or destroyed. A law which forbids a certain use of property deprives it of an essential attribute. The result in effect is a prescription of its ownership. *Spann v. Dallas*, *supra*. The defendants, however, say that the right of private property is subject to the police power of the state and must yield to such measures as are designated to promote the public health, safety and general welfare of a community. This, as a general proposition, is true. But the police power is based upon public necessity, and only public necessity can justify its use. The abridgment of the rights of the individual is the usual re-

sult of its exercise. It should never be exercised unless it is clear that the subject to be attained is so essential to the public health, safety and welfare as to fully justify its exercise. The use of the police power has grown in recent years, and courts have sustained laws and ordinances as valid which formerly would have been declared invalid and invasions of private rights. Its use affords an easy route to the attainment of ends otherwise impossible. Each case must be considered separately and tested by these general principles. In the present case the question to be determined is whether or not the provisions of the ordinance which prevent the relator from using his property for a store are necessary for the health and safety of the public, of Nutley, for, unless the use of said property for store purposes reasonably endangers or threatens the public safety, health, or welfare, the abridgment of its contemplated use is an invasion of the inherent and constitutional rights of the relator. A provision of an ordinance which assumed to be a police regulation, but which in reality is designed to deprive one of the use of his property under the pretense that it is enacted to promote the public welfare, safety and health, will be set aside as an invasion of the right of private property."

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

The ordinance in question provides: "In Residence 'A' and Residence 'C' Districts, no part of a building shall be higher above the curb level than the distance it sets back from the street line of the street on which it faces and

the front yard set-back distance to the main front wall shall not be less than 25 feet, except that on a corner lot the set-back distance from one street line may be reduced to not less than 15 feet."

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

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

It will be at once noticed that this differs considerably from the usual building line case. What is generally meant by a building line is a fixed determined distance back of the property line beyond which no building may be erected. But such a building line is not the kind involved in this case. Here we are dealing not with a definite line, but an indefinite, varying line, which may be set back from the street anywhere from 25 to 55 feet. The relator's building is to be 18 feet in height. He must therefore build back 25 feet from the street line. His neighbor may wish to erect only a 20 feet high bungalow. He need go back, then, only 25 feet. The man next to him may wish to build a building 55 feet in height, which is the limit of height permitted. He must recede 55 feet. The next may be back 35 feet, and so on. There is no regularity about the line at all. It is hard to see what principle of public interest is involved in such a jagged,

staggering line. It does not even seem to be consistent with the principles which are at the basis of the zoning laws, for it offends from an aesthetic point of view.

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

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

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

at 12 miles an hour, there is ever the slightest real danger of collision. The conclusion is inevitable, then, *that danger exists only when the motorists are disobeying the law.*

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

It becomes quite apparent that this argument as to danger to traffic is an argument contrived by the ingenuity to support an ordinance, which, without it, is plainly invalid. It is not a reason inducing the passage of the ordinance, but the excuses offered to sustain it after its passage. It is insincere and factitious. It has not been shown that a situation of traffic danger is so serious in South Orange and in particular at this corner as to demand the passage of an ordinance correcting the condition as to buildings. We have not been shown that on street corners where buildings have been erected up to or near the property line (and it is admitted that there are such corners in South Orange and that in the business section of the town permission to build up to the property line is given) numerous accidents have resulted. It does not appear that in the business section of the Village, which is closely built up, the situation has become so grave as to demand corrective action by the municipal authorities.

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

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

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

HOWE & DAVIS,
Attorneys for Relator.

EDWARD L. DAVIS,
Of Counsel.

73

New Jersey Court of Errors & Appeals

FRANK B. EATON AND LILLIAN
EATON, *Relators,*

vs.

THE VILLAGE OF SOUTH OR-
ANGE, *et al., Defendants.*

*On Mandamus
Brief for Defendants.*

FACTS

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

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

—LAW—

POINT 1.

A MUNICIPAL ORDINANCE PROVIDING A BUILDING LINE FOR APARTMENT HOUSES DESIGNED TO PROTECT THE PUBLIC IS A REASONABLE EXERCISE OF THE POLICE POWER AND NOT UNCONSTITUTIONAL.

