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Bill of Complaint.

(filed as of March 3, 1927).

To his Honor, EDWIN ROBERT WALKER, Chancellor of the State of New Jersey:

The Complainant, the Township of Maplewood, of the County of Essex and State of New Jersey, a municipality duly created and existing under the laws of said State, respectfully shows:

1. This Township has for many years been and is now devoted to the maintenance of a residential population for those occupying detached private residences and in reliance upon such plan many such residences have been erected in the Township so as to constitute large neighborhoods consisting of such houses alone; and the said Township in keeping with such plan and without disturbing such residential neighborhoods has provided convenient locations for apartment houses, business structures and buildings for industrial and manufacturing purposes. For the purpose of continuing such plan, of keeping faith with those establishing residences within the Township and of promoting the general welfare, health and safety of the community, said Township pursuant to the laws of the State of New Jersey thereto pertaining, by an ordinance duly enacted March 15th, 1921, and by ordinances amendatory thereof and supplemental thereto, provided regulations for erection of buildings throughout the Township, copy of which so far as necessary for this proceeding is attached hereto as Schedule A and made a part hereof. Same were in force in April 1926 and continuously ever since.

This Township covers an area of about three and one-third square miles and has about 15,000 inhabitants.

2. Under the regulations of said ordinance Burnet Street in said Township is restricted to private residences, thus excluding therefrom what are known as apartment or multi-family houses. Said street consists of three blocks of approximately 350 feet frontage each and is fifty feet in width, including the sidewalks, and with the exception of a portion fronting the Junior School of Maplewood (the building of which is set back far from the street line) and the vacant lot hereinafter mentioned, said street is built up with private residence, of detached kind, and about two and one-half stories in height, for the most part occupied by their respective owners.

3. The vacant lot aforesaid is owned by one, Max Margolis, and is 100 feet in width and about 159 feet in depth. It is between private residences on the same side and private residences for the whole length of the block on the westerly side, the vacant lot itself being on the easterly side, in the middle of the middle block of said Burnet Street.

4. On or about April 5th, 1926, the Marlyn Realty Company, a corporation of the State of New Jersey, of which defendant, Max Margolis, was President, acquired said vacant tract by deed of Edward T. Johnson and Hattie L., his wife, recorded in the office of the Register of the County of Essex April 29, 1926, in Book N 74 of Deeds, page 4, which deed contained among other things the following:

> "Subject to existing restrictions if effective and Statutory and municipal requirements relating to land and buildings."

and as part consideration therefor executed and delivered to said Johnson and wife a mortgage covering said premises, containing the same precise words, in both instances following the description of the property in said instruments.

5. On or about April 29, 1926, said Marlyn Realty Company by said Max Margolis as President, conveyed said premises to said Max Margolis individually, by deed recorded in the office of the Register of Essex County April 29, 1926 in Book E 57, page 420.

6. Said Max Margolis made application to the Building Department of said Township for permit to erect on said vacant lot an apartment house 86 feet in front, 105 feet in depth and 50 feet high, four stories, housing 32 families, which application was refused on the ground that said ordinance forbade such erection on said lot. Said Margolis then applied to the Township Committee of said Township to amend the ordinance aforesaid so as to permit such erection, and while such application was pending said Margolis applied to the Supreme Court of New Jersey for a writ of mandamus compelling the said Building Department to issue such permit, and said writ of mandamus was granted by said Supreme Court.

7. Said Margolis has stated his intention to erect such apartment on said vacant lot on Burnet Street. Your complainant therefore alleges it as a fact that said Margolis has such intention.

8. The erection of such apartment house would constitute a violation of the ordinance aforesaid; it would be a nuisance to the neighborhood and community, entirely out of harmony with such neighborhood and the plan of the community afore-

said; it would substantially interfere with light, air and outlook of other residents of the street and would impair the general welfare, health and safety of the community.

9. The Supreme Court of New Jersey in granting such writ of mandamus exercised its discretion only and could not and would not consider the equitable side of the matter, and your complainant is without adequate remedy at law.

WHEREFORE, your complainant prays that this honorable Court issue its writ of injunction, enjoining and restraining said Max Margolis and all others whom it may concern, from in any way violating the terms of the ordinance of this Township aforesaid and from erecting the so-called apartment house in particular, and to that end complainant prays that your Honor require the said Max Margolis and others whom it may concern, to show cause at a time and place to be set by your Honor why such writ of injunction should not issue and why complainant should not have such other and further relief in the premises as the Court may deem equitable and just.

SAMUEL D. WILLIAMS,
Solicitor of Complainant.

A. P. BACHMAN,
Of Counsel.

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

JOHN S. DEHART, JR., of full age, being duly sworn on his oath deposes and says that he is Chairman of the Township Committee of the Township of Maplewood; that he has read the foregoing Bill of

Complaint and knows the contents thereof; and that same is true to the best of his knowledge, information and belief.

J. S. De HART, Jr.

Subscribed and sworn to before
me this 7th day of March, 1927.
JOHN A. MCKENNA,
Atty in Law of the
State of New Jersey.

SCHEDULE A.

