# INDEX

*Notice of Application for Writ of Mandamus.*

**NOTICE.**

# New Jersey Supreme Court

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| REBECCA KOPLIN, *Relator,* *vs.* VILLAGE OF SOUTH ORANGE and EVERETT W. BIRD, Building Inspector of the Village of South Orange, *Defendants.* | *Notice.* |

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To the Above-Named Defendants:

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TAKE NOTICE, that on Saturday, the 5th day of March, 1927, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, we shall apply to the New Jersey Supreme Court at the Court House, Newark, for an order to show cause why a writ of mandamus should not issue in the above-entitled cause requiring the Village of South Orange, through its building inspector, to issue a permit for the erection of an apartment house as set forth in the attached petition and affidavits.

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FEIT & FEIT,
Attorneys for Relator.

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## PETITION.

### NEW JERSEY SUPREME COURT.

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

10 The petition of Rebecca Koplin, of the Village of South Orange, in the County of Essex and State of New Jersey, respectfully shows:

1. Your petitioner is the owner in fee simple of a certain tract of land and premises in the Village of South Orange, County of Essex and State of New Jersey, situate at the northwest corner of South Orange avenue and Stanley Road and having a frontage on South Orange avenue of about two hundred fourteen (214) feet
20 and on Stanley Road of about one hundred forty-seven (147) feet.

2. Petitioner is desirous of erecting a nine-story brick apartment house for the accommodation of seventy-three families and to contain one hundred ninety-three rooms on the said premises, which are at the present time occupied by a one-family dwelling facing Stanley Road and a one-story real estate office, frame building, on
30 the rear of said lot facing South Orange avenue, at the cost of approximately four hundred thousand ($400,000) dollars.

3. On the ninth day of November, 1926, petitioner applied to Ira T. Redfern, then building inspector of the Village of South Orange, for a permit for the erection of said apartment house by application in writing duly submitted to said building inspector accompanied by plans and specifications, as provided by the building code
40 of the Village of South Orange, and also tendered

the said building inspector the legal fees fixed by the said building code.

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

5. The petitioner then presented the matter to the Board of Trustees of the Village of South Orange, who referred the petitioner to the Board of Appeals on Zoning.

6. On January 19, 1927, the said Board of Appeals on Zoning recommended unto the Board of Trustees that the application of Rebecca Koplin, to erect the said apartment house be granted; but on February 7, 1927, at a special meeting of the said Board of Appeals on Zoning, the said Board rescinded their aforesaid recommendation.

7. On Monday, February 28, 1927, the Board of Trustees of the Village of South Orange con-

curred in the recommendation of the Board of Appeals on Zoning to the effect that no change be made in the Zoning Ordinance insofar as it would permit the erection of the said apartment house upon the said site.

10 8. Your petitioner believes and is verily informed that the Zoning Ordinance of the Village of South Orange does not provide for a board of adjustment nor is there any other provision pursuant to any ordinance of the village for a board of adjustment under and pursuant to an act of the Legislature entitled "An Act concerning municipalities," approved March 27, 1917, and the various amendments and supplements thereto.

20 9. The application of the petitioner to the building inspector shows the said apartment house to set back twenty-five feet from the line of South Orange avenue and twenty-five feet from the line of Stanley Road, and it was and is the intention of the petitioner to locate and construct said apartment house in such manner. South Orange avenue, upon which the said property fronts is a county road eighty feet in width, and Stanley Road, on which the property has its 30 depth, is a street fifty feet in width.

10. Petitioner charges and insists that said ordinance insofar as it purports to prevent Rebecca Koplin from erecting and constructing the said apartment house as contemplated is illegal in that the reservation of the district in which the petitioner's said property is located, to the use prescribed by said ordinance is beyond the power of the Village of South Orange under the provisions of the statute and that the Village of 40 South Orange under the statute has no power

to prevent the erection of an apartment house in said district; and that the restriction is not designed to promote the public health, safety and general welfare; and that the effect of enforcing the provisions of said ordinance to prevent the said petitioner from erecting the building which she seeks to erect would be to deprive the said petitioner of a right to possess and protect property in violation of the State of New Jersey; and would be a taking of the private property of the said petitioner for public use without just compensation in violation of the 16th paragraph of article 1 of the Constitution of New Jersey; and would be in effect a taking of private property for private purposes in violation of the right secured to said petitioner by the Constitution of the State of New Jersey; and would likewise be a violation of the rights secured to said petitioner by the 14th amendment to the Constitution of the United States, in that it would be a deprival of the petitioner of her property without due process of law and would be a denial to her of the equal protection of the law; and that the said ordinance is for other reasons illegal and invalid.

Petitioner therefore prays that a writ of mandamus may issue out of and under the seal of this Honorable Court directed to the Inspector of Buildings of the Village of South Orange to the Village of South Orange commanding and enjoining them to issue the building permit granting permission to petitioner to erect an apartment house of the type above-mentioned, upon the said lands and premises hereinbefore described in accordance with the plans and specifications tendered by her to the building inspector

pursuant to the statute in such case made and provided.

And your petitioner will ever pray, etc.

FEIT & FEIT,
Attorneys for Petitioner.

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## AFFIDAVITS.

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

REBECCA KOPLIN, of full age, being duly sworn according to law, upon her oath deposes and says:

20 1. I am the petitioner mentioned in the foregoing petition and the owner in fee simple of the premises at the northwest corner of South Orange avenue and Stanley Road, in the Village of South Orange, having a frontage on South Orange avenue of about two hundred fourteen (214) feet and on Stanley Road of about one hundred forty-seven (147) feet.

2. I am desirous of erecting a nine-story brick apartment house for the accommodation of 30 seventy-three families and to contain one hundred ninety-three rooms on the said premises, which are at the present time occupied by a one-family dwelling facing Stanley Road and a one-story real estate office, frame building, on the rear of said lot, facing South Orange avenue, at the cost of approximately $400,000.

3. On the 9th day of November, 1926, I applied to Ira T. Redfern, then Building Inspector of the Village of South Orange, through my

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agent in that behalf, to wit, my husband, Louis Koplin, for a permit for the erection of said apartment house by application in writing duly submitted to said building inspector accompanied by plans and specifications, as provided by the building code of the Village of South Orange, and also tendered the said building inspector the legal fees fixed by the said building code.

4. After retaining the said application, plans and specifications for a few days, said building inspector notified me that it was not necessary for me to give any fees to the said building inspector since he could not issue the said permit, giving as his reason therefor that an ordinance entitled "An Ordinance to regulate and restrict the location hereafter of trades and industries and subsequent location of buildings designed for a specified use and in a designated area and to regulate and limit the height and bulk of buildings hereafter erected and to regulate and determine the area of yards, courts and other open spaces for that purpose to divide the Village of South Orange into districts," passed March 20, 1922, and the various ordinances amendatory and supplementary thereto, forbids the erection of an apartment house upon the premises owned by me.

5. I then presented the matter to the Board of Trustees of the Village of South Orange, who referred me to the Board of Appeals on Zoning.

6. On January 19, 1927, the said Board of Appeals on Zoning recommended unto the Board of Trustees that the application to erect the said apartment house be granted; but on February 7, 1927, at a special meeting of the said Board of Appeals on Zoning, the said Board rescinded their aforesaid recommendation.

7. On October 29, 1926, the Board of Tenement House Supervision of the State of New Jersey approved of the plans and specifications of the said apartment house.

8. I charge and insist that said ordinance above referred to, insofar as it purports to prevent me from erecting and constructing the said apartment house as contemplated, is illegal in that the reservation of the district in which my said property is located, to the use prescribed by said ordinance is beyond the power of the Village of South Orange under the provisions of the statute and that the Village of South Orange under the statute has no power to prevent the erection of an apartment house in said district and that the restriction is not designed to promote the public health, safety and general welfare, and that the effect of enforcing the provisions of said ordinance to prevent me from erecting the building which I seek to erect would be to deprive me of a right to possess and protect property in violation of the first clause of Article 1 of the Constitution of the State of New Jersey and would be a taking of the private property which I own, for public use without just compensation in violation of the 16th paragraph of Article 1 of the Constitution of New Jersey and would be in effect a taking of private property for private purposes in violation of the right secured to me by the 14th Amendment to the Constitution of the United States, in that it would be a deprival of my property without due process of law and would be a denial to me of the equal protection of the law; and that the said ordinance is for other reasons illegal and invalid.

I therefore pray that a writ of mandamus may issue out of and under the seal of this Honor-

able Court directed to the Inspector of Buildings of the Village of South Orange to the Village of South Orange commanding and enjoining them to issue the building permit granting permission to me to erect an apartment house of the type above mentioned upon the said lands and premises hereinbefore described in accordance with the plans and specifications tended by me to said building inspector pursuant to the statute in such case made and provided.

(Signed) REBECCA KOPLIN.

Sworn and subscribed to before
me this 3rd day of March
A. D. 1927.

LOUIS J. FEIT,
Master in Chancery of New Jersey.

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

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

1. I am the husband of Rebecca Koplin, the relator herein and the owner of premises situate at the northwest corner of South Orange avenue and Stanley Road, in the Village of South Orange, County of Essex and State of New Jersey.

2. In behalf of Rebecca Koplin, the relator herein, on November 9, 1926, I applied to Ira T. Redfern, then Building Inspector of the Village of South Orange, for a permit for the erection of a nine-story apartment house for the accom-

modation of seventy-three families to be erected on said lands and premises, by an application in writing duly submitted to said building inspector, accompanied by plans and specifications in duplicate as provided by the Building Code of the Village of South Orange and also tendered the said building inspector the legal fees fixed by the said building code.

3. After retaining the said application, plans and specifications for a few days, said building inspector notified me that it was not necessary for me to give any fees to the said building inspector since he could not issue said permit, and said further objection to granting such permit was made by the said building inspector on the ground that the Zoning Ordinance of the village forbade the erection of an apartment house of the said type, because it was a violation of the Zoning Ordinance of the Village of South Orange in that only a one-family house could be erected thereon under the said Zoning Ordinance.

4. South Orange avenue, upon which the said property fronts, is a county road eighty feet in width, and Stanley Road on which the property has its depth is a street fifty feet in width.

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

*Affidavit of Louis Koplin.*

6. Together, with the plans and specifications, I also left with the building inspector a plan or plot of the lot upon which said apartment house is proposed to be erected, which plan or plot showed the proposed location of the said building upon said lot. The said plan showed that the said building would be set back twenty-five feet from the building line on South Orange avenue and twenty-five feet from the building line on Stanley Road, the entrance of said apartment house to be located on Stanley Road.

LOUIS KOPLIN.

Sworn and subscribed to before
me this 3rd day of March
A. D. 1927.

LOUIS J. FEIT,
Master in Chancery of New Jersey.

## ORDER TO SHOW CAUSE.

NEW JERSEY SUPREME COURT.

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|---|---|
| REBECCA KOPLIN, *Relator,* *vs.* VILLAGE OF SOUTH ORANGE and EVERETT W. BIRD, Building Inspector of the Village of South Orange, *Defendants.* | *Order to Show Cause.* |

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On reading the petition and affidavits filed in the above-entitled cause, it is on this 5th day of March, 1927, ORDERED, that the Village of South Orange and Everett W. Bird, Inspector of Buildings of the Village of South Orange, in the County of Essex, do show cause before this Honorable Court at the State House in the City of Trenton on Tuesday, the 3rd day of May, 1927, at eleven o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why a peremptory or alternative writ of mandamus should not issue out of and under the seal of this Honorable Court commanding them and directing them, the said Village of South Orange and Everett W. Bird, Inspector of Buildings of the Village of South Orange, to issue a permit to said Rebecca Koplin for the erection of a nine-story apartment house for the accommodation of seventy-three families on the property of the said Rebecca Koplin at the northwest corner of South Orange avenue and Stanley Road in said Village of South Orange, and it is

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further ordered that both parties have leave to take depositions.

Let this rule be entered in the minutes.

Dated March 5, 1927.

WILLIAM S. GUMMERE,
Chief Justice. 10

Entered March 8, 1927.

On motion of

FEIT AND FEIT,
Attorneys for Relator.

We hereby consent to the entry of the above order.

RIKER & RIKER, 20
Attys. for Defendants.

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## AGREED STATE OF FACTS.

NEW JERSEY SUPREME COURT.

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| REBECCA KOPLIN, *Relator,* *vs.* VILLAGE OF SOUTH ORANGE and EVERETT W. BIRD, Building Inspector of the Village of South Orange, *Defendants.* | *On Mandamus.* *Agreed State of Facts.* |

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It is hereby stipulated by and between the parties hereto that the facts hereinafter set forth affecting the matters in controversy involved in these proceedings are to be taken as true:

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1. The relator, Rebecca Koplin, is the owner in fee simple of a certain tract of land and premises in the Village of South Orange, County of Essex and State of New Jersey, and described as follows:

BEGINNING at the corner formed by the intersection of the Westerly line of Stanley Road with the Northerly line of South Orange Avenue; and running thence (1) along the Westerly line of said Stanley Road North three degrees forty-seven minutes East one hundred forty-seven and ninety-two hundredths feet (147.92′); thence (2) still along the same North thirteen degrees nine minutes East two and eight one-hundredths feet (2.08′); thence (3) North seventy-six degrees thirty minutes West one hundred eighty-seven (187′) feet; thence (4) South fourteen de-

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grees thirty-one minutes West one hundred fifty (150′) feet to the northerly line of South Orange Avenue; thence (5) along said Northerly line of South Orange Avenue South seventy-five degrees thirty-seven minutes East seventy-six (76′) feet and thence (6) still along the said line of said Avenue South seventy-seven degrees fifty-one minutes East one hundred thirty-eight and sixty-eight one hundredths feet (138.68′) to the point or place of BEGINNING.

