

Record.

No. 53

Frank C. Bostock and Edgar
M. Noel

vs.

Conway W. Sams and others,
Judges of the Appeal Tax
Court of Baltimore City.

WM. J. O'BRIEN, JR.,
GANS & HAMAN,
FOR APPELLANTS.

WM. PINKNEY WHYTE,
FOR APPELLEES.

IN THE
COURT OF APPEALS

OF MARYLAND.

Appeal from the Court of
Common Pleas.

FILED APRIL 5th, 1902.

Frank C. Bostock and
Edgar M. Noel

vs.

Conway W. Sams, Solo-
mon H. Freburger, Os-
car Leser, Judges of the
Appeal Tax Court of
Baltimore City,

Appellants.

Appellees.

Court of Appeals of Maryland.

Appeal from the Court of Common Pleas
of Baltimore City.

Appealed to the April Term 1902 of the
Court of Appeals of Maryland.

WILLIAM J. O'BRIEN, JR.,
GANS & HAMAN,

For Appellants.

WILLIAM PINKNEY WHYTE,

For Appellees.

FRANK C. BOSTOCK AND ED-
GAR M. NOEL,

vs.

CONWAY W. SAMS, SOLOMON
H. FREBURGER AND OSCAR
LESER, Judges of the Ap-
peal Tax Court of Baltimore
City.

In the Court of Common
Pleas of Baltimore City.

Petition For Mandamus.

(Filed 19th March 1902.)

To the Honorable, the Judge of said Court:

The petition of Frank C. Bostock and Edgar M. Noel, the latter a resident of Baltimore City, State of Maryland, respectfully represents unto Your Honor as follows:—

1.

That the said Frank C. Bostock heretofore and on or before October 22nd, 1901, has leased for a valuable consideration, from a certain William P. Harvey, who is the owner thereof, a vacant lot of ground, about one hundred and fifty feet square, situated at the northeast corner of Mount Royal and Maryland Avenues, in Baltimore City; and is now the tenant in possession thereof with authority from the owner to erect thereon the building hereinafter mentioned and that said Frank C. Bostock has entered into an agreement with the said Edgar M. Noel by which the said Noel has undertaken, for a consideration, to erect for the said Bostock a building on the above mentioned vacant lot.

2.

That for the purpose of executing said building agreement, the said Edgar M. Noel heretofore, on October 22nd, 1901, in accordance with an ordinance of the Mayor and City Council of Baltimore, approved June 7th, 1889, and which is now codified in Article 50 of the Ordinances of the Mayor and City Council of Baltimore, contained in the Code of 1893, the portion of said ordinance herein especially referred to constituting section 27 of said Article 50, duly applied to the Appeal Tax Court of Baltimore City for a permit to erect said building, Mt. Royal Avenue being more than fifty feet in width.

3.

Your petitioners show that sections 27 and 28 of said

ordinance of June 7th, 1889, as codified in Article 50 of the Baltimore City Code, are as follows:

“27. Whenever application accompanied by the payment of the cost of the advertisement provided for in section 28 is made to the Judges of the Appeal Tax Court for a permit or permits to erect any new building or buildings on any street or avenue of the width of fifty feet or more, the person or persons making such application shall be required, before such permit or permits shall be granted, to file with the Appeal Tax Court a plat accurately describing the piece or parcel of ground to be improved, giving the front and depth thereof, its distances from the nearest established corner of a street, lane or alley, and the number of improvements (if more than one) proposed to be erected thereon; also an accurate description of the frontage, height, depth, material to be used in the proposed building or buildings and the general appearance and cost of same.

28. It shall be the duty of the judges of the Appeal Tax Court to grant such permits on application without charge, except as hereinbefore provided, and to keep a record of all permits issued; provided that no such permit shall be granted unless in the judgment of said judges of the Appeal Tax Court or a majority of them, the size, general character and appearance of the building or buildings to be erected, will conform to the general character of the buildings previously erected in the same locality, and will not in any way tend to depreciate the value of surrounding improved or unimproved property; and provided further, that before any such permit shall be granted, at least ten days notice by advertisement inserted in some daily newspapers shall be given by the Appeal Tax Court that application for such permit has been made. And before any permit shall be granted to erect any building or buildings within the limits of the City of Baltimore, the applicant shall first satisfactorily prove to the judges of the Appeal Tax Court that provision has been made for such drainage as the topography of the ground requires.”

4.

And your petitioners further show that the said Edgar M. Noel, at the time of applying for said permit, duly filed with the Appeal Tax Court a plat accurately describing the piece of ground to be improved by said building, giving the front and depth thereof, its distances from the nearest established corner of a street, lane or alley, and the number of improvements proposed to be erected thereon; also an accurate description of the frontage, height, depth, material to be used in the proposed building, and the general appearance and cost of the same; and your petitioners further show that the said building proposed to be erected by them, will be erected under the supervision of the Building Inspector of Baltimore City, and in conformity with all the building laws of Baltimore City, governing the erection and construction of said building, and that provision has been

made for all drainage that the topography of the building requires.

5.

And your petitioners further show that the said Appeal Tax Court appointed Monday, the 28th of October, 1901, at 3 o'clock P. M. as the time for a hearing of the application for said permit and any objections or remonstrances against the granting of the same, and that on said day and at said time, a number of owners of property in the vicinity of the above mentioned vacant lot, appeared before the said Appeal Tax Court, and offered to submit evidence in support of their objections to the granting of said permit; and your petitioners also attended and offered to submit evidence, by witnesses there present, in support of their application for said permit. And your petitioners show that many of the said parties who attended the said session of the Appeal Tax Court, were the same parties who are parties complainant in a bill of complaint for an injunction recently filed in the Circuit Court of Baltimore City on October 22, 1901, entitled I. Townsend Burden and others, against Frank C. Bostock, which bill of complaint seeks to obtain an injunction to restrain the said Bostock from erecting a building on the said mentioned lot of ground to be used for the purposes of a Zoo; and your petitioners further show that the said Appeal Tax Court, at said session, refused and declined to hear any testimony whatever, either in support of or in objection to the application for said permit, stating at the time that their decision in the matter would be entirely governed by their own knowledge of the facts and advice obtained by them from the Inspector of Buildings of Baltimore City, and other officials of the City.

6.

And your petitioners further show that shortly after said session, said Appeal Tax Court of Baltimore City filed an order and decision in the matter, refusing to grant said permit, which order and decision is in the following language:

“In the matter of the application for a permit to erect a building on Mt. Royal Ave. to be used for the purposes of a Zoo. The Appeal Tax Court having considered the same under Ordinances 91 and 92, Approved June 7th, 1889, see Art. 50, Sec. 27 & 28, page 1037, Baltimore City Code 1893, which requires that the applicant for a permit to erect any new building, should among other things file a description of the improvement to be erected, and that it shall be the duty of the Judges of the Appeal Tax Court, not to grant such permit unless, “the size, general character and appearance of the building or buildings to be erected will conform to the general character of the buildings previously erected in the same locality and will not in any way tend to depreciate the value of surrounding improved or unimproved property.” This language is found in Sec. 28 of said Art. 50, and controls the granting or refusing of said permit.

As officers of the City of Baltimore, the Judges of the Appeal Tax Court must perform the duties required of them as they find them in the Ordinances of the Mayor and City Council. The important and interesting question, of the constitutionality or unconstitutionality of the Ordinance under consideration is one that the Appeal Tax Court cannot decide. That question can only be passed upon by the proper tribunal. The Appeal Tax Court must execute the laws of the City as they are upon the statute books, until they are repealed or declared null and void. Therefore, if we find that the proposed building will not conform to the general character of the buildings previously erected in said locality, and will tend to depreciate the value of surrounding property, we cannot issue the permit. Upon the plans and specifications for this building presented to the Inspector of Buildings and examined by the Appeal Tax Court, we are of the opinion that these do not conform to the general character of the buildings in the said locality. The use of this building, when erected, will be for the purposes of a Zoo. These purposes are among other things to show wild animals, in reality conducting a continuous circus upon one of the most beautiful streets in the City of Baltimore. It is a matter of almost common knowledge that from this Zoo come disagreeable noises, unpleasant odors, and but a short time ago a building used for the same purposes upon this identical spot was burned down, causing considerable excitement in that neighborhood from the fear that wild animals would escape. As the Ordinance above quoted gives the Appeal Tax Court the authority to act, the application for a permit made by Edgar M. Noel, builder, for Frank C. Bostock, will not be granted.

CONWAY W. SAMS, *President.*”

7.

And your petitioners show that it is manifest from consideration of the above set forth order and decision of the Appeal Tax Court that said Court, in refusing to grant said permit, have based their refusal solely and only on the ground that the plans and specifications for the building presented by your petitioners to the Inspector of buildings, and examined by said Court, do not conform to the general character of the buildings in the locality of said lot. The said Court assigns as reasons for said conclusions the following:

1st. The building, when erected, is to be used for the purposes of a Zoo.

2nd. These purposes include the showing of wild animals, and in reality the conducting of a continuous circus.

3rd. That it is a matter of common knowledge that from a Zoo come disagreeable noises and unpleasant odors.

And your petitioners show unto Your Honor that the above set forth reasons do not in any way justify the conclusion reached by said Appeal Tax Court in the premises, and

that in arriving at said conclusion in reference to the general character of the building proposed to be erected, and whether or not the same conformed to the general character of the buildings in the said locality, the said Court had no right to consider said assigned reasons, and particularly said Court had no right in passing upon the matter, to consider to what use or uses the building would be put when erected, and therefore, your petitioners show that said conclusion, being based upon reasons which are illegal and invalid, and on which said Appeal Tax Court had no warrant in law for relying, the decision itself is in law *coram non iudice*.

And in this connection your petitioners show that the reasons above set forth relied on by said Appeal Tax Court have been made the basis of a bill for injunction recently filed in the Circuit Court of Baltimore City by I. Townsend Burden and others, against the said Frank C. Bostock, which said bill for an injunction the said Frank C. Bostock has answered, under affidavit, and has moved to dissolve the preliminary injunction issued thereon by this Honorable Court. And your petitioners further show that said answer entirely denies any and all allegations of said bill to the effect that the said Zoo will constitute a nuisance, and your petitioners further show that it is entirely competent and proper for such allegations to be investigated and tried in said Circuit Court of Baltimore City, but that the said Appeal Tax Court had no right to try said issues nor to base its decision in refusing said permit on its conclusion as to said issues.

8.

And your petitioners further show that even if it should be determined that the said decision of the Appeal Tax Court in refusing to grant said permit, is based on reasons which the said Court had the right and power to consider, and that their conclusion in the matter is therefore justified by said reasons, yet nevertheless, it is conclusively evident from the said order and decision of the Appeal Tax Court in the matter, that their refusal to grant said permit is based solely and entirely on that portion of the Ordinance in question, which provides: "That no such permit shall be granted unless in the judgment of said judges of the Appeal Tax Court, or a majority of them, the size, general character and appearance of the building or buildings to be erected will conform to the general character of the buildings previously erected in the same locality, and will not in any way tend to depreciate the value of surrounding improved or unimproved property."