Section 1. Establishment of Districts. In order to regulate and restrict the location of trades and industries, and the location of buildings designed for specified uses, the Township of South Orange (Maplewood) in the County of Essex, is hereby divided into six kinds of districts, to be known as follows:

1. Single-family residence districts.
2. Two-family residence districts.
3. General residence districts.
4. Business districts.
5. Commercial districts.
6. Industrial districts.

Section 2. District Boundaries. The boundaries of the districts shall be the boundary lines shown on the map acompanying this ordinance, as modified from time to time by the Township Committee, and the map is hereby made a part of this ordinance, with all the lines, designations, explanations and other things shown thereon, as if all these things were described in this ordinance. Where the boundary lines are shown on the map within street lines, the center lines of such streets shall be

the boundaries of the districts. Where the boundary lines are shown approximately on the location of property, such property lines shall be the boundaries of the districts. Where the boundary lines are shown approximately one hundred feet from street lines and it appears that they are not intended to follow property lines, then the boundary lines shall be regarded as being located one hundred feet distant from the street lines. In cases not covered by these provisions, the location of boundary lines shall be determined by the distances in feet, if given, from other lines on the map, or by the scale of the map, if no distances in feet are given. Where any uncertainty exists as to the exact location of a boundary line, the location shall be determined by the Building Inspector subject to an appeal to the Building Committee by any owner affected by a decision.

Section. 3. Single Residence Districts. In the single residence districts, no buildings, structure or premises shall be used, and no building or structure or alteration, enlargement or extension of the same shall be constructed, unless designed, arranged or intended to be used exclusively for one or more of the following purposes:

1. A residence for a single family.
2. A church.
3. A library, public school or public museum.
4. A club (excepting clubs the chief activity of which is a service customarily carried on as a business).
5. A place of meeting or assembly.
6. A public park or playground.
7. Such accesories as are customarily incident to the foregoing uses, and are not injurious to any district as a place of residence.

Such accessories shall not include a business or manufacturing, but may include:

a. An office of a physician or dentist, authorized by law to practice a profession and living on the premises;

b. A private garage with provision for not more than three motor vehicles;

c. A private stable with provision for not more than three horses;

d. A home industry or other accessory not injurious to a district as a place of residence;

e. Accessories shall not be deemed to include billboards or other advertising signs; except that there shall be permitted (1) on a residence, signs bearing the name and designations of any occupation lawfully carried on in such residence by any person residing therein; any such sign not to exceed one square foot in area; (2) real estate signs advertising as for sale or rent the property upon which they are displayed; (3) on other buildings, signs customarily and necessarily incident to use to which the buildings are lawfully put.

Section 12. Amendments and Repeals. This ordinance shall not be amended or repealed except after due public notice of a proposed amendment or repeal and a public hearing. This ordinance shall not be amended except by a three-fifths vote of the entire membership of the Township Committee, and shall not be repealed except by a four-fifths vote of such membership.

Section 13. Permission of Township Committee. Whenever, under the provisions of this ordinance, the permission of the Township Committee must be obtained for any act, such permission shall be granted only at a public hearing of which a reasonable public notice shall have been given. Such permission shall be granted only upon such condi-

tions as are necessary to safeguard the character of the district, with relation to which the permission is sought. A failure to observe any condition so imposed shall be deemed to be a violation of this ordinance.

Order Permitting Bill of Complaint in Place of Petition.

(filed March 8, 1927).

IN CHANCERY OF NEW JERSEY

Between:
TOWNSHIP OF MAPLEWOOD,
Complainant,
and
MAX MARGOLIS,
Defendant.

Above named complainant having heretofore filed its Petition praying for injunction etc., against defendant and the Chancellor having made his order requiring the defendant to show cause before him why such prayer should not be granted, and the complainant having in open Court prayed for leave to amend by filing a Bill of Complaint in place of the Petition it is thereupon on this 8th day of March, 1927, ORDERED that complainant be and it hereby is granted leave to amend by filing a Bill of Complaint in place of the Petition heretofore filed herein and that the order to show cause made herein be captioned with the Township of Maplewood as Complainant instead of as Petitioner and

the same amendment be made in the body of said order to show cause to conform.

E. R. WALKER,
C.

Respectfully advised.
JOHN H. BACKES,
V. C.

Order to Show Cause.

(filed March 3, 1927).

IN CHANCERY OF NEW JERSEY.

Between:
TOWNSHIP OF MAPLEWOOD,
Petitioner,
and
MAX MARGOLIS,
Defendant.
On Petition for Injunction Order to Show Cause.

The Township of Maplewood having presented to the Court its petition praying for the Court's writ of injunction enjoining and restraining above named defendant, Max Margolis and all others whom it may concern from violating the zoning ordinance of said Township and in particular from erecting on premises described in the petition a so-called apartment house in violation of the provisions of said zoning ordinance, on motion of A. P. Bachman, of counsel with said Township it is thereupon on this 3rd day of March, 1927, ORDERED that Max Margolis show cause before the Chancellor in his Chambers in the Industrial Building, City

of Newark, N. J., on the 8th day of March, 1927, at ten o'clock in the forenoon why said petition should not be granted and why said petitioner should not have such other or further relief in the premises as may be just and proper.