In the brief submitted by counsel for the relators it is asserted in his first point that the establishment of a building line without compensation to the owner is invalid regardless of surrounding circumstances and this point is argued at great length, and an exhaustive argument is made based upon the early Constitutional Law both of this country and the early Common Law of England.

In view of the recent decisions of the highest court of this state it seems hardly necessary to spend much time on the first point presented by counsel for the relators. It is a well established principle of law that any municipality under a proper exercise of its police power can make regulations which in effect means a confiscation of private property without compensation, provided that such regulation is reasonably necessary to protect the safety, health and general welfare of the municipality. This proposition is laid down by an opinion of this court decided June 19, 1922 in the case of

SCHAIT v. SENIOR, 97 Law 390. In that case at page 391, Mr. Justice Trenchard, writing the opinion of the court, said:

“The realtor contends that the Home Rule Acts of 1917 (Pamph. L., page 319), as supplemented by Chapter 240 of laws of 1920 (Pamph. L., page 455), pursuant to which the ordinance was avowedly enacted, is unconstitutional as depriving the relator of his property without compensation. To this it is sufficient for present purposes to say that the act authorizing a town in the exercise of its police power to enact a Zoning Ordinance to promote the public health, safety and general welfare, and in that respect and to that extent is constitutional. CLIFFSIDE PARK REALTY CO. v. CLIFFSIDE PARK, 96 N. J. L. 278.”

In that case the relator requested the Town of Montclair to issue a permit for the erection of a garage to accommodate more than five motor vehicles. The application was refused on the ground that the particular section in question was zoned by ordinance prohibiting the erection of a garage or a group of garages for more than five motor vehicles on any lot situated within a radius of two hundred feet of or within any portion of a street between two intersecting streets in which portion there

existed a public library or a church and this court held that such regulation was a reasonable regulation touching public health, safety and general welfare of the Town of Montclair and was within the scope of the police power of the town and that such provision was valid.

In the instant case a somewhat similar question is involved. The property upon which the relator proposes to erect an apartment house consisting of four stories and being about fifty feet in height is located at one of the busiest and most dangerous cross corners in the Village of South Orange. South Orange Avenue is a county road upon which heavy traffic at all times of the day and night passes. Prospect Street is likewise a main artery of traffic running from South Orange Avenue, South Orange, to Springfield Avenue in the Township of Maplewood. Across the street from the property in question is located the Methodist Episcopal Church and within one block to the west is located the First Presbyterian Church. When services are being held in these churches there is a large gathering of people in the vicinity of the property in question. To allow an apartment house of the type proposed to be erected within ten feet of the street line of South Orange Avenue and within five feet of the street line of Prospect Street would increase the hazard which already exists at the intersection of the two streets mentioned above.

The uncontradicted testimony which appears in the agreed state of the case was furnished by Patrick J. McGuire, Chief of Police of the Village of South Orange, who says at page 42 of the testimony, which was taken before a special master, in answer to a question as to what are the conditions that exist at the corner of South Orange Avenue and Prospect Street "that the street is narrow there and there is a trolley passing the street all day long, South Orange and Newark trolley, and there is no obstruction there that will interfere with traffic at all only a fence, at least there was a fence the last time I noticed it."

Q South Orange Avenue is a main highway? A Yes.

Q Prospect Street is a main artery of traffic? A Yes.

Q And there is considerable traffic on both of these streets? A Yes.

Q Automobile and otherwise? A Yes.

Q In your opinion would the erection of a four story apartment house fifty-two feet high set back ten or fifteen from the street line on South Orange Avenue and five feet from the street line of Prospect Street be dangerous to the safety of the inhabitants of the Village of South Orange and the inhabitants of other communities who use South Orange Avenue and Prospect Street. A I think it would be dangerous.

Q In what respect? A Because it would obstruct the view of people coming up South Orange Avenue to see any motorists or any other vehicle coming up Prospect Street on South Orange Avenue.

Q And the same condition would exist on Prospect Street, people coming up Prospect Street to South Orange Avenue? A Yes.