And your petitioners further show that the said Appeal Tax Court in basing their refusal to grant the said permit upon said portion of said ordinance, wrongfully refused to grant said permit, because your petitioners show that they are advised and believe, and therefore aver that said portion of said Ordinance is illegal and invalid, and of no force or effect in law, in that,—

1st. The Mayor and City Council of Baltimore City had no power or authority to enact such a provision, and that said portion of said ordinance is therefore *ultra vires* and void.

2nd. That at the time of the passage of said Ordinance, there was no Statute of the General Assembly of Maryland in force authorizing the passage of the above set forth portion of said ordinance, nor has the passage of said ordinance ever since been ratified by any act of the General Assembly of Maryland.

3rd. That even if there had been such Statute authorizing or ratifying said ordinance, yet nevertheless, the same would have been void and illegal in that the same is unconstitutional, in that it deprives a citizen of Baltimore City of his property without due process of law.

4th. And that said portion of said ordinance is void, illegal and unreasonable in that it commits to the said Appeal Tax Court unlimited and unbounded discretion in granting or refusing said permits, and does not undertake to provide any general rules or regulations limiting the exercise of said discretion by the said Appeal Tax Court.

9.

And the said Edgar M. Noel has also, by his attorneys, tendered to the said Appeal Tax Court the cost of the advertisement of the notice in connection with said application provided for by the above set out section 28 of said ordinance, but said Appeal Tax Court refused to receive the same, and waived payment thereof, stating they would not grant said permit even though the costs of advertisement of said notice were paid to it, and even if said notice had been advertised, as required by said Ordinance.

10.

And your petitioners further show unto your Honor that in-as-much as they have in all respects duly complied with the provisions of said Ordinance which are valid, and all laws and ordinances relating thereto, and have duly applied for said permit in conformity with the valid provisions of said Ordinance, and in view of the fact, as aforesaid, that said permit has been wrongfully refused by the said Appeal Tax Court, therefore your petitioners are advised and aver that they are entitled of right to have from this Honorable Court a writ of Mandamus directed to the defendants requiring them to issue said permit for the construction and erection of said building in accordance with the application therefore made by your petitioners.

11.

And your petitioners further show unto your Honor that promptly after the refusal of the said Appeal Tax Court to grant said permit, your Petitioners filed their Bill of Complaint in the Circuit Court of Baltimore City praying for a writ of

injunction against the said Judges of the Appeal Tax Court of Baltimore City and the acting Marshal of Police of Baltimore City and others to enjoin them from interfering with your petitioners in the construction and erection of said building, to which Bill of Complaint a demurrer was filed by the several defendants, and which demurrer has been sustained by said Circuit Court of Baltimore City, and said Bill for Injunction dismissed without prejudice on the 18th day of March, 1902, on the ground that the proper remedy of your petitioner, if any, in the premises was by petition for a Mandamus : and your petitioners further show that there is no appeal provided by law or ordinance from the action of the said Judges of the Appeal Tax Court in refusing said permit, nor is there any other remedy for your petitioners in the premises other than by the writ of Mandamus.

Wherefore your petitioners pray that the writ of Mandamus may be issued by this Honorable Court directed to the said Conway W. Sams, Solomon H. Freburger and Oscar Leser, Judges of the Appeal Tax Court of Baltimore City directing and commanding them to issue to the said petitioners, and particularly the said Edgar M. Noel, a permit for the erection of the building on said vacant lot of land, according to the plans and specifications filed with the application for said permit.

WILLIAM J. O'BRIEN, JR.,
GANS & HAMAN,
Attys for Petitioners.

STATE OF MARYLAND,
City of Baltimore, ss:

I hereby certify that on this 19th day of March, 1902, before me, the subscriber, a Notary Public of the State of Maryland, in and for the City of Baltimore aforesaid, personally appeared Edgar M. Noel, one of the above named petitioners, and made oath in due form of law that the matters and facts set forth in the foregoing petition are true as therein stated to the best of his knowledge and belief. As witness my hand and notarial seal.

HOWARD D. ADAMS,
Notary Public.

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Upon the foregoing petition and affidavit it is this 20th day of March, 1902, by the Court of Common Pleas of Baltimore City, ordered that the defendants therein named show cause, if any there be, on or before the 31st day of March, 1902, why a writ of Mandamus shall not be issued as prayed for in said petition, provided that a copy of this order be served on said defendants or the City Solicitor of Baltimore City on or before the 22nd day of March, 1902.

J. UPSHUR DENNIS.

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Answer of Respondents.

Filed 22d of March, 1902.

FRANK C. BOSTOCK, AND ED-
GAR M. NOEL,

vs.

CONWAY W. SAMS, SOLOMON
H. FREBURGER AND OSCAR
LESER, Judges of the Ap-
peal Tax Court of Baltimore
City.

In the Court of Common
Pleas of Baltimore City.
Mandamus.

To the Honorable, the Judge of said Court:

The Answer of Conway W. Sams, Solomon H. Freburger and Oscar Leser, Judges of the Appeal Tax Court of Baltimore City, in obedience to the Order of this Honorable Court, passed on the 20th of March, 1902, in the above entitled cause, for cause why the writ of mandamus should not issue as prayed for in the petition of the plaintiffs, respectfully shows:

1.

These respondents do not admit that the said Frank C. Bostock has heretofore leased, for a valuable consideration, from a certain William P. Harvey, alleged to be the owner thereof, a vacant lot of ground about one hundred and fifty feet square, situated at the northeast corner of Mt. Royal and Maryland Avenues in Baltimore City, but require full proof of such lease and the production of the agreement therein referred to. Nor do they admit that the said Frank C. Bostock has entered into an agreement with the said Edgar M. Noel, by which the said Noel has undertaken, for a consideration, to erect for the said Bostock a building on the above mentioned vacant lot, but demand full and legal proof thereof, and the production of such agreement, if in existence.

2.

These respondents admit that the said Edgar M. Noel, on or about October 22, 1901, in accordance with an ordinance of the Mayor and City Council of Baltimore, approved June 7, 1889, now codified in Article 50 of the ordinances of the Mayor and City Council of Baltimore and contained in the Baltimore City Code of 1893, applied to the Appeal Tax Court of Baltimore City for a permit to erect a building on Mt. Royal Avenue, alleged to be more than fifty feet in width.

3.

These respondents admit that Sections 27 and 28 of said

ordinance of June 7, 1889, as codified in Article 50 of the Baltimore City Code are as follows:

"27. Whenever application accompanied by the payment of the cost of the advertisement provided for in section 28 is made to the Judges of the Appeal Tax Court for a permit or permits to erect any new building or buildings on any street or avenue of the width of fifty feet or more, the person or persons making such application shall be required, before such permit or permits shall be granted, to file with the Appeal Tax Court a plat accurately describing the piece or parcel of ground to be improved, giving the front and depth thereof, its distances from the nearest established corner of a street, lane or alley, and the number of improvements (if more than one) proposed to be erected thereon; also an accurate description of the frontage, height, depth, material to be used in the proposed building or buildings and the general appearance and cost of same.

"28. It shall be the duty of the judges of the Appeal Tax Court to grant such permits on application, without charge, except as hereinbefore provided, and to keep a record of all permits issued; provided, that no such permit shall be granted unless in the judgment of the said judges of the Appeal Tax Court, or a majority of them, the size, general character and appearance of the building or buildings to be erected, will conform to the general character of the buildings previously erected in the same locality, and will not in any way tend to depreciate the value of surrounding improved or unimproved property; and provided further, that before any such permit shall be granted, at least ten days' notice by advertisement inserted in some daily newspapers shall be given by the Appeal Tax Court that application for such permit has been made. And before any permit shall be granted to erect any building or buildings within the limits of the city of Baltimore, the applicant shall first satisfactorily prove to the judges of the Appeal Tax Court that provision has been made for such drainage as the topography of the ground requires."

But these respondents aver that in addition to the aforesaid sections of Article 50 of the Code, there are sections 24, 25 and 26, relating to permits for the erection of buildings in the City of Baltimore, which sections are as follows:

"24. It shall not be lawful for any person, without a permit from the Appeal Tax Court, to erect within the limits of the city, any building upon a new foundation, whether in connection with an existing building or not, or to pull down any old building or part of a building to the ground, and build upon the old foundation, or to put an additional story upon any building or part of a building by increasing the height of the walls; and any person or persons who may build within the city of Baltimore shall be required to take out a permit for each and every house he or they may purpose to build."

"25. All persons receiving permission for the erection of any special improvements from the City Council, shall, before commencing the erection of the same, obtain the endorsement of the Appeal Tax Court on said permit."

"26. Any person or persons offending against the two preceding sections shall be subject to a fine of not more than twenty dollars and not less than five dollars, and it shall be the duty of the bailiffs employed in the collector's office to attend to the collection of such fines."

4.

These respondents admit that the said Edgar M. Noel, when applying for said permit, filed with the Appeal Tax Court a plat describing the piece of ground to be improved by said building, giving the front and depth thereof, its distances from the nearest established corner of a street, lane or alley, and the number of improvements purposed to be erected thereon, and also a description of the frontage, height, depth, material to be used in the proposed building and the general appearance and cost of the same; but these respondents aver that it is not material to the inquiry here presented whether the petitioners purposed that the building which was to be erected, according to the plans presented, was to be erected under the supervision of the Building Inspector of Baltimore, and in conformity with all the building laws of Baltimore City governing the erection and construction of said building. These respondents admit the allegation in the fourth paragraph of said petition that the petitioners gave assurance to the Appeal Tax Court that provision had been made for all drainage that the topography of the ground required.

5.

These respondents further answering say, that the said Appeal Tax Court appointed Monday, the 28th day of October 1901, at three o'clock P. M., as the time for the hearing of the application for said permit and any objections or remonstrances against the granting of the same; and they aver that on the said day and at that time, a number of owners of property in the vicinity of the above mentioned vacant lot, appeared before the said Appeal Tax Court, and were heard, without being sworn, but they deny that the Appeal Tax Court declined to hear facts and arguments pro and con, but stated that the Court thought it had sufficient evidence before it upon which to act, and by consent of all parties, the matter was left to the Appeal Tax Court. And these respondents aver that it is not material whether any of the parties who attended the session of the Appeal Tax Court were the same parties who are parties complainant in a Bill of Complaint for an injunction filed in the Circuit Court of Baltimore City on October 28, 1901, entitled I. Townsend Burden, and others, vs. Frank C. Bostock, for the decision of that case has no relation whatever to the action of the Appeal Tax Court in regard to the granting of a permit.