Service of a copy of this order and the said petition upon Max Margolis on one day's notice, shall be deemed sufficient service.

E. R. WALKER,
C.

Respectfully Advised,
JOHN H. BACKES,
V. C.

By stipulation, proof of due service of petition and show cause order is not printed. Messrs. Howe & Davis having appeared for Max Margolis on the return day.

Decree of Dismissal.

(filed April 6, 1927).

IN CHANCERY OF NEW JERSEY.

Between: TOWNSHIP OF MAPLEWOOD, Complainant, and MAX MARGOLIS, Defendant.	On Bill, etc. Decree of Dismissal

The Chancellor having on the third day of April 1927 made his order requiring above named defendant to show cause before him in Chambers of this Court in the City of Newark, on the 8th day of April, 1927, why the prayer of a petition by complainant for an injunction against defendant, filed with said order, should not be granted, and complainant having prayed for and obtained leave to file a bill of complaint in place of petition, the order aforesaid to apply thereto, and after hearing the solicitors of the respective parties, it is thereupon on this 6th day of April, 1927, ORDERED that that said order to show cause be and it is hereby discharged and that said bill of complaint be and it is hereby dismissed.

E. R. WALKER,
C.

Respectfully Advised,
JOHN H. BACKES,
V. C.

Conclusions of Vice Chancellor.

(filed March 14, 1927).

IN CHANCERY OF NEW JERSEY.

Between TOWNSHIP OF MAPLEWOOD, Petitioner, and MAX MARGOLIS, Defendant.	Opinion

There is no equity in a bill to restrain the violation of a zoning ordinance which the law courts have held to be unlawful.

On order to show cause for restraint *pendente lite* and motion to dismiss the bill.

For Petitioner, Samuel D. Williams.
For Defendant, Howe & Davis.

BACKES, V. C.

The Township of Maplewood has a zoning ordinance. The defendant is desirous of building an apartment house on his lot within a zone in which the erection of such structures is forbidden, and the authorities of the township having denied him permission he applied to the Supreme Court and it issued its mandamus that a permit be granted, it is assumed, on the authority of *State* v. *Nutley*, 99 N. J. L. 389, and *Jersey Land Co.* v. *Scott*, 100 N. J. L. 45. The bill, after stating the foregoing facts, pleads that "The Supreme Court of New Jersey in granting such writ of mandamus exercised its discretion only and could not and would not consider the equitable side of the matter, and your petitioner is without adequate remedy at law." The prayer is to restrain a violation of the ordinance. Just what the equitable side of the matter is is not disclosed by the bill, nor was it pointed out on the argument, and a lone search of the Chancellor's conscience has not revealed any ground for equitable interference. If the ordinance were authorized by law, and the law provided no adequate remedy and protection, equity undoubtedly would lend aid, but, as the case stands, the township has no legal right, it has no lawful ordinance in respect of the matter upon which it rests its prayer for relief.

Counsel said on the argument, that the bill was intended to carry the zoning question to the Court of Appeals on the equity side, presumably, because favorable results have not been reached on the law

side, but just how he expects to make this appeal for redress was not divulged, at least not to our understanding and, consequently, if his point has been missed, he must share with us the responsibility for the meagre account of our reason for denying relief in this branch of our judicial system.

The order to show cause will be discharged and the bill will be dismissed.

Notice of Appeal.

(filed April 9, 1927).

IN CHANCERY OF NEW JERSEY.

Between TOWNSHIP OF MAPLEWOOD, Complainant, and MAX MARGOLIS, Defendant.	On Bill etc. Notice of Appeal

Township of Maplewood, the complainant in the above stated cause hereby appeals to the Court of Errors and Appeals in the last resort in all causes, from each and every part of the decree of dismissal made by the Chancellor on the advice of Vice Chancellor John H. Backes and filed in the within cause on the 6th day of April, 1927.

SAMUEL D. WILLIAMS,
Solicitor of Complainant.

I conceive that there is good cause for appeal in the above stated cause.

A. P. BACHMAN,
of Counsel with Complainant.

Petition of Appeal.

(filed April 9, 1927).

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between TOWNSHIP OF MAPLEWOOD, Complainant-Appellant, and MAX MARGOLIS, Defendant-Respondent.	On Appeal from final decree in Chancery

To the Honorable the Court of Errors and Appeals in the last Resort in all Causes:

The Petition of the Township of Maplewood, the complainant herein and the appellant in the above stated cause, respectfully shows that your petitioner is aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, bearing date the 6th day of April, in the year 1927, wherein complainant's bill of complaint was dismissed and the order to show cause issued herein discharged, in the following respects:

1. That it was erroneous to dismiss the said bill of complaint, for the reason that same showed that complainant is without adequate remedy at law in the matters set forth therein and that complainant was entitled to the relief prayed for.

2. That it was further erroneous because complainant showed to the Court that although the Supreme Court had granted a mandamus in favor of defendant in a proceeding had in that Court, said Supreme Court could not and would not consider the equitable side of the matter and the Court of Chancery should have considered the equities disclosed in the bill of complaint and granted the relief prayed for.