2. On November 9, 1926, relator applied to Ira T. Redfern, then Building Inspector of the Village of South Orange for a permit to erect an apartment house in accordance with certain plans and specifications therewith submitted, which application was in writing, a copy of same with the endorsements thereon being hereto attached and marked Exhibit A. The said plans and specifications had first been approved by the Board of Tenement House Commissioners of the State of New Jersey, and the legal fee required by law to be paid for the issuance of said permit was thereupon tendered to said Building Inspector.

3. The said Building Inspector refused to issue said permit or accept such payment on the ground that by an ordinance entitled "An Ordinance to regulate and restrict the location hereafter of trades and industries and the subsequent location of buildings designed for a specified use and in a designated area and to regulate and limit the height and bulk of buildings hereafter erected and to regulate and determine the area of yards, courts and other open spaces and for that purpose to divide the Village of South Orange into districts," passed March 20, 1922, and the various ordinances amendatory and sup-

plementary thereto, forbids the erection of an apartment house upon the area of the premises owned by petitioner to the extent contemplated. The front line is to be set back twenty-five feet from the street line of South Orange avenue and twenty-five feet from the street line of Stanley Road.

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

5. By the terms of said ordinance as in force at the time of the making of said application, the said premises are located in what is known as Residence A District.

6. The relator then presented the matter to the Board of Trustees of the Village of South Orange, who referred the relator to the Board of Appeals on Zoning.

7. On January 19, 1927, the said Board of Appeals on Zoning recommended unto the Board of Trustees that the application of Rebecca Koplin to erect the said apartment house be granted; but on February 7, 1927, at a special meeting of the said Board of Appeals on Zoning, the said Board rescinded their aforesaid recommendation.

8. On Monday, February 28, 1927, the Board of Trustees of the Village of South Orange concurred in the recommendation of the Board of Appeals on Zoning to the effect that no change be made in the Zoning Ordinance insofar as it would permit the erection of the said apartment house upon the said site.

9. The said Zoning Ordinance of the Village of South Orange does not provide for a board

of adjustment, nor is there any other provision pursuant to any ordinance of the Village for a board of adjustment under and pursuant to an act of the legislature entitled "An Act concerning municipalities," approved March 27, 1917, and the various amendments and supplements thereto.

10. The relator's property is situate on the Northwest corner of Stanley Road and South Orange avenue. South Orange avenue, upon which the said property fronts, is a county road eighty feet in width and Stanley Road, on which the property has its depth, is a street fifty feet in width. On the premises north of relator's lot is a two and one-half-story, one-family frame dwelling house, the front line of which is not more than twenty-five feet from the street line, and the side line of which, that is, the southerly side line of the said one-family dwelling is at least fifty feet distant northerly from the dividing line of relator's premises and the said adjoining premises.

11. South Orange avenue, up to the Newark—South Orange boundary line has a diversity of buildings occupied as business sites on both sides of the street, and is one of the main streets of the City of Newark, practically running through the center of the Village of South Orange. The relator's property is situate on South Orange avenue about three hundred and twelve feet from the Newark—South Orange boundary line. On the Northeast corner of South Orange avenue and Stanley Road is a one-family residence and adjoining that on the East is also a one-family house. Then comes Holland avenue, which is one block East of Stanley Road. Between Stan-

ley Road and Holland avenue on the South is Montrose Terrace, which runs into South Orange avenue and which has on both sides of the street two-family houses. There is no property on South Orange avenue to the West of relator's lot closer than one hundred and twenty-five feet from the same. Within two hundred feet North of the relator's property on Stanley Road and within two hundred feet West of relator's property on South Orange avenue are there any existing buildings that have a setback from the street line of more than twenty-five feet.

12. A distance of one thousand and fifty feet West of the relator's land is an apartment house at the corner of South Orange avenue and Turrell avenue, which has forty families and nineteen stores, a permit for which was issued pursuant to a writ of mandamus obtained out of this Court.

13. South Orange avenue at a point a few thousand feet from the relator's property continues where it left off as a main business area at the boundary line of Newark and South Orange and in fact commences at said point, to wit, a few thousand feet from relator's property, as the main business thoroughfare in the Village of South Orange. South Orange avenue furnishes a direct route from the heart of Newark into the Village of South Orange. The Public Service Railway Company maintains trolley tracks and runs cars to and from South Orange into Newark on South Orange avenue, maintaining double tracks thereon, one set of tracks running in a Westerly direction into South Orange and the other in an Easterly direction from South Orange into Newark. One set of tracks

is situated at the extreme Northerly side of South Orange avenue and one set of tracks on the extreme Southerly side of South Orange avenue. The traffic along South Orange avenue is very heavy and is not confined by any rules or regulations of the Village of South Orange to light vehicles. 10

14. The relator seeks to erect on the premises hereinbefore mentioned a nine-story brick apartment house for the accommodation of seventy-three families and to contain one hundred ninety-three rooms, with the setback as aforestated.

15. The said apartment house building is in violation of the building code of the Village of South Orange insofar as it is nine stories in height. The said building code of the Village 20 of South Orange provides as follows:

ARTICLE XII, SECTION 1:

(C) No tenement house or apartment house hereafter erected shall occupy more than seventy-five per cent. of the area of the plot upon which it is erected and no portion of the building shall be located nearer any street line than forty feet nor nearer any side or rear lot line than twenty feet *and shall not be more than three stories or forty-four feet in height.* Provided how- 30 ever, that this paragraph does not apply to any apartment house which may be erected in an established business locality, district or neighborhood where business or commercial use occupancy has been established on both sides of the premises to be used as an apartment or tenement house use.

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*Exhibit "A."*

## EXHIBIT "A."

APPLICATION TO THE INSPECTOR OF BUILDINGS

FOR PERMIT FOR THE

10 CONSTRUCTION OF NEW BUILDINGS BY THE OWNER ARCHITECT OR BUILDER

South Orange, N. J., Nov. 9th, 1926.

The following information is required for the construction of new buildings:

1. Number of Buildings to be erected One. Location South Orange Avenue & Stanley Road.

2. Size of Main Building 68′0″ x 111′0″; 20 number of stories 9; height of building 93 feet.

3. Depth of foundation 8′6″ & 20′0″; thickness 1′4″; material conc.

4. Mortar for foundation 1:2:4; cellar or trench wall Cellar wall of brick; Waterproofed below grade Yes.

5. Footing course; width 28″; thickness 12″; material concrete.

6. If piers, columns or posts are used, state 30 what kind Steel Columns.

7. Thickness of outside walls; 1st story 1′0″; 2nd 1′0″; 3rd 1′0″; 4th 1′0″; 5th, 6th, 7th, 8th & 9th, 1′0″; material Stone Brick & Hollow tile, fire stops at each story, Yes.

8. Thickness of inside partition walls; 1st story 4″; 2nd 4″; third 4″; 4th 4″; 5th 4″; material gypsum & Hollow Tile Block; entrance to cellar from outside Yes.

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*Exhibit "A."*

9. Material of roof and style; also cornices and appendages 5 ply slag and tar flat roof. Stone cornice.

10. Material of timber—. bearing partition walls—.

11. Size of floor beam, 1st tier, 4″ to 15″ I's; second tier, ditto, 4th tier ditto; 5th tier ditto; 3rd tier ditto; ceiling beams ditto; roof beams ditto.

12. Girders, of what material and size to support floors, Steel girders. How supported Standard Connections.

13. Iron Girders supporting walls; depth 15″, how supported, Standard Connections.

14. Iron or Steel construction Steel Construction.

15. Distance of wood work from inside of any flue—inches; size of flue lining 30″ x 30″ fire brick lining.

16. Distance of beams or headers from outside of chimney or flue—inches; concrete cellar bottom Yes.

17. Distance chimney projects inside of building, no inches; chimney, where started from Boiler Room.

18. Size of bridging—rows in each tier—material of lathing in cellar metal lath.

19. Hearths, how supported—fire escapes, how many—; what kind—.

20. Height of ceilings; 1st story 9′0″; 2nd 9′0″; 3rd 9′0″; 4th 9′0″; 5th 9′0″.

21. Bulkhead on roof, Yes; skylight No; scuttle? No. Elevator? Yes; dumbwaiter No.

22. Size and number wood ceilings None; metal ceiling No.

*Exhibit "A."*

23. Openings for doors and windows. State whether arched, or lintels are to be used, Lintels. If lintels are used, material Steel, size 3½ x 4 x 5/16; corner or interior lot, Corner.

24. Hall partitions; fow fireproofed 6″ Hollow tile.

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25. Distance from property line, front, 25 feet from South Orange Avenue and 25 feet from Stanley Road. See plot plan. Size of lot 121′11″ x 78′9″.

EXTENSIONS OR WINGS

27. Size of wing 18′6″ x 43′4″; number of stories 9; height of building 93 feet.

28. Depth of foundation walls 8′6″ & 20′0″; thickness 1′4″; material concrete.

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29. Footing course width 28″; thickness 12″; material concrete.

30. If piers, columns or posts are used, state what kind Steel Columns; cellar or trench walls, Cellar walls of brick.

31. Thickness of outside walls; 1st story 12 inches; 2nd 12 inches; 3rd 12 inches; 4th 12 inches; 5th 12 inches; material—size of timbers as for main building—.

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32. Thickness of inside partition walls; 1st story 4 inches; 2nd 4 inches; 3rd 4 inches; 4th 4 inches; 5th 4 inches; material Hollow tile and gypsum block; style and material of roof 5 ply slag and tar roof (flat).

33. Proposed use of building Apartment house; how heated, Steam; how lighted Electric.

Estimated cost (exclusive of lot) of each building separate $400,000.

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*Exhibit "B."*

ENDORSEMENT

South Orange, N. J., November 9th, 1926.

This certifies that on the above date I made application at the Building Inspector's Office, for a permit to erect a building in accordance with this detailed statement and plans filed with the Building Inspector, and I agree to construct said building in conformity with said plans and detailed statement, and in compliance with all the provisions of the Building Ordinance, and that the statement of the estimated cost is correct.

Signed: Rebecca Koplin,
Owner.

Per: Louis Koplin.

**EXHIBIT "B."**

Section 4. General Height Limits and Setback Front Yards.

(a) No building shall exceed three stories or 55 feet in height except that the provisions of this ordinance with regard to height shall not apply to church spires, cupolas, belfries, chimneys, flag poles or water towers; nor to bulkheads, hose towers, elevator enclosures, water tanks or scenery lofts, occupying an aggregate area of not over 25 per cent. of the ground area of the building. A mezzanine story shall always be considered to be a full story.

(b) Except along one street frontage of a corner lot, no story of a building shall be nearer to the street line of any street on which it faces

than the average alignment of the corresponding stories of existing buildings within 200 feet on each side of the lot and within the same block where such setback distance is greater than that prescribed below in Section 5 for the district involved, excepting that no building shall be required to set back more than 50 feet from any street line.

SECTION 5. District Height Limits and Setback Front Yards.

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

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

SECTION 10. Residence "A" Districts "Use" Provisions.

(a) Within any Residence "A" District, as indicated on the Building Zone Map, no building or premises shall be used for other than one or more of the following specified purposes except as hereinafter prescribed:

(1) A dwelling for one family or for one housekeeping unit only. Roomers or boarders shall not be prohibited, provided that there is no display or advertising or conspicuous sign.

*Exhibit "B."*

(2) The office of a professional person, provided there is no display of goods or advertising or no conspicuous sign.

(3) Clubs, lodges, social and community center buildings, excepting those a chief activity of which is a service customarily carried on as a business.

(4) Recreation buildings, playgrounds or parks.

(5) Schools, memorial buildings, public libraries, public museums, public art galleries.

(6) Churches and other places of worship, parish houses, Sunday school buildings.

(7) Farms, nurseries or greenhouses not operated primarily for profit, provided that there is no display of products other than in growth, and no advertising, and further provided that there is no power plant and that any greenhouse heating plant is at least 20 feet distant from each lot line.

(8) Inconspicuous real estate signs, advertising the sale, rental or lease of only the premises on which they are maintained. Such signs shall be distant at least 25 feet from any street line, except that they may be against such portion of a building as may be nearer to the street line.

(9) Accessory uses, customary or incident to the above uses and located on the same lot with them. Except as provided above, "accessory uses" shall not include any uses customarily carried on as a business, nor any billboard or advertising sign.

(10) Private garages as prescribed below in Section 14.

*Exhibit "B."*

SECTION 12. Residence "C" "Use" Provisions.

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

(1) Apartment houses.

(2) Tenement Houses.

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

FEIT & FEIT,
Attorneys for Relator.

RIKER & RIKER,
Attorneys for Defendants.

## OPINION OF SUPREME COURT.

Filed May 14, 1928.

NEW JERSEY SUPREME COURT.

No. 216, May Term, 1927.