These respondents further answering, admit that after said session, the said Appeal Tax Court of Baltimore City filed an order in the matter, refusing to grant said permit, which order and decision is in the following language:

"In the matter of the application for a permit to erect a building on Mt. Royal Ave. to be used for the purposes of a Zoo. The Appeal Tax Court having considered the same under Ordinances 91 and 92, approved June 7th, 1889, see Art. 50, Sec. 27 & 28, page 1037, Baltimore City Code 1893, which requires that the applicant for a permit to erect any new building, should among other things file a description of the improvement to be erected, and that it shall be the duty of the Judges of the Appeal Tax Court, not to grant such permit unless, 'the size, general character and appearance of the building or buildings to be erected will conform to the general character of the buildings previously erected in the same locality and will not in any way tend to depreciate the value of surrounding improved or unimproved property.' This language is found in Sec. 28 of said Art. 50, and controls the granting or refusing of said permit.

"As officers of the City of Baltimore, the Judges of the Appeal Tax Court must perform the duties required of them as they find them in the Ordinances of the Mayor and City Council. The important and interesting question, of the constitutionality or unconstitutionality of the Ordinance under consideration is one that the Appeal Tax Court cannot decide. That question can only be passed upon by the proper tribunal. The Appeal Tax Court must execute the laws of the City as they are upon the Statute books, until they are repealed or declared null and void. Therefore, if we find that the proposed building will not conform to the general character of the buildings previously erected in said locality and will tend to depreciate the value of surrounding property, we cannot issue the permit. Upon the plans and specifications for this building presented to the Inspector of Buildings and examined by the Appeal Tax Court, we are of the opinion that these do not conform to the general character of the buildings in the said locality. The use of this building, when erected, will be for the purposes of a Zoo. These purposes are among other things to show wild animals, in reality conducting a continuous circus upon one of the most beautiful streets in the City of Baltimore. It is a matter of almost common knowledge that from this Zoo come disagreeable noises, unpleasant odors; and but a short time ago a building used for the same purposes upon this identical spot was burned down, causing considerable excitement in that neighborhood from the fear that wild animals would escape. As the Ordinance above quoted gives the Appeal Tax Court the authority to act, the application for a permit made by Edgar M. Noel, builder, for Frank C. Bostock, will not be granted.

CONWAY W. SAMS, *President.*"

7.

These respondents deny the construction put upon the order and decision of the Appeal Tax Court, as above set forth, in refusing to grant said permit; but, on the contrary, they aver that the grounds upon which the permit was refused were (1) that the proposed building will not conform to the general character of the buildings previously erected in said locality and (2) will tend to depreciate the value of surrounding property; and as a reason why the erection of such a building would tend to depreciate the value of the surrounding property, stated that the establishment of a zoo does not only occasion disagreeable noises and unpleasant odors, but by reason of its character, being composed of inflammable material, there had occurred, but a short time previously, a fire which destroyed the whole building and caused considerable excitement in that neighborhood from the fear that the wild animals would escape; and relying upon the ordinance above quoted as giving the Appeal Tax Court the discretion to grant or refuse a permit in any given case thereunder, they felt bound to refuse such a permit for the erection of a building and the re-establishment of a business which had involved such peril to the people occupying the surrounding property and thus tending to depreciate the value of that property. And these respondents aver that, for the reasons above set forth, they were justified in refusing the permit, as in their judgment, such discretion was necessary and beneficial to the City of Baltimore, and the said discretion was exercised with the honest purpose of discharging their official duties.

8.

These respondents further answering show, that they did not deny the permit asked for by the petitioners wrongfully, but aver that the said portion of said ordinance, giving them discretion to grant or refuse such permit, is legal and valid in law because (1) the Mayor and City Council of Baltimore had power and authority, under the acts of incorporation, to enact such a provision as contained in Section 28 of Article 50 of the Baltimore City Code of 1893; (2) because the powers therein conferred are powers properly conferred by the Mayor and City Council upon the Appeal Tax Court of said City, its duly authorized agents; (3) because the refusal upon the part of the Judges of the Appeal Tax Court of the permit, which was applied for by the Plaintiff, Edgar M. Noel, under and by virtue of the power and authority conferred upon said Court by said ordinance, in said petition referred to, was a proper exercise of police powers which the Mayor and City Council of Baltimore had, by the authority in it vested, conferred on said members of the Appeal Tax Court, its duly authorized and accredited agents; (4) because, under the Acts of Assembly creating the Municipality, and the amendments thereto, there was ample power granted to the legislative department of said Municipality to pass the ordinance referred to, and the same

is in no way unconstitutional, for it does not deprive a citizen of Baltimore City of his property without due process of law; (5) because the said ordinance is not void, illegal or unreasonable in committing to the Appeal Tax Court discretion in granting or refusing such permits, and it does provide a rule or regulation directing the manner of exercising the discretion on the part of the Judges of the said Appeal Tax Court.

9.

These respondents admit that said Edgar M. Noel, through his attorneys, tendered the cost of advertisement of the notice, in connection with said application, provided for by the above set out section 28 of said ordinance, which was refused upon the ground that the cost of advertisement could not be accepted when the permit had been refused.

10.

These respondents deny that the said permit has been wrongfully refused by the Judges of the said Appeal Tax Court, and they deny that the petitioners are entitled of right to have from this Honorable Court a writ of mandamus directed to the defendants, requiring them to issue said permit for the construction and erection of said building, in accordance with the application made by the petitioners; but on the contrary, they say that their application, their statements, their plans, all indicate that if a permit were granted for the erection of such a building as proposed, the building would not conform to the general character of the buildings previously erected in the same locality, and would tend materially to depreciate the value of the surrounding improved or unimproved property.

11.

These respondents admit that after the refusal of the Appeal Tax Court to grant said permit, the petitioners filed a Bill of Complaint in the Circuit Court of Baltimore City, as described in the 11th paragraph of their petition for a mandamus, to which Bill a demurrer was filed and the demurrer was sustained by the Circuit Court of Baltimore City and the Bill for injunction dismissed without prejudice.

And now having answered all the material allegations of the said petition, and having shown cause why the writ of mandamus should not issue, these respondents pray to be hence dismissed with their costs.

And as in duty &c.

CONWAY W. SAMS,
S. H. FREBURGER,
OSCAR LESER,

Judges of the Appeal Tax Court.

WM. PINKNEY WHYTE,
City Solicitor and Atty for Dfts.

STATE OF MARYLAND, *Baltimore City, Set:*

I hereby certify, that on this 22nd day of March, 1902, before me, the subscriber, a Justice of the Peace of the State of Maryland, in and for Baltimore City aforesaid, personally appeared Conway W. Sams, Solomon H. Freburger, and Oscar Leser, Judges of the Appeal Tax Court of Baltimore City, and made oath in due form of law that the matters and things in the foregoing answer set forth are true to the best of knowledge, information and belief.

DANL. J. LODEN, *J. P.*

FRANK C. BOSTOCK AND ED-
GAR M. NOEL

vs.

CONWAY W. SAMS et al.

In the
Court of Common Pleas of
Baltimore City.

Demurrer to Answer

(Filed 4th of April 1902)

And the petitioners as to the answer heretofore filed by the defendants in this case say that the same is insufficient in law and they therefore demur thereto.

WILLIAM J. O'BRIEN, JR.,
GANS & HAMAN,
Attorneys for Petitioners.

And on same day the demurrer was overruled.

Joinder of Issue & Demurrer to Part of Answer.

Filed 4th of April 1902.

FRANK C. BOSTOCK AND ED-
GAR M. NOEL

vs.

CONWAY W. SAMS et al.

In the
Court of Common Pleas of
Baltimore City.

And the petitioners as to the answer heretofore filed by the respondents in this case, say, that they join issue on the matters contained in the first paragraph of said answer.

And said petitioners as to each and all of the other paragraphs of said answer say they are insufficient in law and therefore demur thereto.

WM. J. O'BRIEN, JR.,
GANS & HAMAN,
Attorneys for Petitioners.

And on same day Demurrer was overruled.

FRANK C. BOSTOCK AND ED-
GAR M. NOEL

vs.

CONWAY W. SAMS et al.

In the
Court of Common Pleas of
Baltimore City.

Joinder of Issue.

(Filed 4th of April 1902)

And the petitioners as to the answer of the defendants heretofore filed in this case join issue thereon as far as said answer in any way denies the averments of facts contained in the petition filed by the petitioners in this case.

WM. J. O'BRIEN, JR.,
GANS & HAMAN,
Attorneys for Petitioners.

The Petitioners offered one prayer which was rejected, as set out in Bill of Exceptions.

FRANK C. BOSTOCK AND ED-
GAR M. NOEL

vs.

CONWAY W. SAMS et al.

In the
Court of Common Pleas of
Baltimore City.

Order of Court.

Filed 4th of April, 1902.

This case having come on to be heard upon petition, answer and testimony, the pleadings were read and considered and counsel for the respective parties heard.

It is, thereupon, this fourth day of April, 1902, by the Court of Common Pleas of Baltimore City ordered that the writ of mandamus prayed for in this case be and the same is hereby refused and the petition be and the same is hereby dismissed.

J. UPSHUR DENNIS.

Order of Appeal.

(Filed 4th of April 1902.)

FRANK C. BOSTOCK AND ED-
GAR M. NOEL

vs.

CONWAY W. SAMS et al.

In the
Court of Common Pleas of
Baltimore City.

Mr. Clerk: Please enter an appeal to the Court of Appeals on behalf of the petitioners in this case from the order

of Court dated April 4th, 1902, refusing to issue the writ of mandamus.

WM. J. O'BRIEN, JR.,
GANS & HAMAN,
Attorneys for Petitioners.

FRANK C. BOSTOCK AND ED-
GAR M. NOEL

v.

CONWAY W. SAMS et al.

In the
Court of Common Pleas of
Baltimore City.

Bill of Exceptions.

Filed 4th of April, 1902.

At the trial of this cause in the Court of Common Pleas before the Honorable J. Upshur Dennis, sitting without a Jury, the Petitioners to maintain the issues joined on their part called as a witness William P. Harvey, who testified as follows:

WILLIAM P. HARVEY, a witness on behalf of Plaintiffs, being duly sworn, testified as follows:

Direct Examination.

Q. (Mr. CHESNUT) Do you own a lot of land at the northeast corner of Mt. Royal and Maryland Avenues in Baltimore City, about 150 feet square?

A. I do.

Q. Please tell the Court who is the tenant now in possession of that lot of ground?

Mr. WHYTE: We object to that. If there is any agreement in writing, we want the writing.

Mr. CHESNUT: We will see whether there is an agreement in writing or not.

The WITNESS: Frank C. Bostock is for the present.

Q. Will you tell the Court whether or not Mr. Bostock was a tenant in possession—

(Objected to)

Q. Is there now any formal written agreement?

A. There was a written agreement.

Mr. WHYTE: Where is it?

Mr. CHESNUT: Please state when Mr. Bostock or his agent first approached you in reference to consummating a lease of this lot?