WHEREFORE your petitioner prays that said final decree be wholly reversed and for nothing holden; and that petitioner-appellant have such other or further relief or both as this Court may deem just and proper, together with the costs and disbursements of this appeal.

Dated, April 8, 1927.

SAMUEL D. WILLIAMS,
Solicitor and of Counsel
with Petitioner-Appellant.

Answer to Petition of Appeal.

(filed April 12, 1927).

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between TOWNSHIP OF MAPLEWOOD, Complainant-Appellant, and MAX MARGOLIS, Defendant-Respondent.	On Appeal from Final Decree in Chancery.

The answer of Max Margolis, the above named appellee, to the petition of appeal of the Township of Maplewood, the above named appellant.

This appellee, not admitting the truth of all or any of the matters in the said petition of appeal contained for answer thereto, notwithstanding, admits that a decree was on the 6th day of April, in the year Nineteen Hundred and Twenty-seven, made and entered in the Court of Chancery of New

Jersey in the above-entitled cause for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree, this appellee begs leave to refer thereto when the same shall be produced.

This appellee is advised and believes that the said decree is agreeable to equity; and he prays that the same may be affirmed with costs to be taxed in favor of this appellee.

HOWE & DAVIS,
Solicitors for and of Counsel with Appellee.

109MAY.1.1927

New Jersey Court of Errors and Appeals

Between
TOWNSHIP OF MAPLEWOOD,
Appellant,
and
MAX MARGOLIS,
Respondent.

APPELLANT'S BRIEF.

This is an appeal from a final decree in Chancery (10/20) which dismisses complainant-appellant's bill of complaint (p. 1) and discharges the order to show cause (9/10) why an injunction should not issue as prayed for.

By mistake a petition was first filed, but by order of the Court (8/10) and consent of counsel in open court leave was granted to file a bill of complaint in place of the petition and to regard the showcause order amended to conform.

Complainant-appellant is a municipality duly created and existing under the laws of this State.

It has for many years been and is now devoted to the maintenance of a residential population for those occupying detached private residences and in reliance upon such plan many such residences have been erected in the Township so as to constitute large neighborhoods consisting of such houses alone.

The Township, however, has also provided convenient locations for business structures and buildings for industrial and manufacturing purposes, as well as for apartment houses, while at the same time holding to the general plan stated and without disturbing residential neighborhoods (1/20).

The Township covers an area of about three and one-third square miles (1/30) and has about 15,000 inhabitants.

The Township for the purpose of keeping faith with those establishing residences within the Township and also for promoting the general welfare, health and safety of the community, duly enacted, in accordance with the statutes of the State, a so-called zoning ordinance (1/30), the parts of which so far as necessary for this proceeding appear as Schedule A on page 5 of the appeal book.

Burnet Street in this Township is restricted to private residences, thus excluding therefrom so-called apartment or multi-family houses.

It consists of three blocks of about 350 feet frontage each and the street itself is fifty feet in width, including the sidewalks (2/10).

With the exception of a space occupied by the Junior School of Maplewood, which is set far back from the street, and the vacant lot which is owned by respondent and is the centre of this appeal, Burnet Street is built up with private residences of the detached kind, about 2½ stories in height and mostly occupied by their respective owners (2/10).

The vacant lot is 100 feet front by about 159 feet deep and has private residences on each side and the whole length of the block on the opposite side (2/20).

It may be stated here that appellant does not claim to be beneficiary of any private restrictions, but it repeated in its bill (2/30) the insertion in the deed by which this lot was acquired and *in the*

mortgage given back as part of the purchase money, of a specific condition, reading:

> "Subject to existing restrictions if effective and Statutory and *municipal requirements relating to land and buildings.*"

Respondent first applied to the Building Department of appellant for a permit to erect the apartment house on the vacant lot, same to be 86 feet front, 105 feet deep, 50 feet high, four stories, housing 32 families (3/20) and it was refused by reason of the ordinance stated. Respondent then applied to the Township Committee to amend the ordinance so as to permit such erection, but before the application was passed upon, respondent applied to the Supreme Court for a mandamus.

The Supreme Court proceeding for mandamus is admittedly an appeal to the discretion of the Court. At any rate the mandamus was ordered after effort was made to enlarge the proceeding (*Margolis* v. *Maplewood,* 135 Atl. 662), and thereupon it was determined to bring up the matter as one of right in the Township for enforcement of its ordinance by the present proceeding.

When applying for the order to show cause counsel was told by the learned Vice Chancellor that the application would be denied, but that if counsel wanted a hearing he would sign the order. Counsel then stated that he would like the hearing, so that if necessary he might take an appeal. That is what the learned Vice Chancellor must be referring to in his conclusions (12/30).

The application was denied (decree, 10/30, conclusions, 11/30) and this appeal resulted.

In order to establish a claim to equity complainant showed that the Supreme Court takes no cog-

nizance of equitable matters and could not consider them if it would.

As will appear from the ordinance itself (5/20), there is no penalty on defendant if he starts to erect the apartment house, and complainant showed the Court that respondent threatens to erect the apartment house (3/30), and it had no adequate remedy at law; and with the disclosures of the bill of complaint it sought to get an injunction against the erection of the apartment house.