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| REBECCA KOPLIN, *Relator,* *vs.* VILLAGE OF SOUTH ORANGE and EVERETT W. BIRD, Building Inspector of the Village of South Orange, *Defendants.* | |

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Submitted June 3, 1927; decided May 14, 1928.

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

Before Justices Trenchard, Kalisch and Katzenbach.

For the relator, Feit & Feit (Louis J. Feit, of counsel).

For the defendants, Riker & Riker (Thomas E. Fitzsimmons, of counsel). 30

*Per Curiam:*

On November 9, 1926, the relator applied to the Building Inspector of the Village of South Orange for a permit for the erection of a nine-story apartment house for the accommodation of seventy-three families on property owned by her at the northwest corner of South Orange avenue and Stanley Road in that village.

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The building inspector refused such permit on the ground (which is true in point of fact) that the Zoning Ordinance of the village, passed March 20, 1922, prohibited the erection of the type of building proposed on the land in question, in that it was to be an apartment house in a residential district and exceeded in height the limitation contained in the ordinance and failed to comply with the setback provisions of the ordinance.

On March 5, 1927, the relator obtained this rule to show cause why a writ of mandamus should not issue commanding the building inspector and the Village of South Orange to issue such permit.

We think that the writ must be denied.

The relator contends that the provisions of such ordinance prohibiting such building are not within the police powers of the State.

But, at a special election held on September 20, 1927, there was submitted to the voters of this State a proposed amendment to the constitution of the State, which provided as follows:

"The Legislature may enact general laws under which municipalities, other than counties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use, and the exercise of such authority shall be deemed to be within the police power of the State. Such laws shall be subject to repeal or alteration by the Legislature." See P. L. 1927, p. 818.

That amendment was approved and ratified by the voters on September 20, 1927, and took effect October 18, 1927. See Fitzgerald's Manual, 1928, p. 60.

On April 3, 1928, pursuant to the power conferred by that amendment to the constitution, the Legislature adopted Chapter 274 of the Laws of 1928 (which took effect immediately) and is entitled "An Act to enable municipalities to adopt zoning ordinances limiting and restricting to specified districts and regulating therein buildings and structures, according to their construction, and the nature and extent of their use, and the repeal of sundry zoning laws."

That act provides, among other things, as follows:

"3. General Purpose. Any municipality of this State may, by a zoning ordinance, limit and restrict to specified districts and may regulate therein, buildings and structures according to their construction, and the nature and extent of their use, and the exercise of such authority, subject to the provisions herein contained, shall be deemed to be within the police power of the State. The authority conferred by this act shall include the right to regulate and restrict the height, number of stories, and sizes of buildings, and other structures, the percentage of lot that may be occupied, the sizes of yards, courts, and other open spaces, the density of population, and the location and use and extent of use of buildings and structures for trade, industry, residence, or other purposes."

"4. Districts. For any or all of said purposes the governing body or board of public works may divide the municipality into districts of such number, shape and area as may be

deemed best suited to carry out the purposes of this act; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, or other structures. All such regulations shall be uniform for each class or kind of buildings or other structures throughout each district, but the regulations in one district may differ from those in other districts."

"5. Purposes in View. Such regulations shall be made in accordance with a comprehensive plan and designed for one or more of the following purposes: To lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health, morals or the general welfare; to provide adequate light and air; to prevent the overcrowding of land or buildings; to avoid undue concentration of population. Such regulation shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view of conserving the value of property an encouraging the most appropriate use of land throughout such municipality."

"7. Existing Zoning Ordinances Saved. Wherever any municipality shall have adopted an ordinance, or ordinances, prior to the adoption of this act, for any of the purposes set forth in this act, such ordinance, or ordinances, shall continue in effect as if they had been adopted under the provisions of this act; and it shall not be necessary in such cases for the governing body or board of public works to appoint a zoning commission as provided by section six herein. All such ordinances shall

remain in full force and effect, except insofar as they are inconsistent with the provisions of this act, until they shall have been amended, or repealed by the governing body or board of public works."

Of course we take judicial notice of that statute. 10

We have made no reference to other provisions of the statute because, for present purposes, we do not deem it essential so to do. But we make pointed reference to the provisions contained in section 7 to the effect that ordinances adopted prior to the adoption of the act, for the purposes set forth in the act, shall continue in effect as if they had been adopted under the provisions of this act and shall remain in full force and effect, except insofar as they are inconsistent 20 with the provisions of this act, until they shall have been amended or repealed.

The effect of that provision of the statute, adopted pursuant to the constitutional amendment, would seem to be that the provisions of the ordinance of the Village of South Orange (now in question) as to zoning for residential purposes, and as to the height of buildings and setbacks, are deemed to be within the police powers of the State, if made with reasonable 30 consideration "to the character of the district and its peculiar suitability for particular uses, with a view of conserving the value of property and encouraging the most appropriate use of land throughout such municipality" and not otherwise unreasonable.

In the present case there is nothing to show (as we read the stipulation as to the facts) that such provisions were not so made and there is nothing to show that they are unreasonable. 40

If it be suggested for any reason that Section 7 of the Zoning Act does not have the retroactive effect which we have indicated, nevertheless the result in this case, so far as this court is concerned, will be the same, because this court is bound to deny the permit sought upon principles
10 declared in the Supreme Court in the case of *Rohrs* v. *Zabriskie,* 133 Atl. 65. In that case the relator applied to the Superintendent of Buildings of the Village of Ridgewood for a permit to erect a five-story apartment house on the corner of Prospect street and West Spring avenue in that village. That application was refused upon the ground that the land was located in a zone in which the erection of such a building was prohibited by the zoning ordinance.
20 Subsequent to this refusal, the governing body of the village passed an amendment to its building code ordinance and thereby prohibited the erection of an apartment house of more than three stories unless it should be of fireproof construction. The questions before the Court were, first, whether the last named ordinance was a valid exercise of the police power, and secondly, if it was, then whether it was a bar to the relator's alleged right to compel the issuing of
30 a permit because passed subsequent to the application therefor.

The Court determined that the ordinance was a valid and reasonable exercise of the police power; and as to the second question, the Court said: "Assuming that the ground upon which the superintendent refused to issue the permit was unsubstantial and that the action of the board of adjustment was not justified under the statute, will this court, when confronted with an
40 ordinance passed in the valid exercise of power

conferred upon the municipality, disregard its existence and direct a permit to be granted to this relator to erect a building of the character described in her application, although its erection will be a threat to the public safety, merely for the reason that such ordinance was not passed until after the conclusion of the hearing before the board of adjustment and its action thereon. We have no doubt but that this question should be answered in the negative. Admitting that the ordinance does not have a retroactive effect, so far as buildings in the course of erection are concerned, it is clearly applicable where the process of construction has not yet been begun. The power to issue a writ of mandamus is a discretionary one (*Jones Company* v. *Guttenberg,* 48 A. 537; 66 N. J. Law 58; *O'Hara* v. *National Biscuit Co.,* 54 A. 241; 69 N. J. Law 198), and it would be abuse of that power for this court to direct the municipality to grant a permit for the erection of a building the existence of which, if erected, has already been declared by legal authority to be a menace to the safety of the community."

Accordingly, the Court in that case denied the writ of mandamus.

We believe that the principle declared in that decision is conclusive of the present case in this court. It therefore follows that the writ applied for must be denied. For we believe it to be immaterial whether the changed conditions arise from an intervening valid municipal ordinance (as in that case) or from a statute enacted pursuant to an amendment of the constitution of the State, as in this case. Under the authority of the Zabriskie case, the writ of mandamus being discretionary, there can be no

vested rights that control the exercise of that discretion, unless a permit is issued and work actually commenced thereunder.

The result is that the rule to show cause in the present case will be discharged and the writ of mandamus denied accordingly.

10 Having reached the conclusion stated, we deem it highly important to all parties in interest to announce it promptly, and we do so in this somewhat informal manner in order to enable the relator to avail herself of the earliest possible opportunity for review if a review is desired. And if a review is desired, the relator is hereby given permission to enter a rule allowing and directing the molding of the pleadings so as to permit of such review.

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## RULE DISCHARGING ORDER TO SHOW CAUSE.

NEW JERSEY SUPREME COURT.

No. 216, May Term, 1927.

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| REBECCA KOPLIN, *Relator,* *vs.* VILLAGE OF SOUTH ORANGE and EVERETT W. BIRD, Building Inspector of the Village of South Orange, *Defendants.* | *In Mandamus.* *Rule Discharging Order to Show Cause and Denying Writ.* |

An order to show cause having been entered March 8, 1927, directing defendants to show cause why a permit should not issue to relator for the building of the apartment house referred to in the petition, and such order to show cause having come on for argument at the May term, 1927, and having been duly argued by Messrs. Feit and Feit, by Louis J. Feit, of counsel with relator, and Messrs. Riker and Riker, by Thomas E. Fitzsimmons, of counsel for defendants, and the Court having considered the same:

It is on this 21st day of May, nineteen hundred and twenty-eight, ORDERED, that the order to show cause be and the same hereby is discharged and the writ of mandamus accordingly denied;

And it is further ORDERED, that the relator have leave to mould the pleadings in this cause in order that the relator may appeal to the Court of Errors and Appeals, and permission

is hereby given to the said relator to appeal to the said Court of Errors and Appeals.

On motion of

FEIT & FEIT,
Attorneys for Relator.

10 By Louis J. Feit,
Of Counsel.

Rule entered this 21st day of May, nineteen hundred and twenty-eight.

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## ALTERNATIVE WRIT OF MANDAMUS.

### NEW JERSEY SUPREME COURT.

NEW JERSEY, *ss.*

(L. S.) The State of New Jersey to the Village of South Orange and Everett W. Bird, Building Inspector of the Village of South Orange and State of New Jersey, GREETING: Whereas, Rebecca Koplin has applied to the Inspector of Buildings of the Village of South Orange for a permit to erect a nine-story brick apartment house for the accommodation of seventy-three families and to contain one hundred ninety-three rooms, plans and specifications of which had first been approved by the Board of Tenement House Commissioners of the State of New Jersey, to be constructed on the premises of said Rebecca Koplin at the northwest corner of South Orange avenue and Stanley Road, in the Village of South Orange, New Jersey, said plot of land having a frontage on South Orange avenue of approximately two hundred and fourteen feet and a frontage on Stanley Road of approximately one hundred and forty-seven feet, the front line of which apartment house is to be set back twenty-five feet from the street line of South Orange avenue and twenty-five feet from the street line of Stanley Road; and whereas the said Building Inspector of the Village of South Orange refused to issue said permit upon the sole ground that under an ordinance adopted by the Village of South Orange, approved March 20, 1922, and entitled "An Ordinance to regulate and restrict the location hereafter of trades and industries and the subsequent location of build-

ings designed for a specified use and in a designated area and to regulate and limit the height and bulk of buildings hereafter erected and to regulate and determine the area of yards, courts and other open spaces and for that purpose to divide the Village of South Orange into districts," and the various ordinances amendatory and supplementary thereto, said building could not be erected because the said ordinance forbids its erection in what is called Residence A District, the said property being located in Residence A District; and whereas it is charged and insisted before us that the said ordinance insofar as it purports to prevent the said Rebecca Koplin from erecting and constructing the said building as contemplated is illegal, in that the reservation of the district in which the relator's said property is located, to the use prescribed by said ordinance, is beyond the power of the Village of South Orange under the provisions of the statute and that the Village of South Orange under the statute has no power to prevent the erection of said building in said district, and that the restriction is not designed to promote the public health, safety and general welfare; and whereas it has also been represented to us that the effect of enforcing the provisions of said ordinance to prevent the said Rebecca Koplin from the erection and building which she seeks to erect would be to deprive the said Rebecca Koplin of the right to possess and protect property in violation of the first clause of the Article 1 of the Constitution of the State of New Jersey, and would be a taking of the private property of the said Rebecca Koplin for public use without just compensation, in violation of the 16th paragraph of Article 1 of

the Constitution of New Jersey and would be in effect a taking of private property for private purposes in violation of the right secured to the said Rebecca Koplin by the Constitution of the State of New Jersey, and would likewise be a violation of the rights secured to the said Rebecca Koplin by the 14th Amendment to the Constitution of the United States, in that it would be a deprival of Rebecca Koplin of her property without due process of law and would be a denial to her of the equal protection of the law; all as by the complaint of the said Rebecca Koplin we have understood:

We, therefore, willing that due and speedy justice should be done in this behalf, command and strictly enjoin you, that immediately after the receipt of this writ you do issue to the said Rebecca Koplin a permit to erect the building aforesaid or cause to us to the contrary thereof signify, lest in your default complaint should come to us repeated; and how you shall execute this our command certify to our Justices of our Supreme Court of Judicature, at Trenton, upon this 27th day of June, 1928, together with this our writ, and this in nowise omit at your peril.

WITNESS, the Honorable WILLIAM S. GUMMERE, Chief Justice of the Supreme Court at Trenton, the 7th day of June, 1928.

EDWARD J. KELLEHER,
Clerk.

FEIT & FEIT,
Attorneys for Relator.

Approved as to form.

RIKER & RIKER,
Attorneys for Defendants.

See p. 51

## RETURN TO ALTERNATIVE WRIT OF MANDAMUS.

NEW JERSEY SUPREME COURT.