As stated this testimony has not been rebutted by the relators and it is our contention that the burden of proving that the regulation requiring the proposed apartment house to be set back from the street line a minimum of twenty-five feet is unreasonable should be borne by the relators and should be overcome by competent evidence, which has not been done in this case. The defendants further contend that any regulation of a municipal body honestly arrived at without equivocation or in an effort to benefit one property owner over another will be sustained, provided there is any slight ground to show that such regulation is for the public necessity and for the public safety.

It is plainly evident that the regulation in question is not designed for purely aesthetic purposes, but on the contrary has been enacted by the governing body after making a complete survey of the conditions of the Town and determining that the regulation was a proper exercise of its police power. The pro-

position was further elaborated upon in the case of *SCHAIT v. SENIOR*, *Supra*, at page 392 where this court said:

“The provision of the ordinance prohibiting the granting of the permit in such circumstances is a reasonable regulation touching public health, safety and general welfare and is within the scope of the police power of the town and is consequently valid. *NINTH STREET IMPROVEMENT COMPANY, v. OCEAN CITY*, 90 N. J. L. 106, affirmed *Id.* 703. It is not designed for aesthetic purposes. It is a designation of the uses for which certain buildings may not be erected giving reasonable consideration to the character of the district and the necessities of the public safety and welfare. It is a reasonable regulation of the size and location of garages, in view of their obvious and recognized possibilities for incidental dangers if unreasonably large and unduly near churches, public libraries or the like where large bodies of citizens habitually congregate.”

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

Point II.

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

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

At the time the ordinance in question was adopted there existed in the Village of South Orange three apartment houses, two of which are located in the zone now set apart for apartment houses. At that time a complete survey of the municipality was made and careful consideration was given to the erection of

additional apartment houses in the municipality and the governing body after consulting disinterested experts and upon the advice of the chief engineer of the fire department, determined that on account of its limited fire facilities it would be highly dangerous and detrimental to the safety and general welfare of the inhabitants of said municipality to allow apartment houses to be built promiscuously throughout its territory. As a result it was decided to prohibit the erection of apartment houses in certain areas and to confine the same to an area where under certain conditions it might be possible to protect said apartments and other houses in the vicinity with some degree of success.

Counsel for the relator in his brief refers to the fact that it is not logical to allow apartment houses to be constructed at all if the fire hazard is so great. In this connection it is our contention that to permit apartments in one area and to prohibit the same apartments in other areas is highly sound and reasonable. It is well settled that a governing body of a municipality has wide discretionary powers in determining what is best for the health, safety and general welfare of its inhabitants under the peculiar conditions that exist in that particular municipality.

In the testimony attached to the agreed state of case it appears without being contra-

dicted that the present fire department of the Village of South Orange is inadequate to properly take care of apartment houses of the type proposed. The fire chief testified that it has not sufficient men to take care of a four story apartment house and that in the event of a fire it is necessary for him to place one man at each floor. If that is true and that testimony is corroborated by a disinterested witness, Matthew P. A. McDermit, Deputy Chief of the Fire Department of the City of Newark, a man who has been connected with the Newark Fire Department for a period of more than forty years, that with the manpower, which the Chief of the Fire Department of the Village of South Orange has at the present time, he could not adequately cope with a fire that might break out in apartment houses.

Counsel for the relator in his brief says, and he introduces testimony to show, the increase in the ratables in the Village of South Orange and the proportionate increase in the expense of the fire department in order to show, we assume, that the Village of South Orange is financially able to provide a fire department sufficient to take care of structures of the type proposed. We do not contend that the Village of South Orange is too poor to have a larger fire department. We contend it is not for this court in this proceeding to determine whether they should or whether they should not. The