It is regrettable that the learned Vice Chancellor did not, as we believe, give full consideration to the merits of this proceeding. As we shall later discuss, our contention is that he was in error, but the facts as we assemble them in the bill of complaint (and the Supreme Court State of Case did not present these facts fully) are:

Due enactment of zoning ordinance under the Statutes.

Restrictions by that ordinance of Burnet Street to private detached residences.

Acquisition by respondent of vacant lot with deed giving condition revealing call for municipal requirements as to land and buildings.

Giving back purchase money mortgage with same condition, so that foreclosure would not destroy the condition.

Intent of respondent to erect an apartment house on Burnet in violation of the zoning ordinance and such condition.

Apartment house to have width of 86 feet on a lot of 100 feet width; 105 feet in depth; 50 feet high, four stories; entirely out of harmony with the neighborhood.

By allowing such erection, Township would be breaking faith with those owning detached private residences; the community plan would be destroyed; light, air and outlook substantially interfered with, and

As it is surrounded by private residences, such erection would constitute a nuisance.

Appellant présents as error (14/20):

1. That it was erroneous to dismiss said bill of complaint, for the reason that same showed that complainant is without adequate remedy at law in the matters set forth therein and that the complainant was entitled to the relief prayed for.

2. That it was further erroneous because complainant showed to the court that although the Supreme Court had granted a mandamus in favor of defendant in a proceeding had in the Court, said Supreme Court could not and would not consider the equitable side of the matter and the Court of Chancery should have considered the equities disclosed in the bill of complaint and granted the relief prayed for.

Both of these are discussed herein under the following points:

1. The Bill of Complaint shows ground for equitable relief.

2. There is no ground for holding that the ordinance in this case is illegal or invalid.

3. The erection of the apartment house threatened by respondent will be a nuisance.

4. The law provides no adequate remedy herein and appellant was entitled to the protection of the Court of Chancery.

FIRST POINT.

The Bill of Complaint shows ground for equitable relief.

What remedy has appellant if not in equity? It could not interpose opposition in the Supreme Court on any equitable basis whatever, on jurisdictional grounds. Its ordinance, *duly enacted* under the Legislative statutes, carries no penalty. It has but one Court to which it can go for relief, where it can disclose its full story of the facts.

It can claim estoppel of respondent by reason of the conditions of the deed and purchase money mortgage, as to being subject to municipal requirements relating to land and buildings (2/30).

Appellant stands more or less helpless and is compelled to go to equity. And what more need it allege to make equity recognize its claim? We have labored under the impression that we need not do more than show a reasonable ground for intervention by the Court.

It is a fact that the learned Vice Chancellor bases his decision (p. 12) on other grounds and we believe that he did not seriously regard the bill standing by itself as devoid of ground for equitable relief; but that he thought counsel was seeking a roundabout way to make the Court of Chancery an appellate court of the Supreme Court. This is in no sense the case and our disclaimer should be sufficient on this point.

It is permitted in Chancery to spread many facts before the Court which would not be permitted in a mandamus proceeding in the Supreme Court. The opinion in *Margolis* v. *Maplewood,* 135 Atl. 662, shows that counsel did indeed try to get an enlarged case in the Supreme Court. This having been refused, and appellant, having its ordinance which respondent is aiming to flout, with no penalty provided for its infraction, sought to put all the facts before the Chancellor and get relief.

We believe it to be settled by the case of *Village of Euclid* v. *Ambler Realty Co.,* 47 Sup. Ct. Rep. 114, that a municipality has the right to apply in equity for enforcement of its ordinances; for in that case, although the Village of Euclid was defendant below, it became plaintiff in the U. S. Supreme Court by reason of its appeal and if it had had no right to seek enforcement of the ordinance below, its appeal would have been dismissed without the Court going into the merits.

Our learned Chancellor in *Cashin* v. *Alamac Hotel Co.* 98 N. J. Eq. 432, discusses "Equity" thus:

> "Equity as a noun is defined to be 'an equitable claim or right and such a claim or right a party possessing it has a right to enforce and the adversary has no right to thwart that enforcement by anything less than a countervailing right.' An 'equity' is not a chancellor's sense of moral right or any vague or indefinite opinion as to altruism, but is a right cognizable in a court of chancery, governed by established rules and proceedings."

Blackstone quotes Grotius as saying that:

> "Equity is the correction of that wherein the law by reason of its universality is deficient."

It is apparent that in the instant case there is a large freedom of expression, bringing in facts which it would be impossible to have the Supreme Court consider in a mandamus proceeding.

The question therefore suggests itself: Must appellant be held as without any remedy whatever?

To hold that the Supreme Court cannot consider these facts and the Court of Chancery will not, is to present a case where there is a wrong without any relief whatever. That is quite unconscionable.

Equitable remedy may be had, even if remedy by law is doubtful.

Bohler v. *Callaway,* 45 Sup. Ct. Rep. 431.

And where the remedy at law is not as complete, practical and efficient as that which equity can afford, equity will intervene.

Windholz & Son v. *Burke,* 98 N. J. Eq. 471.
Terrace v. *Thompson,* 44 Sup. Ct. Rep. 15.

