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Writ of Certiorari.

(Filed August 31, 1925.)

New Jersey, ss.:

The State of New Jersey, to the City of East Orange, Lincoln E. Rowley, Clerk of the City of East Orange, James H. Muchmore and J. (Seal) Woods McWilliams, Members of the Board of Assessments of the City of East Orange, and Herman B. Lehlbach, Secretary and Member of the Board of Assessments of the City of East Orange, GREETING:

We being willing for certain reasons to be certified of a certain notice of intention preceding, together with all things concerning the considering, passing and approving of an ordinance entitled "An Ordinance to provide for the improvement of certain public streets, by repaving the roadway and resetting the curbs and to fix the appropriation therefor" adopted by the City Council of the City of East Orange, May 8, 1922 and approved by the Mayor of the City of East Orange, on May 11, 1922, a certain report of the Board of Assessments of the City of East Orange, making special assessments for alleged benefits, dated June 10, 1925, certain proceedings of said Board of Assessments prior to said report, a certain resolution adopted by the City Council of the City of East Orange on July 17, 1925 and approved by the Mayor on July 29, 1925, confirming said report of assessments, do command you that you certify and send under your seal, to our Justices of our Supreme Court of Judicature, at Trenton, on or before the 14th day

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Writ of Certiorari.

of September next, the notice of intention preceding, together with all things concerning the considering, passing and approving of an ordinance entitled, "An Ordinance to provide for the improvement of certain public streets, by repaving the roadway and resetting the curbs and to fix the appropriation therefor" adopted by the City Council of the City of East Orange May 8, 1922 and approved by the Mayor of the City of East Orange, on May 11, 1922, the certain report of the Board of Assessments of the City of East Orange, making special assessments for alleged benefits, dated June 10, 1925, certain proceedings of said Board of Assessments prior to said report, the certain resolution adopted by the City Council of the City of East Orange on July 17, 1925 and approved by the Mayor on July 29, 1925, confirming said report of assessments with all things touching and concerning the same, as fully and completely as they remain before you, together with this our writ, that we may cause to be done thereupon what of right and justice and according to the laws of the State of New Jersey ought to be done.

WITNESS, William S. Gummere, Chief Justice of our Supreme Court, at Trenton, this 25th day of August in the year of our Lord one thousand nine hundred and twenty-five.

EDWARD J. KELLEHER,
Clerk.

AARON MARDER,
Attorney for Prosecutors.

Return.

(Filed September 14th, 1925.)

EXTRACT from the minutes of a regular meeting of the City Council of The City of East Orange, New Jersey, held at the Council Chambers, City Hall, 388 Main Street, in said City, on April 24, 1922, at eight o'clock, at which meeting all of the ten members of the Council were present:

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Mr. Dailey, on behalf of the Ordinance Committee, introduced ordinances entitled as follows:

(1) * * * * *

(2) * * * * *

(3) An Ordinance to provide for the improvement of certain public streets by repaving the roadway and resetting the curbs, and to fix the appropriation therefor.

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(4) * * * * *

Each ordinance was read by sections, and Mr. Dailey moved in each instance that the ordinance be passed on first reading, published in the official newspaper according to law, and come up for Second Reading on May 8th.

The motion was duly seconded and unanimously carried in each instance on the call of ayes and nays.

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I, LINCOLN E. ROWLEY, Clerk of The City of East Orange, Do HEREBY CERTIFY that the foregoing extract from the minutes of a meeting of the City Council of the City of East Orange held on April 24, 1922, has been compared by me with the original minutes of said meeting and it is a correct

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Return.

transcript therefrom and of the whole of the original so far as the same relates to the matter therein referred to.

10 (Seal) IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said City, this 8th day of September, 1925.

LINCOLN E. ROWLEY,
City Clerk.

Proof of Publication, Posting and Service.

I HEREBY CERTIFY the following to be a true copy of affidavit filed in City Clerk's Office.

20 (Seal) LINCOLN E. ROWLEY,
City Clerk.

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

30 LINCOLN E. ROWLEY, of full age, being duly sworn, according to law, on his oath saith: That he is the City Clerk of the municipal corporation, The City of East Orange; that he caused to be published in the official newspapers of The City of East Orange, a notice, a copy of which is hereto attached, as directed by The City Council of The City of East Orange, on the 24th day of April, 1922.

NOTICE OF INTENTION.

THE CITY OF EAST ORANGE.

THE IMPROVEMENT OF CERTAIN PUBLIC STREETS
BY RESETTING THE CURBS AND REPAVING THE
ROADWAY.

40 PUBLIC NOTICE is hereby given to all persons whose lands may be affected thereby,

Return.

or who may be interested therein, that at a meeting of the City Council, held on April 24th, 1922, an ordinance providing for the improvement of Main Street and North Harrison Street at their intersection by resetting the curbs and repaving the roadway; for the improvement of North Harrison Street and William Street at their intersection by resetting the curbs and repaving the roadway; for the improvement of Washington and William Streets at their intersection by resetting the curbs and repaving the roadway; in accordance with said ordinance and with plans and specifications on file in the office of the City Clerk and appropriating respectively the sums of Six Thousand Dollars, Three Thousand Dollars, and Two Thousand Dollars for such improvements, was introduced and that it is the intention of the City Council of the City of East Orange to consider the final passage of said ordinance and the making of such improvements at a meeting thereof, to be held at the Council Chamber in the City Hall, at the hour of 8 p. m. on Monday, May 8, 1922, at which time and place all persons whose lands may be affected by such improvement or who may be interested therein, will be given an opportunity to be heard. Property benefited will be subject to assessment.

By order of the City Council.

LINCOLN E. ROWLEY,
City Clerk.

The East Orange Record,
April 29 and May 6, 1922.

Return.

10 that on the second day of May, 1922, he deposited in the post office of East Orange, envelopes, each containing a copy of Notice of Intention and date of consideration of ordinance addressed to all persons whose names and addresses appear on the tax books of the City as owners of the property along the land, street or section of street so proposed to be improved.

LINCOLN E. ROWLEY.

Sworn and subscribed to before me, at East Orange, N. J., this 8th day of May, 1922.

(Seal) J. EASTON WILLIAMS,
Notary Public of New Jersey.

20 THE EAST ORANGE RECORD
477-479-481 Main Street
East Orange, N. J.

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

30 LESTER M. LINDSAY of full age, maketh oath and saith that he is bookkeeper of The East Orange Record, a weekly newspaper published in East Orange, in the County and State aforesaid, that an advertisement, of which the annexed is a true copy, was published in said newspaper two times, successively the first publication being on the 26th day of April, 1922 and the last on the 6th day of May, 1922, making two weekly insertions.

LESTER M. LINDSAY.

Sworn and subscribed before me this 2nd }
day of September, 1925. }

40 (Seal) LINWOOD C. GILLIS,
Notary Public,
New Jersey.

Return.

NOTICE OF INTENTION.

THE CITY OF EAST ORANGE.

THE IMPROVEMENT OF CERTAIN PUBLIC STREETS
 BY RESETTING THE CURBS AND REPAVING THE
 ROADWAY.

PUBLIC NOTICE is hereby given to all persons whose lands may be affected thereby, or who may be interested therein, that at a meeting of the City Council, held on April 24th, 1922, an ordinance providing for the improvement of Main Street and North Harrison Street at their intersection by resetting the curbs and repaving the roadway; for the improvement of North Harrison Street and William Street at their intersection by resetting the curbs and repaving the roadway; for the improvement of Washington and William Streets at their intersection by resetting the curbs and repaving the roadway; in accordance with said ordinance and with plans and specifications on file in the office of the City Clerk and appropriating respectively the sums of Six Thousand Dollars, Three Thousand Dollars, and Two Thousand Dollars for such improvements, was introduced and that it is the intention of the City Council of the City of East Orange to consider the final passage of said ordinance and the making of such improvements at a meeting thereof, to be held at the Council Chamber in the City Hall, at the hour of 8 p. m. on Monday, May 8, 1922, at which time and place all persons whose lands may be affected by such improvement

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Return.

or who may be interested therein, will be given an opportunity to be heard. Property benefited will be subject to assessment.

By the order of the City Council.

LINCOLN E. ROWLEY,
City Clerk.

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The East Orange Record,
April 29 and May 6, 1922.

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

20

I, EDWARD J. PARKER, a clerk in the office of the Newark Evening News, do solemnly swear that a City of East Orange Notice appeared in said Newark Evening News in a space of forty-four lines on April 28th, 1922, and May 5th, 1922, reading as follows:

NOTICE OF INTENTION.

THE CITY OF EAST ORANGE.

THE IMPROVEMENT OF CERTAIN PUBLIC STREETS
BY RESETTING THE CURBS AND REPAVING THE
ROADWAY.

30

PUBLIC NOTICE is hereby given to all persons whose land may be affected thereby, or may be interested therein, that at a meeting of a city council, held on April 24, 1922, an ordinance providing for the improvement of Main Street and North Harrison Street, at their intersection, by resetting the curbs and repaving the roadway; for the improvement of North Harrison Street and William Street at their intersection by resetting the curbs and repaving the roadway;

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Return.

for the improvement of Washington Street and William Street at their intersection by resetting the curbs and repaving the roadway, in accordance with said ordinance and with plans and specifications on file in the office of the city clerk and appropriating, respectively, the sums of six thousand dollars, three thousand dollars, three thousand dollars and two thousand dollars for such improvements, was introduced and that it is the intention of the City Council of the City of East Orange to consider the final passage of said ordinance and the making of such improvements at a meeting thereof, to be held at the Council Chamber in the City Hall at the hour of 8 P. M. on Monday, May 8, 1922, at which time and place all the persons whose lands may be affected by such improvement or who may be interested therein, will be given an opportunity to be heard. Property benefited will be subject to assessment.

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By order of the City Council.

Lincoln E. Rowley, City Clerk.

Newark Evening News—April 28
and May 5, 1922.

30

EDWARD J. PARKER.

Subscribed and sworn to before me this twelfth day of September in the year of Our Lord One Thousand Nine Hundred and Twenty-Five.

(Seal)

HENRY W. MORRIS,
Notary Public.

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Return.

EXTRACT from the minutes of a regular meeting of the City Council of The City of East Orange, New Jersey, held at the Council Chambers, City Hall, 388 Main Street, in said City, on May 8, 1922, at eight o'clock, at which meeting all of the ten members of the Council were present:

10 Mr. Dailey, on behalf of the Ordinance Committee, then moved that an ordinance, passed on first reading on April 24th, entitled "An Ordinance to provide for the improvement of certain public streets by repaving the roadway and resetting the curbs, and to fix the appropriation therefor," be taken up on second reading and read by title. The motion was duly seconded and carried.

20 The Clerk submitted his affidavit of having advertised and mailed notices of intention for consideration of the final passage of this ordinance at this meeting, and reported having received no objections to the same.

The Chairman called for objections, but none was made.

The ordinance was then read by title, and Mr. Dailey moved that the ordinance be passed on second and final reading.

30 The motion was seconded and unanimously adopted on the call of ayes and nays.

I, LINCOLN E. ROWLEY, Clerk of The City of East Orange, Do HEREBY CERTIFY that the foregoing extract from the minutes of a meeting of the City Council of The City of East Orange held on May 8, 1922, has been compared by me with the original minutes of said meeting and it is a correct transcript therefrom and of the whole of the original so far as the same relates to the matter therein referred to.

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IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said City, this 8th day of September, 1925.

(Seal) LINCOLN E. ROWLEY,
City Clerk.

THE EAST ORANGE RECORD 10
477-479-481 Main Street
East Orange, N. J.

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

LESTER M. LINDSAY of full age, maketh oath and saith that he is bookkeeper of The East Orange Record, a weekly newspaper published in East Orange, in the County and State aforesaid, that an advertisement, of which the annexed is a true copy, was published in said newspaper on the 13th day of May, 1922. 20

LESTER M. LINDSAY.

Sworn and subscribed before me }
this 2nd day of September, 1925. }

(Seal) LINWOOD C. GILLIS,
Notary Public,
New Jersey.

THE CITY OF EAST ORANGE. 30

ORDINANCES OF 1922.

Number 18.

AN ORDINANCE to provide for the improvement of certain public streets by repaving the roadway and resetting the curbs, and to fix the appropriation therefor.

Return.

BE IT ORDAINED by the City Council of the City of East Orange:

10 SECTION 1. That Main Street and North Harrison Street at their intersection, as widened by Ordinance 28, 1920, be improved by resetting the curbs in concrete and repaving the roadway with Bitulithic pavement on a 6-inch concrete base.

SECTION 2. That North Harrison Street and William Street at their intersection, as widened by Ordinance 29, 1920, be improved by resetting the curbs in concrete and repaving the roadway with either Bitulithic pavement or wood blocks on a 6-inch concrete base.

20 SECTION 3. That Washington Street and William Street at their intersection, as widened by Ordinance 30, 1920, be improved by resetting the curbs in concrete and repaving the roadway with wood blocks on a 6-inch concrete base.

30 SECTION 4. That the City Engineer be and he is hereby directed to prepare the necessary plans and specifications for said work and present the same to the City Council, or to the Road Committee thereof, for approval; and that when so approved the said plans and specifications be filed in the office of the City Clerk; and that the City Clerk is hereby directed to advertise for bids for such work, agreeable to law, after a copy of such approved plans and specifications shall have been filed in his office.

40 SECTION 5. That the City Council does

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hereby fix and determine as the appropriation for the improvement described in Section 1 of this ordinance the sum of six thousand dollars (\$6,000); for the improvement described in Section 2 of this ordinance the sum of three thousand dollars (\$3,000); for the improvement described in Section 3 of this ordinance the sum of two thousand dollars (\$2,000); and does authorize the issuance of temporary notes to an amount not to exceed the total sum of eleven thousand dollars (\$11,000) for the purpose of financing said improvements. The property in the vicinity of such improvements benefited or increased in value by reason thereof will be subject to an assessment hereafter to be levied.

We hereby certify that the foregoing ordinance was passed by the City Council of The City of East Orange on May 8, 1922.

FRANK B. COLTON,
Chairman of the City Council.

LINCOLN E. ROWLEY,
City Clerk.

Approved May 11, 1922.

CHARLES H. MARTENS,
Mayor.