fact is, and the testimony of Louis F. Bird, Chairman of the Fire Committee of the Village of South Orange, Harry J. Becker, Chief of the Fire Department of said Village, and Matthew P. A. McDermit, Deputy Chief of the fire department of the City of Newark is uncontradicted on the point that the fire departments of the majority of the municipalities throughout the state is controlled by the Civil Service Commission under a statute passed by the Legislature of this state. The Civil Service Law provides that when a municipality desires to increase its department it must request the Civil Service Commission to furnish an eligible list from which appointments can be made and that the applicants for positions in the fire department must be residents of the municipality. It further appears by the uncontradicted testimony of Mr. Bird and Mr. Becker that the Village of South Orange has requested the Civil Service Commission to furnish an eligible list but that the Commission has been unable to do so due to the fact that no of the Village of South Orange have appeared to take the necessary examination. This is a condition which has been created by the Legislature of this state and is one over which the governing body of the Village of South Orange has absolutely no control and until that statute is amended or supplemented the Village of South Orange is powerless to obtain the men necessary to increase its department

both in man power and in apparatus to properly care for existing conditions as well as further development especially if that development is to be along the lines of apartment house structures promiscuously built throughout the community.

The point which is raised in this case is a new one and has not been passed upon as yet by our courts. In the case of *Ingersoll v. South Orange* argued before this court at its last term an application was made for a peremptory writ of mandamus in a similar case concerning the erection of an apartment house. The court refused to grant the peremptory writ but granted an alternative writ so that testimony concerning the fire facilities in the Village of South Orange could be properly presented to the court.

The testimony which has been presented to the court in this case is un rebutted. The relator has not shown by testimony or by argument in his brief that the regulation contained in the ordinance under which the permit was refused is not a reasonable one. On the contrary it is very plain that the regulation is reasonably necessary for the safety and general welfare of the community.

We are very familiar with all of the cases that have been decided recently by the courts of this state relative to zoning in municipali-

ties and feel that the section of the ordinance under attack is valid exercise of the police power as defined by our courts and in this case it has been our purpose to show both the testimony introduced and the argument in this brief that the regulation was made for the safety of the public both from the standpoint of traffic conditions and the hazard of fire. It has been determined many times that zoning in order to be legal must be brought within some phase of the exercise by a municipality of its police power, which is defined by different authors and jurors in many ways. In Words and Phrases it is defined as follows: (p. 1066, para. 2.)

“‘Police Power’ is nothing more or less than the power of government inherent in every sovereignty. While generally speaking the police power of the state is said to extend to the protection of the public health, the public morals, and the public safety, the law does not recognize those as the extent of the powers, but it embraces regulations designed to promote public convenience and general prosperity as well and the rights of a sovereign state to regulate public service corporations rests on the police power of the state. In re Arkansas Rate Cases, 187 Fed. 290, 292, 297; State v. Kofines, 80 Atl. 432, 33 R. I. 211 Ann. Cas. 19130 (cit-

ing License Cases 5 How. 583, 12 L. Ed. 256; Chicago, B. & O. Ry. Co. v. Drainage Commissioners, 26 Sup. Ct. 341, 200 U. S. 561, 592, 50 L. Ed. 596, 4 Ann. Cas. 1175)."

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

"Court and law writers have found it difficult to define the extent and boundaries of the 'police power.' It certainly extends to the protection of the lives, health and property of the citizens and to the preservation of good order and public morals. Every citizen has the constitutional guaranty of life, liberty and the enjoyment of his property and they cannot be taken from him except by due process of law. Social and conventional rights, however, are subject to such reasonable limitations in their enjoyment as will prevent them from being dangerous and hurtful to the body politic, and the law-making department of the government, under the power vested in it by the constitution, can enact laws providing for such reasonable restraints and regulations as may be necessary and expedient to secure social order and

public morals. A City Council has a large discretion in the enactment of ordinances and an ordinance enacted under the police power will not be declared void unless it is clearly oppressive or unreasonable. Commonwealth, for Use of City of Madisonville v. Price, 94 S. W. 32, 33, 123 Ky. 163, 13 Ann. Cas. 489 (quoting and adopting definition in Dunn v. Commonwealth, 105 Ky. 834, 49 S. W. 813, 43 L. W. A. 701, 88 Am. St. Rep. 344)."

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

There seems to be no doubt concerning the constitutionality of the law under which the ordinance under consideration was adopted

and the following cases are cited as authority on this point:

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

ROMER REALTY CO. v. HAD-
DONFIELD, 114 Atl. 248.