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| 10 REBECCA KOPLIN, *Relator,* *vs.* VILLAGE OF SOUTH ORANGE, *et al., Defendants.* | *On Mandamus.* *Return to Alternative Writ of Mandamus.* |

*To the Honorable Justices of the Supreme Court of New Jersey.*

WE, the VILLAGE OF SOUTH ORANGE and
20 EVERETT W. BIRD, Building Inspector of the Village of South Orange and State of New Jersey, to whom the said writ is directed, do hereby make return thereto to your Honors and assert and certify that all the statements set forth in said writ are not true; and that it is true that we refused to issue the building permit referred to in the alternative writ of mandamus for the reason that the Village of South Orange has a Zoning Ordinance which prevents the erec-
30 tion of the type of building proposed by the relator, which ordinance is designed to protect the health, safety and general welfare of the inhabitants of the Village of South Orange and is a valid exercise of the police power under the statute and under the charter of the Village of South Orange for the following reason:

The Village of South Orange has a Building Code designed to protect the health, safety and general welfare of the inhabitants of the Village
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of South Orange, and the plans and specifications filed by the relator herein do not comply with the terms of said Building Code.

Therefore, we humbly pray that said writ may be dismissed and that we be relieved from obeying the command therein given.

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VILLAGE OF SOUTH ORANGE,

By George H. Becker,
President.

Everett W. Bird,
Building Inspector.

See p. 52

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## DEMURRER TO RETURN.

NEW JERSEY SUPREME COURT.

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|---|---|
| REBECCA KOPLIN, *Relator,* *vs.* VILLAGE OF SOUTH ORANGE, *et al., Defendants.* | *On Alternative Writ of Mandamus.* *Demurrer to Return.* |

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Rebecca Koplin, the relator, demurs to the return of the defendants upon the following grounds:

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

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

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

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

FEIT & FEIT,
Attorneys for Relator.

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## AMENDED RULE DISCHARGING ORDER TO SHOW CAUSE.

AND JUDGMENT

NEW JERSEY SUPREME COURT.

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|---|---|
| REBECCA KOPLIN, *Relator,* *vs.* VILLAGE OF SOUTH ORANGE and EVERETT W. BIRD, Building Inspector of the Village of South Orange, *Defendants.* | *On Mandamus.* *Amended Rule Discharging Order to Show Cause and Denying Writ and Directing the Moulding of the Pleadings.* |

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An order to show cause having been entered March 8, 1927, directing defendants to show cause why a permit should not issue to relator for the building of the apartment house referred to in the petition, and such order to show cause having come on for argument at the May Term, 1927, and having been duly argued by Messrs. Feit and Feit, by Louis J. Feit, of counsel with relator, and Messrs. Riker and Riker, by Thomas E. Fitzsimmons, of counsel for defendants, and the Court having considered the same:

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It is, on this 20th day of August, nineteen hundred and twenty-eight, ORDERED, that the order to show cause be and the same is hereby discharged and the writ of mandamus accordingly denied:

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And it is further ORDERED, that the pleadings in said cause be moulded by filing an alternative writ of mandamus, a return thereto, in which papers the issues decided by this court shall be plainly expressed, and a demurrer to said return upon which demurrer judgment be and is hereby ordered overruling the demurrer, denying the issuance of the peremptory writ of mandamus against the Village of South Orange and Everett W. Bird, Building Inspector, and denying the issuance to the said Rebecca Koplin of a building permit authorizing the erection and construction of the building described in said petition.

On motion of

FEIT & FEIT,
Attorneys for Relator.

We hereby consent to the entry of the foregoing rule.

RIKER & RIKER,
Attorneys for Defendants.

Rule actually entered August 20, 1928.

## NOTICE AND GROUNDS OF APPEAL.

NEW JERSEY SUPREME COURT.

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| REBECCA KOPLIN, *Relator,* *vs.* VILLAGE OF SOUTH ORANGE and EVERETT W. BIRD, Building Inspector of the Village of South Orange, *Defendants.* | *On Mandamus.* *Notice of Appeal and Grounds of Appeal.* |

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To the Clerk of the New Jersey Supreme Court, and Messrs. Riker and Riker, attorneys for the defendants:

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TAKE NOTICE, that Rebecca Koplin, relator, hereby appeals to the Court of Errors and Appeals of the State of New Jersey, from the judgment final entered herein in favor of the defendants and against the relator, and from every part of said judgment.

The grounds of relator's appeal are as follows:

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1. Because the Supreme Court erred in giving judgment to the defendants instead of the relator, by denying the writ of mandamus to the relator, in that:

(a) The Zoning Ordinance of the Village of South Orange, insofar as it tends to prohibit the erection of an apartment house of the kind and character contemplated by the relator on the grounds of the relator on the northwest corner of South Orange avenue and Stanley

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Road, is illegal in that the reservation of the district in which the relator's said property is located, to the use prescribed by said ordinance is beyond the power of the Village of South Orange under the provisions of the statute entitled, "An Act concerning municipalities," approved March 27, 1917, and the various amendments and supplements thereto.

(b) That the said restriction is not designed to promote the public health, safety and general welfare.

(c) That the effect of enforcing the provisions of said ordinance to prevent the said relator from erecting the building which she seeks to erect would be to deprive the said relator of a right to possess and protect property, in violation of the Constitution of the State of New Jersey; and would be a taking of the private property of the said relator without proper compensation, in violation of the 16th paragraph of Article 1 of the Constitution of New Jersey; and would be in effect a taking of private property for private purposes in violation of the right secured to said relator by the Constitution of the State of New Jersey; and would likewise be a violation of the rights secured to said relator by the 14th Amendment to the Constitution of the United States, in that it would be a deprival of relator of her property without due process of law and would be a denial to her of the equal protection of the law.

2. The Supreme Court in its opinion upon which this judgment is based held that the amendment to the constitution, which was approved and ratified by the voters on September 20, 1927, and took effect October 18, 1927, was applicable to and governed this case.

3. The Supreme Court in its opinion upon which this judgment is based held that Chapter 274 of the Laws of 1928, governed and was applicable to this case.

4. The Supreme Court in its opinion, which is the basis of its judgment, held that Chapter 274 of the Laws of 1928, especially sections 3, 4, 5 and 7 thereof, are retroactive.

5. The Supreme Court in its opinion, which is the basis of this judgment, held that the provisions of the Zoning Ordinance of the Village of South Orange as to zoning for residential purposes and as to the height of buildings and setbacks, are deemed to be within the police powers of this State, if made with reasonable consideration "to the character of the district and its peculiar suitability for particular uses, and with a view of conserving the value of property and encouraging the most appropriate use of land throughout such municipality."

6. Because the Supreme Court in its opinion, upon which its judgment is based, held that there is nothing to show in the stipulated facts that the provisions of the said ordinance are not within the police powers of the State of New Jersey and that they are not made with reasonable consideration to the character of the district and its peculiar suitability for particular uses, with a view of conserving the value of property and encouraging the most appropriate use of land throughout such municipality.

7. The Supreme Court in its opinion, which is the basis of its judgment held that the provisions of said ordinance are not unreasonable.

8. The Supreme Court in its opinion, which is the basis of its judgment held that the case of *Rohrs* v. *Zabriskie,* 133 Atl. page 65, was analogous to the case in question on the theory that the constitutional amendment hereinabove adverted to, in paragraph 2, applied, because no construction had as yet been commenced upon the proposed apartment house.

9. The relator, on November 9, 1926, the date of the application for a permit had and continues to have a vested right to receive the said permit from the Building Inspector of the Village of South Orange, she being lawfully entitled thereto.

10. The stipulated facts conclusively show the Zoning Ordinance of the Village of South Orange, insofar as same prohibits the erection of the apartment house on relator's site, to be unreasonable.

11. The Supreme Court in its opinion, which is the basis of its judgment, in effect held that the burden of proving the unreasonableness of the ordinance would be upon the relator.

12. Chapter 274 of the Laws of 1928, entitled, "An Act to enable municipalities to adopt zoning ordinances limiting and restricting to specified districts and regulating therein buildings and structures, according to their construction, and the nature and extent of their use, and the repeal of sundry zoning laws," is unconstitutional in that is it violative of the constitutional amendment: "The Legislature may enact general laws under which municipalities, other than counties, may adopt zoning ordinances limiting and restricting to specified dis-

tricts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use, and the exercise of such authority shall be deemed to be within the police power of the State. Such laws shall be subject to repeal or alteration by the Legislature.'' (P. L. 1927, p. 818.) 10

13. Section 7 of Chapter 274 of the Laws of 1928, the title of which is set out in the preceding paragraph, is invalid and unconstitutional in that it is violative of paragraph 6, section 6, article 4, of the State Constitution, in that the said constitutional amendment provides that municipalities may adopt zoning ordinances pursuant to legislative laws, whereas the said section provides that ordinances already in effect 20 ''shall continue in effect as if they had been adopted under the provisions of this act.''

14. Section 7 of Chapter 274 of the Laws of 1928, entitled, ''An Act to enable municipalities to adopt zoning ordinances limiting and restricting to specified districts and regulating therein buildings and structures, according to their construction, and the nature and extent of their use, and the repeal of sundry zoning laws,'' is invalid because it is in violation of Article 4, 30 Section 7, Paragraph 3, of the State Constitution, in that it is retroactive in operation and deprives the relator of her vested rights, and is also violative of Paragraph 1, Article 1 of the State Constitution in that it denies the relator

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the right of acquiring, possessing and protecting her property.

FEIT and FEIT,
Attorneys for Relator.

By:

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LOUIS J. FEIT,
Of Counsel.

Service of a true copy of the within notice is hereby acknowledged by us this 21st day of August, 1928.

RIKER & RIKER,
Attorneys for Defendants.

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## ADDENDUM TO STATE OF THE CASE.

NEW JERSEY COURT OF ERRORS AND APPEALS.

| | |
|---|---|
| REBECCA KOPLIN, *Relator-Appellant,* *vs.* VILLAGE OF SOUTH ORANGE and EVERETT W. BIRD, Building Inspector of the Village of South Orange, *Defendants-Respondents.* | *On Mandamus.* *Appeal from Supreme Court.* |

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### STIPULATION.

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WHEREAS, the Supreme Court rendered an opinion in the above-entitled cause denying a peremptory writ to the relator-appellant, and in the said opinion gave permission to the said relator-appellant to enter a rule allowing and directing the molding of the pleadings so as to permit a review in this court; and

WHEREAS, it was intended by the respective parties to present in said molded pleadings the identical issues decided by the Supreme Court; and

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WHEREAS, the alternative writ of mandamus may not be considered to fully present such issues: Now, therefore,

IT IS HEREBY STIPULATED by and between the respective parties hereto that paragraphs 1 to 14, both inclusive, of the agreed state of facts fully set forth in the State of the Case presented upon this appeal shall be deemed and considered

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as part and parcel of the alternative writ of mandamus, and shall be deemed the true facts governing this appeal.

It Is Further Stipulated that the violation of the building code by the relator's plans and specifications as specified in respondent's return to the alternative writ is limited to the violation described in paragraph 15 of the aforesaid agreed state of facts.

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FEIT & FEIT,
Attorneys for Relator-Appellant.

RIKER & RIKER,
Attorneys for Defendants-Respondents.

Dated: September 21, 1928.

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The Henry Cook Printshop, Elizabeth, N. J.

# New Jersey Court of Errors and Appeals

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|---|---|
| REBECCA KOPLIN, *Relator-Appellant,* *vs.* VILLAGE OF SOUTH ORANGE and EVERETT W. BIRD, Building Inspector of the Village of South Orange, *Defendants-Respondents.* | *On Mandamus.* *Appeal from Supreme Court.* |

## BRIEF OF APPELLANT.

This is an appeal from the judgment of the Supreme Court denying a peremptory writ of mandamus to the relator-appellant, Rebecca Koplin (top of p. 44, State of the Case). See opinion of Supreme Court on page 27.

### Facts.

1. The appellant, on November 9, 1926, applied to the Building Inspector of the Village of South Orange for a permit to erect a nine-story brick apartment house for the accommodation of seventy-three families, and to contain one hundred ninety-three rooms, on a plot of land owned by the relator, situate at the northwest corner of South Orange avenue and Stanley Road, which plot has a frontage of one hundred fifty feet on Stanley Road and a depth of two hundred fourteen and sixty-eight hundredths feet on South Orange avenue (paragraph 1, Agreed State of Facts); (p. 14, State of Case).

2. The front line of the contemplated structure is to be set back twenty-five feet from the

respective street lines of South Orange avenue and Stanley Road (bottom of paragraph 3, Agreed State of Facts; S. C., p. 16).

3. The Board of Tenement House Commissioners approved of the plans and specifications submitted by the appellant (paragraph 2, Agreed State of Facts; S. C., p. 15).

4. The Building Inspector denied appellant's application for a permit on the ground that the erection of such a building on the plot aforesaid violated the Village Zoning Ordinance (paragraph 3, Agreed State of Facts; S. C., p. 15).

5. The site in question was zoned in what is described as Residence A District, which prohibits the erection of apartment houses within that district (see Exhibit B., Section 10, Agreed State of Facts; S. C., p. 24).

6. The other pertinent sections of the Zoning Ordinance which this contemplated structure is said to violate, are:

Section 4. General Height Limits and Setback Front Yards.