The East Orange Record,
May 13, 1922.

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Return.

THE CITY OF EAST ORANGE, NEW JERSEY

OFFICE OF THE CITY CLERK.

I HEREBY CERTIFY that the following is a true and correct copy of an ordinance adopted by the City Council of The City of East Orange May 8th, 1922, and approved by the Mayor May 11th, 1922:

THE CITY OF EAST ORANGE.

ORDINANCES OF 1922.

Number 18.

AN ORDINANCE to provide for the improvement of certain public streets by repaving the roadway and resetting the curbs, and to fix the appropriation therefor.

BE IT ORDAINED by the City Council of the City of East Orange:

SECTION 1. That Main Street and North Harrison Street at their intersection, as widened by Ordinance 28, 1920, be improved by resetting the curbs in concrete and repaving the roadway with Bitulithic pavement on a 6-inch concrete base.

SECTION 2. That North Harrison Street and William Street at their intersection, as widened by Ordinance 29, 1920, be improved by resetting the curbs in concrete and repaving the roadway with either Bitulithic pavement or wood blocks on a 6-inch concrete base.

SECTION 3. That Washington Street and William Street at their intersection, as widened by Ordinance 30, 1920, be improved

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by resetting the curbs in concrete and repaving the roadway with wood blocks on a 6-inch concrete base.

SECTION 4. That the City Engineer be and he is hereby directed to prepare the necessary plans and specifications for said work and present the same to the City Council, or to the Road Committee thereof, for approval; and that when so approved the said plans and specifications be filed in the office of the City Clerk; and that the City Clerk is hereby directed to advertise for bids for such work, agreeable to law, after a copy of such approved plans and specifications shall have been filed in his office.

10

SECTION 5. That the City Council does hereby fix and determine as the appropriation for the improvement described in Section 1 of this ordinance the sum of six thousand dollars (\$6,000); for the improvement described in Section 2 of this ordinance the sum of three thousand dollars (\$3,000); for the improvement described in Section 3 of this ordinance the sum of two thousand dollars (\$2,000); and does authorize the issuance of temporary notes to an amount not to exceed the total sum of eleven thousand dollars (\$11,000) for the purpose of financing said improvements. The property in the vicinity of such improvements benefited or increased in value by reason thereof will be subject to an assessment hereafter to be levied.

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We hereby certify that the foregoing or-

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Return.

dinance was passed by the City Council of
The City of East Orange on May 8, 1922.

FRANK B. COLTON,
Chairman of the City Council.

LINCOLN E. ROWLEY,
City Clerk.

10

Approved May 11, 1922.

CHARLES H. MARTENS,
Mayor.

The East Orange Record,
May 13, 1922.

IN TESTIMONY WHEREOF, I have hereto set my
hand, and affixed the corporate seal of said City,
this 8th day of September A. D., 1925.

20

(Seal) LINCOLN E. ROWLEY,
City Clerk.

EXTRACT from the minutes of a regular meeting
of the City Council of The City of East Orange,
New Jersey, held at the Council Chambers, City
Hall, 388 Main Street, in said City, on February 26,
1923, at eight o'clock, at which meeting all of the
ten members of the Council were present:

30

COMMUNICATIONS AND PETITIONS.

The following communications, applications and
petitions were presented, read and acted upon as
stated:

* * * * *
* * * * *

Certificates from the City Engineer and Auditor
reporting detailed cost of improvements as fol-
lows:

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Return.

(1) Improving North Harrison Street, as widened, at its junction with Main Street	\$3,781.68
---	------------

*	*	*	*	*	*	*
*	*	*	*	*	*	*

Referred to the Board of Assessments. 10

REPORTS OF COMMITTEES.

Mr. Brown, on behalf of the Road Committee, introduced the following resolutions, which were seconded and unanimously adopted on the call of ayes and nays:

"RESOLVED	*	*	*	*	*	*
*	*	*	*	*	*	*
*	*	*	*	*	*	*

20

"WHEREAS, the following improvements have been completed:

1—North Harrison Street (as widened at its junction with Main Street by Ordinance No. 28 of 1920), as provided for by Ordinance No. 18 of 1922,

2—*	*	*	*	*	*	*
3—*	*	*	*	*	*	*

30

WHEREAS, the City Engineer and the City Auditor have certified the detailed cost of said improvements, the total amounts of which are as follows:

1—North Harrison Street	\$3,781.68					
2—*	*	*	*	*	*	*
3—*	*	*	*	*	*	*

and the City Council has considered the same.

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Return.

NOW, THEREFORE, BE IT RESOLVED that the City Council does hereby determine the total cost of said improvements to be

1—North Harrison Street	\$3,781.58
2—* * * * *	* * * *
3—* * * * *	* * * *

10

and

BE IT FURTHER RESOLVED that the City Clerk is directed to refer these matters to the Board of Assessments in conformity with Chapter 152, P. L. 1917, and the amendments thereto."

20

I, LINCOLN E. ROWLEY, Clerk of The City of East Orange, DO HEREBY CERTIFY that the foregoing extract from the minutes of a meeting of the City Council of the City of East Orange held on April 24, 1922, has been compared by me with the original minutes of said meeting and it is a correct transcript therefrom and of the whole of the original so far as the same relates to the matter therein referred to.

30

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said City this 8th day of September, 1925.

LINCOLN E. ROWLEY,
City Clerk.

February 26, 1923.

The Honorable City Council,

Gentlemen:

40

We hereby certify that the total cost of improving North Harrison Street (as widened at its junc-

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tion with Main Street by Ordinance No. 28 of 1920), as provided for by Ordinance No. 18 of 1922, is as follows:

May 1, 1922	Advertising	.....	\$	3.16	
May 5, "	"	.....		3.16	
May 15, "	"	.....		8.44	
May 19, "	"	.....		5.58	10
Aug. 21, "	"	.....		.93	
Aug. 30, "	Contractor	.....		2,770.06	
Sept. 13 "	"	.....		519.39	
Dec. 5 "	Inspection	.....		100.00	
Dec. 5 "	Maps and Surveys ..			25.00	
	Estimated Advertis-				
	ing	.....		5.00	
Aug. 28, 1925	Contractor	.....		69.25	
Aug. 28, 1927	"	.....		103.88	20
	Interest	.....		167.83	
				<hr/>	
				\$3,781.68	

Respectfully submitted,

(Signed) WILLIAM D. WILLIGEROD,
City Engineer.

(Signed) FRANCIS GILBERT,
City Auditor.

I HEREBY CERTIFY the foregoing to be a true and correct copy of carbon copy of certificate of Engineer and Auditor on file in the City Clerk's Office. 30

(Seal) LINCOLN E. ROWLEY,
City Clerk.

Return.

EXTRACT from the minutes of a regular meeting of the City Council of The City of East Orange, New Jersey, held at the Council Chambers, City Hall, 388 Main Street, in said City, on June 22, 1925, at which meeting all of the ten members of the Council were present:

10 The Clerk submitted report from the Board of Assessments for the improvement of North Harrison Street and Main Street at their intersection by resetting the curbs in concrete and repaving the roadway.

A motion was made by Mr. Morrow, seconded and carried, that the report of the Board be advertised and that the 13th day of July be fixed and determined as the day when the Council will meet to consider the report and map and to hear objections thereto.

20

I, LINCOLN E. ROWLEY, Clerk of The City of East Orange, Do HEREBY CERTIFY that the foregoing extract from the minutes of a meeting of the City Council of The City of East Orange held on June 22, 1925, has been compared by me with the original minutes of said meeting and it is a correct transcript therefrom and of the whole of the original so far as the same relates to the matter therein referred to.

30

IN WITNESS WHEREOF, I have hereunto set
(Seal) my hand and affixed the seal of said
City, this 8th day of September, 1925.

LINCOLN E. ROWLEY,
City Clerk.

Return.

THE EAST ORANGE RECORD
477-479-481 Main Street
East Orange, N. J.

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

LESTER M. LINDSAY of full age, maketh oath and saith that he is bookkeeper of The East Orange Record, a weekly newspaper published in East Orange, in the County and State aforesaid, that an advertisement, of which the annexed is a true copy, was published in said newspaper two times, successively the first publication being on the 26th day of June, 1925, and the last on the 3rd day of July, 1925, making two weekly insertions. 10

LESTER M. LINDSAY. 20

Sworn and subscribed before me this }
2nd day of September, 1925. }

(Seal) LINWOOD C. GILLIS,
Notary Public,
New Jersey.

REPORT OF THE BOARD OF ASSESSMENTS.

CLERK'S OFFICE OF THE CITY OF EAST ORANGE, N. J. 30

Notice is hereby given that the Board of Assessments of The City of East Orange has filed its maps, assessments and reports for the following improvement in my office, where the same may be examined by all persons interested in the same:

Resetting the curb and paving the widened

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roadway of North Harrison Street at intersection with Main Street.

10 And the City Council has fixed Monday, the 13th day of July, at eight P. M., as the time when, and the City Hall as the place where it will consider any objections thereto; and that objections to the improvement must be presented in writing and may be delivered to the City Clerk at any time before the hour of meeting as above mentioned.

Lincoln E. Rowley, City Clerk.

The East Orange Record,
June 26 and July 3, 1925.

20 EXTRACT from the minutes of a regular meeting of the City Council of The City of East Orange, New Jersey, held at the Council Chambers, City Hall, 388 Main Street, in said City, on July 13, 1925, at which meeting seven of the ten members of the Council were present:

The Clerk presented the report of the Board of Assessments, dated June 10, 1925, in the matter of the improvement of Main and North Harrison Streets at their intersection by resetting the curbs and repaving the roadway.

30 The Clerk submitted his affidavit of having advertised and mailed notices for the consideration of this report at this meeting, and reported that he had received one objection in writing—from Mr. Louis Levy, who claims that all hearings and proceedings of the Board of Assessments were and are wholly irregular, invalid and void because they were neither authorized by any valid or appropriate municipal ordinance or direction.

40 The Chairman called for objections, and Mr. F.

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B. Colton, representing Mr. Levy, and Mr. Aaron Marder, representing Mr. Joseph Burstiner, argued against the adoption of the report as it now stands, and asked for postponement so that further evidence may be presented.

On motion of Mr. Vail, seconded and carried, further consideration of the assessment was postponed until the next regular meeting of the Council. 10

I, LINCOLN E. ROWLEY, Clerk of The City of East Orange, DO HEREBY CERTIFY that the foregoing extract from the minutes of a meeting of the City Council of The City of East Orange held on July 13, 1925, has been compared by me with the original minutes of said meeting and it is a correct transcript therefrom and of the whole of the original so far as the same relates to the matter therein referred to. 20

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said City, this 8th day of September, 1925.

(Seal) LINCOLN E. ROWLEY,
Clerk.

Proof of Publication, Posting and Service. 30

I hereby certify the following to be a true copy of affidavit filed in City Clerk's Office.

LINCOLN E. ROWLEY,
City Clerk.

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

LINCOLN E. ROWLEY, of full age, being duly sworn, according to law, on his oath saith: That 40

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he is the City Clerk of the municipal corporation, The City of East Orange; that he caused to be published in the official newspapers of The City of East Orange, a notice, a copy of which is hereto attached, as directed by The City Council of The City of East Orange, on the 22nd day of June, 1925.

10

REPORT OF THE BOARD OF ASSESSMENTS.

Clerk's Office of the City of East Orange,
N. J.

Notice is hereby given that the Board of Assessments of The City of East Orange has filed its maps, assessments and reports for the following improvement in my office, where the same may be examined by all persons interested in the same:

20

Resetting the curb and paving the widened roadway of North Harrison Street at intersection with Main Street.

And the City Council has fixed Monday, the 13th day of July, at eight P. M., as the time when, and the City Hall as the place where, it will consider any objections thereto; and that objections to the improvement must be presented in writing and may be delivered to the City Clerk at any time before the hour of meeting as above mentioned.

30

LINCOLN E. ROWLEY,
City Clerk.

The East Orange Record,
June 26 and July 3, 1925.

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that on the second day of July, 1925, he deposited

Return.

in the post office at East Orange, envelopes, each containing a copy of amount of assessment and date of consideration of assessment addressed to all persons whose names and addresses appear on the tax books of the City as owners of the property along the land, street or section of street so proposed to be improved.

10

LINCOLN E. ROWLEY.

Sworn and subscribed to before me, at East }
Orange, N. J., this 13th day of July, 1925. }

(Seal) WARREN A. CLAPP,
Notary Public
of New Jersey.

Extract from the minutes of a regular meeting of the City Council of The City of East Orange, New Jersey, held at the Council Chambers, City Hall, 388 Main Street, in said City, on July 27, 1925, at which meeting eight of the ten members of the Council were present:

20

The Clerk presented the report of the Board of Assessments, laid over from the last meeting, in the matter of the improvement of Main and North Harrison Streets at their intersection by resetting the curbs and repaving the roadway.

30

Mr. Frank B. Colton, representing Mr. Louis Levy, was given the privilege of the floor and again argued that his client is unjustly assessed in the report of the Board of Assessments now under consideration.

Mr. Aaron Marder, for Mr. Joseph Burstiner, argued that the assessment should be more widely spread and that Mr. Burstiner is not benefited to the amount of his assessment.

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Return.

Mr. Morrow, on behalf of the Road Committee, introduced the following resolution:

10 “WHEREAS, The Board of Assessments of The City of East Orange has heretofore filed its report bearing date the tenth day of June, 1925, certifying to the City Council its assessments made on account of the improvement of North Harrison Street and Main Street at their intersection, as may be seen upon the map showing lands and real estate benefited by such improvement and against which benefits have been assessed; and

20 “WHEREAS, It appears that notice has been published as required by law, that said report would be considered by the said City Council of The City of East Orange at a meeting thereof to be held in the Council Chamber at the City Hall, East Orange, New Jersey, on the thirteenth day of July, 1925, and that the City Clerk has mailed a copy of such notice to the owners named in said report, as required by law; and

30 “WHEREAS, The City Council of The City of East Orange did meet at the Council Chamber in the City Hall, East Orange, New Jersey, at 8 P. M. on the thirteenth day of July, 1925, being the time and place designated in said notice and did consider said report and map as well as all objections received to the adoption and confirmation thereof and at such meeting a motion was unanimously adopted to postpone further consideration until July 27th, at the regular meeting of the City Council.