A. You mean what time they began?

Q. Yes.

A. The broker called on me a number of times and we finally decided on the 19th of October, 1900, in regard to the original lease, and the lease was probably drawn up and ready I think on the 21st. They paid a thousand dollars on the morning of the 22nd.

Q. Please look at the paper I now hand you and state whether or not that was the form of lease agreed upon?

A. This is the original agreement.

The agreement referred to is as follows:

“This lease, made this day of October, in the
“year one thousand nine hundred and one, between William
“P. Harvey, landlord, and Jennie J. Harvey, his wife, par-
“ties to the first part; and Frank C. Bostock, tenant, party
“of the second part;

“Witnesseth: That the said landlord hereby leases to
“the said tenant all that fee simple lot of ground at the
“northeast corner of Mt. Royal and Maryland Avenues,
“Baltimore City, belonging to the said landlord, for the term
“of five years, beginning on the first day of January in the
“year one thousand nine hundred and two, and ending the
“31st day of December, one thousand nine hundred and six.
“And the said parties of the first part hereby agree to sell
“and convey the said lot of ground to the said Frank C. Bos-
“tock at any time during the continuance of this lease, for
“the sum of fifty thousand dollars (\$50,000.)

“And the said Frank C. Bostock hereby agrees to pay
“to the said Landlord the sum of twenty-five hundred dol-
“lars (\$2500) per year as rent for the said property, the said
“sum to be paid in quarterly installments of six hundred and
“twenty-five dollars (\$625) each on the first days of January,
“April, July and October, commencing on January 1, 1902;
“and the said Landlord hereby acknowledges the receipt of
“one thousand dollars (\$1000) on account of the first year’s
“rent, of which sum of one thousand dollars (\$1000) the sum
“of two hundred and fifty dollars (\$250) is to be placed to
“the credit of the said rent each quarter; making the net
“rent to be paid on the first days of January, April, July
“and October of the year 1902, the sum of three hundred
“and seventy-five dollars (\$375) each.

“As a condition of this lease, the said tenant agrees to
“cause to be erected on the said lot a one-story brick build-
“ing, 150 feet front by 150 feet deep, with flooring over the
“entire floor, and with a gallery. The said tenant agrees to
“keep the said building in repair and to pay all expenses
“connected therewith, including fire insurance, water rent,
“and gas and electric light bills, and all other expenses of
“every kind and description, when and as the same come
“due and payable; and the said tenant further agrees to pay
“for all licenses or permits that may be necessary.”

“The said Frank C. Bostock agrees to pay all taxes
“that may be assessed against the land and building to be

"erected thereon, when and as the said taxes come due and
 "payable, except special taxes for opening or closing
 "streets, or paving or repairing, the intent of this lease
 "being that the said landlord will receive the said rent of
 "twenty-five hundred dollars (\$2500) per year, over and
 "above all taxes, charges and expenses of every kind upon
 "or in connection with the said land and building, and the
 "business of the said tenant;

"And the said Bostock agrees to protect and save
 "harmless the said landlord from and against any and all
 "liability of any kind growing out of any accident or other
 "occurrence of any character, in, upon or in connection with
 "the said land and premises.

"It is expressly understood and agreed that the build-
 "ing erected upon the said lot of ground will vest in and be-
 "come the property of the said landlord at the expiration of
 "this lease, if the said tenant does not exercise his right of
 "purchase as above provided.

"And in case of any breach of any agreement hereby
 "entered into by the said Bostock—or upon his failure to
 "pay when and as due any of the payments hereby agreed
 "to be paid by him, it is expressly understood and agreed that
 "the said landlord may, after thirty days' notice in writing,
 "to the said Bostock, or his agent in possession of the prem-
 "ises, declare this lease to be null and void and at an end.
 "Whereupon all the rights of the said Bostock under this
 "lease shall, at the expiration of thirty days from said no-
 "tice, cease and terminate. And in the event that the
 "whereabouts of the said Bostock, or his agents or repre-
 "sentatives, are not known to the landlord, then the said
 "notice may be placed upon the said premises, with the same
 "effect as though served upon the said Bostock or his agent.

"And the said tenant hereby covenants to surrender the
 "possession of the said premises at the end of this lease,
 "and that he will not at any time assign this lease without
 "the consent in writing of the said landlord.

"It is expressly agreed and understood that the obliga-
 "tion of this lease is absolute from the date of its execution
 "by the said parties of the first part, and is in no wise con-
 "ditional upon permission being given by the authorities of
 "Baltimore City to the said Bostock to use the property for
 "any particular purpose, and is not conditional upon any
 "other matter or thing whatever.

"Executed in duplicate.

"Witness their hands and seals.

WILLIAM P. HARVEY. (Seal)"

"Witness—Wm. A. Pleasants."

Q. I notice that lease is signed by you and not by Mr. Bostock. Will you please state why it was not signed by Mr. Bostock?

A. He was out of the city and his agent was here who had a power of attorney to sign it, and I declined his signature, and it was sent to Mr. Bostock by him to be signed. In the meantime the objection came about building the Zoo there, and he didn't return this to me signed. I suppose he did not care to sign until the matter was settled.

Q. What day was this signed by you?

A. On the morning of the 22nd, I think.

The COURT: There are stipulations there on both sides.

Mr. CHESNUT: Yes, your Honor. At the time this paper was signed by you, Mr. Harvey, was any money paid on account of the lease by Mr. Bostock or his agent?

A. \$1,000, in cash in part payment of the rent.

Q. By whom was that \$1,000 paid to you?

A. By the agent, but it was a check signed by Mr. Bostock himself.

Q. On what day was that paid?

A. On the morning of the 22nd.

Q. Mr. Bostock never signed that lease?

A. Never signed it.

Q. And you still retained the thousand dollars?

A. I do.

Q. I understand also from what you have said that the reason Mr. Bostock did not sign it was because he was out of town the day the thousand dollars was paid, and you did not want it signed by an agent of his, and in the meantime before Mr. Bostock came back to the city to sign any contract, this trouble occurred by reason of the Appeal Tax Court refusing to grant a permit.

A. Yes, sir.

Q. Was there any subsequent agreement between you and Mr. Bostock in reference to how long he should remain in possession of the property in consideration of that thousand dollars or not?

A. Inasmuch as he paid the thousand dollars on account I did not care to take the money and let him have no claim on the property at all. I extended the lease, I think, just after the objection was filed, with the understanding that in the event of his not getting the permit the lease was to be cancelled. That was my agreement with him, but it was to extend the lease to the first of July. In other words, I could not sell the property. He holds the property as ten-

ant up to the first of July anyhow, in consideration of the thousand dollars that he paid on account. Of course I would not want to take the man's money without giving him something.

Q. And if he is unable to get a permit and unable to erect a building then there is no further obligation on his part to pay further rent?

A. In that event the lease was to be cancelled, and I keep the thousand dollars.

Q. Who is the tenant now in possession and entitled to build on that lot?

A. Mr. Bostock has that property now, and can use it.

Q. Has Mr. Bostock now the right to build on that lot?

A. Yes, sir, I consider he is the tenant and will be until this matter is settled:

Q. Is there or not any objection on your part to his building this proposed structure?

A. I signed a paper to the effect that he is the tenant.

Mr. WHYTE: When did you do that?

A. Just directly after this opposition occurred.

Q. Where is that paper?

A. I may have a copy of it; I certainly signed it.

Q. Mr. CHESNUT: Was or not Mr. Bostock a tenant of yours in possession of that lot on October 22nd last, with authority from you to erect a building such as he desired on that lot?

(Objected to.)

The COURT: Is it in writing?

Mr. CHESNUT: Was there any writing further than this lease?

A. I signed an agreement to extend it.

Q. Was there on October 22, 1901, any other writing than this lease which you have signed?

A. I think that was the only one at that time.

Q. Subsequent to that was there any writing between you and Mr. Bostock in ratification of the oral authority which he had on October 22nd?

Mr. WHYTE: Was there a paper writing?

A. Yes, sir, I signed a paper.

Mr. CHESNUT: When—if you recollect—was there a subsequent ratification by writing between you and Mr. Bostock of the subsequent agreement to the formal lease?

A. That was directly after the opposition occurred ; it was the 5th of December I think when he requested an extension in time and I gave it to him.

Q. Have you the letter from Mr. Bostock to you or to your counsel, Miller & Bonsal written about the 5th of December, 1901?

A. I think I have. I haven't it with me but I can produce it ; it is in my office, in the safe.

(The witness retired from the court room for the purpose of obtaining the writing referred to. He returned and his examination was resumed.)

Q. You have said that subsequent to October 22nd, when the formal lease had been signed by you, and turned over by you to be signed by Mr. Bostock, after the thousand dollars had been paid on account of that lease, or after Mr. Bostock had declined to sign the formal lease, that there was a verbal agreement between you whereby the lease should be extended subject to cancellation on Mr. Bostock's failure in erecting a building there, and subsequent again to that on December 5th there was some correspondence between you relating to the matter. Please look at this correspondence I now hand you and say whether the same is what you refer to? (Handing papers to witness.)

A. Yes, sir.

Q. One is a letter from Miller & Bonsal to Gans & Haman, and one is a letter of Gans & Haman to Miller & Bonsal, also a letter from Bostock to Gans & Haman.

A. Yes.

The letters referred to are as follows :

Baltimore, Md., December 5, 1901.

" MESSRS. GANS & HAMAN, *Calvert Building, City.*

" DEAR SIRs: Referring to the conversation over the telephone with Mr. Haman this morning, we write to say that we have conferred with Mr. Harvey in regard to the matter.

" Mr. Harvey is desirous of leasing the property to Mr. Bostock and is anxious to have him successful over those who are interfering with Mr. Bostock's plans to erect a zoo in Baltimore.

" While therefore Mr. Harvey is anxious to come to an agreement in regard to the property, yet he thinks it is asking almost too much of him to have the property which is for sale at \$50,000, and for which an offer of almost this amount in cash has been made very recently, tied up for a number of months in such a way that Mr. Harvey could not sell the property and yet would be deriving no income from it. He, therefore, thinks that for the lease to com-

“mence on September 1, 1902, would tie up the property too long a time, but he authorizes us to say that if Mr. Bostock would make the date July 1, 1902, he would be willing to make the arrangement.

“Such an arrangement would be as follows: If Mr. Bostock should be unsuccessful in the litigation in which he is engaged—or is about to be engaged—in regard to the erection of a zoo on the property, then no lease is to be made by Mr. Harvey, and the thousand dollars already paid is to be retained by Mr. Harvey. If, however, the litigation is successful, then Mr. Harvey would lease the lot to Mr. Bostock for five years from July 1, 1902, on the same terms as are set forth in the form of lease which was not executed between these parties, the thousand dollars above referred to to be credited on the first year's lease.