(a) No building shall exceed three stories or fifty-five feet in height except that the provisions of this ordinance with regard to height shall not apply to church spires, cupolas, belfries, chimneys, flag poles or water towers; nor to bulkheads, hose towers, elevator enclosures, water tanks or scenery lofts, occupying an aggregate area of not over twenty-five per cent. of the ground area of the building. A mezzanine story shall always be considered to be a full story.

(b) Except along one street frontage of a corner lot, no story of a building shall be nearer to the street line of any street on which it faces than the average alignment of the cor-

responding stories of existing buildings within 200 feet on each side of the lot and within the same block where such setback distance is greater than that prescribed below in Section 5 for the district involved, excepting that no building shall be required to set back more than fifty feet from any street line (see Exhibit B, Agreed State of Facts; S. C., p. 23).

Section 5. District Height Limits and Setback Front Yards.

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

(c) In Business Districts, no part of a building shall be higher above the curb level than ten feet less than twice the distance it sets back from the centre line of the street it faces. Parapet walls and cornices may, however, extend above such height limit not more than five feet (see Exhibit B, Agreed State of Facts; S. C., p. 24).

7. The Village Zoning Ordinance permits the erection of apartment houses in a district termed Residence C (see Exhibit B, Section 12, of Agreed State of Facts; S. C., p. 26).

8. The Village of South Orange also in its Building Code provides:

Article XII, Section 1:

(c) No tenement house or apartment house hereafter erected shall occupy more than seventy-

five per cent. of the area of the plot upon which it is erected and no portion of the building shall be located nearer any street line than forty feet nor nearer any side or rear lot line than twenty feet and shall not be more than three stories or forty-four feet in height. Provided, however, that this paragraph does not apply to any apartment house which may be erected in an established business locality, district or neighborhood where business or commercial use occupancy has been established on both sides of the premises to be used as an apartment or tenement house use (see paragraph 15, Agreed State of Facts; S. C., p. 19).

9. The condition existing in the neighborhood of the relator's property is fully disclosed by paragraphs 10, 11, 12 and 13 of the Agreed State of Facts, to wit:

(Paragraph 10, Agreed State of Facts; S. C., p. 17.)

> The relator's property is situate on the northwest corner of Stanley Road and South Orange avenue. South Orange avenue, upon which the said property fronts, is a county road eighty feet in width and Stanley Road, on which the property has its depth, is a street fifty feet in width. On the premises north of relator's lot is a two and one-half story, one-family frame dwelling house, the front line of which is not more than twenty-five feet from the street line, and the side line of which, that is, the southerly side line of the said one-family dwelling is at least fifty feet distant northerly from the dividing line of relator's premises and the said adjoining premises.

(Paragraph 11, Agreed State of Facts, S. C., p. 17.)

> South Orange avenue, up to Newark—South Orange boundary line has a diversity

of buildings occupied as business sites on both sides of the street, and is one of the main streets of the City of Newark, practically running through the center of the Village of South Orange. The relator's property is situate on South Orange avenue about three hundred and twelve feet from the Newark-South Orange boundary line. On the northeast corner of South Orange avenue and Stanley Road is a one-family residence and adjoining that on the east is also a one-family house. Then comes Holland avenue, which is one block east of Stanley Road. Between Stanley Road and Holland avenue on the south is Montrose Terrace, which runs into South Orange avenue and which has on both sides of the street, two-family houses. There is no property on South Orange avenue to the west of relator's lot closer than one hundred and twenty-five feet from the same. Within two hundred feet north of the relator's property on Stanley Road and within two hundred feet west of relator's property on South Orange avenue there are no existing buildings that have a set-back from the street line of more than twenty-five feet.

(Paragraph 12, Agreed State of Facts; S. C., p. 18.)

A distance of one thousand and fifty feet west of the relator's land is an apartment house at the corner of South Orange avenue and Turrell avenue, which has forty families and nineteen stores, a permit for which was issued pursuant to a writ of mandamus obtained out of this court.

(Paragraph 13, Agreed State of Facts; S. C., pp. 18-19.)

South Orange avenue at a point a few thousand feet from the relator's property continues where it left off as a main business area at the boundary line of Newark and **South Orange and in fact commences at** said point, to wit, a few thousand feet from

relator's property, as the main business thoroughfare in the Village of South Orange. South Orange avenue furnishes a direct route from the heart of Newark into the Village of South Orange. The Public Service Railway Company maintains trolley tracks and runs cars to and from South Orange into Newark on South Orange avenue, maintaining double tracks thereon, one set of tracks running in a westerly direction into South Orange and the other in an easterly direction from South Orange into Newark. One set of tracks is situated at the extreme northerly side of South Orange avenue and one set of tracks on the extreme southerly side of South Orange avenue. The traffic along South Orange avenue is very heavy and is not confined by any rules or regulations of the Village of South Orange to light vehicles.

## ARGUMENT.

### Point One.

(Pages 45 and 46, State of the Case.)

Because the Supreme Court erred in giving judgment to the defendants instead of the relator, by denying the writ of mandamus to the relator, in that:

(a) The Zoning Ordinance of the Village of South Orange, insofar as it tends to prohibit the erection of an apartment house of the kind and character contemplated by the relator on the grounds of the relator on the northwest corner of South Orange avenue and Stanley Road, is illegal in that the reservation of the district in which the relator's said property is located, to the use prescribed by said ordinance is beyond the power of the Village of South Orange under the provisions of the statute entitled, "An Act

concerning municipalities," approved March 27, 1917, and the various amendments and supplements thereto.

(b) That the said restriction is not designed to promote the public health, safety and general welfare.

(c) That the effect of enforcing the provisions of said ordinance to prevent the said relator from erecting the building which she seeks to erect would be to deprive the said relator of a right to possess and protect property, in violation of the Constitution of the State of New Jersey; and would be a taking of the private property of the said relator without proper compensation, in violation of the 16th paragraph of Article 1 of the Constitution of New Jersey; and would be in effect a taking of private property for private purposes in violation of the right secured to said relator by the Constitution of the State of New Jersey; and would likewise be a violation of the rights secured to said relator by the 14th amendment to the Constitution of the United States, in that it would be a deprival of relator of her property without due process of law and would be a denial to her of the equal protection of the law.

1. The appellant deems it important in limine to point out to this court the fact that the appellant applied for the permit to erect the apartment house in question on *November 9, 1926* (paragraph 2, Agreed State of Facts; S. C., p. 15). Also opinion of the Supreme Court on bottom of page 27, S. C. The Building Inspector refused the permit on the ground that the Zoning Ordinance of the Village, passed March 20, 1922, prohibited the erection of the type of building proposed on the land in question, in that it

was to be an apartment house in a residential district and exceeds in height the limitation contained in the ordinance, and failed to comply with the setback provisions of the ordinance. On March 5, 1927, the relator-appellant obtained a rule to show cause from the Supreme Court why a writ of mandamus should not issue commanding the Building Inspector and the Village of South Orange to issue such permit (see opinion of Supreme Court, top of p. 28, S. C.).

2. The rule was listed for argument before the Supreme Court at the May, 1927 Term, and the Supreme Court did not submit its opinion until *May 14, 1928.* In the interim, to wit, on September 20, 1927, the voters approved of the constitutional amendment affecting zoning and this amendment did not take effect until October 18, 1927 (see opinion of Supreme Court, bottom of p. 28 and top of p. 29, S. C.).

3. It was practically two years after the application was made for a permit that the amendment took effect. The voters did not pass upon the amendment until about six months after the rule to show cause was obtained, and the amendment did not take effect until approximately five months after the case was listed before the Supreme Court, so that if the Supreme Court had decided the issue at any time before October 18, 1927, the amendment could not be said to have affected the case as it was not in itself effective as a law in our State.

4. Disregarding the amendment, what are the merits of the appellant's case?

In view of the fact that the Zoning Ordinance of the Village of South Orange did not provide for a Board of Adjustment, nor was there any

other provision pursuant to any ordinance of the Village for a Board of Adjustment, under and pursuant to an act of the Legislature entitled "An Act Concerning Municipalities," approved March 27, 1917, and the various amendments and supplements thereto, mandamus was the proper remedy for the appellant to pursue in the Supreme Court. (*Margolis* v. *Maplewood,* Vol. 5 N. J. Misc. Reports, page 131, N. J. Supreme Court, decided January 18, 1927.) (See paragraph 9, Agreed State of Facts; S. C., p. 16.)

5. Insofar as the denial of this permit is based upon the fact that an apartment house is to be erected on the plot in question, which is zoned under Residence A, and therefore is limited to one-family dwellings, etc., this case comes squarely within the ruling in *State* v. *Nutley,* 99 N. J. L. 389, and *Ignaciunas* v. *Risley,* 98 N. J. L. 712; affirmed 99 Id. 389, and the denial of this permit by the Building Inspector was improper.

The contemplated structure is also claimed to be violative of Section 4 and Section 5 of the Zoning Ordinance hereinbefore set out in length. Both of these sections were held to be invalid in the following cases:

*Heller* v. *South Orange,* 3 N. J. Misc. Reports 1076; 130 Atl. 534;

*Michel* v. *Village of South Orange,* 132 Atl. Rep. 337;

*Eaton* v. *Village of South Orange,* 130 Atl. Rep. 362; affirmed 4 N. J. Advance Reports, page 1859, in 134 Atl. 917.

6. It is also claimed by the respondents in their return to the alternative writ that the contemplated structure violated the building code. In the stipulation entered into between the

parties to this proceedings, which is to be found in the Addendum at the end of the State of the Case, it is stipulated:

> "It is further stipulated that the violation of the building code by the relator's plans and specifications as specified in respondent's return to the alternative writ, is limited to the violation described in paragraph 15 of the aforesaid agreed state of facts."

The appellant demurred to this and properly so. First, because in the Agreed State of Facts (paragraph 3, p. 15, S. C.), it does not appear that the Building Inspector refused the permit on that ground but merely confined it to the violation of the Zoning Ordinance, which fact is confirmed in the Supreme Court's opinion (top of p. 28, S. C.):

> "The building inspector refused such permit on the ground (which is true in point of fact) that the Zoning Ordinance of the village, passed March 20, 1922, prohibited the erection of the type of building proposed on the land in question, in that it was to be an apartment house in a residential district and exceeded in height the limitation contained in the ordinance and failed to comply with the setback provisions of the ordinance."

and this appellant is therefore not compelled to argue such a contention, such an issue not being before the Supreme Court.

Second, the code is invalid. Its provisions are:

> "ARTICLE XII, SECTION 1:
>
> (c) No tenement house or apartment house hereafter erected shall occupy more than seventy-five per cent. of the area of the plot upon which it is erected and no portion of the building shall be located nearer any street line than forty feet nor nearer any side or rear lot line than twenty feet and

shall not be more than three stories or forty-four feet in height. Provided however, that this paragraph does not apply to any apartment house which may be erected in an established business locality, district or neighborhood where business or commercial use occupancy has been established on both sides of the premises to be used as an apartment or tenement house use" (page 19, S. C., paragraph 15 of Agreed State of Facts).

The provisions do not vary much in their restrictive effect from those which have been made part of the Zoning Ordinance and which in cases hereinbefore cited, have been held invalid by this court. (*Eaton* v. *Village of So. Orange,* 130 Atl. Rep. 362; affirmed 4 N. J. Advance Reports, p. 1859 in 134 Atl. 917.)

7. It may also be pointed out that the provisions of the Building Code, while they tend to limit the height of buildings, expressly provide that the same should not apply to any apartment house which may be erected in an established business locality. In other words, according to the provisions in the Building Code, the appellant could have erected an apartment house as that which is now contemplated in a business area; whereas in a residential area no such apartment house could be erected. The import and effect of the provisions of the Building Code are not inserted therein for the purpose of promoting the general welfare, health and safety of the public, but are merely inserted from the aesthetic point of view. By plain reading of the code it contains absolutely nothing to show that the restrictions provided therein are necessary to protect health and safety and advance the public welfare. It therefore is invalid as violating constitutional rights of property owners. (*Robert Realty Co.* v. *Orange,* 5 N. J. Misc. Re-

ports 912; 135 Atl. 60; 5 Adv. Rep. 1514 and 139 Atl. p. 54); (*Van Winkle* v. *Quigley,* 5 Misc. Reports 102; 135 Atl. 658.)

8. In *Nectow* v. *City of Cambridge, et al.*, decided May 14, 1928, Vol. 48 Supreme Court Reporter, on page 447, the United States Supreme Court in a decision handed down by Justice Sutherland, said:

> "The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare."

9. It would therefore seem conclusive that in accordance with the decision of our tribunals, prior to the passage of the aforementioned constitutional amendment, that the relator-appellant had a clear and undisputed right to receive the permit. All of the facts of the case being stipulated and not doubtful in their import, the relator-appellant should have been awarded a peremptory writ of mandamus by the Supreme Court. (*Michel* v. *Village of South Orange,* 132 Atl. 337; *West End Investment Co.* v. *Osterman, &c., et al.,* 5 N. J. Misc. Reports 335.)

Also a fair interpretation of the Supreme Court's opinion indicates that the Court concluded the relator was entitled to her permit were it not for the amendment, the applicability of which to this case will be argued hereafter.

**Points Two and Three.**

(Bottom of p. 46 and top of p. 47, S. C.)

The Supreme Court in its opinion upon which this judgment is based held that the amendment to the Constitution, which was approved and ratified by the voters on September 20, 1927, and took effect October 18, 1927, was applicable to and governed this case.