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Return.

"NOW, THEREFORE, BE IT RESOLVED that the said report and map and the assessments for benefits in said report be and they are hereby adopted and confirmed; and

"BE IT FURTHER RESOLVED that the owner or owners of any lands assessed therein may pay such assessments in ten equal yearly installments with legal interest thereon, and that such payments be made on June first of each year, provided that any such person or persons assessed shall have the privilege of paying the whole of any assessment or any balance of installments with accrued interest thereon at one time."

10

After discussion by Councilmen Morrow and Vail, the vote was ordered, and the resolution was adopted by the following vote: Ayes—Dailey, Morrow, Rauch, Vail, Levins, Shauger, Quinby and Chairman Emory; Nays—None.

20

I, LINCOLN E. ROWLEY, Clerk of The City of East Orange, DO HEREBY CERTIFY that the foregoing extract from the minutes of a meeting of the City Council of The City of East Orange held on July 27, 1925, has been compared by me with the original minutes of said meeting and it is a correct transcript therefrom and of the whole of the original so far as the same relates to the matter therein referred to.

30

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said City, this 8th day of September, 1925.

(Seal)

LINCOLN E. ROWLEY,
City Clerk.

40

Return.

THE CITY OF EAST ORANGE, NEW JERSEY
OFFICE OF THE CITY CLERK

10 I, LINCOLN E. ROWLEY, Clerk of The City of East Orange, Do HEREBY CERTIFY the following to be a true and correct copy of a report of the Board of Assessments filed in the City Clerk's Office for the improvement of North Harrison Street and Main Street at their intersection.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal
(Seal) of said City, this 8th day of September, 1925.

LINCOLN E. ROWLEY,
City Clerk.

20 Endorsed:

No.....
Local Improvement.
Benefit Assessments.

REPORT OF BOARD OF ASSESSMENTS
of The City of East Orange

FOR

30 the improvement of NORTH HARRISON STREET and MAIN STREET at their intersection.

BOARD OF ASSESSMENTS OF THE CITY OF
EAST ORANGE

REPORT OF ASSESSMENTS

LOCAL IMPROVEMENT

40 WHEREAS the City Council of The City of East Orange, by ordinance duly adopted, and approved on the 11th day of May, in the year 1922, did de-

Return.

termine that Main and North Harrison Streets at their intersection should be improved by resetting the curbs in concrete and repaving the roadway, and that the costs of such improvement should be assessed according to the provisions of the act entitled "An act concerning municipalities," approved March 27, 1917, and the amendments and supplements thereto. 10

AND WHEREAS the said improvement has been completed and the said City Council has caused a certified copy of the said ordinance, providing for such improvement, to be delivered to the Board of Assessments of The City of East Orange, together with a statement showing in detail the cost of such improvement, such costs being the sum of \$3,781.68 dollars. 20

AND WHEREAS we, the undersigned, James H. Muchmore, J. Woods McWilliams, Herman B. Lehlbach, being thereunto duly appointed and qualified, constitute the Board of Assessments of The City of East Orange.

NOW, THEREFORE, be it known, that we, the subscribers, the Board of Assessments of The City of East Orange, did, after the receipt of such copy of said ordinance, procure a map to be made, showing the lands and real estate peculiarly benefited by such improvement, and that upon said map each lot and parcel of land is designated by letter or number; which said map accompanies and forms a part of this, our report. 30

AND THAT we have ascertained, so far as practicable, the names of the owners of the lands and real estate peculiarly benefited by the improvement. 40

Return.

AND FURTHER, that we did go upon, view and examine the lands and real estate adjacent to and in the vicinity of the said improvement under said ordinance.

10 AND FURTHER, that we did fix a time and place for the hearing of all persons interested, and that we did give notice of the time and place of such hearing in a newspaper circulating in the municipality, at least ten days before said hearing, as more fully appears by the proved copy of said published notice hereto attached and forming a part hereof.

20 AND FURTHER, that we did mail a notice of such hearing to the owners of all lands peculiarly benefited by said improvement or affected thereby, directed to the last known post office addresses of such owners.

AND FURTHER, that we did, at such time and place, or at adjourned hearings, attend and give all the parties interested ample opportunity to be heard upon the subject of this assessment.

30 AND FURTHER, that we did, after such hearing, assess the cost and expense of said improvement upon the lands peculiarly benefited by the said improvement, so far as the same are so benefited, in proportion to the peculiar benefit, advantage or increase in value, which the respective lots and parcels of land and real estate are deemed by us to have received by reason of such improvement, having due regard to the right and interests of all persons concerned as well as to the value of the lands and real estate benefited, and in no case does the assessment on any parcel of land exceed in amount any such peculiar benefit, advantage or
40 increase in value.

Return.

AND FURTHER, that the following is a tabulated statement of our assessments, showing what lots or parcels are so benefited by the said improvement, the amount assessed by us as such benefits upon each lot or parcel of land, and the names of the owners of the several lots or parcels of land assessed, so far as we can ascertain the same, and the amount of the several assessments so assessed by us against each of the said lots or parcels of land, upon the aforesaid basis. 10

IN WITNESS WHEREOF, we, the Board of Assessments of The City of East Orange, have hereto set our hands this tenth day of June, One Thousand Nine Hundred and Twenty-five.

JAMES H. MUCHMORE
 (Signed) J. WOODS McWILLIAMS 20
 HERMAN B. LEHLBACH

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

James H. Muchmore, J. Woods McWilliams, Herman B. Lehlbach, being duly sworn, according to law, on their respective oaths, each for himself, says: I am a member of the Board of Assessments of The City of East Orange, in the County of Essex and State of New Jersey, and I am not interested, directly or indirectly, in the matter of the above assessment, or in any land or real estate affected thereby; and that I have performed my duty in 30

Return.

relation thereto, faithfully and impartially, to the best of my ability, skill and understanding.

(Signed) JAMES H. MUCHMORE
J. WOODS McWILLIAMS
HERMAN B. LEHLBACH

10 Sworn and subscribed to before me }
this 18th day of June, 1925. }

(Signed) LINCOLN E. ROWLEY,
City Clerk.

THE EAST ORANGE RECORD

477 MAIN STREET

East Orange, N. J.

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

Lester M. Lindsay of full age maketh and saith that he is bookkeeper of The East Orange Record, a weekly newspaper published in East Orange, in the County and State aforesaid, that an advertisement, of which the annexed is a true copy, was published in said newspaper on the 24th day of March, 1923.

(Signed) LESTER M. LINDSAY.

30

BOARD OF ASSESSMENTS

CITY OF EAST ORANGE

In the matter of the improvement of (1) Main and North Harrison Streets at their intersection; (2) North Harrison Street and William Street at their intersection; (3) Washington and William Street at their intersection.

Public notice is hereby given that the Board of

40

Return.

Assessments of the City of East Orange will meet at the Council Chamber, in the City Hall, East Orange, N. J., Wednesday, April 11, 1923, at the hour of 2 o'clock in the afternoon, at which time and place it will hear all persons interested in the matter of recurbing and repaving (1) Main and North Harrison Streets at their intersection; (2) North Harrison Street and William Steet at their intersection; (3) Washington and William Streets at their intersection or whose lands may be affected thereby. 10

By order of the Board of Assessments of the City of East Orange.

HERMAN B. LEHLBACH,
Secretary.

Sworn and subscribed before me } 20
this 22nd day of May, 1925. }

(Signed) LINWOOD C. GILLIS,
(Seal) Notary Public,
New Jersey.

30

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Return.

THE CITY OF EAST ORANGE, NEW JERSEY
Office of the City Clerk

I HEREBY CERTIFY that the following is a true and correct copy of an ordinance adopted by the City Council of the City of East Orange, May 8th, 1922, and approved by the Mayor, May 11th, 1922.

10

THE CITY OF EAST ORANGE,

ORDINANCES OF 1922

Number 18

AN ORDINANCE to provide for the improvement of certain public streets by repaving the roadway and resetting the curbs, and to fix the appropriation therefor.

20

BE IT ORDAINED by the City Council of the City of East Orange:

Section 1. That Main Street and North Harrison Street at their intersection, as widened by Ordinance 28, 1920, be improved by resetting the curbs in concrete and repaving the roadway with Bitulithic pavement on a 6-inch concrete base.

30

Section 2. That North Harrison Street and William Street at their intersection, as widened by Ordinance 29, 1920, be improved by resetting the curbs in concrete and repaving the roadway with either Bitulithic pavement or wood blocks on a 6-inch concrete base.

Section 3. That Washington Street and William Street at their intersection, as widened by Ordinance 30, 1920, be improved

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Return.

by resetting the curbs in concrete and repaving the roadway with wood blocks on a 6-inch concrete base.

Section 4. That the City Engineer be and he is hereby directed to prepare the necessary plans and specifications for said work and present the same to the City Council, or to the Road Committee thereof, for approval; and that when so approved the said plans and specifications be filed in the office of the City Clerk; and that the City Clerk is hereby directed to advertise for bids for such work, agreeable to law, after a copy of such approved plans and specifications shall have been filed in his office.

10

Section 5. That the City Council does hereby fix and determine as the appropriation for the improvement described in Section 1 of this ordinance the sum of six thousand dollars (\$6,000); for the improvement described in Section 2 of this ordinance the sum of three thousand dollars (\$3,000); for the improvement described in Section 3 of this ordinance, the sum of two thousand dollars (\$2,000); and does authorize the issuance of temporary notes to an amount not to exceed the total sum of eleven thousand dollars (\$11,000) for the purpose of financing said improvements. The property in the vicinity of such improvements benefited or increased in value by reason thereof will be subject to an assessment hereafter to be levied.

20

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WE HEREBY CERTIFY that the foregoing or-

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Return.

dinance was passed by the City Council of the City of East Orange on May 8, 1922.

FRANK B. COLTON,
Chairman of the City Council.

LINCOLN E. ROWLEY,
City Clerk.

10

Approved May 11, 1922.

CHARLES H. MARTENS,
Mayor.

The East Orange Record,
May 13, 1922.

IN TESTIMONY WHEREOF, I have hereto set my hand, and affixed the corporate seal of said City, this 9th day of September, A. D. 1925.

(Seal)

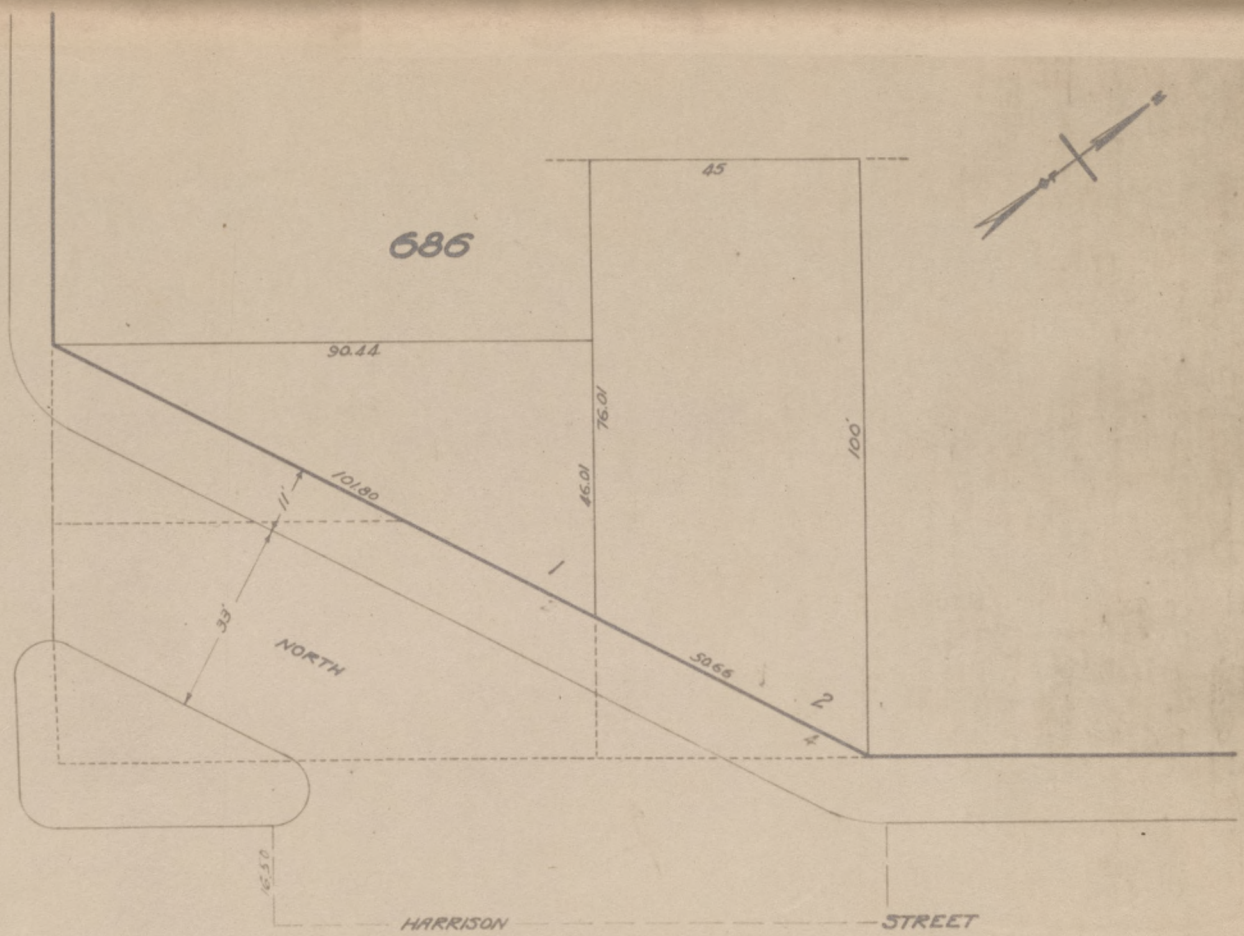
20

LINCOLN E. ROWLEY,
City Clerk.