We thus feel that the learned Vice Chancellor was in error in dismissing our bill of complaint as showing no equity. For it is academic that appellant is only held to specific allegations to show that it has a right; that another wishes to thwart that right; and that as the law Courts cannot give relief, it must naturally go to a Court of Equity.

As we point out elsewhere, there seems to be confusion in the learned Vice Chancellor's conclusions (p. 12); for while he says that neither the bill itself nor counsel on argument showed the equitable side of the matter, and that his own conscience revealed nothing on the subject, yet he adds:

"If the ordinance were authorized by law and the law provided no adequate remedy and protection, equity undoubtedly would lend aid, etc.," suggesting that if the ordinance described in the bill were lawful, equity would intervene. This seems to dispose of previous mention of the lack of equity and leave as the issue the simple one of validity of the ordinance. As to this we argue further on.

SECOND POINT.

There is no ground for holding that the ordinance in this case is illegal or invalid.

We believe the learned Vice-Chancellor erred here. The Supreme Court does not, as far as we can see, hold in zoning cases that an ordinance is illegal or unconstitutional as such, but that as applied to the facts of certain cases, it interfered with constitutional rights, and then only as affecting that particular matter before the Court.

The question of zoning ordinances seems more or less disturbing because of the different views expressed by the Courts of the several States and the United States Supreme Court; but we have digested the cases where reported in this State and we find it to be the fact that our Supreme Court enters into the reasonableness or unreasonableness of the restriction of a zoning ordinance as applied to the particular facts of the case. Otherwise we cannot account for the Supreme Court upholding zoning ordinances and refusing mandamus as it sometimes has done.

The mere fact of illegality is not established by the issuance by the Supreme Court in this building scheme, of a writ of mandamus. Examination of the facts disclosed in the State of Case in the mandamus proceeding, will show that many more facts are given in the instant case—facts which are permissible in an equity court but not in a law court. Hence, the ordering of a mandamus cannot be considered either as an adjudication that the Maplewood ordinance is illegal or that the present application is without merit.

The learned Vice Chancellor has missed the point of the discussion of the United States Supreme

Court in the case of *Village of Euclid* v. *Ambler Realty Co.,* 47 Sup. Ct. Rep. 114.

In that case the parties reversed their places before the highest Court, so that if the appeal were entertained as it undoubtedly was on the part of the Village of Euclid, it is a holding that a municipality has just as much right to go to an equity court as an individual. Furthermore, the authority of the case cited is that zoning ordinances are not *per se* illegal and unconstitutional, but are valid.

We therefore have our own Supreme Court making its findings according to the special facts in each case, leaving the ordinance itself unattacked as to fundamental illegality, but the Euclid case holds that the ordinance is not *per se* illegal. The learned Vice Chancellor was thus in error.

If we study the opinion of Mr. Justice Sutherland in the U. S. Supreme Court case, *supra,* we find precise findings that a zoning ordinance is not invalid as such and does not invade the constitutional right of the property owner; that it is a modern innovation with which Courts should find ground to conform; that it is no more an abuse of police power than traffic ordinances; that an apartment house might be just as much of a nuisance as "a pig in the parlor." Consequently it reversed the lower courts and sustained the ordinance for zoning in the Village of Euclid.

While our own Courts were at one time more severe in zoning matters than they seem to be at present, we feel that recent decisions warrant our holding that in the eyes of the Supreme Court and this Court zoning ordinances are not now regarded as invalid as such.

Our Supreme Court has held that one applying for mandamus must exhaust the remedies through such agencies as the *Legislature has set up for that*

purpose before applying for the allowance of the discretionary writ of that Court.

Eaton v. *City of Newark,* 128 Atl. 377, citing *Florenzie* v. *East Orange,* 88 N. J. L. 438.
Lutz v. *Kaltenbach,* 128 Atl. 421, citing same case.

In the latter case the Legislative statute is discussed and is in no way held to be illegal. In fact, in these cases and others of same kind it is assumed by the Court that the Statute under which the zoning ordinance was in each case passed, is valid.

The building being a potential nuisance, the ordinance as to this proposed apartment house is valid.

Cliffside P. R. Co. v. *Cliffside,* 96 N. Y. Law 278.
Roman Realty Co. v. *Haddonfield,* 96 N. J. Law 117.
Schait v. *Senior,* 97 N. J. Law 290.

There has been no showing that the ordinance in the instant case is void, and there is nothing in the recent decisions of our Supreme Court which justifies a finding that ordinances as to zoning are invalid generally.

It would seem therefore that the learned Vice Chancellor was also in error in assuming that the ordinance herein is not authorized by law (12/30).

THIRD POINT.

The erection of the apartment house threatened by respondent will be a nuisance.

Aside from the good faith which a municipality is called upon to extend to its inhabitants, just as much as it is required of an individual in like circumstances, we have here a street made up of private residences (except the Junior School, far re-

moved from the street line); a lot entirely surrounded with such residences and with the opposite side of the street built up wholly of such; a plan to erect on that lot, 100 feet in width, an apartment house capable of housing 32 families, with the building occupying 86 feet of that width, running back 105 feet and upward 50 feet, with four stories (3/20).