The Supreme Court in its opinion upon which this judgment is based held that Chapter 274 of the Laws of 1928, governed and was applicable to this case.

1. The appellant again points out the history of this application and the litigation based upon the denial of this application, as set forth of Point One in this brief (see paragraphs 1, 2 and 3, in Point One of the Brief).

2. The contention that the amendment is applicable was also made in the case of *A. G. Construction Company* v. *John G. Scott,* submitted to this court as Case No. 103, in the February Term, 1928, and decided May 14, 1928. The case cited was similar to the case *sub judice.* In the former the Supreme Court also denied the writ and an appeal was made to this court, and during the pendency of the litigation the constitutional amendment took effect. Justice Katzenbach delivered the opinion and therein stated:

> "We are asked by the respondents to consider in dealing with this case the fact that a constitutional amendment regarding zoning has been adopted by the voters of this State. In the present case the status of the parties was fixed long before the Zoning Amendment was adopted. The constitutional amendment has, we think, no application to the present case and should not be considered in its disposition."

Also, see *Robert Realty Co.* v. *City of Orange*, E. & A., 139 Atl. p. 54.

Bishine Realty Co v Scott 135 Atl p. 80

The appellant respectfully submits that the question whether the amendment or any legislation passed pursuant thereto is fully disposed of in the above cases.

**Point Four.**

(Top of p. 47, State of Case.)

The Supreme Court in its opinion, which is the basis of its judgment, held that Chapter 274 of the Laws of 1928, especially Sections 3, 4, 5 and 7 thereof, are retroactive.

1. The argument made by the appellant in Points Two and Three are repeated at length here and made part hereof.

2. In addition, however, it is well to point out that neither the constitutional amendment nor the statute recite or intend in any of their provisions that any ordinances which are saved shall have any retroactive effect.

3. This court, in the case of *Crucible Steel Co.* v. *Polack Tyre & Rubber Co.*, 92 N. J. L., p. 221, on page 231, has said:

> "In the absence of any words expressing a contrary intention, a statute will be construed to operate prospectively."

And also in the case of *Public Service Electric Co.* v. *Board of Public Utility Commissioners*, 88 N. J. L. page 603, on page 607:

> "It has been decided over and over again that statutes are to be given prospective and not retrospective effect unless the language makes them retroactive and admits no other construction."

## Points Five and Six.

(Page 47, State of the Case.)

The Supreme Court in its opinion, which is the basis of this judgment, held that the provisions of the Zoning Ordinance of the Village of South Orange as to zoning for residential purposes and as to the height of buildings and setbacks, are deemed to be within the police powers of this State, if made with reasonable consideration "to the character of the district and its peculiar suitability for particular uses, and with a view of conserving the value of property and encouraging the most appropriate use of land throughout such municipality."

Because the Supreme Court in its opinion, upon which its judgment is based, held that there is nothing to show in the stipulated facts that the provisions of the said ordinance are not within the police powers of the State of New Jersey and that they are not made with reasonable consideration to the character of the district and its peculiar suitability for particular uses, with a view of conserving the value of property and encouraging the most appropriate use of land throughout such municipality.

1. Points Five and Six may be embodied under the collective preceding points, which are made part hereof.

## Points Seven and Ten.

(Pages 47 and 48, State of the Case.)

The Supreme Court in its opinion, which is the basis of its judgment held that the provisions of said ordinance are not unreasonable.

The stipulated facts conclusively show the Zoning Ordinance of the Village of South Orange,

insofar as the same prohibits the erection of the apartment house on relator's site, to be unreasonable.

1. It will be noted that the constitutional amendment by its provisions simply authorizes municipalities to "adopt zoning ordinances limiting and restricting to specified districts and regulating therein buildings and structures according to their construction, and the nature and extent of their use, and the exercise of such authority shall be deemed within the police power of the State" (see P. L. 1927, p. 818).

2. It is respectfully submitted that there is nothing in this constitutional provision which changes in any respect what has been declared by our courts heretofore governing the zoning cases. For instance, the amendment does not authorize the Legislature to pass laws permitting the municipalities to pass zoning ordinances and enforce them from merely the aesthetic view point. Such ordinances as may be adopted by any municipality pursuant to the amendment would still have to be within those defined limits which our courts have fixed as constituting them reasonable and within the police powers.

3. This is somewhat borne out by an act of the Legislature passed pursuant to the amendment, to wit; Chapter 274, Laws of 1928; Section 5 of which declares the purposes of the act, amongst others, to be the promotion of health, morals or the general welfare. True, there are other purposes set forth in this section, which do not seem to be within the intent of the constitutional act, which will hereafter be discussed.

4. Assuming that the amendment and its offspring, the statute, are applicable to this case, it is clearly demonstrated by the Agreed State

of Facts that the ordinance of the Village of South Orange is clearly unreasonable insofar as it affects this case. This is demonstrated as follows: The so-called Board of Appeals on Zoning thought appellant's application a reasonable one by recommending the permit (p. 16, S. C,. paragraph 7). A plain reading of paragraphs 10, 11, 12, 13 and 14 found on pages 17, 18 and 19 of the State of the Case, conclusively demonstrate that there is no danger of violating any of the safeguards, even as expressed in Chapter 274, Laws of 1928. We will take the purposes set forth in said section of the said act and apply them to the present case, and demonstrate that this is so.

5. First we have, "—to lessen the congestion in the streets." South Orange is still a *village*. Therefore, how can it be said that the streets will be congested by the erection of this apartment house? It will take many buildings of this type to congest South Orange streets.

6. The next provision is, "To secure safety from fire, panic, and other dangers."

The plot upon which this apartment house is intended to be erected, has a frontage of 150 feet on Stanley Road and a depth of 214.68 feet on South Orange avenue. A setback on each street is provided to the extent of twenty-five feet. Application for the permit, which is to be found on page 20 of the State of the Case, shows the building to be 68′ x 111′, and the construction to be fireproof. The plans were submitted to the Board of Tenement House Commissioners and they approved of the same (middle of p. 15, S. C.). Paragraph 10, Agreed State of Facts, on page 17, shows the appellant's property to be a corner property; that the closest adjoining

property is situate at least fifty feet distant northerly from the dividing line of the relator-appellant's premises and the said adjoining premises, so that it can readily be seen that there cannot be any unusual fire or panic hazards or any other danger.

7. There are thousands of apartment houses throughout our land housing more families than this proposed apartment house, and no one can reasonably say that the health, morals or family welfare of the community are destroyed by these apartments, which is one of the other objects set forth in the statute. Besides, our courts have recorded the fact that simply to inhibit the erection of an apartment house in a residential district, simply from an aesthetic viewpoint, is unreasonable. This is argued under Point One of the brief and reiterated here.

8. The next objects which are expressed in the statute are, "—to provide adequate light and air; to prevent over-crowding of lands and buildings; to avoid undue concentration of lands and population."

There is no over-crowding of lands or buildings in this case, as the space allotted to this building and its distance from the adjoining buildings, is more than ample. There is no question of light and air involved because of the set back and the distance between the adjoining buildings. The Agreed State of Facts shows that the adjoining owner also has a set-back of only 25 feet, and the distance between ~~the houses is~~ 50 feet. The width of the ~~house~~ relator's plot is ~~being~~ 150 feet on Stanley Road and ~~having~~ same has a depth of almost 215 feet on South Orange avenue; the size of the building being only 67'x111'. How can it be said that there is any interfer-

ator's property and the adjoining owner's house is

ence with light and air, or that there is any over-crowding of land or buildings? As was pointed out before, South Orange is only a village. Can it be claimed that there is an undue concentration of population?

9. The statute then goes on further to provide that such regulation shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view of conserving the value of property and encouraging the most appropriate use of land throughout such municipality.

Assuming that this is a constitutional provision, can it be said that a zoning ordinance prohibiting the erection of this building is in obedience to this part of the statute?

As is commonly known and pointed out by the Agreed State of Facts, in paragraphs 11, 12 and 13 on pages 17, 18 and 19 of the State of the Case, which paragraphs are hereby repeated at length, South Orange avenue is a main thoroughfare in the Village of South Orange. It is a county road and the highway is not restricted to light traffic. Trolley cars run upon it. There is considerable traffic, and taking the facts as above set forth, how can it be said that any ordinance restricting the erection of this apartment house is reasonable? Does not the Agreed State of Facts plainly and explicitly demonstrate and prove the unreasonableness of the ordinance, either as it stood before the constitutional amendment was adopted or was saved by the legislative act pursuant thereto? It is respectfully submitted that either under the ordinance as it was or as it is now, it is unreasonable as to the erection of this apartment house on the site proposed.

**Points Eight and Nine.**

(Page 48, State of Case.)

The Supreme Court in its opinion, which is the basis of its judgment held that the case of *Rohrs* v. *Zabriskie,* 133 Atl., page 65, was analogous to the case in question on the theory that the constitutional amendment hereinabove adverted to, in paragraph 2, applied, because no construction had as yet been commenced upon the proposed apartment house.

The relator, on November 9, 1926, the date of the application for a permit had and continues to have a vested right to receive the said permit from the Building Inspector of the Village of South Orange, she being lawfully entitled thereto.

1. The Supreme Court, in the Zabriskie case (133 Atl., p. 65), stated:

> "Admitting that the ordinance does not have a retroactive effect, so far as buildings in the course of erection are concerned, it is clearly applicable where the process of construction has not yet begun."

On why there should be any difference whether a building is in the process of construction or not, the opinion is silent. It is a matter of common knowledge that to have an architect prepare plans for a building of the type in question costs a very substantial sum of money and may exceed the actual construction cost of a small frame building, so that insofar as the appellant has prejudiced herself in disbursing moneys in the anticipation that she would get what she at the time was entitled to get, her outlay was much more in substance than that of an owner of land who has commenced construction upon a smaller building.

2. In the Zabriskie case there was the question of a reasonable ordinance regarding the fireproofing of the building, and something with which the relator-appellant could have complied. In the case *sub judice* every requirement has been fulfilled except the aesthetic and arbitrary requirement of the zoning ordinance prohibiting an apartment house in a residential district.

3. It would seem that the property right of the appellant vested in her with the ownership of the property. The right to enjoyment, present or prospective, vested in her at the time. *(Presbytery of Jersey City* v. *First Presbyterian Church,* 51 Vroom, page 572, on page 577.)

> "The term *vested right,* in its application as a shield of protection, is not used in any narrow sense but as implying a vested interest of which the person cannot be deprived arbitrarily without injustice." *Myer Vest.* R. 17, section 18 (1891).
>
> "Whenever by the voluntary acts of the parties and the force and operation of the law, whether statutory or common, as applied to those acts at the time, a right accrues to the one to have or demand something of the other, such right cannot, against the will of the party to be injuriously affected, be divested, modified or controlled by any subsequent legislation." *Id.,* Sec. 21.
>
> "It is said that the doctrine of the sacredness of vested right has its root deep in the common law of England, whence so much of our own has been transplanted; and that it is a principle of that law, as old as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect." *Id.* 21, Sec. 41. See also *Warshung* v. *Hunt,* 18 Vroom 256 (1885).

4. The appellant submits that at the time the application for a permit was made she had a vested right to receive the same, which could

not be impaired by subsequent legislation. But, if the appellant is in error, it is still the contention of the appellant that her application is not in conflict or violative of the amendment or legislation or ordinance adopted thereunder, but is in full compliance therewith.

**Point Eleven.**

(Page 48, State of Case.)

The Supreme Court in its opinion, which is the basis of its judgment, in effect held that the burden of proving the unreasonableness of the ordinance would be upon the relator.

If the burden of proving the unreasonableness of the ordinance be upon the appellant, it is respectfully submitted as has heretofore been pointed out, that under the Agreed State of Facts the unreasonableness of the ordinance affecting this application is apparent, and the appellant has sustained that burden.

**Point Twelve.**

(Page 48, State of Case.)

Chapter 274 of the Laws of 1928, entitled, "An Act to enable municipalities to adopt zoning ordinances limiting and restricting to specified districts and regulating therein buildings and structures, according to their construction, and the nature and extent of their use, and the repeal of sundry zoning laws," is unconstitutional in that it is violative of the constitutional amendment: "The Legislature may enact general laws, under which municipalities, other than counties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures, according to

their construction, and the nature and extent of their use, and the exercise of such authority shall be deemed to be within the police power of the State. Such laws shall be subject to repeal or alteration by the Legislature." (P. L. 1927, p. 818.)

1. As was heretofore pointed out under Point Seven, Paragraphs 1, 2 and 3, the constitutional amendment gives no power to the Legislature to enact laws for other than the purposes expressed in the amendment. Chapter 274 of the Laws of 1928 violates this constitutional amendment by legislating further and in a manner inconsistent therewith. For instance, Section 5, which is set forth fully in the opinion of the Supreme Court, on page 30 of the State of the Case, by statute sets forth the purposes in "view," and generally expresses the purposes as follows:

> "Such regulation shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view of conserving the value of property and encouraging the most appropriate use of land throughout such municipality."

2. We submit that there is nothing in the constitutional amendment that gives the Legislature power to legislate with respect to the *character* of the district or with respect to its *peculiar suitability for particular uses* or for *conservation of the value of the property,* or encouraging the most appropriate use of land.