Assessment Map, Lot No.	Block Map, Block No.	Block Map, Lot No.	Names of Owner or Owners	Frontage in Lineal Feet	Amount of Assessment
1	686	2	Joseph Burstiner	101.80	\$2194.26
2		4	Louis Levy	50.66	1091.96
			The City of East Orange		495.46
					\$3781.68

30

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ASSESSMENT MAP
 FOR THE PAVING OF THE WIDENING OF THE NORTHWEST CORNER OF

NORTH HARRISON ST. & MAIN ST.

OFFICE OF THE CITY ENGINEER

EAST ORANGE N.J.

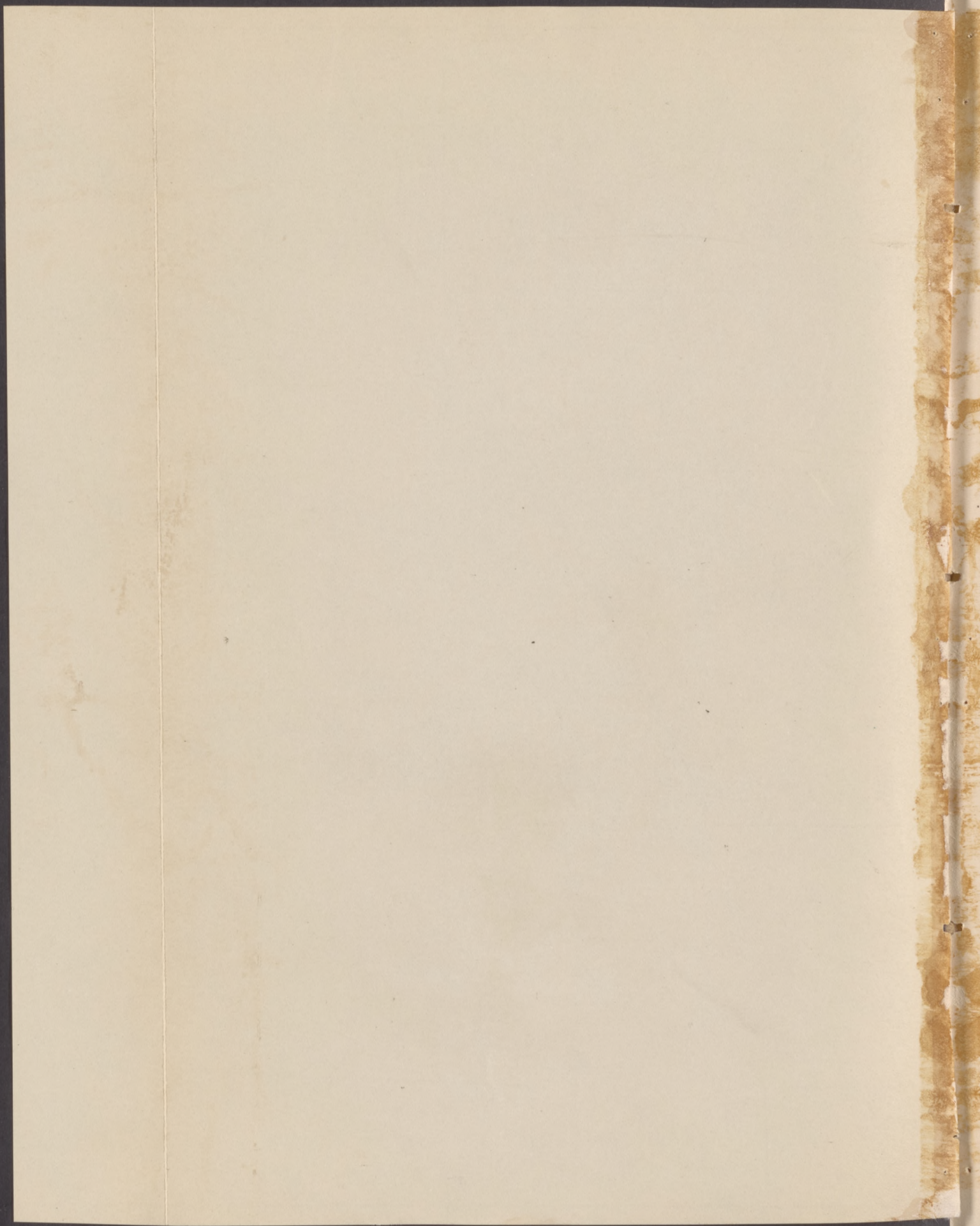
Scale: 1" = 20'

Approved

W. C. ...
 CITY ENGINEER

December 1922
 Revised May 1925

3 MAPS
 MAP NO 1



Reasons.

reading and after the consideration of said improvement ordinance by the Common Council of the City of East Orange.

10 4. The notice of intention and/or improvement ordinance did not properly or accurately describe the improvement undertaken.

5. The improvement completed was, for the greater part, new paving and the notice of intention and improvement ordinance provided for repaving only and did not provide for new paving.

20 6. The improvement ordinance was passed without affording prosecutors with notice required by due process of law and/or was considered before giving those interested a hearing and consequently, said ordinance is unconstitutional and void as to the prosecutors and any assessment for benefits thereunder or pursuant thereto is illegal and void.

7. To allow an assessment for new paving when the improvement ordinance and notice of intention provided for repaving only, is not due process of law and is unconstitutional.

30 8. The proceedings in question are judicial in character and the prosecutors were not given such adequate or sufficient notice so as to permit a special assessment against their land.

9. Said City Council did not request the Board of Assessments that a proper assessment be made and did not furnish the Board of Assessments with a statement showing in detail the cost of said improvement in accordance with Section 14, Article XX, Chapter 152, Laws of 1917.

40 10. Other properties in the immediate neigh-

Reasons.

borhood were especially benefited by said improvement, which is plainly shown by the map accompanying the report of the Board of Assessments and were not assessed, and because, if such properties were assessed the Burstiner assessment would be considerably less.

11. The proceedings brought into this court do not show a valid and legal assessment for divers other reasons.

AARON MARDER,
Attorney for and of Counsel
with Prosecutors.

Endorsed:

Service of the within reasons acknowledged this 21st day of September, 1925.

WALTER C. ELLIS,
Attorney of Respondents.

[3767]

10

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Page 40.

Filed October 5, 1925.

NEW JERSEY SUPREME COURT.

JOSEPH BURSTINER and FANNIE)	
BURSTINER,)	
)	
Prosecutors,)	
)	
-vs-	)	ON WRIT OF CERTIORARI.
	)	STIPULATION.
The City of East Orange, et)	
als.,)	
)	
Respondents.)	

It is hereby stipulated by and between Walter C. Ellis, attorney of respondents and Aaron Harder, attorney of prosecutors as follows:

1. The prosecutors are residents of the City of East Orange and were aware of the paving and repaving and resetting of curbs in question, while the same was being done in the summer of 1922.

2. As appears on assessment map opposite page 36 of the state of the case, a portion of the paving covers what prior to the work in question was never paved and what was not street prior to the widening ordinance.

3. At the meetings of the City Council, held July 13, 1925 and July 27, 1925, counsel for the prosecutors, in arguing against confirmation of the assessment report, also reserved whatever legal rights and objections the prosecutors might have.

Dated: October 2, 1925.

WALTER C. ELLIS.
Attorney of Respondents.

Opinion of Supreme Court.

OPINION OF SUPREME COURT.

Filed March 15, 1926.

NEW JERSEY SUPREME COURT.

No. 267, October Term, 1925.

10

JOSEPH BURSTINER and FANNIE
BUNSTINER,

Prosecutors,

vs.

THE CITY OF EAST ORANGE,
et al.,

Respondents.

Submitted November 7, 1925; decided March 12, 1926. 20

On writ of certiorari, etc.

Before Justices Trenchard, Katzenbach and Lloyd.

For the prosecutors, Aaron Marder.

For the respondents, Walter C. Ellis.

PER CURIAM:

30

The subject-matter of these proceedings is an assessment for special benefits for the improvement of North Harrison street, in the City of East Orange.

The city was incorporated under Chapter 250, P. L. 1908, and the improvement was made thereunder except in so far as such act was affected by the so-called "Home Rule Act" of 1917, and the amendments and supplements thereto.

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Opinion of Supreme Court.

The ordinance for the improvement was introduced and passed on first reading on April 24, 1922. On that date the City Council fixed May 8, 1922, at 8:00 P. M. at the City Hall as the time and place for the further consideration of the ordinance, and a notice of intention, in the language of the statute, was duly published and a copy of said notice of intention was also mailed to the prosecutors herein, who do not deny the receipt of such notice. On May 8, 1922, at the appointed time, the City Council, after the public hearing, adopted the ordinance on second and final reading (no one objecting thereto), and the same was approved by the Mayor. The ordinance by Section 1 provided "That Main street and North Harrison street, at their intersection, as widened by Ordinance No. 28 of 1920, be improved by re-setting the curbs in concrete, and re-paving the roadway with Bitulithic pavement on a six-inch concrete base." Section 5 provided that "The property in the vicinity of such improvements benefitted or increased in value by reason thereof will be subject to an assessment hereafter to be levied." In the manner prescribed by statute, the city advertised for bids, awarded the contract, and carried the improvement to completion. This was all done with full knowledge of prosecutors, they admitting that they knew of the improvement and were aware that the work was being done. On February 26, 1923, the City Engineer and City Auditor presented to the City Council certificates, reporting in detail the cost of the improvement of North Harrison street "(as widened at its junction with Main street by Ordinance No. 28 of 1920), as provided for by Ordinance No. 18 of 1922," in the sum of \$3,-

Opinion of Supreme Court.

781.68, and thereupon the City Council by resolution, determined the cost of said improvement to be \$3,781.68, and directed that the matter be referred to the Board of Assessments in conformity with Chapter 152, P. L. 1917, and the amendments thereto. On June 22, 1925, the Board of Assessments submitted to the City Council its report and map, showing assessments for benefits for such improvement, dated June 10, 1925, and the City Council on that day fixed July 13, 1925, at the City Hall as the time and place for consideration of the report and map, and to hear any objections thereto, and directed that said report and map be advertised for a public hearing. The publication of notice of such public hearing was duly made, and a copy thereof mailed to prosecutors. On July 13, 1925, the City Council held a hearing on such report, at which time prosecutors appeared and objected verbally to the said assessment against the prosecutors. Further consideration of the report and map was, by proper action, postponed until July 27, 1925, at which time the report and map were adopted and confirmed by the Mayor and City Council. The report of the Board of Assessments for benefits provided for assessments against Joseph Burstiner and Fannie Burstiner, the prosecutors herein, in the sum of \$2,194.26, and assessments against one Louis Levy of \$1,091.96 and against the City of East Orange at large in the sum of \$495.46.

It appears that the ordinance in question used the word "re-paving," whereas, strictly speaking, the work was "paving and re-paving," but attention is called to the fact that the ordinance provided the street be "re-paved as widened," and that the prosecutors had full knowledge of the work.

Opinion of Supreme Court.

10 With respect to the objection now urged as to the amount of the assessments against the prosecutors, it is sufficient to say that when an attack is made upon an assessment on the ground that it is unfair, the Home Rule Act provides a remedy by appeal, and a dissatisfied landowner must use this method before resorting to a writ of certiorari. *Braham v. Ocean City*, 98 N. J. L. 426; *Breckenridge, et als., v. Newark*, 94 N. J. L. 361.

20 The prosecutors urge that the assessment in its entirety be set aside because the notice of intention, prescribed by statute, was given after the governing body had considered the ordinance on first reading, and because the ordinance used the word "re-paving," whereas, strictly speaking, a part of it was for "paving."

30 It is to be noted, however, that the prosecutors did not contend that they had no knowledge of the improvement and they did not claim they understood the work was to be done as a general improvement, and in this latter connection it is significant that the ordinance advised that properties benefitted would be assessed for the work. Since the language of the ordinance was that the street "as widened by Ordinance No. 28 of 1920" be improved by re-paving the roadway with Bitulithic pavement on a six-inch concrete base, we believe that the prosecutors cannot complain that they were misled by the inadvertent use of the word "re-paved," in view of the fact that the prosecutors admit full knowledge of all the work, and they stood by and said nothing in spite of this knowledge until they were assessed for benefits.

40 We also think that regardless of the irregularity in the procedure in the enactment of the

Opinion of Supreme Court.

ordinance, the certiorari should be dismissed because of gross laches of the prosecutors, who, having full knowledge of the facts and knowing the work was going on, allowed the city to expend a considerable sum, which they knew the city, as provided for in its ordinance, expected to assess against properties especially benefited. They waited until they were assured that all benefits to their property would be deprived from the improvement and now seek to escape their proportion of the cost of the work. That they cannot do. 10

The writ will be dismissed, with costs.

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Rule for Judgment.

RULE FOR JUDGMENT.

Filed March 22, 1926.

NEW JERSEY SUPREME COURT.

10 JOSEPH BURSTINER and FANNIE
BUNSTINER,
Prosecutors,

vs.

20 THE CITY OF EAST ORANGE,
LINCOLN E. ROWLEY, Clerk of
the City of East Orange,
JAMES H. MUCHMORE and J.
WOODS MCWILLIAMS, Mem-
bers of the Board of Assess-
ments of the City of East
Orange, and HERMAN B.
LEHLBACH, Secretary, and
Members of the Board of As-
sessments of the City of East
Orange,
Defendants.

*On
Certiorari.
Rule for
Judgment.*

30 The Court having inspected the transcript of proceedings of The City of East Orange and the report and map of the Board of Assessments of The City of East Orange, removed by the writ of certiorari in this cause, and having considered the reasons filed for setting aside said report and map, and having heard the arguments of counsel therein, and duly considered the same;

40 IT IS ORDERED that the said writ of certiorari be and the same hereby is dismissed with costs,

Rule for Judgment.

and that the said report and map of the Board of Assessments of The City of East Orange for assessments for benefits, removed by the writ of certiorari in this cause, be and the same hereby are in all things affirmed.

Entered on motion of

WALTER C. ELLIS.

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Dated, March 20, 1926.

Rule entered March 22, 1926.

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*Notice and Grounds of Appeal.***NOTICE AND GROUNDS OF APPEAL.****NEW JERSEY SUPREME COURT.**

10 JOSEPH BURSTINER and FANNIE
BUNSTINER,
Prosecutors,

vs.