Such a picture in the midst of detached private residences would stand out like a "spite fence," out of all harmony with the neighborhood, bringing into comparatively small space more families than the rest of the street on both sides contained, towering above all other houses and so different from the others as to be a constant annoyance to persons with the slightest sense of community aesthetics.

The question as to exercising police power in matters of an aesthetic nature came before the U. S. Supreme Court in *Welch* v. *Swasey,* 214 U. S. 91, 208, which affirmed same case in 193 Mass. 364, supporting such exercise.

A recent case, *People of the State of New York* v. *Wolf,* advance publication in New York Law Journal of April 27, 1927, involved the application of police power to the control of erection of bill boards and the Appellate Division of Supreme Court, Second Department, upheld an ordinance enacted for such control.

To the same effect is the case of *Thomas Cusack Co.* v. *Chicago,* 242 U. S. 526, although the Supreme Court held that it must follow the finding of the highest court of the State of Illinois in same case, reported 267 Ill. 344.

The question of regulation for aesthetic purposes is not, therefore, at all unsettled. Of course, such regulation cannot be arbitrary and unreasonable; but the underlying idea of the aesthetic is supported by the U. S. Supreme Court. Assume that the

Burnet Street project herein places an apartment house 86 feet front, 105 feet deep and fifty feet high, four stories, housing 32 families, in the midst of detached private residences of 2½ stories, for use by a single family, does not the right rest in the Township to regulate this under the zoning ordinance here enacted, even if it were looked at only on the aesthetic side? We can imagine nothing more offensive than the erection of such an apartment house in that environment.

Respondent cannot claim surprise over this attitude of the municipality or its people, for his grantor (of which he was and is President) acquired the plot in a deed which made it subject to "statutory and *municipal* requirements relating to land and buildings" (2/30) and gave back a purchase money mortgage containing the same condition. Nothing could have been in the mind of the grantors and grantee but that they expected the zoning ordinance to apply and made sure of it by taking and giving back a mortgage with it in, so that foreclosure would not disturb the condition.

Little imagination is needed to make this situation conform to Mr. Justice Sutherland's reference in the Euclid case, *supra,* of "a pig in the parlor." An apartment house in this quarter would be a nuisance in cutting off light and air, too.

FOURTH POINT.

The law has provided no adequate remedy herein and appellant is entitled to the protection of the Court of Chancery.

We follow here the words of the learned Vice Chancellor's conclusions (p. 12).

We must respectfully urge that the learned Vice

Chancellor takes a position which opposes what he says further ahead in his conclusions. For example: he holds that appellant has shown no ground for equitable intervention, either in the bill or in argument, and that the Chancellor's conscience reveals no ground for it.

But he adds these words:

> "If the ordinance were authorized by law and the law provided no adequate remedy and protection, equity would undoubtedly lend aid, but as the case stands the township has no legal right, it has no lawful ordinance in respect of the matter upon which it rests its prayer for relief."

This can only mean that if the ordinance alleged in the bill were authorized by law (and we show by allegation that it is at least authorized) and that ordinance were a lawful one establishing a legal right in the appellant township (also shown by allegation in the bill) and there is no finding anywhere to the contrary, equity will lend aid, *but it has not done so.*

Stated otherwise, either the bill shows ground for equitable relief by its very allegations or else there must be some finding which holds as *res adjudicata,* binding on the Court of Chancery, that the ordinance which appellant relies on is invalid. And there is no such finding except in the learned Vice Chancellor's conclusions.

We show in our previous points that the ordinance is not invalid and the cases cited by the learned Vice Chancellor (p. 12) do not justify a finding of invalidity. It is true that in the Nutley case our Courts took decided stand as to constitutional right of a zoning ordinance to keep a man from putting up whatever he wanted to as long as he did not violate the general welfare, health and safety of the community. But since that time, both

the Supreme Court and this Court have shown a disposition to soften that position. In fact, there have been decisions recently where mandamus was positively refused because appeal had not been taken to the Board of Adjustment as provided by the Legislature. This can only mean that the ordinance itself is held valid. In other cases mandamus has been refused where the thing sought to be erected was a nest of garages in a neighborhood of residences. This, too, can only mean that the ordinance itself has been held valid.

With the premise stated by the learned Vice Chancellor in his conclusions (p. 12) thus disposed of, and with it being admitted that if the ordinance were valid, equity would intervene, we are completely at a loss to understand why the prayer of the bill was not granted by the learned Vice Chancellor.

LAST POINT.

The decree appealed from should be wholly reversed with costs and the prayer of the bill of complaint for an injunction granted with costs.

Respectfully submitted,

A. P. BACHMAN,
Of Counsel with Appellant.

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New Jersey Court of Errors and Appeals

Between

TOWNSHIP OF MAPLEWOOD,
Appellant,

and

MAX MARGOLIS,
Respondent.

BRIEF FOR RESPONDENT.