3. It is these elements to which our courts have prior to the passage of the amendment objected and declared invalid in prior ordinances. As the constitutional amendment does not authorize the Legislature to pass legislation for these

express purposes, consequently municipal ordinances framed accordingly are also invalid.

4. If it can be said that the South Orange ordinance was saved by this piece of legislation and affects the property in question, then the fact that the ordinance forbids the erection of this apartment house in a residential section and the prescribed height merely from an aesthetic view point, is not in compliance with the constitutional amendment and therefore is invalid.

**Point Thirteen.**

(Page 49, State of Case.)

Section 7 of Chapter 274 of the Laws of 1928, the title of which is set out in the preceding paragraph, is invalid and unconstitutional in that it is violative of paragraph 6, section 6, article 4, of the State Constitution, in that the said constitutional amendment provides that municipalities may adopt zoning ordinances pursuant to legislative laws, whereas the said section provides that ordinances already in effect "shall continue in effect as if they had been adopted under the provisions of this act."

Section 7 is also invalid because it is violative of the amendment in that the amendment contemplates the enactment of new legislation and makes no provision for the saving of old legislation.

**Point Fourteen.**

(Page 49, State of Case.)

Section 7 of Chapter 274 of the Laws of 1928, entitled, "An Act to enable municipalities to adopt zoning ordinances limiting and restricting to specified districts and regulating therein build-

ings and structures, according to their construction, and the nature and extent of their use, and the repeal of sundry zoning laws,'' is invalid because it is in violation of Article 4, Section 7, Paragraph 3, of the State Constitution, in that it is retroactive in operation and deprives the relator of her vested rights, and is also violative of Paragraph 1, Article 1 of the State Constitution in that it denies the relator the right of acquiring, possession and protecting her property.

Specific arguments under this point are referred to the combined arguments under all the preceding points and made part hereof.

It is respectfully submitted that the appellant is entitled to the writ and the judgment of the Supreme Court should be reversed.

FEIT & FEIT,
Attorneys for Relator-Appellant.
Louis J. Feit
LOUIS J. FEIT,
Of Counsel.

# New Jersey Court of Errors and Appeals

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|---|---|
| REBECCA KOPLIN,<br>*Relator-Appellant,*<br>*vs.*<br>VILLAGE OF SOUTH ORANGE AND EVERETT W. BIRD, Building Inspector of the Village of South Orange<br>*Defendants-Respondents.* | *On Mandamus*<br><br>*Appeal From Supreme Court* |

## BRIEF FOR RESPONDENTS

This is an appeal from the judgment of the Supreme Court denying a peremptory writ of mandamus to the relator-appellant.

## FACTS

The respondent Village of South Orange, through its Building Inspector, has refused to grant the appellant a permit for the erection of a building on a tract of land owned by said appellant situate at the northwest corner of South Orange Avenue and Stanley Road in the Village of South Orange, said building to be a nine story brick apartment house for the accommodation of seventy-three families and to contain one hundred ninety-three rooms. Said refusal was based on the ground that the proposed building would be injurious to the safety and general welfare of the citizens of

the Village of South Orange and secondly, that the erection of said building would be a violation of the Zoning Ordinance and Building Code of the Village of South Orange, both of which ordinances prohibited the erection of the type of building proposed.

The Supreme Court at the last term rendered a decision denying the appellant's request for a peremptory writ of mandamus from which judgment said appellant appeals to this court.

## POINT 1.

**The provisions of the ordinance under review prohibiting the erection of the building proposed is a valid exercise of the Police Power.**

This case is not controlled by the case of IGANCINUNAS vs. NUTLEY 99 N. J. 389 and the cases which follow for several reasons. First, in that case this court held that each subsequent case would stand on its own footing and that, if it could be shown in any particular case that the Zoning Ordinance was a reasonable exercise of the police power, the provisions of said ordinance would be sustained. Secondly. on September 20, 1927 the voters of the State of New Jersey ratified an amendment to the State Constitution which amendment in effect permitted the Legislature to

pass laws permitting municipalities to adopt Zoning Ordinances of the type in force in the Village of South Orange and presented in this case. Subsequently the Legislature by the passage of the Zoning Law known as "Chapter 274 of the Laws of 1928" put into effect the will of the voters of this state. This law not only permits municipalities to pass Zoning Ordinances of the type in force in the Village of South Orange but also contains a provision saving all Zoning Ordinances passed prior to the adoption of said law, provided said ordinances do not contravene the provisions of said law. This provision and other provisions of the 1928 act will be taken up in more detail later in this brief.

In addition to the above reasons for differentiating this case from the principle adopted by this court in the Nutley case, we contend that the recent decision of the Supreme Court of the United States in the case of VILLAGE OF EUCLID, OHIO, AND HARRY W. STEIN, INSPECTOR OF BUILDINGS FOR THE VILLAGE OF EUCLID v. AMBLER REALTY COMPANY reported in 47 Supreme Court Reporter Advanced Sheets page 114 has a distinct bearing on the issues involved in the instant case.

In paragraph 5 of the syllabus the following appears:

> "Zoning law, drawn in general terms and providing reasonable margin to secure effective enforcement, will not be held invalid, because individual cases may turn out to be innocuous in themselves."

In paragraph 8 of the syllabus in the same case the following appears:

> "Zoning ordinance must be clearly arbitrary and unreasonable and without substantial relation to public health, safety, morals or general welfare before it can be declared unconstitutional."

In the opinion delivered by Mr. Justice Sutherland the following appears in the third paragraph on page 117:

> "Before proceeding to a consideration of the case it is necessary to determine the scope of the inquiry. The bill alleges that the tract of land in question is vacant and has been held for years for the purpose of selling and developing it for industrial uses, for which it is especially adopted being immediately in the path of progressive industrial development; that for such uses it has a market value of about $10,000., per acre, but if the use be limited to residential purposes the market value is not in excess of $2500., per acre, that the first 200 feet of the parcel

back from Euclid Avenue, if unrestricted in respect of use, has a value of $150. per front foot, but if limited to residential uses, and ordinary mercantile business be excluded therefrom, its value is not in excess of $50. per front foot.

"It is specially averred that the ordinance attempts to restrict and control the lawful uses of appellee's land, so as to confiscate and destroy a great part of its value; that it is being enforced in accordance with its terms; that prospective buyers of land for industrial, commercial and residential uses in the metropolitan district of Cleveland are deterred from buying any part of this land because of the existence of the ordinance and the necessity thereby entailed of conducting burdensome and expensive litigation in order to vindicate the right to use the land for lawful and legitimate purposes; that the ordinance constitutes a cloud upon the land, reduces and destroys its value, and has the effect of diverting the normal industrial, commercial and residential development thereof to other and less favorable locations.

"The record goes no farther than to show, as the lower court found, that the normal and reasonably to be expected uses and development of that part of ap-

pellee's land adjoining Euclid Avenue is for general trade and commercial purposes, particularly retail stores and like establishments, and that the normal and reasonably to be expected use and development of the residue of the land is for industrial and trade purposes. Whatever injury is inflicted by the mere existence and threatened enforcement of the ordinance is due to restrictions in respect of these and similar uses, to which perhaps should be added—if not included in the foregoing-restrictions in respect of apartment houses. Specifically there is nothing in the record to suggest that any damage results from the presence in the ordinance of those restrictions relating to churches, schools, libraries and other public and semi-public buildings. It is never alleged nor proved that there is or may be a demand for any part of appellee's land for any of the last-named uses, and we cannot assume the existence of facts which would justify an injuction upon this record in respect to this class of restrictions. For present purposes the provisions of the ordinance in respect of these uses may therefore be put aside as unnecessary to be considered. It is also unnecessary to consider the effect of the restrictions in respect to U-1 districts,

since none of Appellee's land falls within that class."

The facts stated above are identical with the present case. Here the relator owns a piece of property in which might be termed an exclusive one family residential district. There is no evidence in the case that there are any other buildings of the type proposed erected in the Village of South Orange. There is no proof that the relator has sustained any damage by reason of the refusal of the respondents to grant the permit. Continuing further in the Euclid case quoted above in paragraphs two to four on page 118 the United States Supreme Court says:

"Building zone laws are of modern origin. They began in this country about twenty-five years ago. Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been

rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the **meaning,** but to the **application** of the constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall.

"The ordinance now under review and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitations. It varies with cir-

cumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities might be clearly invalid as applied to rural communities. In solving doubts, the maxium "Six utere tuo ut alienum non laedas" which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clew. And the law of nuisances, likewise, may be consulted, not for the purposes of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of the power. Thus the question whether the power to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or the thing considered apart, but by considering it in connection with the circumstances and the locality, STURGIS v. BRIDGEMAN, L. R. 11 Ch. 852, 865. A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. RADICE v. NEW YORK, 264 U. S. 292, 294, 44 S. Ct. 325, 68, L. Ed. 690.

"There is no serious difference of opinion in respect of the validity of laws and regulations, fixing the height of buildings within reasonable limits, the character of materials and methods of construction, and the adjoining area which must be left open, in order to minimize the danger of a fire or collapse, the evils of overcrowding and the like, and excluding from residential sections offensive trades, industries and structures likely to create nuiances. See WELCH v. SWASEY, 214, U. S. 91, 29, S. Ct. 567, 53 L. Ed. 923; HADACHECK v. LOS ANGELES, 239 U. S. 394, 36, S. Ct. 143, 60 L. Ed. 348 Ann. Cas. 1917B, 927; REINMAN v. LITTLE ROCK, 237 U. S. 171, 35 S. Ct. 511, 59 L. Ed. 900; CUSACK CO. v. CITY OF CHICAGO 242 U.S. 526, 529, 530, 37 S. Ct. 190, 61, L. Ed. 472 L. R. A. 1918A, 136 Ann. Cas. 1917C. 594."

In paragraphs 7 and 8 on page 119, the Court says:

"We find no difficulty in sustaining restrictions of the kind thus far reviewed, The serious question in the case arises over the provisions of the ordinance excluding from residential districts apartment houses, business houses, retail stores and shops and other like establishments. The

question involves the validity of what is realy the crux of the more recent zoning leglislation, namely the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded. Upon that question this court has not thus far spoken. The decisions of the state courts are numerous and conflicting; but those which broadly sustain the power greatly outnumber those which deny it altogether or narrowly limit it, and it is very apparent that there is a constantly increasing tendency in the direction of the broader view. We shall not attempt to review these decisions at length, but content ourselves with citing a few as illustrative of all.

"As sustaining a broader view, see Opinion of the Justices, 234 Mass. 597, 607, 127 N. E. 525; Inspector of Buildings of Lowell v. Stoklosa, 250 Mass. 52. 145, N. E. 262; Spector v. Building Inspector of Milton 250 Mass. 63, 145, N. E. 265; Brett v. Building Commissioner of Brookline, 250 Mass. 73, 145 N. E. 269; State v. City of New Orleans, 154, L. 271, 282, 97, So. 440, 33 A. L. R. 260; Lincoln Trust Co. v. Williams Bldg. Corp. 229, N. Y. 313, 128, N. E. 209; City of

Aurora v. Burns, 319 Ill., 84, 93, 149, N. E. 784; Deynzer v. City of Evanston, 319 Ill., 226, 149 N. E. 790; State ex rel. v. Houghton, 164 Minn. 146, 204 N. W. 569; State ex rel. Carter v. Harper 182, Wis. 148, 157-161, 196, N. W. 451, 33 A. L. R. 269; Ware v. City of Wichita, 113 Kan. 153, 214 P. 99; Miller v. Board of Public Works, 195 Cal. 477, 486-495, 234, P. 381, 38 A. L. R. 1479; City of Providence v. Stephens (R. I.) 133 A. 614.

"For the contrary view, see Goldman v. Crowther, 147, Md. 282, 128A, 50, 38, A. L. R. 1455; Ignaciunas v. Risley 98 N. J. L. 712, 121A. 783; Spann v. City of Dallas, Ill., Tex. 350, 235, S. W. 513, 19, A. L. R. 1387.

"As evidence of the decided trend toward the broader view, it is significant that in some instances the state courts in later decisions have reversed their former decisions holding the other way. For example campare State ex rel. v. Houghton supra. sustaining the power, with State ex rel. Lachtman v. Houghton, 134 Minn. 226, 158 N. W. 1917 L. R. A. 1917F 1050, State ex rel. Roerig v. City of Minneapolis, 136 Minn. 479, 162, N. W. 477 and Vorlander v. Hokenson, 145 Minn. 484, 175 N. W. 995, denying it all of which are

disapproved in the Houghton case (page 151, 204 N. W. 569) last decided.

"The decisions enumerated in the first Group cited above agree that the exclusion of building devoted to business, trade, etc., from residential districts, bears a rational relation to the health and safety of the community. Some of the grounds for this conclusion are promotion of the health and security from injury of children and others by separating dwelling houses from territory devoted to trade and industry; suppression and prevention of disorder;facilitating the extinguishment of fires and the enforcement of street traffic regulations and other general welfare ordinances; aiding the health and safety of the community by excluding from residential area the confusion and danger of fire, contagion and disorder which in greater or less degree attach to the location of stores, shops and factories. Another ground is that the construction and repair of streets may be rendered easier and less expensive, by confining the greater part of heavy traffic to the streets where business is carried on.