20 THE CITY OF EAST ORANGE,
LINCOLN E. ROWLEY, Clerk of
the City of East Orange,
JAMES H. MUCHMORE and J.
WOODS McWILLIAMS, Mem-
bers of the Board of Assess-
ments of the City of East
Orange, and HERMAN B.
LEHLBACH, Secretary, and
Members of the Board of As-
sessments of the City of East
Orange,
Defendants.

*On
Certiorari.*

*Notice and
Grounds of
Appeal.*

30 To Walter C. Ellis, Esq., attorney of defendants:
TAKE NOTICE that the prosecutor appeals to
the Court of Errors and Appeals from the whole
of the judgment entered in this cause, on the
following grounds:

1. That the Supreme Court erred in affirming the proceedings and the assessments for benefits brought up for review by the writ of certiorari in this case.
2. That the Supreme Court erred in refusing
40 to set aside the proceedings and assessments for

Notice and Grounds of Appeal.

benefits brought up for review, and returned with the writ herein.

3. That the Supreme Court erred in refusing to hold that the said proceedings and the assessments for benefits thereunder were illegal and void, and should be set aside.

AARON MARDER,
Attorney of Prosecutors.

10

Service of the within notice is hereby acknowledged this 22nd day of March, 1926.

(Signed) WALTER C. ELLIS,
Attorney for Defendants and City Counsel
for the City of East Orange.

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Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

JOSEPH BURSTINER and FANNIE
BURSTINER,
Prosecutors-Appellants,

vs.

THE CITY OF EAST ORANGE, LIN-
COLN E. ROWLEY, Clerk of the
City of East Orange; JAMES
H. MUCHMORE and J. WOODS
McWILLIAMS, Members of the
Board of Assessments of the
City of East Orange, and
HERMAN B. LEHLBACH, Sec-
retary and Member of the
Board of Assessments of the
City of East Orange,
Respondents-Appellees.

*On Writ of
Certiorari.*

*On Appeal
from
Supreme
Court.*

BRIEF ON BEHALF OF PROSECUTORS- APPELLANTS.

The writ in this case brought up for review an assessment for special benefits alleged to have been caused by the paving of North Harrison street at its junction with Main street in the City of East Orange, the municipality looking for its authority, in making said improvement and the consequent assessment, *solely* to the Home Rule Act, Ch. 152, P. L. 1917 (p. 319, *et seq.*), and the amendments thereof and supplements thereto. This is on appeal from the judgment of the Supreme Court dismissing the writ with costs (p. 46).

Statement of Facts.

By ordinance entitled "An ordinance to provide for the improvement of certain public streets by *repaving* the roadway and resetting the curbs and to fix the appropriation therefor," adopted by the Common Council of the City of East Orange, on May 8, 1922, and approved by the Mayor on May 11, 1922, and known as Ordinance No. 18 of the Ordinances of the City of East Orange for 1922, it was provided in Section 1, "that Main street and North Harrison street, at their intersection as widened by Ordinance No. 28 of 1920 be improved by resetting the curbs in concrete and *repaving* the roadway with bitulithic pavement on a six-inch concrete base" (pp. 11 and 14). (Italics mine.)

Said ordinance was introduced and read by sections at a meeting of the Common Council of City of East Orange, held April 24, 1922, and *was passed on first reading* at the same meeting and still at the same meeting the Common Council, for the first time, ordered that the said ordinance be published and advertised and notice thereof be given, there being no publication or notice of intention prior to said meeting of April 24, 1922 (pp. 3 and 4).

Said notice of intention gave notice that the ordinance provided for the improvement of Main street and North Harrison street at their intersection, by resetting the curbs and *repaving* the roadway (p. 5).

On or about June 18, 1925, the Board of Assessments of the City of East Orange filed its report (dated June 10, 1925) of assessments for alleged benefits caused by the improvement alleged to have been made under said ordinance, with the Common Council of the City of East

Orange, which report was confirmed by resolution passed by the Common Council of the City of East Orange on July 27, 1925, and approved by the Mayor on July 29, 1925 (pp. 25-34, inc.).

Said assessment report provides for a special assessment of \$2,194.26 against the Burstiner property and \$1,091.96 against the property of Louis Levy, immediately adjoining on the north, and a balance of \$495.46 is to be paid by the city at large. The total cost of said improvement being \$3,781.68 (pp. 18 and 36).

The work actually done in connection with said improvement was new paving for the greater part and not repaving; the new paving was on what was recently private property and not city streets. This is indicated both by Section 1 of the ordinance and the map accompanying the assessment report (p. 36). See also stipulation on page 40.

The opinion of the Court below states (p. 42, ll. 30-33) that "In the manner prescribed by statute, the city advertised for bids, awarded the contract, and carried the improvement to completion. This was all done with full knowledge of the prosecutors, they admitting that they knew of the improvement and were aware that the work was being done." It is submitted that in this statement the learned Court below erred in that nothing to such effect appears anywhere in the return (which, it is elementary, governs and controls). Paragraph 1 of the Stipulation (p. 40) does state that "the prosecutors are residents of the City of East Orange and were aware of the paving and repaving and resetting of curbs in question, while the same was being done in the summer of 1922," indicating only that the prosecutors were aware of the *physical*

work while it was being done, and not of any other matters in connection therewith or prior thereto. Furthermore, the stipulation gives the entire truth.

Ordinance No. 28 of 1920, which provided for the *widening*, was reviewed by this Court in *Burstiner v. East Orange*, 3 A. R. 215, and in that case the special assessment for benefits levied against the property of the prosecutors (the same property involved in the case at bar) was set aside for the reason that the *notice of intention* preceding the improvement ordinance did not state that the improvement was a local one or that the cost, to the extent of benefit, was to be specially assessed, as required by Section 9 of Article XX of the Home Rule Act; the defect in that case was one of *form*. In the case at bar the *notice of intention* preceding the improvement ordinance was not given at the *time* required by Section 9; the defect is one of *time* and it is submitted that a like result should follow and that the assessment should be set aside; similarly, in the case at bar, there is also a defect of *form* in that the notice did not properly *describe* the improvement as required by the statute.

POINT I.

The burden is on the municipality to sustain the assessment by the proceedings returned with the writ.

In *Cook v. Manasquan*, 80 N. J. L. 206, Mr. Justice Voorhees says (p. 213):

“To found a power to act against a private right of property (in the instant case, the power to assess for special benefits), there must be affirmative proof of a compliance with the prerequisites. It is a juris-

dictional fact which may not be presumed or inferred.”

Section 26 of Article 37 of the Home Rule Act (P. L. 1917, p. 463) calling for a construction of said act favorable to municipalities, deals rather with powers and not their mode of exercise. Mr. Justice Minturn, speaking for the Court of Errors and Appeals and dealing with the Home Rule Act, says in *Logan v. Belsferd*, 94 N. J. L., page 505, on page 507, as follows:

“The ordinance which was passed was not the measure which was introduced, and which the property owners were notified to appear, and had a right to discuss, but was a measure of a radically different character, and created new and more comprehensive obligations, and as the proceedings are statutory, and are conceived and prosecuted not upon the initiative of the property owners affected, but are entirely *in invitum*, the statutory provisions must be subjected to a reasonably strict construction, in furtherance of the constitutional requirement of due process of law. *State v. Van Gieson*, 15 N. J. L. 340; *State v. Jersey City*, 30 *id.*, 93; *Erie Railroad v. Paterson*, 79 *id.*, 512.”

In the *Logan* case, the change in the ordinance is described as follows:

“When amended this ordinance provided not for the construction of sidewalks and curbs alone, but for the ‘construction, reconstruction, paving, repaving, curbing, recurbing, improving, and repairing the sidewalks * * * and the laying of crosswalks at the general expense of the city.’ ”

Mr. Justice Katzenbach, in speaking for the Court of Errors and Appeals, in *Gross v. Hague*, 99 N. J. L. 457, on page 461, says the following:

“In the first place, it is well settled that the power of a municipality in the matter

of street improvements is a specially delegated power; and the acts of a municipality are legal only when they strictly follow the procedure laid down by the legislature. *Terhune v. City of Passaic*, 41 N. J. L. 90."

POINT II.

The assessment should be set aside, in that before giving the notice of intention prescribed by statute or any notice whatsoever, the Common Council considered the improvement ordinance and passed same on first reading.

Section 9 of Article XX of the Home Rule Act, as amended in P. L. 1918, page 484, prescribes, in so far as pertinent, as follows:

"*After the introduction of any ordinance authorizing any local improvement, public notice shall be given to all persons whose lands may be affected thereby or who may be interested therein, of the intention of the governing body to consider the undertaking of such improvement. Such notice shall state the time when and the place where such governing body shall consider the said ordinance, and shall briefly describe the proposed improvement. Such notice shall be published at least once in a newspaper circulating in the municipality, at least ten days prior to the date so fixed. At the time and place so specified in such notice, or at any time and place to which the meeting shall have adjourned, all persons whose lands may be affected by such improvements, or who may be interested therein, shall be given an opportunity to be heard concerning such improvement.*" (Italics mine.)

In *Haake v. Norwood*, 99 N. J. L. 479, this Court set aside an improvement ordinance, since the "notice of intention" was not given until after the ordinance had been read in full and had passed its first reading, the governing body,

after such passage, for the first time directing the publication of the notice of intention (on all fours with the situation in the case at bar, except that in the case at bar the improvement ordinance was passed *on* first reading, all the more implying a *consideration*, as hereinafter pointed out). Following are some excerpts from the opinion of Judge Clark in the *Haake* case:

“It was early decided in this state that, even in the absence of a statute, due process of law entitled a landowner, especially affected by a proposed public improvement, to have notice thereof and an opportunity to be heard before the municipal body which intended to undertake the same. *Camden v. Mulford*, 26 N. J. L. 49. This is so because such proceedings are judicial in character. *Groel v. Newark*, 78 *id.* 142; *Sears v. Atlantic City*, 72 *id.* 435. *Prosecutor in the case at bar had a hearing before the final passage of the ordinance to which he now objects.* Since he has raised no constitutional questions, he is, apparently, satisfied that the requirements of due process were thereby met. The question to be decided in this appeal is therefore purely one of statutory construction.” * * * (Italics mine.)

“It will be observed that the ordinance had already been read at the time when the motion that it passed its first reading was made and adopted. We may or may not be able to interpret this as a motion that it be read a second time, the next step in the orderly progress of an ordinance. At any rate, it seems quite clear to us that it is indubitable proof of that fact that no opposition to the first reading was made by the borough council or any member thereof.

“Since we have seen that a right to object to such reading, and to demand a vote thereon, exists, their failure to so object *ex necessitati*, in our opinion, implies a consideration of the ordinance. On any other view, it seems to us that the members of the council

would be derelict in their duties. This, because, if they have a right to reject an ordinance at any stage of its passage, they must be under obligation to their constituents to apply their minds to the problem of whether the interests of such constituents would be best served by a rejection. On any other view, also, we would arbitrarily be eliminating one of the stages into which the passage of legislative acts were separated. It follows, then, that the action of the borough council of Norwood, in permitting the improvement ordinance to be read without objection, *amounts to a consideration* of the same, and their 'notice of intention' accordingly comes too late to satisfy the statute.

"A further argument to sustain our construction of the statute may be found, we think, in the nature of the particular proceeding. The members of a deliberative body may, either individually or collectively, reverse their previous action at any one of the various stages through which the measure before them is passing. A certain reluctance to admit error is a common characteristic of all of us, either in our private or official capacities. *The property owners affected would, in some degree, be prejudiced if they were not permitted to make their objections before the councilmen had in any way committed themselves. Our interpretation of the legislative intention gives them such an opportunity.*" (Italics mine.)

In the opinion in the *Burstiner* case in 3 A. R. 215 on page 217, the following appears:

"It will be observed that this notice is confined to an announcement of the physical character of the particular public work to be undertaken, namely, the widening of a street, and a reference to such work as an improvement. It nowhere uses the word 'local' or intimates that an assessment will be made against lands in the vicinity benefiting thereby. *The Supreme Court, in meeting the*

prosecutor's argument that the municipality did not intend a local improvement, overlooked, we think, the real defect in the notice. In our view the civic intention is quite immaterial. As a matter of fact, the proceedings subsequent to the notice obviously point to an improvement whose benefits are to be assessed against the property owners along North Harrison street.

*This is unimportant, however, if the notice itself does not comply with the statute. The answer to this question presents a problem in statutory construction." * * **
(Italics mine.)

and on pages 218 and 219, the following appears:

*"Inasmuch, therefore, as the notice in the case at bar does not contain the word 'local,' and does not, as a substitute therefore, set forth the definition of a local improvement given by the statute (Pamph. L. 1922, p. 645), namely, an improvement, the cost of which is to be assessed on the lands benefited thereby, we think it is clearly defective. It is significant, furthermore, that the Home Rule act, as originally drawn, contained a provision in respect to these notices of similar import. Pamph. L. 1917, p. 317. Although the notice, under the act before its amendment, was to be given even before the introduction of the ordinance, it is, nevertheless, illustrative of the legislative policy in the matter." * * ** (Italics mine.)

It is submitted, hence, that the ordinance in the case at bar cannot afford a basis for the assessment, in that it was adopted in a manner contrary to the provisions and requirements of the statute, and the notice of intention did not comply with the statute.

In *App v. Stockton*, 61 N. J. L. 520 (dealing with paving), the opinion reads on page 523 partly as follows:

"The power of the council in the matter of this character of street improvements was a

especially delegated authority, and the proceedings thereunder were legal only when in strict conformity with its direction. Terhune v. Passaic, 12 Vroom, 90. The presentation of this petition was a condition precedent to the exercise of the power to grade this street, and was a jurisdictional requisite. The improvement, if any was ordered made at all, must have been confined to that requested in the petition, and cost and expense incurred could only be for the grading, and an assessment for any other expense would be a void assessment. 2 Dill. Mun. Corp. (4th ed.), 604, 605, 800, 801; Camden v. Mulford, 2 Dutcher, 49; State v. Elizabeth, 1 Vroom, 176; State v. Hudson, 5 Dutcher, 104. This doctrine is now universally enforced.” (Italics mine.)