“In reference to the thousand dollars above mentioned we desire to be clearly understood in saying on behalf of Mr. Harvey, that the said thousand dollars by the verbal agreements which constitute the only contract now in force between the parties, belongs to Mr. Harvey—without any conditions whatever—but that for the purpose of meeting the views of Mr. Bostock we have referred to the above as being applicable to the new arrangement hereby proposed.

“We call your attention to the fact that Mr. Bostock has left a trench all around the property, unprotected from the public, and that it is important that a fence should at once be erected, as there is danger of some one falling into the trench and bringing a suit for damages against the owner of the property.

Very truly yours,

(Signed) MILLER & BONSAI.

“*Baltimore, Md., U. S. A., Dec. 5, 1901.*

“MESSRS. MILLER & BONSAI, *City.*

“GENTLEMEN: We have your letter of this date in the matter of the zoo. We are sending you herewith a letter written to us by Mr. Frank C. Bostock, in which Mr. Bostock accepts the proposition of Mr. Harvey contained in your letter.

Yours very truly,

(Signed) GANS & HAMAN.”

“*Baltimore, December 5, 1901.*

“MESSRS. GANS & HAMAN, *City.*

“GENTLEMEN: I accept the proposition set forth in the letter of December 5, 1901, written by Messrs. Miller & Bonsal on behalf of Mr. Wm. P. Harvey, to you as my coun-

“ sel. Please to send this letter to Messrs. Miller & Bonsal.

Yours very truly.

(Signed) FRANK C. BOSTOCK.

Q. Who then was the tenant in possession of the lot mentioned between October 22, 1901, and July 1, 1902?

(Objected to and objection overruled).

A. F. C. Bostock.

Q. The petitioner in this case?

A. Undoubtedly.

Q. Irrespective of anything else, had Mr. Bostock authority from you as owner to erect the building we have been speaking of proposed to be put upon this lot?

(Objected to; objection overruled).

A. He had authority from me as far as I was concerned. He had not got the permit yet.

Q. As a matter of fact, did not Mr. Bostock begin the work of building on that lot, to your knowledge, about October 22nd, 1901?

A. Just about the time, as soon as he decided he would take the property on my terms. He was very anxious to complete his building and he started in at once.

Cross Examination.

Q. (Mr. WHYTE) Before this written agreement was even signed?

A. It was signed the 22nd of October by me.

Q. He did not sign it?

A. He was in Buffalo attending the exposition. He could not get on here and he sent on his right hand man.

Q. And it was not signed?

A. Signed by me.

Q. But you both did not sign it?

A. He never signed it because the objection was raised.

Q. Therefore you say he commenced to do work there before he even signed this agreement?

A. I gave him that privilege.

Q. Was it before you signed that that he went on the property and commenced digging?

A. I believe he did.

Q. Before you had any agreement?

A. Yes, sir.

Q. He was not your tenant then ?

A. I had not signed that deed yet, but I had agreed on the 19th, and that was the day he commenced to dig.

Q. I see a fence up there with advertisements upon it; who put that fence there ?

A. I got a notice from the police, through a boy, that a man fell down in the trench and hurt his foot, and that he was going to sue for \$10,000 damages against me if I didn't have a fence put around there; I gave a man permission to put the fence up.

Q. Did he pay for the privilege ?

A. Yes, sir.

Q. Who received the money for the signs on that fence ?

A. The man that put the fence up.

Q. And you gave him that authority ?

A. Yes, sir.

Q. I thought you said Bostock was in possession ?

A. I saw his agent here before that was done. Mr. Bostock consented that I should put up a fence, or have the fence erected. I didn't put it up of my own accord at all, but went to see Mr. Haman, who was the representative of Mr. Bostock here.

Q. How do you know he was in possession when you say he began digging there ?

A. Because I gave him my word that it was all satisfactory.

Q. Now then you did in this letter through your counsel announce to him that this agreement was at an end, and there was nothing but your verbal agreement to make a new lease by the first of July, if he got a permit from the city to build that zoo there.

A. I took the thousand dollars and I consented to extend the time up to the first of July.

Q. And if he did not enter on that agreement the first of July you were going to keep the thousand dollars, were you not ?

A. Undoubtedly.

Q. Hadn't you been notified by Mr. Stewart that he would oppose the establishment of a zoo there, and that he would go in the courts, and did he not warn you that the grant of a lease to this gentleman would produce litigation ?

(Objected to ; objection overruled, and exception noted)

Q. About when was that fence erected?

A. I don't exactly remember.

Q. Was it before this agreement or after this agreement that Miller & Bonsal made for you, December 5th?

A. I cannot say exactly; I know I went to see Gans & Haman about getting permission from them. Mr. Bostock not being here.

Petitioners further called as a witness George H. Thomas,
| testified as follows:

GEORGE H. THOMAS, a witness on behalf of Plaintiffs, being duly sworn, testified as follows:

Direct Examination

Q. (Mr. CHESNUT) What is your occupation?

A. I am contracting agent for Mr. E. M. Noel.

Q. Do you know Mr. Frank C. Bostock?

A. Yes, sir.

Q. Did you as agent for Mr. Noel make any building agreement with Mr. Bostock some time in October of last year?

A. I did.

Q. Have you that agreement in writing?

A. I have.

Q. Please produce it?

A. Here it is (handing paper to counsel).

Paper referred to is as follows:

"Baltimore, Md., October 22, 1901.

"This Agreement made this 22nd day of October, 1901,
"by and between E. M. Noel, party of the first part, and F.
"C. Bostock, party of the second part,

"Witnesseth: For the consideration hereinafter named
"the party of the first part agrees to build for the party of
"the second part, on the northeast corner lot of Mt. Royal
"and Maryland Avenues, a brick and frame building, ac-
"cording to the plans and specifications as furnished by the
"party of the first part, and which are made a part of the
"contract.

"In consideration of the faithful performance of the
"foregoing agreements, the party of the second part agrees
"to pay the party of the first part the sum of nine thousand
"dollars (\$9000.) in the following manner:

"Four thousand and five hundred dollars (\$4500.) when

“the brick walls are up, and the balance at the completion
 “of the building. The building to be completed November
 “23rd.

“The consideration for the additional items to be as fol-
 “lows, if ordered by the party of the second part:

“The two store fronts,

“The four sky-lights,

“The face brick for front,

“The stone coping on the Mt. Royal Avenue front,

“The surfacing of all lumber in roof.

“For the sum of one thousand one hundred and fifty
 “dollars (\$1150.)”

(Signed) EDGAR M. NOEL,
 By GEORGE H. THOMAS,
Party of the First Part.

FRANK C. BOSTOCK,
 By JOHN H. CASWELL
Party of the Second Part.

Witness:—Edward Walters.

At the conclusion of the testimony of George H. Thomas the Petitioners, by their counsel, announced that they had no further testimony to offer, and Respondents stated by their counsel that they had no testimony to offer.

Thereupon—upon the conclusion of the testimony, the petitioners offered the following prayer:

The Petitioners pray the Court to declare, if the Court sitting as a jury, finds from the evidence:

(1) That on the 22nd day of October, 1901, the petitioner Frank C. Bostock was, and now still is, the tenant in possession of the lot of ground mentioned in the petition, with authority from the owner thereof to erect thereon the building mentioned in said petition;

(2) And that on said day the petitioner, Edgar M. Noel, as agent and builder for the petitioner, Frank C. Bostock, applied for the permit mentioned in said petition;

(3) That then, under the pleading in this case, the verdict must be for the petitioners.

Whereupon the Court refused the said prayer, and to the action of the Court—in refusing said prayer—the petitioners excepted, and pray the Court to sign this, their Bill

of Exceptions, which is accordingly done this fourth day of April, nineteen hundred and two.

J. UPSHUR DENNIS.

Appellants Costs 9.80.

Appellees Costs, 6.00.

Truly taken

JAMES H. LIVINGSTON, *Clerk.*

STATE OF MARYLAND,

Baltimore City, Set:

I, James H. Livingston, Clerk of the Court of Common Pleas of Baltimore, in the Eighth Judicial Circuit of the State of Maryland, do hereby certify that the foregoing is truly taken from the record of proceedings of said Court in the therein mentioned case.

{ SEAL. }

In testimony whereof I hereto set my hand and affix the seal of said Court on the 4th day of April, 1902.

JAMES H. LIVINGSTON,
Clerk of the Court of Common Pleas.

FRANK C. BOSTOCK

vs.

CONWAY W. SAMS
ET AL.

IN THE

Court of Appeals

OF MARYLAND.

APRIL TERM, 1902

GENERAL DOCKET,

No. 53.

BRIEF FOR APPELLANT.

The case below was a petition for a mandamus against the Judges of the Appeal Tax Court to require them to issue to the appellants a building permit.

The petition was answered, (Record, 6-8-13), the answer was demurred to and demurrer overruled, (Record, 14,) issue was then joined on the first paragraph of the answer, and demurrer to the balance, which was overruled, (Record, 14,) and testimony was taken on the issue joined on first paragraph of answer. (Record, 16-26.)

At the conclusion of the testimony the petitioners offered one prayer, which was overruled. (Record, 26.) The case then being heard by the Court, sitting as a jury, on petition, answer and testimony the Court passed an order refusing the writ of mandamus and dismissing the petition, from which this appeal was prayed.

FACTS.

Upon the question whether the mandamus should issue or not the following are the facts presented by the Court below on the pleadings and prayer :

That Frank C. Bostock, on the 22nd of October, 1901, was the tenant in possession of a lot of ground, about one hundred and fifty feet square, situated at the northeast corner of Mount Royal and Maryland avenues in Baltimore City, with authority from the owner to erect thereon a building ; that on that day the other petitioner, Edgar M. Noel, as agent and builder for said Bostock, applied to the Appeal Tax Court for a permit to erect said building ; that Mt. Royal avenue was more than fifty feet in width ; that the ordinances regulating the subject are as follows :

“27. Whenever application accompanied by the payment of the cost of the advertisement provided for in section 28 is made to the Judges of the Appeal Tax Court for a permit or permits to erect any new building or buildings on any street or avenue of the width of fifty feet or more, the person or persons making such application shall be required, before such permit or permits shall be granted, to file with the Appeal Tax Court a plat accurately describing the piece or parcel of ground to be improved, giving the front and depth thereof, its distances from the nearest established corner of a street, lane or alley, and the number of improvements (if more than one) proposed to be erected thereon ; also an accurate description of the frontage, height, depth, material to be used in the proposed building or buildings and the general appearance and cost of same.”

“28. It shall be the duty of the judges of the Appeal Tax Court to grant such permits on application, without charge, except as hereinbefore provided, and to keep a record of all permits issued ; provided, that no such permit shall be granted unless in the

judgment of the said judges of the Appeal Tax Court, or a majority of them, the size, general character and appearance of the building or buildings to be erected, will conform to the general character of the buildings previously erected in the same locality, and will not in any way tend to depreciate the value of surrounding improved or unimproved property; and provided further, that before any such permit shall be granted, at least ten days' notice by advertisement inserted in some daily newspapers shall be given by the Appeal Tax Court that application for such permit has been made. And before any permit shall be granted to erect any building or buildings within the limits of the city of Baltimore, the applicant shall first satisfactorily prove to the Judges of the Appeal Tax Court that provision has been made for such drainage as the topography of the ground requires."