HANDY v. SOUTH ORANGE, 118
Atl. 838.

DORISON v. SAUL, 118 Atl. 691.
VERNON v. WESTFIELD, N. J.
Adv. Rep. 1031.

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

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

SCHAIT v. SENIOR, 117 Atl. 517.

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

COOPER LUMBER CO. v. DAM-
MERS, 125 Atl. 325.

It is contended by counsel for the relator that the erection of an apartment house on the property in question would have no marked effect upon the fire risk or safety of said neighborhood. Experience, however, has shown that risk from fire is greater in these large structures than in small dwellings. This state-

ment is substantiated by the testimony of Mr. McDermit that in the City of Newark apartment houses and large structures are considered the greatest fire hazard possible and is a problem which is constantly confronting the authorities of that city. Counsel also argues that the erection of one or two apartment houses would not seriously increase the fire hazard. This contention is not sound because it would be foolhardy and lack of good judgment upon the municipal authorities to increase a hazard that already exists. In addition this case is a very important one because it is one of first impression in this state, as there seems to be no decision directly in point on the subject of excluding or regulating the erection of apartment houses under circumstances such as are presented in this case. At the present time there are two other applications before this court for a peremptory writ of mandamus to compel the Village of South Orange to grant a permit for the erection of apartment houses. If the permit is granted in this case the door is immediately thrown open to other property owners to apply for permits to erect apartment houses under similar circumstances and the creation of such a precedent will be injurious to the health, safety and general welfare of the Village of South Orange.

Certain principles have been laid down by the Supreme Court of the United States ex-

pressive of its attitude with reference to the exercise of the police power by the several states. It has been declared repeatedly that the police power is not susceptible of limiting and confining definitions.

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

“The police power is not subject to any definite limitations but is co-extensive with the necessities of the case and the safeguard of the public interests.”

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

“While this court has refrained from any attempt to define with precision the limits of the police power, yet its disposition is to favor the validity of laws relating to matters completely within the territory of the state enacting them and it so reluctantly disagrees with the local legislative authority, primarily the judge of the public welfare, especially when its action is approved by the highest court of the state whose people are directly concerned, that it will inter-

fere with the action of such authority only when it is plain and palpable that it has no real or substantial relation to the public health, safety, morals, or to the general welfare. JACOBSON v. MASSACHUSETTS, 197 U. S. 11, 30."

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

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

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

"The principle (that the police power cannot be arbitrarily exercised

is familiar, but in any given case it must plainly appear to apply. It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed seem harsh in its exercise usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. CHICAGO & ALTON R. R. v. TRAILBARGER, 238 U. S. 67, 68. To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress and if in its march private interests are in the way they must yield to the good of the community. The logical result of petitioner's contention would seem to be that a city could not be formed or enlarged against the resistance of an occupant of the ground and that if it grows at all it can only grow as the environment of the occupation that are usually banished to the purloins."

For analogous cases see MURPHY v. CALIFORNIA, 225 U. S. 623; SLICH v. KIRKWOOD, 237 U. S. 52; MILLER v. STRAHL,

239 U. S. 426; EAST v. VAN DENMAN & LEWIS, 240 U. S. 342; ARMOUR & CO. v. NORTH DAKOTA, 240 U. S. 510; HUTCHINSON ICE CREAM CO., v. IOWA, 242 U. S. 153, and numerous other cases cited.

In the case of LINCOLN TRUST COMPANY v. WILLIAMS BUILDING CORPORATION, 128 N. E. 209, a leading New York case, it was held that the exercise of police power within constitutional limitations, depends largely on the discretion and judgment of municipal authorities with which the courts are reluctant to interfere and that municipalities in the exercise of such police powers may regulate the conduct of an individual and the use of his property.