It is further submitted that in face of the above citations, together with the cases cited in Point I of this brief, that since the proceedings are judicial in character (since assessment is contemplated, *Sears v. Atlantic City*, 73 L. 710, on p. 714) and a strict compliance by the municipality with the requirements of the statute is necessary to confer jurisdiction upon the municipality, and since such statute was not complied with, that the assessment cannot be sustained by the proceedings, irrespective of any estoppel or laches that might be urged because of failure to object before completion of improvement.

In the *Burstiner* case, reported in 3 A. R. 215, part of the opinion reads on page 221 as follows:

“What we have said in the preceding paragraph disposes likewise, we think, of the city’s contention that the prosecutor is barred because of laches or estoppel. We shall not therefore pass upon the question that suggests itself as to whether or not the defect in the notice is a jurisdictional fact, and, so, one which would make the proceedings void irrespective of estoppel or laches.

App v. Stockton, 61 N. J. L. 520. Since, moreover, we hold that the notice has not complied with the statute, we shall not touch upon the constitutional question—not raised by the prosecutor—of whether such notice fulfills the requirements of due process. Suffice it to say that this Court has rigidly insisted upon the applicability of that principle to these improvement notices. *Sears v. Atlantic City*, 73 *id.* 710, and has, in fact, gone further in this regard than many of the other states. 25 Rul. Cas. L. 75.”

The opinion in the *Burstiner* case, especially that part (above quoted), on pages 217, 218, 219 and dealing with the evincing of a municipal intent to assess for benefits is authority, it is submitted, for holding that laches or estoppel cannot successfully be urged against the defects in the notice of intention in the case at bar, and that if the notice of intention preceding the improvement ordinance does not comply substantially, either as to *form* or *time*, with the requirements of Section 9 of Article XX, there can be no valid special assessment for an improvement under such ordinance.

Further cases dealing with estoppel or laches are *State v. Council of Newark*, 30 N. J. L., page 303; *Howeth v. Jersey City*, 30 N. J. L., page 93; *Burnett v. Boonton*, 75 N. J. L. 467.

In *State v. Council of Newark*, *supra*, the improvement ordinance, of which notice was given, was materially amended, in that the grade was changed; the ordinance, as amended, was passed on third reading without further notice; held, that although after the work was done and the assessment levied, the ordinance could not be attacked, nevertheless the assessment would be set aside because of the defect in the adoption of the improvement ordinance.

In the *Howeth* case, the Supreme Court held that the final ordinance provided for a different improvement from that asked for in the petition presented to the council and specified in public notice given according to the Charter and hence set aside the assessment despite the fact that the work had been done. This case was reversed by an opinion reported in 30 N. J. L. 521, for the reason that this Court was of the opinion that the final ordinance did not provide for a different improvement from that asked for in the petition, etc.

In *Burnett v. Boonton*, *supra*, the improvement ordinance called for the grading, curbing, flagging, etc., but not the macadamizing of the street in question: the work included also macadamizing; held that the assessment was illegal so far as paving with macadam was concerned, in that same was not authorized by the ordinance and that the inaction and silence of the prosecutor while the work was being done worked no estoppel or laches on his part; "that he had a right to rest upon the fact that he was not to be assessed for the benefit of this unauthorized work any more than he would have been if it had been done by some *mere volunteer*."

It is submitted, that this situation in the case at bar is different from that typified by the case of *Quinlan v. Cross*, a recent case reported in 3 Misc., 781, where the defect dealt with irregularities in the *contract* for the *work*. Such a defect is not *jurisdictional*. Cases illustrating jurisdictional defects, amongst others, are *Walsh v. Newark*, 77 N. J. L. 181; 78 N. J. L. 168, and *Groel v. Newark*, 78 N. J. L. 142.

As to estoppel, prosecutors respectfully submit that this cannot be equitably raised by the

municipality, in that, as pointed out in Judge Clark's opinion in the *Haake* case, the improvement ordinance is presumed to have been "considered" and the councilmen were presumed to have committed themselves before the prosecutors were given or afforded a hearing and since the prosecutors were entitled to be heard before the ordinance was considered; in other words, there was a pre-judgment.

It is further submitted, as to laches and estoppel, *that the prosecutors also had a right to assume that the work was being done as a general improvement and at the general expense of the municipality, under another and valid ordinance, which did not require special notice to them, and further, once the work was done it was useless and impossible to object until the special assessment was attempted.*

Prosecutors further submit that such a proceeding, to wit, either actual (the ordinance, after reading, was passed on first reading) or presumed consideration before notice of intention and hearing is not due process of law and violates the 14th Amendment to the Federal Constitution, and hence an ordinance so passed cannot afford a basis for a special assessment.

In the *Erie R. R. Co. v. Paterson*, 79 N. J. L. 512, the Court of Errors and Appeals held that proceedings to open a street are judicial in character and the landowner is entitled to be heard. Mr. Justice Swayze, speaking for said court, then says on page 514 as follows:

"The prosecutors were therefore entitled to a hearing before they could be subjected to this burden. It is said they had such a hearing because they availed themselves of an opportunity to file objections with the street commissioners. Upon the question

what suffices to constitute due process of law, we are bound by the decisions of the United States Supreme Court. It has recently been held there that an opportunity to submit objections in writing is not enough even in proceedings for taxation. *Londoner v. Denver*, 210 U. S., 373, 386. The Court said: 'A hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument, however brief, and, if need be, by proof, however, informal.' No such hearing was had in this case, and the method adopted was well calculated to lull the prosecutors into security and deprive them of the opportunity even to ask for a hearing. They had the right to expect that the board would hold its regular meetings as its own rules required; it was not incumbent upon them to attend a special meeting, since the ordinance could only be passed by action of the board at two regular meetings. The action of the members at the meeting on August 31, in agreeing to meet on September 10, was not, as the Supreme Court thought, a change of the rules, which were left as before; it was not even a suspension of the rules such as was relied on in *Eggers v. Newark*; in effect the agreement was to hold a special meeting on September 10, because it was inconvenient to hold the regular meeting since it fell on a legal holiday.'

It is respectfully submitted that a consideration before a hearing or opportunity for hearing less meets the requirements of due process of law than affording a hearing before consideration on a day other than the one the prosecutors in the *Paterson* case had a right to expect a hearing; that such a consideration is a violation of the elementary requirement of an impartial tribunal.

That the statute must be followed to meet the requirements of due process of law is indicated

in *Schushard v. Drake*, 33 N. J. L. 194. In that case the notice of application to increase the prosecutor's tax was served upon his tenant, some miles distant from prosecutor's dwelling house; the statute provided notice in writing, either served personally or left at dwelling house; held as follows:

"This was not the kind of service contemplated by the statute. There is no evidence that the prosecutor had ever appointed his tenant his agent for that purpose. But it is said that he appeared by attorney. But the attorney, when he appeared, protected against the legality of the service of the notice. The case, therefore, stands as if this tax had been increased thus without any notice to the prosecutor, and was, consequently, illegal, and must be set aside."

It is suggested, hence, that, as to local improvements, perhaps, Chapter 155 of P. L. 1925, page 392, which provides that municipal ordinances, after being introduced and having passed a first reading, shall first then be published, is unconstitutional, but the validity of this act is not involved in the case at bar and is mentioned because the respondents' attorney may urge, as he did in appearing against the application for the writ, that the procedure pursued by the municipality in the case at bar is sometimes followed and has received legislative sanction. Chapter 155 of Laws of 1925 was adopted long after the proceedings in the case at bar and does not govern at all in the case at bar.

POINT III.

The assessment should be set aside, in that most of the work was new paving and the notice of intention and improvement ordinance called for repaving, and the notice of intention and improvement ordinance did not properly describe the work.

It is submitted that the rule to be determined from the cases cited above require that before there can be a special assessment for public improvement, the ordinance must provide for the improvement, for which the assessment is levied. Prosecutors urge that, on this point, the case at bar is on all fours with the case of *Burnett v. Boonton, supra*, where the opinion on page 470 reads partly as follows:

“Nor is the prosecutor estopped from denying the validity of the assessment so far as the benefit of the macadam is concerned. If the defect consisted or an irregularity only, this contention might prevail, since the prosecutor was inactive and silent in the face of the progress of the work. *But this improvement, so far as paving with macadam is concerned, was unauthorized by the ordinance under which the work was instituted. The inaction and silence of the prosecutor therefore worked no estoppel or laches on his part. He had a right to rest upon the fact that he was not to be assessed for the benefit of this unauthorized work any more than he would have been if it had been done by some mere volunteer. App. v. Stockton, supra.*” (Italics mine.)

See also:

Ogden v. City of Hudson, 29 N. J. L. 475, on page 478.

Prosecutors also urge that there can be no assessment for new paving when the notice of

intention called for "re-paving" only, and when said notice generally did not *describe* the proposed improvement.

The prosecutors also urge that to assess for new paving is not due process of law, since the improvement of new paving was undertaken without either notice or affording prosecutors with opportunity to be heard as to new paving (the notice of intention and the ordinance not providing for new paving). Prosecutors also urge that they are not barred from asserting the impropriety of the assessment after the work was done, because of any alleged estoppel or laches by reason of the lack of jurisdiction of the municipality to assess for "paving." Prosecutors also rely, for their contentions, under Point III, on the cases and arguments above, insofar as these apply.

Section 9 of Article XX of the Home Rule Act, quoted above, requires the notice of intention *to briefly describe* the proposed improvement so that the landowner be apprised of the proposed action; when the notice provided for repaving only, the landowner was justified in assuming that that part which formerly was private property was not to be paved under the ordinance in question.

In *People v. City of Buffalo*, 137 N. Y. S. 464, it was held by the Supreme Court of the State of New York, that where a street has been paved for a part of its width, subsequent pavement of those parts which have never been paved is not a "re-pavement," as affecting liability for the expense of the improvement, the opinion, by Pound, *J.*, reading partly as follows:

"The charter recognizes (a) repair of paved streets by the commissioner of public

works, and (b) repaving, when the commissioner certifies that it is not expedient to make further repairs. 'Repairing' means restoration of the paved surface, 'Repaving' means paving again, taking up the old pavement and replacing it with new. *To the extent that the new pavement extends beyond the lines of the old, the street is not repaved, but is paved for the first time.*" (Italics mine.)

Sub-section (d) of Section 1 of Article XX of the Home Rule Act (P. L. 1917, p. 370, amended by P. L. 1924, p. 434) recognizes the difference between paving and repaving in the enumeration of both; the language is as follows:

"(d) The paving, repaving, or otherwise improving or reimproving a street, road, avenue, alley, or other public highway, or portion thereof."

In *Hurley v. Trenton*, 66 N. J. L. 538, affirmed per curiam, in 67 N. J. L. 350, the distinction is pointed out between the words "repair" and "repave." The opinion reading partly as follows:

"It is a cardinal rule of construction of municipal charters that the powers conferred are to be strictly construed, and, where doubtful, held not to exist. 1 *Dill. Mun. Corp.* 89-91; *City of Ottawa v. Carey*, 108 U. S. 110, 2 Sup. Ct. 361, 27 L. Ed. 669; *Potts v. City of Cape May*, 49 Atl. 584. The right to 'repave' is not embraced within the authority given in a city charter to 'repair' streets."

In *McGovern v. Trenton*, 84 N. J. L. 237, it was held that since the City Charter of Trenton did not provide for "repaving," although it is a public improvement, "repaving" was not governed by Section 107 of the City Charter, which provided "that all contracts for doing work, furnishing materials, for any improvements, pro-

vided under this act, extending in amount to \$200.00, shall be advertised for ten days." P. L. 1898, page 43, cited in the *McGovern* case on page 240, is an act for "the repavement of paved streets" and also shows the legislative distinction between "paving" and "repaving."

In *Boynton Real Estate Co. v. Woodbridge*, 94 N. J. L. 226, this Court, in dealing with the requirements of Section 9, to the effect that the notice of intention *briefly describe* the proposed improvement, said:

"The notice stated: 'Notice is hereby given that an ordinance has been introduced for the improvement of the road from West Pond to Kinsey Corner by grading and paving the same *in the manner described in the said ordinance as amended*. Said ordinance as amended further provides for financing such improvement and for assessment of one-half of the cost thereof on the property benefited;' then states the time and place, where and when the ordinance would be considered. We concur with the Supreme Court on the point that the notice is not sufficient to satisfy the terms of the statute. It does not *briefly describe* the proposed improvement.

It may be difficult; it seems impossible to formulate a definition of the words in the statute 'briefly describe the proposed improvement' that will fit all cases or that would have any practical value; perhaps, the sufficiency of the notice can only be determined from concrete cases as they may arise. The meaning of the word 'notice' in a statute is knowledge or information—whatever puts one upon inquiry amounts to notice. 5 Words and Phrases 4840. 'Briefly' means concisely, in a few words. Webster's Dictionary. A short or abridged statement. Standard Dictionary. To 'describe' means to narrate, express, explain. Webster's Dictionary. At all events, precision in describing the im-

provement under such a notice may not be necessary, *but the substance of what the improvement is, is essential to be stated. That cannot be ascertained from the notice in this record.* Some facts relative to the grading and paving should be stated, so that the property owner may know how he is to be affected by the improvement."

In view of the above, it is difficult, and prosecutors urge it is impossible, to say that "repaving" describes an improvement which is mostly new paving, and hence Section 9, Article XX of the statute was not complied with.

It is submitted that the learned court below erred in that part of its opinion (p. 44, ll. 28-38) wherein it states that the prosecutors were not misled by the inadvertent use of the word "repaved," since the ordinance provided for "repaving" the street "as widened," and prosecutors knew of the work done. As urged above, prosecutors had a right to assume that the paving was being done under some other and valid ordinance. Further, the question is one of jurisdiction and not of misleading; also, the matter is one of the compliance with statutory requirement; and, in addition, "repaved as widened" (used in the ordinance only) gives *location* and not *extent*, especially since there is this well recognized difference between "paving" and "repaving." Furthermore, the notice of intention does not use the words "as widened"; it simply states (p. 5) "that an ordinance providing for the improvement of Main street and North Harrison street at their intersection by resetting the curbs and *repaving the roadway*" was introduced; this clearly does not describe the work contemplated and done and does not give notice to an interested property owner of the intent to pave new roadway. Even aside

from the difference between "paving" and "repaving," the notice of intention fails to describe the improvement as required by Section 9 of Article XX of the Home Rule Act; the municipality might have intended thereunder to repave the easterly side of the Harrison street roadway, or the northerly side of the Main street roadway, east of Harrison street (see map opposite page 36). Especially since "repaved" was used. Similarly, as to the resetting of curbs.