"24. It shall not be lawful for any person, without a permit from the Appeal Tax Court, to erect within the limits of the city any building upon a new foundation, whether in connection with an existing building or not, or to pull down any old building or part of a building to the ground, and build upon the old foundation, or to put an additional story upon any building or part of a building by increasing the height of the walls; and any person or persons who may build within the city of Baltimore shall be required to take out a permit for each and every house he or they may purpose to build."

"25. All persons receiving permission for the erection of any special improvements from the City Council shall, before commencing the erection of the same, obtain the endorsement of the Appeal Tax Court on said permit."

"26. Any person or persons offending against the two preceding sections shall be subject to a fine of

not more than twenty dollars and not less than five dollars, and it shall be the duty of the bailiffs employed in the collector's office to attend to the collection of such fines "

That said Edgar N. Noel, when applying for said permit, filed with the Appeal Tax Court a plat describing the piece of ground to be improved by said building, giving the front and depth thereof, its distances from the nearest established corner of a street, lane or alley, and the number of improvements proposed to be erected thereon, and also a description of the frontage, height, depth, material to be used in the proposed building and the general appearance and cost of the same, and the building proposed to be erected by them, would be erected under the supervision of the Building Inspector of Baltimore City, governing the erection and construction of said building, and that provision had been made for all drainage that the topography of the building requires; that the case was presented to the Appeal Tax Court, who filed an order refusing to grant the permit, and a decision in the following language:

"In the matter of the application for a permit to erect a building on Mt. Royal avenue, to be used for the purposes of a Zoo. The Appeal Tax Court having considered the same under Ordinances 91 and 92, approved June 7, 1889, see Article 50, sections 27 and 28, page 1037, Baltimore City Code, 1893, which requires that the applicant for a permit to erect any new building, should among other things file a description of the improvement to be erected, and that it shall be the duty of the Judges of the Appeal Tax Court, not to grant such permit unless, 'the size, general character and appearance of the building or buildings to be erected will conform to the general character of the buildings previously erected in the

same locality and will not in any way tend to depreciate the value of surrounding improved or unimproved property.' This language is found in Section 28 of said Article 50, and controls the granting or refusing of said permit.

“As officers of the City of Baltimore, the Judges of the Appeal Tax Court must perform the duties required of them as they find them in the Ordinances of the Mayor and City Council. The important and interesting question, of the constitutionality or unconstitutionality of the Ordinance under consideration is one that the Appeal Tax Court cannot decide. That question can only be passed upon by the proper tribunal. The Appeal Tax Court must execute the laws of the City as they are upon the Statute books, until they are repealed or declared null and void. Therefore, if we find that the proposed building will not conform to the general character of the buildings previously erected in said locality, and will tend to depreciate the value of surrounding property, we cannot issue the permit. Upon the plans and specifications for this building presented to the Inspector of Buildings and examined by the Appeal Tax Court, we are of the opinion that these do not conform to the general character of the buildings in the said locality. The use of this building, when erected, will be for the purposes of a Zoo. These purposes are among other things to show wild animals, in reality conducting a continuous circus upon one of the most beautiful streets in the City of Baltimore. It is a matter of almost common knowledge that from this Zoo come disagreeable noises, unpleasant odors; and but a short time ago a building used for the same purposes upon this identical spot was burned down, causing considerable excitement in that neighborhood from the fear that wild animals would escape. As the Ordinance above quoted gives

the Appeal Tax Court the authority to act, the application for a permit made by Edgar M. Noel, builder, for Frank C. Bostock, will not be granted.

CONWAY W. SAMS, *President.*”

That Edgar M. Noel tendered the cost of advertisement of the notice in connection with the said application, which was refused on the ground that the cost of advertisement could not be accepted when the permit would be refused.

ARGUMENT.

An examination of the order and decision of the Appeal Tax Court shows that they refused the permit on two grounds :

1. That the proposed buildings would not conform to the general character of buildings previously erected in said locality, and would tend to depreciate the value of surrounding property.

2. That the use of the property when erected would be for the purposes of a Zoo, which in effect would be a nuisance.

We will examine these grounds of refusal in their order.

I.

Non-Conformity to, and Depreciation of, Surrounding Property.

The Appeal Tax Court attempts to justify their decision by the provisions of article 50, section 28 of the Baltimore City Code. This ordinance does in terms give them the right to refuse a permit in case, in the judgment of a majority of the Court, the size, general character and appearance of the building or buildings to be erected, will conform to the general character of the buildings previously erected in the same locality, and will not in any way tend to depre-

ciate the value of surrounding property. If the ordinance is valid, then the appellants have no case, for in that event, an unappealable discretion is lodged in the Appeal Tax Court, which they have exercised. Our contention is that this ordinance is manifestly invalid.

The power of the Mayor and City Council on the subject of buildings is found in the New City Charter. By Section 6 it is provided that the Mayor and City Council shall have full power and authority—

1. To direct in what part of the city buildings of wood shall not be erected.

2. To regulate and establish the size of bricks that are to be used.

3. To regulate, restrain or prohibit the erection of wooden or frame buildings within the present limits of the city.

4. To regulate the height, construction and inspection of all new buildings hereafter erected.

5. To regulate the alteration and repairs of any buildings already erected or hereafter to be erected in said city.

And by the same Charter, *Section 79*, the Inspector of Buildings has the supervision of the construction of all buildings erected in the city, and shall see that the building laws relating to the construction of all buildings shall be complied with.

Under these powers the Mayor and City Council by an ordinance of October 23, 1891, now codified in the Baltimore City Code, and validated by section 6 of the City Charter, passed a great number of minute regulations, applicable to all persons, governing the erection of buildings in the city of Baltimore. We find no fault with these regulations. They are general laws applicable to all alike.

Such being the case, the question now arises, what right has the Mayor and City Council, after passing a general system of regulations, governing the erection of buildings in the city of Baltimore, to place the whole subject in the unlimited discretion of a local board?

Let us examine this ordinance, section 28.

An owner of property desires to improve it. He submits his plan to the Appeal Tax Court. It conforms in all respects to the building laws of the city and is to be built in accordance therewith, under the inspection of the Inspector of Buildings. The Appeal Tax Court say, no; your building does not conform in size, general character and appearance to the buildings in the neighborhood. Have they the right to say this? Here lies the whole question. If they have, then they have the right to say that in a neighborhood of two-story houses a three-story house cannot be built; that if the houses are twenty feet front the new building must also have twenty feet frontage; that a store or a theatre could not be built in a residential neighborhood; that certain architectural designs must be followed, etc., In a word, whether a building like the Stafford Hotel or the Equitable Building or the Continental Trust Building could be built would rest entirely upon the final determination of the Appeal Tax Court as to whether they conformed to the surrounding neighborhood in size, character, or general appearance. The whole improvement of the city in all its details would by this ordinance be at the absolute will of the Appeal Tax Court. For be it remembered, when they refuse a permit on the ground that there is want of conformity with the surrounding neighborhood, their decree is final, and there is no appeal to any other tribunal. This is not regulation—such an ordinance cannot be called a law—it creates simply an autocratic

despotism. Every man's rights in the improvement of his own property are not regulated by laws binding on all alike, but at the mercy of the tastes, opinions and fads of subordinate boards of the city.

This ordinance came up before Judge Harlan shortly after its adoption. In the case of *Hampson vs. The Appeal Tax Court*, in the Superior Court, Judge Harlan issued a mandamus ordering the issuance of a building permit by the Judges of The Appeal Tax Court, who had withheld it on the ground that the improvements contemplated would not comport with the general character of other improvements in the same locality, and would tend to depreciate values in the neighborhood.

Judge Harlan in his opinion said:

“The Constitution of this State has guaranteed to every citizen the right of private property. It prevents private property from being taken without compensation and says no man shall be deprived of life, liberty and property without due process of law. This means not only the right to own property but to exercise all the powers of ownership. One of the ordinary incidents of ownership of property is that the owner shall use it as he sees fit, so long as he does not use it to create a nuisance. To say he shall not use it in one way, or only in a particular way, deprives him to that extent of the right to use his property. Because a rich man has improved his property in a certain way is no reason why his poor neighbor shall not improve his property in any other way, and improve it in his own way. It may be desirable to have handsome avenues in the city, but they cannot be secured by interference with the constitutional rights of citizens.”

Whenever the absolute dominion of an owner over his property is restricted by ordinance, there should be a uniform rule of action provided, and not left to

the arbitrary will of the governing authorities. This principle has the support of all the authorities :

Yick Wo. vs. Hopkins, 118 U. S. 356.

Balto. vs. Radecke, 49 Md. 217.

State vs. Tenant (N. C.), 14 S. E. Rep. 387.

Newton vs. Belger, 143 Mass. 598.

City of Richmond vs. Dudley, 28 N. E. Rep. 312.

May vs. People, 27 Pac. Rep. 1010.

Anderson vs. City of Wilmington, 40 Kans. 173.

In re Frazier, 63 Mich. 396.

Barthet vs. City of New Orleans, 24 Fed. Rep. 564.

Sioux Falls vs. Kirby, 25 L. R. A. 621.

The case of Commissioners of Easton vs. Covey, 74 Md. 262, is cited against us as conclusive. If the broad language of the opinion is regarded in itself, detached from the actual case before the Court, the contention of the appellee might be correct. But it is to be noted—

1. That there the application was to build a frame stable.
2. That no general building regulations had been passed.
3. That the application was made to the same body that had the power to pass ordinances, and each decision might be regarded as establishing a new regulation.

The broad language of this opinion is against the whole current of authority.

II.

Rejection on Ground that use of Building would be a Nuisance.

This point scarcely needs discussion. Whether a certain use of property is a nuisance or not is a ques-

tion of law which the owner of property always has the right to have decided by the judicial authority. Certainly the mere declaration of a local municipal board could never be allowed to preclude a judicial investigation as to an alleged nuisance.

State vs. Mott, 61 Md. 306.

1 Dillon, Municipal Corp., secs. 308-374.

Yates vs. Milwaukee, 10 Wallace, 505.

City of Evansville vs. Miller, 38 L. R. A. 161.

Again, the allegation is, not that the building itself would be a nuisance, but that the use to which it was proposed to put it would violate the law of nuisance. Evidently the Appeal Tax Court is not given the power, even by the ordinance in question, to determine the use to which a building is to be put, and especially not to determine that such use is contrary to law.

Even in injunction cases where it is the use of the structure which will create the nuisance, the *erection* of the building will not be enjoined.

Wood on Nuisances, section 796.

GANS & HAMAN,
WM. J. O'BRIEN, JR.,

For Appellant.