The attention of the court is particularly directed to the testimony of Matthew P. A. McDermit, Deputy Chief of the Fire Department of the City of Newark, which appears on pages 33-41 of the testimony attached to the state case. He testifies in general that he has been connected with the department of which he is Deputy Chief as a paid man for forty-one years and that he has made a survey of the conditions existing in the Fire Department of the Village of South Orange. He states that in his opinion the erection of apartment houses in that municipality would be very dangerous and detrimental to the safety and general welfare of the municipality states that the fire hazard is greater with

apartment houses than it is with a normal one, two or three family house and that until the Village of South Orange is able to increase its department to the point where it will have a reserve company no further apartment houses should be allowed to be constructed. This testimony is very valuable coming from a man of the experience of Mr. McDermit, who is entirely disinterested in this case. It stands before this court without being contradicted in the slightest degree and should be weighed very carefully by this court in arriving at a decision.

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

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

Counsel for the relators attempts to say that the governing body has been negligent in not providing adequate facilities to properly take care of the property of its citizens. Whether that is so or not, in our opinion, before the court in this proceeding. If any citizen or property owner of the Village of South Orange feels that the Village authorities have been negligent in the duties imposed upon it by the Legislature of this state, we think their remedy lies in presenting the facts to the prosecutor of the county with a view of securing an indictment by the Grand Jury.

POINT III.

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

Too much emphasis cannot be placed upon the tendency which zoning ordinances have to preserve, especially in suburban communities such as South Orange, the community for the purposes of which it was originally established.

Let us for a moment consider the inducements which have been offered to prospective residence of the suburban community such as the Village of South Orange. The trend from the more populous urban centers to the smaller, more highly restricted urban communities has been continuous for many years past. The controverting of what had been regarded as

excellent residential section in our cities into semi-residential sections such as boarding and rooming houses and then into business sections has gone on to such a degree that it is obvious to the most casual observer that the injection of (apartment houses) into a residence community involves a change in use which is inconsistent with the full enjoyment of residential property, and owners of valuable residence property in cities have time and again disposed of their property at a sacrifice in order to seek the quiet, the freshness, the beauty of the less populous neighborhood. It is to this tendency and practically to this tendency alone that suburbs owe their prosperity. The intent to prevent the incursion even of dwellings not of a specified type or not surrounded by a certain minimum of land has clearly been shown in so many suburban developments by restrictive covenants placed in deeds as to indicate beyond question that those who have sought to develop outlying sections have clearly appreciated that any restrictive covenant which would insure a certain type of development of the ideal of the suburban dwelling would be realized and it is the multiplication of these individual ideals of the suburban dwellers that constitutes the ideal community.

It may be said that in most instances these restrictive covenants were for a limited number of years and that those who established

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

The town, whether under building restriction or by an actual development, has built up into fairly well defined residence districts of more or less pretentious type and into business districts. While the incursion into the residence districts of apartment houses will repeat the old

haphazard of municipal development involving wasteful demolition or remodeling of buildings to uses not contemplated when they were built it will do more. It will destroy the ideal of suburban community which the Village of South Orange typifies. The very life and prosperity of the community were posited upon maintenance of the conditions established. It was because such conditions existed either actually or potentially that development of the Village of South Orange along the lines which have resulted in the Village of today was possible. The fact that, to those who desired, lands at moderate prices might be obtained whereon to erect modest homes with the advantage of fresh air, comparative quiet and congenial neighbors determined one type of development; the fact that elsewhere in the town other lands might be obtained of higher price with greater seclusion and greater quiet determined a development in other parts of another type; but those typical developments in the various parts of the Village taken as whole show the community ideal and determined what in the case of the Village of South Orange might properly be considered the public convenience and general prosperity or, to use the language of the 1920 and 1921 Acts of the State Legislature, the public or general welfare.

The defendants respectfully submit that the rule to show cause granted in this case be dismissed on the ground that the provisions of

the ordinance under attack is a valid and reasonable exercise of the police power based upon public necessity and is designed to protect the health, safety and general welfare of the municipality in accordance not only with the authority granted to municipalities of this state by the Acts of the Legislature passed in 1920 and 1921, but also under the inherent police power vested in municipalities by the Legislature.

RIKER & RIKER,
Attorneys for Defendants.
THOS. E. FITZSIMMONS,
of Counsel.