Hence, aside from the question of "paving" or "repaving," prosecutors urge that the notice of intention was defective, and does not permit an assessment for benefits for the reasons above argued more particularly as to "paving" and "repaving," to wit: unconstitutionality of assessment (no hearing being afforded on the improvement undertaken), defective notice, defective description, jurisdictional defect, no estoppel or laches, and impropriety of urging estoppel or laches.

POINT IV.

The City Council did not request the Board of Assessments that a proper assessment be made and did not furnish the Board of Assessments with a statement showing in detail the cost of the improvement in question.

Section 14 of the Home Rule Act on page 376 of P. L. 1917 calls for a *request* by the City Council to the Board of Assessments that a proper assessment be made and the furnishing of the Board of Assessments by the City Council the statement showing *in detail* the cost of the local improvement.

The resolution of the City Council purporting to deal with "requests" and "statement in detail" above called for is the one to be found on pages 17 and 18 of the state of the case. Said resolution *does not* set forth *in detail* the cost of the improvement; it simply fixes the cost at \$3,781.68. It next resolves that the City Clerk was directed to refer the matter to the Board of Assessments in conformity with Chapter 152, P. L. 1917, etc.

It is respectfully submitted that such a *reference* is far from a *request* that a special assessment be made; if it be argued that the reference is a delegation of the power to determine whether a special assessment be made, the rule is well recognized that discretionary powers cannot be delegated.

POINT V.

Other lands in the immediate neighborhood of the improvement were specially benefited by said improvement and were not assessed for such benefits: if said property benefited as aforesaid were properly assessed, the assessments against the prosecutors would be considerably less.

The Home Rule Act (Sections 14 and 17, P. L. 1917, p. 376 and p. 378) made it mandatory that a "proper assessment be made on any lands or real estate that may have been benefited or increased in value."

Examination of the map accompanying the assessment report makes it manifest that other properties in the vicinity of the improvement were benefited, so that if these other properties were assessed, the Burstiner assessment would be materially less. Hence the assessment should be set aside under *Richter v. Newark*, 45 N. J.

L. 104; *Davis v. Newark*, 54 N. J. L. 144. It is submitted that the adjoining properties were, in fact, more benefited by the improvement than either the Burstiner or Levy properties, the only two assessed, in that the paving, which was directly in front of the Burstiner and Levy properties, made the others more accessible, whereas the Burstiner and Levy properties were just as accessible before the paving as after.

The prosecutors are not unmindful of the decision in *Florenzie v. East Orange*, 88 N. J. L. 438, where it was held that the Supreme Court, on certiorari, will not review an assessment for benefits on the ground that the same was improperly apportioned for the reason that the act under which the assessment was made gave a remedy by appeal and therefore the statutory tribunal should first be exhausted before application is made to this Court for relief, since the statutory tribunal has "peculiar opportunity and machinery for the investigation of questions of valuation."

It is submitted, however, that in this case there is no complaint of an improper apportionment; the complaint is rather because of want of apportionment altogether.

Where, as in the instant case, the assessment report, on its face, shows benefit to properties not assessed, and where it is manifest and clear that if properties not assessed were properly assessed the assessment against the prosecutors would be considerably less, there is no necessity for the "investigation of question of valuation" so as to necessitate an appeal to the statutory body and this Court may, under such circumstances, set the assessment aside, even though the Home Rule Act provides for appeal. It is

submitted that the legal situation is analogous to the one in *Tweddell v. South Orange*, 95 N. J. L. 327, where the Supreme Court said:

“The third point of practice urged against the allowance of the writ is that after the award was made and which award provided that the prosecutors were not entitled to any compensation for the appropriation of their land as a public street, they appealed the matter to the Circuit Court of the County of Essex, and that appeal is still pending. As to this our view is that the appeal to the Circuit Court is normally upon the question of how much damages the prosecutors are entitled to and not, as in the present case, as to whether they are entitled to any damages at all, or are barred, as the defendants claim, by dedication of the lands taken.”

The question of whether damages should be awarded in the *South Orange* case is analogous to whether it be manifest that other property owners should have been assessed.

The opinion by Mr. Justice Black for this Court, in *Bradley v. Asbury Park*, 87 N. J. L. 293, it is submitted, is here pertinent, although in that case it was the Common Council that limited the range of the assessment to property owners on a certain street, whereas in the case at bar the Board exempted property manifestly benefited, which exemption was confirmed by the municipal governing body; on page 296 of the *Bradley* case is the following:

“All property benefited must be brought within the range of the assessment. What Mr. Justice Swayze said, speaking for the Supreme Court, in the case of *Simmons v. City of Millville*, 75 N. J. L. 177; affirmed 76 *Id.* 821, is pertinent to the subject under consideration. ‘The act requires a just and equitable assessment of the cost upon all the owners of lands fronting on the improve-

ment which are peculiarly benefited thereby in proportion, as nearly as may be, to the advantage each shall be deemed to acquire.' As the cost was assessed upon certain designated properties, and a quarter arbitrarily imposed upon the city, to the exclusion of others, the result is injurious to the prosecutors and cannot be sustained. The commissioners were bound to assess all the property benefited, in proportion to, and not in excess of, the benefits conferred. While it may be that the prosecutors would not be injured if the assessment upon their property did not exceed the benefits, they would be injured if the assessment upon their property did not exceed the benefits, they would be injured if it was out of proportion to the benefits. They would also be injured as taxpayers if any of the property was omitted that should have been assessed, since, thereby the burden cast upon them as taxpayers would be increased unjustly."

In conclusion, it is respectfully submitted that the judgment of the court below should be reversed and the assessment for special benefits should be set aside and for nothing holden for the reasons above argued.

Respectfully submitted,

AARON MARDER,
Attorney for and of Counsel with
Prosecutors-Appellants.

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Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

JOSEPH BURSTINER and FANNIE
BURSTINER,
Prosecutors-Appellants,

vs.

THE CITY OF EAST ORANGE,
LINCOLN E. ROWLEY, Clerk of
the City of East Orange;
JAMES H. MUCHMORE and J.
WOODS McWILLIAMS, Members
of the Board of Assessments
of the City of East Orange,
and HERMAN B. LEHLBACH,
Secretary and Member of the
Board of Assessments of
the City of East Orange,
Respondents-Appellees.

*On Writ of
Certiorari.*

*On Appeal
from
Supreme
Court.*

BRIEF ON BEHALF OF RESPONDENTS- APPELLEES.

Statement of Facts.

The subject matter of these proceedings is an assessment for special benefits for the improvement of North Harrison street, between Washington street and Main street, in the City of East Orange, the said Washington and Main streets being one block apart.

The City of East Orange was incorporated under Chapter 250, P. L. 1908, and the improvement was made under said statute, except insofar as such act was effected by the so-called "Home Rule Act of 1917," and the amendments and supplements thereto.

The ordinance for the improvement was introduced and passed on first reading on April 24, 1922. On that date the City Council fixed May 8, 1922, at 8:00 P. M., at the City Hall, East Orange, N. J., as the time and place for the further consideration of the ordinance, and a notice of intention, in the language of the statute, was duly published (see p. 7, State of Case), and a copy of said notice of intention was also mailed to the prosecutors herein, and the prosecutors do not deny the receipt of such notice of intention. On May 8, 1922, at the appointed time, the City Council, after the public hearing, adopted the ordinance on second and final reading (no one objecting thereto), and the same was approved by the Mayor.

The ordinance (see p. 11, State of Case) described the nature of the improvement, and section 2 provided as follows: "That Main street and North Harrison street, at their intersection, *as widened by Ordinance No. 28 of 1920*, be improved by resetting the curbs in concrete and repaving the roadway with bitulithic pavement on a six-inch concrete base." (Italics mine.)

In section 5 of said ordinance it was provided: "The property in the vicinity of such improvements benefited or increased in value by reason thereof will be subject to an assessment hereafter to be levied." In the manner prescribed by statute, the City proceeded to advertise for bids, awarded the contract and carried the improvement to completion. This was all done with full knowledge of prosecutors, they admitting that they knew of the improvement and were aware that the work was being done (see stipulation filed and made a part of the State of Case).

On February 26, 1923, the City Engineer and City Auditor presented to the City Council certifi-

cates, reporting in detail the cost of the improvement of North Harrison street "(as widened at its junction with Main street by Ordinance No. 28 of 1920), as provided for by Ordinance No. 18 of 1922," in the sum of \$3,781.68 (see p. 18, State of Case), and thereupon the City Council did, by resolution, determine the cost of said improvement to be \$3,781.68, and directed the matter be referred to the Board of Assessments in conformity with Chapter 152, P. L. 1917, and the amendments thereto (see p. 18, State of Case).

On June 22, 1925, the Board of Assessments submitted to the City Council its report and map, showing assessments for benefits for said improvement, dated June 10, 1925, and the City Council on that day fixed July 13, 1925, at the City Hall in East Orange, N. J., as the time and place for consideration of the said report and map, and to hear any objections thereto, and directed that said report and map be advertised for a public hearing. The publication of notice of the said public hearing was duly made, and a copy thereof mailed to prosecutors. On July 13, 1925, the City Council held a hearing on the report of the Board of Assessments for assessments for benefits for the improvement in question, at which time prosecutors, accompanied by counsel, appeared and objected verbally to the said assessment against the prosecutors. Further consideration of the said report and map was, by proper action, postponed until July 27, 1925, at which time the report and map were adopted and confirmed by the Mayor and City Council.

The said report of the Board of Assessments for benefits provided for assessments against

Joseph Burstiner and Fannie Burstiner, the prosecutors herein, in the sum of \$2,194.26, and assessments against one Louis Levy of \$1,091.96, and against the City of East Orange at large in the sum of \$495.46.

As it appears in the State of Case, the ordinance in question used the word "repaving," whereas, strictly speaking, the work was "paving and repaving." The City had previously acquired a portion of prosecutors' land for the street widening for which it paid the prosecutors the sum of \$17,500.00, and this portion of the street was "paved," but in order to establish the proper "crown" or "slope" to the pavement it was necessary to remove the old pavement and "repave" the full width of the street.

Attention is called to the fact that the ordinance provided the street be "repaved as widened," the prosecutors having full knowledge of the work.

Chapter 250, P. L. 1908, under which the City of East Orange was incorporated, provides on page 504, "every ordinance when introduced shall be read; if passed upon such reading, it shall then be advertised twice in each of the official newspapers, not more than one insertion of which shall be in a calendar week, before further action is taken thereon, and no ordinance shall be passed on second reading unless at least ten days have elapsed from the time of its passage on first reading."

Prior to the decision in *Haake v. Norwood*, 2 Adv. Rep., page 1046 (May 19, 1924), East Orange, in common with so many other municipalities, passed its local improvements ordinance on first reading before publishing the notice of intention. Prosecutors, however, had

knowledge of this irregularity (if such it be) prior to and while the improvement was being made. With this knowledge they permitted the City to go ahead and improve the streets and said nothing for a period of three years. Prosecutors have filed a notice of appeal of the assessment to the Circuit Court of Essex County, which appeal is now pending and will be heard after the disposition of these proceedings.

POINT I.

Since the adoption of the Home Rule Act certiorari may be resorted to only to contest the legality of the proceedings and not to review and adjust assessments for benefits and for alleged unfairness, since prosecutors have a remedy of appeal to the Circuit Court.

This principle is now firmly established.

In *Florenzie v. City of East Orange*, 88 N. J. Law, p. 438, an appeal was made for a writ of certiorari, and Mr. Justice Kalisch, in discharging a rule to show cause, said:

“An ample remedy by appeal to the Circuit Court is provided for, etc., applicable to the City of East Orange to persons aggrieved by improper assessment, etc. No such appeal was taken and the time for taking it has elapsed, no good reason has been advanced why an appeal was not taken to the Circuit Court, no jurisdictional question is involved. The legislature has mapped out a certain policy which shall govern objections to the levying of assessments, etc., in the interests of both the municipality and the taxpayer in that a summary method is provided for the hearing and the disposition of controversies concerning such assessments.”

In sustaining this decision of Justice Kalisch this Court said:

“The doctrine of the general availability of the Court’s prerogative writ, when no other remedy exists, has no application in cases when the legislature has provided a specific remedy and a special agency for its prompt administration. It is a sound exercise of discretion for the Courts to forward rather than thwart such legislative policy and this can be done only by denying allocatur, where the statutory review has not been had, reserving the use of the prerogative writs for the review of such statutory tribunals rather than permitting its use to their disparagement.”

So also in *Graham v. Ocean City*, 119 Atlantic, p. 772, Mr. Justice Katzenbach remarked:

“When an attack is made upon an assessment on the ground that it is unfair, the Home Rule Act of 1917 provides a remedy by appeal to the Court of Common Pleas. This provision is contained in Article 20, paragraph 42; P. L. 1917, page 392, as amended in 1918, page 46. A dissatisfied land-owner must use this method before resorting to a writ of certiorari.”

See also *Breckenridge, et als., v. Newark*, 94 N. J. L. 361.

The Court is respectfully reminded that the prosecutors herein have filed a notice of appeal, which appeal is now pending in the Circuit Court of Essex County.

POINT II.

The assessments for both damages and benefits are presumed to have been regularly assessed and confirmed and the burden to show otherwise is on the prosecutors.

Defendants quote from Section 30, Article 20 of the Home Rule Act:

“Every assessment for local improvements of any kind, together with interest thereon and all costs and charges connected therewith, shall upon confirmation of the same by the governing body, be a first and paramount lien upon the lot of land described in such assessment, and paramount to all prior or subsequent alienations and descents of such lands or encumbrances thereon, except subsequent taxes or assessments, notwithstanding any mistake in the name or names of any owner or owners, or any omission to name any owner or owners who are unknown, and notwithstanding any lack of form therein or in any other proceeding which does not impair the substantial rights of the owner or owners or other person or persons having a lien upon or interest in any such lot of land; all assessments for local improvements shall be presumed to have been regularly assessed and confirmed, and every assessment or proceeding preliminary thereto shall be presumed to have been regularly made or conducted until the contrary be shown.”