FRANK C. BOSTOCK
AND EDGAR M. NOEL,

vs.

CONWAY W. SAMS
ET ALS., Judges of the
Appeal Tax Court of
Baltimore City.

IN THE
Court of Appeals

OF MARYLAND.

—
APRIL TERM, 1902.

GENERAL DOCKET, No. 53.

—o—
Appeal from the Court of Common Pleas. (Mandamus).

—o—
BRIEF FOR APPELLEES.

This is an appeal by Frank C. Bostock and Edgar M. Noel from an order of the Court of Common Pleas of Baltimore City, refusing a writ of mandamus and dismissing the petition of the plaintiffs filed against Conway W. Sams and others, Judges of the Appeal Tax Court of Baltimore City.

The prayer of the petition was that Conway W. Sams, Solomon H. Freburger and Oscar Leser, Judges of the Appeal Tax Court of Baltimore City, should be directed and commanded by writ of mandamus to issue to the petitioners, and particularly to Edgar M. Noel, contractor, a permit for the erection of a building on a lot of ground situated on Mt. Royal avenue at the corner of Maryland avenue in the said city, according to the plans and speci-

cations which the said Edgar M. Noel had filed with his application to the Appeal Tax Court for such permit. (Record, page 7.)

The first allegation of the petition, which said petition was filed on the 19th of March, 1902, recited that the said Frank C. Bostock heretofore, on or prior to October 22, 1901, had leased for a valuable consideration from a certain William P. Harvey, who is the owner thereof, the aforesaid lot of ground, about one hundred and fifty feet square, at the northeast corner of Mt. Royal and Maryland avenues in Baltimore city, and is now the tenant in possession thereof, with authority to erect a building thereon; and that said Frank C. Bostock has entered into an agreement with said Edgar M. Noel by which the said Noel had undertaken, for a consideration, to erect for the said Bostock a building on the above-mentioned lot. (Record, page 1.)

Under the second paragraph, he alleges that he applied for a permit, under Ordinance of June 7, 1889, which is now embodied in Article 50, City Code of 1893, section 27 of said article.

And under the third allegation of the petition, sections 27 and 28 of said Ordinance of June 7, 1889, as codified in article 50 of the Baltimore City Code of 1893, are set out, which are as follows:

“27. Whenever application accompanied by the payment of the cost of the advertisement, provided for in section 28, is made to the Judges of the Appeal Tax Court for a permit or permits to erect any new building or buildings *on any street or avenue of the width of fifty feet or more*, the person or persons making such application shall be required before such permit or permits shall be granted, to file with the Appeal Tax Court a plat accurately describing the piece or parcel of ground to be improved, giving the front and depth thereof, its distances from the nearest established corner of a street, lane or alley, and the number of improvements (if more than one) proposed to be erected

thereon; also an accurate description of the frontage, height, depth, material to be used in the proposed building or buildings, and the general appearance and cost of same."

"28. It shall be the duty of the Judges of the Appeal Tax Court to grant such permits on application, without charge, except as hereinbefore provided, and to keep a record of all permits issued; provided, that no such permit shall be granted *unless in the judgment of the said Judges of the Appeal Tax Court, or a majority of them*, the size, general character and appearance of the building or buildings to be erected, will conform to the general character of the buildings previously erected in the same locality, and will not in any way tend to depreciate the value of surrounding improved or unimproved property; and provided further, that before any such permit shall be granted, at least ten days' notice by advertisement inserted in some daily newspapers shall be given by the Appeal Tax Court that application for such permit has been made. And before any permit shall be granted to erect any building or buildings within the limits of the city of Baltimore, the applicant shall first satisfactorily prove to the Judges of the Appeal Tax Court that provision has been made for such drainage as the topography of the ground requires."

They further allege, in their petition, that they have filed plats, drawings, &c., required under the provisions of those sections above referred to. (Record page 2.)

In the fifth paragraph, it is alleged, that a day was fixed for the hearing of the petition by the Judges of the Appeal Tax Court; but that they did not take testimony, acting on their own knowledge and information from the Inspector of Public Buildings; and in the sixth paragraph, it is alleged that the Appeal Tax Court afterwards filed an order refusing the permit; and in the said sixth paragraph the order of the Appeal Tax Court is inserted, which is as follows:

"In the matter of the application for a permit to erect a building on Mt. Royal avenue, to be used for the purposes

of a Zoo. The Appeal Tax Court having considered the same, under Ordinances 91 and 92, approved June 7th, 1889, see article 50, sections 27 and 28, page 1037, Baltimore City Code, 1893, which requires that the applicant for a permit to erect any new building should, among other things, file a description of the improvement to be erected, and that it shall be the duty of the Judges of the Appeal Tax Court not to grant such permit, unless "the size, general character and appearance of the building or buildings to be erected will conform to the general character of the buildings previously erected in the same locality and will not in any way tend to depreciate the value of surrounding improved or unimproved property." This language is found in section 28 of said article 50, and controls the granting or refusing of said permit.

"As officers of the city of Baltimore, the Judges of the Appeal Tax Court must perform the duties required of them as they find them in the ordinances of the Mayor and City Council. The important and interesting question of the constitutionality or unconstitutionality of the ordinance under consideration is one that the Appeal Tax Court cannot decide. That question can only be passed upon by the proper tribunal. The Appeal Tax Court must execute the laws of the city as they are upon the statute books, until they are repealed or declared null and void. Therefore, if we find that the proposed building will not conform to the general character of the buildings previously erected in said locality, and will tend to depreciate the value of surrounding property, we cannot issue the permit. Upon the plans and specifications for this building presented to the Inspector of Buildings and examined by the Appeal Tax Court, we are of the opinion that these do not conform to the general character of the buildings in the said locality. The use of this building, when erected, will be for the purposes of a Zoo. These purposes are, among other things, to show wild animals—in reality, conducting a continuous circus upon one of the most beautiful streets in the City of

Baltimore. It is a matter of almost common knowledge that from this Zoo come disagreeable noises, unpleasant odors, and but a short time ago a building used for the same purposes upon this identical spot was burned down, causing considerable excitement in that neighborhood from the fear that wild animals would escape. As the ordinance above quoted gives the Appeal Tax Court the authority to act, the application for a permit made by Edgar M. Noel, builder, for Frank C. Bostock, will not be granted.

CONWAY W. SAMS, *President*.

(Record, pages 3-4.)

The seventh paragraph complains of the *insufficient reasons* relied on by the Appeal Tax Court for its decision, and it makes reference to the bill filed by certain citizens to restrain the erection of the proposed building, and asking for an injunction from the Circuit Court of Baltimore City, which bill is still pending in that Court. The eighth paragraph of the petition assails the clause of the ordinance lodging with the Appeal Tax Court the power to issue the permit applied for, which points of assault will be referred to directly. The ninth and tenth paragraphs of the petition refer to their having complied with the formal requirements of the ordinance, in regard to cost of advertisement and matters relative to drainage, &c., and then follows the prayer for mandamus, commanding the judges of the Appeal Tax Court aforesaid to issue a permit for the erection of the building on said vacant lot, according to the plans and specifications filed with the application for said permit.

The objections to sections 27 and 28 of Article 50 of the City Code set up by the petitioners, as indicating that the portion complained of is illegal and invalid, are as follows:

1st. The Mayor and City Council of Baltimore City had *no power or authority to enact such a provision*, and that said portion of said ordinance is, therefore, *ultra vires* and void.

2d. That at the time of the passage of said ordinance there was no statute of the General Assembly of Maryland in force authorizing the passage of the above set forth portion of said ordinance, nor has the passage of said ordinance ever been ratified by any Act of the General Assembly of Maryland.

3d. That even if there had been such statute authorizing or ratifying said ordinance, yet, nevertheless, the same would have been void and illegal in that the same is unconstitutional, in that it deprives a citizen of Baltimore City of his property without due process of law.

4th. And that said portion of said ordinance is void, illegal and unreasonable in that it commits to the said Appeal Tax Court unlimited and unbounded discretion in granting or refusing said permits, and does not undertake to provide any general rules or regulations limiting the exercise of said discretion by the said Appeal Tax Court. (Record page 6.)

The answer of the Judges of the Appeal Tax Court was filed on the 22d of March, 1902. On the 4th of April, 1902, a demurrer was filed to the answer, and overruled by the Court on the same day. As the questions involved in the demurrer arise on the general answer, no attempt at a discussion of the demurrer will be made in this brief.

The answer of the defendants did not admit that the petitioner, Frank C. Bostock, *had leased* for a valuable consideration from William P. Harvey the lot referred to, and demanded full proof of such lease and the production of the agreement therein referred to; nor did they admit any contract with Edgar M. Noel by the said Bostock for the erection of the proposed building, but demanded full proof of that agreement.

They admitted that Edgar M. Noel had, on or about October 22, 1901, applied to the Appeal Tax Court of Baltimore City for a permit to erect a building under Article 50, of the ordinances of the Mayor and City Council of Baltimore, contained in the Baltimore City Code of

1893. The answer also spreads out the provisions of sections 27 and 28, of Article 50, of the City Code of 1893, but adds that in addition to the aforesaid sections of Article 50 of the City Code, under which the application for a permit was made, there are sections 24, 25 and 26, relating to permits for the erection of buildings in the City of Baltimore, which sections are set out as follows :

“24. It shall not be lawful for any person, without a permit from the Appeal Tax Court, to erect within the limits of the city any building upon a new foundation, whether in connection with an existing building or not, or to pull down any old building, or part of a building, to the ground, and build upon the old foundation, or to put an additional story upon any building, or part of a building, by increasing the height of the walls ; and any person or persons who may build within the city of Baltimore shall be required to take out a permit for each and every house he or they may purpose to build.”

“25. All persons receiving permission for the erection of any special improvements from the City Council shall, before commencing the erection of the same, obtain the endorsement of the Appeal Tax Court on said permit.”

“26. Any person or persons offending against the two preceding sections shall be subject to a fine of not more than twenty dollars and not less than five dollars, and it shall be the duty of the bailiffs employed in the collector's office to attend to the collection of such fines.” (Record, pages 9-10.)

The answer admitted that Edgar M. Noel had filed, upon making application for the permit referred to in sections 24, 25 and 26, certain plans and a plat of the ground, as set forth in paragraph four of the answer. The answer in the fifth paragraph states the circumstances under which the hearing was had, which it is not deemed material to recite, as they were not required by law to have any hearing whatever.

The order of the Appeal Tax Court refusing the permit was admitted by the answer to be correctly stated in the petition; but the *reasons* given by the Judges of the Appeal Tax Court were not material, and therefore are not considered as open to discussion here. Oftentimes the reasons for a judgment are irreconcilable with the judgment itself. In the seventh paragraph of the answer, the grounds upon which the permit was refused are stated, as justifying the refusal of the permit, and as being on the part of the said judges the exercise of a proper and legal discretion in the honest discharge of their official duties. (Record, page 12.)