"The Supreme Court of Illinois, in the City of Aurora v. Burns, supra, pages 93-95 (149 N. E. 788) in sustaining a comprehensive building zone ordinance dividing the city into eight districts, including exclusive residential districts for one and two family dwellings,

churches, educational institutions and schools said:

> "The constantly increasing density of our urban populations, the multiplying forms of industry and the growing complexity of our civilization make it necessary for the state, either directly or through some public agency by its sanction to limit individual activities to a greater extent than formerly. With the growth and development of the state the police power necessarily develops within reasonable bounds to meet the changing conditions. * * *
>
> * * *The harmless may sometimes be brought within the regulation of prohibition in order to abate or distroy the harmful. The segregation of industries, commercial pursuits and dwellings to particular districts in a City, when exercised reasonably may bear a rational relation to the health, morals, safety and general welfare of the community. The establishment of such districts or zones may, among other things, prevent congestion of population, secure quiet residence districts, expedite local transportation, and facilitate the suppression of disorder, the extinguishment of fires and the enforcement of traffic and sanitary

conditions. The danger of fire and the risk of contagion are often lessened by the exclusion of stores and factories from areas devoted to residences and, in consequence, the safety and health of the community may be promoted. * * *

* * *The exclusion of places of business from residential districts is not a declaration that such places are nuisances or that they are to be suppressed as such, but it is a part of the general plan by which the city's territory is allotted to different uses, in order to prevent, or at least to reduce, the congestion, disorder and dangers which often inhere in unregulated municipal development."

"The Supreme Court of Louisana, in State v. City of New Orleans, supra, pages 282, 283 (97 So. 4444) said:

'In the first place the exclusion of business establishments from residence districts might enable the municipal government to give better police protection. Patrolmen's beats are larger, and therefore fewer, in residence neighborhoods than in business neighborhoods. A place of business in a residence neighborhood furnishes an excuse for any criminal to go into the neighborhood, where, otherwise, a stranger would be under the ban of suspicion. Besides, open shops invite

loiterers and idlers to congregate; and the places of such congregations need police protection. In the second place, the zoning of a city into residence districts and commercial districts is a matter of economy in street paving. Heavy trucks hauling freight to and from places of business in residence districts, require the city to maintain the same costly pavement in such districts that is required for business districts; whereas, in the residence districts, where business establishments are excluded, a cheaper pavement serves the purpose. * * *

'Aside from consideration of economic administration in the matter of police and fire protection, street paving, etc., any business establishment is likely to be a genuine nuisance in a neighborhood of residences. Places of business are noisy; they are apt to be disturbing at night; some of them are malodorous, some are unsightly; some are apt to breed rats, mice, roaches, flies, ants, etc. * * *

'If the municipal council deemed any of the reasons which have been suggested, or any other substantial reason, a sufficient reason for adopting the ordinance in question, it is not the province of the courts to take issue with the council. We have nothing to do with the question of

the wisdom of good policy of municipal ordinances. If they are not satisfying to a majority of the citizens, their recourse is to the ballot—not the courts.' "

"The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business and industrial buildings will make it easier to provide fire appartus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life, greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections, decrease noise and other conditions which produce or intensify nervous disorders, preserve a more favorable environment in which to rear children, etc. With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such

sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun, which otherwise would fall upon the smaller homes, and bringing, as their necessary accompainments the disturbing noises, incident to increased traffic and business, and the occupation by means of moving and parked automobiles, of larger portions of the streets thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favorable localities—until, finally the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to be nuisances.

"If these reasons, thus summarized do not demonstrate the wisdom or sound policy in all respects of those restrictions

> which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare. CUSACK CO. v. CITY OF CHICAGO, supra pages 530-531, (37 St. Ct. 190); JACOBSON v. MASSACHUSETTS, 197 U. S. 11, 30 31; 25 S. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765."

It is plainly evident from the discussion of the law by the United States Supreme Court in the above case that the trend of judicial opinion throughout the country is leaning toward the right of a municipality to pass ordinances providing for the segregation of various types of building. The case at issue presents a novel question in this state which has not as yet been passed by our courts and that is whether or not a municipality in the interest of the public health, safety and welfare can reasonably regulate the height of a building. We submit that to deprive municipalities of this power is unreasonable. If this court orders the issuance of a permit in this case it simply means that the Village of South Orange will be overrun with buildings of the

same type and on account of their great height will greatly interfere with the free circulation of air and create a monoply of the rays of the sun, which otherwise would fall upon the smaller homes. In addition the construction of a number of buildings of the type proposed would greatly increase the fire hazard.

We are aware of the fact that this court in the case of INGERSOLL v. SOUTH ORANGE has stated that it is a plain duty resting upon the municipal authorities to furnish and provide to its inhabitants reasonable, proper and adequate fire protection and that it is unreasonable to hold the adequacy of such a department should be maintained by restricting building and construction, but that on the contrary said adequacy should be maintained and kept step with increases in buildings and resulting increase of fire hazard by increasing and enlarging fire department in men, apparatus and efficiency. It will be noted that in the above statement the court uses the word "reasonable" in speaking about increased fire facilities, and we firmly believe that by the use of said term the court did not have in mind the erection in small communitties, of buildings nine stories in height.

Counsel for the appellant in his brief lays great stress upon the fact that about one thousand feet west of his client's property business buildings and apartments have been erected.

This is true but he does not say that said business buildings are one story in height and of absolute fire proof construction and the apartments in question are four stories in height and that said apartments comply with the terms of the Zoning Ordinance of the Village of South Orange as far as the height and type of construction is concerned. It is plainly apparent that an ordinance limiting the height of a building in a small rural community to four stories is not unreasonable and that any property owner who desires to erect in such community a nine story apartment house to house seventy-three families on a plot of land two hundred fourteen feet front on one street by one hundred fifty feet on another with a set back of twenty-five feet from each street line is unreasonable and is designed for selfish motives. In addition there appears to be no room for argument that the erection of such a building and the subsequent use of same for the purpose of housing seventy-three families will certain affect the safety, health and general welfare of the Community.

We respectfully submit that the ordinance is a valid exercise of the police power and that the writ applied for in this case should be denied.

## POINT II

**The building code ordinance limiting the**

**height of buildings is a valid exercise of the police powers.**

It is stipulated in the agreed state of facts (See S. of C. page 19, par. 15) that the Building Code of the Village of South Orange prevents the erection of the building under consideration. This we contend is a very important factor which this court should consider in the determination of the issues involved in this case. The Supreme Court found it unnecessary in its decisions to make any decision in connection with this point due to the fact that its decision was predicated on other reasons which that court deemed sufficient to warrant it in denying appellant's application. We submit that, if this court reaches the conclusion that the Supreme Court erred in its decision and that it was wrong in determining that the Zoning Ordinance provision was a reasonable exercise of police power and that the Zoning Act of 1928 applied with equal force to the case before this court, that aside from these considerations the appellant is absolutely precluded from relief in this court, because the only way in which the validity or the reasonableness of the Building Code can be attacked is by a writ of certiorari and not by mandamus.

We further believe that the rules laid down by the United States Supreme Court in the Euclid case cited herein apply with even

greater force to the above point and for that reason we will not go into a detailed discussion of this point. We merely urge upon this court that the Village of South Orange has spent considerable money and the officials have given considerable time to the study of the adoption of a Building Code and that the results of their investigation should not be disturbed by this court in this proceeding. There is no evidence in this case that the above regulation is unreasonable, oppressive or confiscatory and that said Building Code Ordinance is not designed for the health, safety and general welfare of the community.

## POINT III

**The supreme Court did not err in giving retroactive effect to Chapter 274 of the Laws of 1928.**

It is contended by counsel for the appellant that the Supreme Court erred in denying the writ of mandamus because the rights of the parties were fixed prior to its adoption of the constitutional amendment and the subsequent passage of Chapter 274 of the Laws of 1928.

The constitutional amendment which was approved by the voters of this state at a special election held on September 20, 1927 provided as follows:

"The Legislature may enact general laws under which municipalities other than counties may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use, and the exercise of such authority shall be deemed to be within the police power of the state. Such laws shall be subject to repeal or alteration by the Legislature."

On April 3, 1928 pursuant to the power conferred by that amendment the Legislature adopted Chapter 274 of the Laws of 1928 (which took effect immediately.) That act provides, among other things, as follows:

"3 General Purpose. Any municipality of this State may, by zoning ordinance, limit and restrict to specified districts and may regulate therein, buildings and structures according to their construction, and the nature and extent of their use, and the exercise of such authority, subject to the provisions herein contained, shall be deemed to be within the police power of the State.. The authority conferred by this act shall include the right to regulate and restrict the height, number of stories, and sizes of buildings, and other structures, the percentage of lot that may be

occupied, the sizes of yards, courts and other open spaces, the density of population, and the location and use and extent of use of buildings and structures for trade, industry, residence or other purposes."

"4. Districts. For any or all of said purposes the governing body or board of public works may divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this act; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings or other structures. All such regulations shall be uniform for each class or kind of buildings or other structures throughout each district, but the regulations in our district may differ from those in other districts."

"5. Purposes in View. Such regulations shall be made in accordance with a comprehensive plan and designed for one or more of the following purposes; To lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health, morals or the general welfare; to provide adequate light and air; to prevent the overcrowding of land or buildings; to avoid undue concentration

of population. Such regulation shall be made with reasonable consideration, among other things to the character of the district and it peculiar suitability for particular uses, and with a view of conserving the value of property and encouraging the most appropriate use of land throughout such municipality."

"7. Existing Zoning Ordinances Saved. Wherever any municipality shall have adopted an ordinance, or ordinances, prior to the adoption of this act, for any of the purposes, set forth in this act, such ordinance, or ordinances, shall continue in effect as if they had been adopted under the provisions of this act; and it shall not be necessary in such cases for the governing body or board of public works to appoint a zoning commission as provided by section six herein. All such ordinances shall remain in full force and effect, except insofar as they are inconsistent with the provisions of this act, until they shall have been amended, or repealed by the governing body or board of public works."

The Supreme Court took judicial notice of that statute and made particular reference to the provisions contained in Section 7 of said act to the effect that ordinances adopted prior

to the adoption of the act for the purposes set forth in the act shall continue in effect as if they had been adopted under the provisions of said act and shall remain in full force and effect except insofar as they are inconsistent with the provisions of said act.

The burden of proof that the provisions of the Zoning Ordinance of the Village of South Orange were unreasonable rests solely upon the appellant and it is respectfully submitted that no where in the agreed facts as shown in the state of the case (See S. of C. page 14) does it appear that said provisions were not made for the safety, health and general welfare of the community and are unreasonable.

In the case of ROHRS v. ZABRISKE 133 Atl. 65 the relator applied to the Superintendent of Buildings of the Village of Ridgewood for a permit to erect a five story apartment house on the corner of Prospect Street and West Spring Avenue in that village. The application was refused upon the ground that the land was located in a zone in which the erection of such a building was prohibited by the Zoning Ordinance. Subsequent to this refusal the governing body of the Village passed an amendment to its Building Code Ordinance and thereby prohibited the erection of an apartment house of more than three

stories unless it should be of fire proof construction. The question before the court were—first, whether the last named ordinance was a valid exercise of the police power and secondly, if it was, then whether it was a bar to the relator's alleged right to compel the issue of a permit because it was passed subsequently to the application therefor.

The Court determines that the ordinance was a valid and reasonable exercise of the police power; and as to the second question the court said "Assuming that the ground upon which the superintendent refused to issue the permit was unsubstantial and that the action of the Board of Adjustment was not justified under the statute, will this court, when confronted with an ordinance passed in the valid exercise of power conferred upon the municipality, disregard its existence and direct a permit to be granted to this relator to erect a building of the character described in her application although its erection will be a threat to public safety, merely for the reason that such ordinance was not passed until after the conclusion of the hearing before the Board of Adjustment and its action thereon. We have no doubt but that this question should be answered in the negative. Admitting that the ordinance does not have a retroactive effect so far as buildings in the course of erection are concerned it is clearly appli-

cable where the process of construction has not yet been begun. The power to issue a writ of mandamus is a discretionary one (JONES v. GUTTENBERG, 66 N. J. L. 58; O'HARA v. NATIONAL BISCUIT CO., 69 N. J. L. 198), and it would be abuse of power for this court to direct the municipality to grant a permit for the erection of a building the existence of which, if erected, has already been declared by legal authority to be a menace to the safety of the community.

Accordingly the court in that case denied the writ of mandamus.

We contend that the principle of law expounded in the above case is sound and should be followed in the present instance. It would be a travesty on justice for this court to exercise its discretionary power to grant a writ of mandamus to the appellant, the fact of which would serve to defeat the expressed will of the voters of this state. This action would only serve to satisfy the selfish desire of the apellant who desires to obtain monetary gain at the expense of her fellow citizens. It would be a gross injustice to the inhabitants of the Village of South Orange who have been poineers in the question of zoning and who have for the past six or seven years spent enormous sums of money to obtain the benefits which the Act of 1928 permits them to enjoy. We do not

believe that this court should be a party to any such proposition.

We, therefore, submit that the provisions of both the Zoning Ordinance and the Building Code of the Village of South Orange are reasonable and are within the police powers vested in the municipal authorities and that the decision of the Supreme Court should be affirmed with costs.

Respectfully Submitted,

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Attorneys for Defendants-Respondents

THOMAS E. FITZSIMMONS,
On Brief

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