POINT III.

Proceedings returned herewith show affirmatively that assessments for costs of the improvement were made upon lands peculiarly benefited in proportion to the peculiar benefits, and in no case did the assessments exceed any such peculiar benefit, advantage or increase in value.

The report of the Board of Assessments (p. 65, State of the Case) recites, among other things:

“And further that we did go upon, view and examine the lands and real estate adjacent to and in the vicinity of the said improvement under said ordinance; and further that we did fix a time and place for the hearing of all persons interested, and that we did give notice of the time and place of such hearing in a newspaper circulating in the municipality, at least ten days before said hearing, as more fully appears by the proved copy of said published notice hereto attached and forming a part hereof; and further that we did mail a notice of such hearing to the owners of all lands peculiarly benefited by said improvement or *affected* thereby, directed to the last known address of such owners; and further that we did at such time and place or at adjourned meetings attend and give all the parties ample opportunity to be heard upon the subject of this assessment; and further that we did after such hearing assess the costs and expenses of said improvement upon the lands peculiarly benefited by said improvement, so far as the same are benefited in proportion to the peculiar benefit, advantage or increase in value, which the respective lands or parcels of land or real estate are deemed by us to have received by reason of such improvement and in no case does the assessment on any parcel of land exceed in amount any such peculiar benefit, advantage or increase in value.”

The present case is thus distinguished from *Becker v. Garwood*, 96 N. J. Law, p. 329, where the report did not so recite.

The rule of law applied to all such cases is stated in *Davis v. Newark*, 54 N. J. Law, p. 144:

“To justify interference on the ground that assessments upon prosecutors are in excess of the benefits conferred by the improvement, evidence that the judgment of the commissioners was erroneous, must be cogent. There is much variance of opinion based, however, upon the same facts. I see no reason to overthrow the judgment of the commissioners.”

Mr. Justice Katzenbach in the late case of *Graham v. Ocean City*, 119 Atlantic 772, after quoting from the report of the Commissioners of Assessments, remarked:

“This report must be overcome by the evidence. We do not think that the testimony offered by the prosecutors overcomes the report of the Commissioners.”

See also *Worth v. Westfield*, 81 Law, p. 301.

In the case at bar there is surely no evidence to rebut the report of the Board of Assessments.

POINT IV.

In construing the provisions of the Act under which this improvement was made, all Courts must construe the same most favorably to municipalities.

Defendants refer to Section 26, Article 37, P. L. 1917, which provides as follows:

“And in construing the provisions of this Act all Courts shall construe the same most favorably to municipalities, it being the intention hereof to give all municipalities, to which this Act applies, the fullest and most

complete powers possible over the internal affairs of such municipalities for self-government."

POINT V.

There is no evidence that other lands in the vicinity of this improvement were benefited thereby. If such lands were benefited and prosecutors were therefor unfairly assessed, that is a matter to be determined in the appeal now pending in this case.

Prosecutors' claim that other properties in the vicinity were benefited is unsupported by the slightest evidence. Surely such statement cannot overcome the opinions of the Board of Assessments Commissioners, who had given special and expert attention to the assessments.

In *Humphries v. Bayonne*, 60 N. J. Law 406, Mr. Chief Justice Gummere states:

"The only other ground upon which prosecutors seek to contest the confirmation of this assessment is that the Commissioners did not assess all the lands which had been benefited by the improvement. But it is settled in this Court that an objection of this kind will not be sustained unless it is made to appear that the failure of the Commissioners to assess *all the property benefited* has operated against the prosecutor by imposing on his lands more than a proper assessment. In the present case, as has already been stated, the evidence fails to show that the assessment placed upon the property of the prosecutor is in excess of the benefits received from the improvement." (Italics mine.)

See also *Righter v. Newark*, 16 Vr., p. 104;

Davis v. Newark, 54 N. J. Law 145;

Youngster v. Paterson, 40 N. J. L. 248.

In the present case the City of East Orange is contributing \$495.46 toward the cost of the improvement, and only by the widest stretch of the imagination could other lands in the vicinity be considered as receiving benefits sufficient to total the amount assumed by the city at large. Hence to have assessed other properties would have affected the city alone.

POINT VI.

The proceedings show that the governing body did request the Board of Assessments to make assessments for benefits in conformity with Chapter 152, P. L. 1917, and the amendments thereto, and did furnish said Board with a statement showing in detail the cost of the improvement.

The prosecutors-appellants' brief denies there was a request for an assessment for benefits, and denies that the Board was furnished with a statement of detailed costs.

Respondents refer to the resolution of City Council of East Orange of April 24, 1922, shown on page 18 of the State of the Case, which recited as follows:

“Whereas the City Engineer and the City Auditor have certified the detailed costs of said improvements, the total amounts of which are as follows: (Then follows a list of costs of various improvements, among which is recited North Harrison St. at its junction with Main St., \$3,781) and the said Council has considered the same. Now, therefore, be it Resolved that the City Council does hereby determine the total costs of said improvement to be (recital of various improvements including North Harrison St. and the cost thereof). And be it further Resolved that the City Clerk is directed to refer these matters to the Board of Assess-

ments in conformity with Chapter 152, P. L. 1917, and the amendments thereto."

The respondents further refer to page 18 of the State of the Case, wherein appears a copy of the certificate of detailed cost, signed by the City Engineer and the City Auditor, and also on page 29, State of the Case, in the report to the Board of Assessments in which the Board of Assessments report that they had received a copy in detail of the cost of such improvement.

It is obvious that it must be a matter for the Board of Assessments to decide whether or not benefits have been received from the improvement, and this matter was referred to the Board for that purpose.

POINT VII.

The writ of certiorari should be dismissed in spite of any irregularities in the procedure because Prosecutors were guilty of gross laches.

The appellants urge that the assessment in its entirety be set aside because the notice of intention, prescribed by statute, was given after the governing body had considered the ordinance on first reading, and because the ordinance used the word "repaving," whereas, strictly speaking, a part of it was for "paving."

As stated herein, the statute (Chapter 250, P. L. 1908), under which the City of East Orange was incorporated, provided that all ordinances should pass on first reading before being advertised. This applied to a great many municipalities, and in common with them, the City of East Orange, under the rules of the City Council, followed such procedure prior to the decision of *Haake v. Norwood*, 2 Adv. Rep. 1046, and

passed its ordinances on first reading before *servicing* and *publishing* a notice of intention. The attention of the Court is respectfully called to the fact that this procedure has again been adopted since the enactment of Chapter 155, P. L. 1925. After the Norwood case, however, and until the enactment of Chapter 155, P. L. 1925, the City of East Orange followed the rule as laid down in that case.

It is to be noted, however, that the prosecutors do not contend they had no knowledge of the improvement, and they do not claim they understood the work was to be done as a general improvement, since the ordinance advised that properties benefited would be assessed for the work. The other defect claimed by the prosecutors is that the ordinance used the word "repaving."

Since, however, the language of the ordinance was that "Main Street and North Harrison Street, at their intersection, *as widened by Ordinance No. 28 of 1920* be improved by resetting the curbs in concrete and repaving the roadway with bitulithic pavement on a six-inch concrete base," the prosecutors cannot seriously contend that they were misled by the inadvertent use of the word "repaved," since the ordinance stated that the street would be "*repaved as widened.*" Prosecutors do not deny receipt of a notice of intention. They also had knowledge of the adoption of the ordinance which provided for assessment for benefits, and admit full knowledge of all the work and they stood by and said nothing in spite of all this information, until they were assessed for benefits. (See City Clerk's affidavit of publication and service of notice of intention, page 4, State of Case.)

It is therefore respectfully urged that regardless of these irregularities in the procedure, the certiorari should be dismissed because of gross laches of the prosecutors, who, knowing all the facts and knowing the work was going on, allowed the City to expend a considerable sum, which they knew the City, as provided for in its ordinance, expected to assess against properties especially benefited. However, they waited until they were assured that all benefits to their property would be derived from the improvement and now seek to escape their proportion of the cost of the work.

By a long line of cases down to a recent opinion of Mr. Justice Lloyd, *Quinlan v. Cross* N. J. Adv. Rep. 1341, the law is well settled that "where property owners without objection and with knowledge of the progress of the work, have permitted a municipality to expend money for a public improvement and assessed for said improvement, they have no standing by reason of laches to object to the assessment made on the ground of irregularities in the procedure." A distinction is here made between the present case and the case of *Haake v. Norwood*, hereinbefore mentioned, in that in the Norwood case the prosecutors were not guilty of laches, but immediately made application to have the ordinance set aside before the contract for the improvement had been awarded. Mr. Justice Parker, in deciding this case in the Supreme Court, 99 N. J. L. 479, indicated that an entirely different result might have obtained if a contract for the work had been made before Haake applied for a writ.

Youngster v. Paterson, 40 N. J. L. 244, was almost identical to the present case. In that

case the Court dismissed the writ and affirmed the assessment, having the following to say:

“It is admitted, in behalf of the City of Paterson, that there have been irregularities in these proceedings, and it is also conceded that if the prosecutors had acted promptly, the defects are such that the grading and curbing of this avenue could have been stopped. But it is also contended that the prosecutors had actual notice of these improvements before they were made, and during their progress; that, with this knowledge, they permitted the work to go on to completion, and after the City had expended and actually paid the whole cost thereof, now refuse to pay their respective assessments, because of these preliminary defects. All the proofs in the case show that they had such notice, and there is no denial on their part. They were not in a position to be silent if the City was acting with a misapprehension of its right, and under color of authority given it by the charter to grade, pave and curb the streets. The first work done upon the land of each, or affecting it, with their knowledge, was notice to them that the City authorities were there with a claim of right to make a public improvement, and if they neglected to make the proper inquiries, or to object with an assertion of their rights as land owners, until the work was done and paid for, such conduct is a waiver of all objections to the right to make such improvement. This has become the settled law in our State relating to such improvements.”

In *Whitney Glass Works v. Glassboro*, 79 N. J. L. 352, Mr. Justice Trenchard dismissed the certiorari reviewing an assessment, with the following comment:

“It must be considered as completely settled in this State that when the proceedings of a municipal corporation have contemplated and resulted in the expenditure

of public money, objections, even when founded on lack of authority, must be made promptly. The writ of certiorari, being discretionary, may be refused when it appears that the public interest will suffer or private injustice will be done. If the prosecutor suffers a public work, on account of which his property may properly be assessed for benefits, to proceed for several weeks without applying for his writ, and only applies for it after the work is nearly completed at a large expenditure of public moneys, the writ will be refused, or, if allowed, will be dismissed when these facts are brought to the attention of the Court. We think the prosecutor failed to proceed with the diligence required by law."

In a most recent case, Mr. Justice Lloyd, in *Quinlan v. Cross*, dismissed a writ and affirmed an assessment in the following language:

"It appears from the proofs that the prosecutor, while cognizant of the steps that were being taken, took no action looking to the arrest of the proceedings under the ordinance and the improvement until after the entire work had been completed and was in use. I think under the authorities, and under all principles of justice and equity, she was obliged to act promptly upon learning of the contemplated action, and not to permit the expenditure of large sums of money and the commitment of the municipal authorities to a course of action which entailed great burden and expense upon it if she were going to attack the validity of the contract and the subsequent action thereunder. The authorities dealing with the question of laches under such circumstances are numerous and in no uncertain voice. They declare that one situated as the prosecutor cannot sit idly by and observe such improvements without thereafter being estopped from complaining. *Cunningham v. Borough of Merchantville*, 61 N. J. L. 466; *Glass Works v. Glassboro*, 79 *Id.* 352."

Following are some of the leading cases supporting the aforesaid principles:

Ropes v. Essex Public Road Board, 37 N. J. L. 335.

Bowne v. Logan, 43 N. J. L. 421.

Provident Inst. v. Jersey City, 52 N. J. L. 490.

Simmons v. Passaic, 55 N. J. L. 485.

Van Wagoner v. Paterson, 67 N. J. L. 455.

Rosell v. Neptune City, 68 N. J. L. 509.

Doughten v. Camden, 71 N. J. L. 426.

Durell v. Woodbury, 74 N. J. L. 206.

Durell v. Woodbury—affirmed, 75 N. J. L. 939.

Counsel has repeatedly argued in appellant's brief that the doctrine expressed in *Burstiner v. East Orange*, 3 A. R. 215, should be applied herein. (The above case was between the same parties.) It is respectfully pointed out, however, that the question raised is entirely different. In the previous case no notice of intention was received and the ordinance in no manner advised Burstiner that he would be assessed for benefits. The ordinance did not use the word "local" improvement, nor did it make mention of assessments for benefits. The Court therefore held that Burstiner was justified in assuming the work was to be done as a "general" improvement. Such being the case, he could not be guilty of laches, because he could not reasonably be charged with assuming an assessment would be made.

In the case at bar, however, Burstiner does not deny he received a notice of intention, nor does he deny the ordinance recited "that property in the vicinity of such improvement benefited or increased in value by reason thereof will be subject to an assessment hereafter to be levied."

Counsel for appellant also refers to *Sears v. Atlantic City*, 73 L. 710; *State v. Council of Newark*, 30 L. 303; *Howeth v. Jersey City*, 30 L. 93; *Burnett v. Boonton*, 75 L. 467. A reference to these cases show that either no notice at all was given to property owners to be assessed, or that the ordinance as passed was entirely different from the improvement referred to in the notice.

In conclusion, defendants-appellees again respectfully urge that the judgment of the Supreme Court be sustained. The appellants do not claim to have been misled by any step in the proceedings. They had knowledge of the ordinance. They received a notice of intention. They knew the work was being done and watched the progress of it. They knew they were to be assessed for benefits. They stood by for over three years and watched the City spend the public funds improving their property. Their property has been greatly increased in value by reason of the improvement and they did not oppose the proceedings at any time until the City attempted to assess them for a part of the cost of the improvement in proportion to their peculiar benefits.

If they are dissatisfied with the amount of the assessment, we repeat the appellants' remedy is by the appeal they have already taken to the Circuit Court. That appeal is now pending.

Respectfully submitted,

WALTER C. ELLIS,
Attorney for Respondents-Appellees
and City Counsel for the City of East
Orange.