The bill of complaint sets up that the Township of Maplewood has been for many years devoted to the maintenance of residential population. For the purpose of continuing this plan the Township adopted a zoning ordinance which forbade the erection of apartment houses in certain neighborhoods; that the respondent, Max Margolis, is the owner of land in the Township of Maplewood; that said Margolis made application to the Building Inspector of Maplewood for a permit to erect an apartment house for the accommodation of thirty-two families, which permit was refused by the Building Inspector on the ground that the zoning ordinance forbade such an erection; that thereupon Margolis applied to the Supreme Court for writ of mandamus compelling the issuance of such permit; and that said writ of mandamus was granted by the Supreme Court. The bill further charges that the erection of such apartment house would constitute a violation of the ordinance, would be a nuisance to the neighborhood and would substantially interfere with the light, air and outlook of other residents of the street and would impair the general welfare, health and safety of the community. The bill further alleged that in

granting the writ of mandamus the Supreme Court could not and would not consider the equitable side of the matter. The complainant therefore prays that an injunction may issue restraining the respondent from in any way violating the terms of the ordinance and from erecting the so-called apartment house.

An order to show cause was issued and on the return of the same and upon application of the respondent the bill of complaint was dismissed. In dismissing the bill of complaint, the learned Vice-Chancellor said, "Just what the equitable side of the matter is, is not disclosed by the bill nor was it pointed out on the argument, and a lone search of the Chancellor's conscience has not revealed any ground for equitable interference." From this decree the appellant appeals to the Court of Errors and Appeals. The brief of appellant states that the matter will be discussed under four points, which we will take up in their order.

LAW.

I.

"The bill of complaint shows ground for equitable relief."

Counsel for appellant naively asks, "What remedy has appellant, even in Equity?" What remedy indeed?

Has not counsel ever heard of the legal expression, "*damnum absque injuria*"? In his discussion of this point, counsel fails to show either *damnum* or *injuria*. It may very well be that the appellant has no remedy at law and such would seem to be the case for the Supreme Court has so decided, but it by no means follows that

that failure gives him the right to obtain relief in a court of Equity.

Pomeroy in his work on Equity Jurisprudence, Fourth Edition, Volume 1, section 62, says:

> "Although the jurisdiction of chancery was originally based in great measure upon the omissions of the common law, the injustice of many of its rules, and its inability, from its modes of procedure, to grant the variety of remedies adequate to the wants of society and the demands of justice, yet since the equitable system has become fully established, and its principles settled, this origin of the jurisdiction is no longer regarded as furnishing the real criterion. The whole question by which the extent of the equity jurisdiction is practically determined is no longer, whether the case is omitted by the law, or the legal rule is unjust, or even the legal remedy is inadequate—although the latter inquiry is still sometimes made and treated as though it were controlling—the question is, rather, whether the circumstances and relations presented by the particular case are fairly embraced within any of the settled principles and heads of jurisdiction which are generally acknowledged as constituting the department of equity. Two results therefore follow: FIRST, a court of equity will not, unless perhaps in some very exceptional case, assume jurisdiction over a controversy that facts of which do not bring it within some general principle or acknowledged head of the equitable jurisprudence."

We are unable to find nor has opposing counsel shown us that the relief he desires comes under any recognized head of Equity Jurisdiction.

We respectfully submit that the bill of complaint shows no grounds for equitable relief.

II.

"There is no ground for holding that the ordinance in this case is illegal or invalid."

The answer to this proposition is that the Supreme Court has said that so far as respondent's state of facts is concerned, the ordinance *is* illegal and invalid.

As to the main proposition, we need only refer to the celebrated Nutley case.

III.

"The erection of the apartment house will be a nuisance."

In what way? The bill of complaint alleges as an abstract proposition that the building will be a nuisance, but it does not state facts that will constitute it a nuisance.

Our Court of Errors and Appeals has stated that an apartment house is not *per se* a nuisance (*Jersey Land Co.* v. *Scott,* 126 Atl. 173). Counsel says that such a building would stand out like a "spite fence," would be out of harmony with the neighborhood and would be constant annoyance to the persons with community aesthetics. Unfortunately, the law at the present time regards all alike, whether they possess community aesthetics or lack them, or even if they have no aesthetics at all, community or otherwise. It is not necessary to be a citizen of this country or to own property in this country that one must pass an examination to show that one is possessed of aesthetic sensibilities. We have, however, always been under the impression that one's ideas of aesthetics were as personal as one's use of a tooth brush, and we sincerely trust that even in these days when everything is being

regulated it will be a long time before the statutes or the courts commence to regulate our so-called aesthetics.

IV.

"The law has provided no adequate remedy herein and appellant is entitled to the protection of the Court of Chancery."

This is a perfect example of a *non sequitur.* The word "remedy" is used as though an evil existed. We do not by any means admit this to be true. Every city in this great land is possessed of numerous apartment houses and the people who live in them are average citizens of average education, of average earning capacity and perform their duties as citizens in every respect as creditably as those who live in one-family dwellings. The time has yet to come when we will refuse to associate with a man because he happens to reside in an apartment house.

As before stated, appellant has shown no grounds for Equity jurisdiction.

For the foregoing reasons, it is respectfully submitted that the decree appealed from should be affirmed with costs.

HOWE & DAVIS,
Attorneys for Respondent.

EDWARD L. DAVIS,
Of Counsel.

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