The grounds of defense against the application for a writ of mandamus, stated in brief, as set up by the answer, are as follows:

1. That the petitioners have not stated in their petition such a case as entitles them to a mandamus against these defendants or any of them.

2. That the defendants, Conway W. Sams, Solomon H. Freburger and Oscar Leser, Judges of the Appeal Tax Court of Baltimore City have *discretionary powers* as to the granting or refusing of permits for the erection of a building or buildings, as prescribed in the ordinance to which reference is made in the petition, and upon the invalidity of which the petitioners rely. That said ordinance is valid and binding, and the powers therein conferred are powers properly conferred by the Mayor and City Council of Baltimore upon its duly authorized agents, the members of the Appeal Tax Court, and the petitioners are not, therefore, entitled to the relief prayed for.

3. That the refusal on the part of the members of the Appeal Tax Court of the permit, which was applied for by Edgar M. Noel, petitioner, under and by virtue of the power and authority conferred upon the judges of the said Court by said ordinance, in the petition referred to, was

the proper exercise of police powers, which the Mayor and City Council of Baltimore had, by the authority in it vested, conferred upon said members of the Appeal Tax Court, its duly authorized and accredited agents.

4. That the ordinance is not void, nor any part of it, nor is it unreasonable in committing to the Appeal Tax Court discretion in granting and refusing such permits, and it does provide a rule or regulation directing the manner of exercising the discretion on the part of the judges of the said Appeal Tax Court.

5. That the writ of mandamus must not only serve some just and useful purpose, but it must be necessary to secure the ends of justice. There is nothing in the petition which shows that the ends of justice require such a writ, and for that reason the writ should not be granted.

ARGUMENT.

The appellees will contend that the Mayor and City Council of Baltimore had power and authority to enact such provisions as are contained in sections 27 and 28 of said Article 50 of the City Code of 1893.

It is a *concessum*, that under the 24th section of Article 50 of City Code of 1893, the petitioners were required to have a permit to erect the building in question. It was for the obtention of *this permit* the application was made to the Judges of the Appeal Tax Court. The question arises, cannot the authority to issue such permit be coupled with conditions? What is the rule of construction in regard to powers granted under a municipal charter? There are some cardinal principles well settled.

Occasionally the charter or incorporating act, without any specific enumeration of the purposes for which by-laws may be made, contains a general and comprehensive grant of power to pass all such as "*may seem necessary to the well-being and good order of the place.*"

Sec. 315, Vol. 1, Dillon on Municipal Corporations, 4th Ed.

The power to pass by-laws under the general clause does not enlarge or annul the power conferred by the special provisions in relation to their various subject matters; but gives authority to pass by-laws *reasonable in their character upon all matters* within the scope of their municipal authority and not repugnant to the Constitution and general laws of the State.

The power to make by-laws, when not expressly given, is implied as an incident to the very existence of a corporation.

The possession of this power depends upon the charter of the city, either as conferred by express terms or by necessary implication. This power is clearly derived from the "general power to pass all ordinances necessary to give effect and operation to all the powers vested in the corporation of the city."

Art. 4, sec. 29, Code of Public Local Laws,
Balto. City.

Also Act of 1898, chapter 123, sec. 3.

Mayor, etc., of Balto. vs. Radecke, 49 Md. 217.

These powers are usually styled police powers and regulations, and if any one is injured by their exercise it is *damnum absque injuria*, upon the principle that the safety of the people is the highest law, and that every owner of property must use it so as not to injure his neighbor or the community at large.

1 Dil. on Mun. Corp., sec. 93, page 210.

Cooley's Cons. Lims., 573, 594 and 595.

The Supreme Court of the United States and other Courts in numerous cases have held that articles could be seized and destroyed by the proper authorities, on the principle that the constitutional right of the individual to hold property is subject to those reasonable regulations, which are necessary for the common good and general welfare.

Ford vs. State, 85 Md. 489.

It will be noted that the second objection of the petitioners is that at the time of the passage of said ordinance, there was no statute of the General Assembly of Maryland in force authorizing the passage of the above set forth portion of said ordinance, nor has the passage of said ordinance ever been ratified by any Act of the General Assembly of Maryland. This is erroneous and untenable.

The conclusive answer to this is found in the Act of 1898, chapter 123, section 3: "That all laws now in force relating or applicable to the Mayor and City Council of Baltimore or the City of Baltimore, and not included in this Act, and not inconsistent with said Act, and all ordinances of the Mayor and City Council of Baltimore now in force and not inconsistent with this Act, shall be and they are hereby continued until changed or repealed, respectively, by the General Assembly of Maryland or the Mayor and City Council of Baltimore."

This has been recently referred to by this Court. See the case of—

Mayor and City Council of Balto. vs. Stewart,
92 Md. 553.

The selection of the means and the manner of exercising the power are confided to the sound discretion of the municipal authorities.

Meth. P. E. Ch. vs. Mayor, etc., 6 Gill, 400.

Harrison vs. Mayor, 1 Gill, 277.

1 Dillon on Mun. Corp., page 178, sec. 58.

In this case the Mayor and City Council of Baltimore has adopted the requisite legislation. The manner of applying for a permit, the subsequent publication of the notice that such application has been made, the terms and conditions on which it will be granted, are fully set out and expressed in the ordinance referred to. The issue of the permit on the determination whether the erection of

the proposed building or buildings will conform to the character of the buildings previously erected in said locality, and will *tend to depreciate the value of surrounding property*, is left to the discretion of the Judges of the Appeal Tax Court.

To what municipal agents could such discretion be better confided ?

Appeal Tax Court, Charter, secs. 146 and 147.

The Court of Appeals, in the case of *Radecke vs. M. & C. C. of Balto.*, 49 Md. 228, said :

“But the Legislature has granted ample power of legislation upon the subject of the erection and use of steam engines within the city limits, to the Mayor and City Council of Baltimore, independent of the power to prevent and remove nuisances.”

“They are clothed with the power to pass ordinances ‘for the prevention and extinguishment of fires,’ for ‘securing persons and property from danger or destruction, and for promoting the great interests and insuring the good government of the city,’ and ‘to pass all ordinances necessary to give effect and operation to all the powers vested in the corporation of the city.’ It has been well said in reference to such general grants of power, that as to the *degree of necessity* for municipal legislation on the subjects thus committed to their charge, the Mayor and City Council are *the exclusive judges*, while the selection of the means and manner (contributory to the end) of exercising the powers which they may deem requisite to the accomplishment of the objects of which they are made the guardians is committed to their sound discretion.”

Harrison vs. Mayor, etc., 1 Gill, 264.

In the *State vs. Mott*, 61 Md. 300, the Court of Appeals said :

“This Court, in *Mayor and City Council of Balto. vs. Clunet et al.*, 23 Md. 450, has said that every intendment and presumption ought to be made in support of the acts of corporations, where exclusive jurisdiction and power to legislate upon a given subject, has been conferred upon them by law, and that Courts of justice should never pronounce them void, unless their nullity and invalidity are placed beyond reasonable doubt. See also *Mayor and City Council vs. Hughes, Adm’r, etc.*, 1 Gill & John. 492; *Mayor, etc., of Balto. vs. Radecke*, 49 Md. 229.”

Does the ordinance which the Mayor and City Council of Baltimore have passed upon this subject vest in the Appeal Tax Court the discretion to grant or refuse permits in any given case?

The Court of Appeals in a like case have said: Yes.

Comms. of Easton vs. Covey, 74 Md. 266.

The authority of those Commissioners was that “such ordinances as they may deem necessary and beneficial to said town may be passed.” *It is a reasonable regulation.*

1 Dillon, *Mun. Corp.*, secs. 316-319.

Harrison vs. M. & C. C. of Balto., 1 Gill, 264.

Mayor, etc. vs. Radecke, 49 Md. 228.

Even if there had been no special statute authorizing or ratifying said ordinance, yet nevertheless, the same would have been valid and legal, and in no way unconstitutional, in that it does not deprive a citizen of Baltimore City of his property *without due process of law*.

The petitioner, Mr. Bostock, has no right to complain. He is not an actual lessee. His lease for five years has never been signed by him, and its execution *is dependent upon his obtaining the mandamus and the issue of the permit*. He is in no position to argue that the refusal of the permit deprives him of his property without due process of law. He has no *property* of which he will be deprived. He has, merely, a contractual right, dependent upon a contingency. (Record pages 19-20.)

The passage of the ordinance was simply in the exercise of the police power.

In the *State vs. Broadbelt*, 89 Md., 578, this Court said: "The preservation of the public health by preventing the sale of infected milk, or of milk that may come from infected sources, when milk as an article of food is especially likely to spread disease, is one of the most imperative duties of the State, and obviously one most incontestably within the scope of the police power. As a means to that end—the preservation of the public health—a requirement that every person selling milk for consumption in cities, towns and villages, shall cause his herd of cattle to be registered with the Live Stock Sanitary Board, is a reasonable and an appropriate enactment; and the subsequent provisions are necessary parts of the scheme. The 19th section no more deprives the individual of due process of law than did the ordinance in *Easton vs. Covey*, 74 Md., 262, which prohibited the erection of any building without a permit from the commissioners of the town; or an ordinance forbidding the keeping of swine without a permit in writing from the Board of Health; *Quincy vs. Kennard*, 151 Mass., 262; or an ordinance requiring the written permission of the Mayor of a town before any person was allowed to move a building along the streets; *Wilson vs. Eureka City*, 173 U. S., 32 (decided February 20, 1899); or the ordinance requiring a license for the removal of the contents of privies and subjecting the holders of such license to the orders of the Board of Health. (*Boehm vs. Mayor, etc.*, Baltimore, 61 Md., 259.) The constitutional limitations which declare that no person shall be deprived of his property or liberty without due process of law have never been construed as being incompatible with the principle, equally vital, because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community. * * * The exercise of the police power by the

destruction of property which is itself a public nuisance, or *the prohibition of its use in a particular way*, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. *Mugler vs. Kansas*, 123 U. S. 623."

"A prohibition, simply, upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals or *safety of the community*, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by anyone for certain forbidden purposes is prejudicial to the public interest."

Ib., 668-669.

The refusal of the Judges of the Appeal Tax Court to grant the permit applied for was clearly in the line of duty and in the exercise of a sound legal discretion, because the plans and specifications of the proposed building showed that it would not conform to the general character of the buildings already erected on Mount Royal Avenue, the main approach to Druid Hill Park, and because the erection of such a building as proposed would tend to depreciate the value of surrounding property.

Nothing conduces more to the preservation of a healthy judicial atmosphere than the reference from time to time to those familiar and unchanging principles which lie at the root of certain legal questions, and this Court has, in the recent case of *George M. Upshur et als. vs. Mayor and City Council of Baltimore*, in its opinion filed April 1, 1902, rendered signal service to the profession in marshalling these fundamental principles in review upon that important branch of the law of "*mandamus*." It will be pardonable to reproduce in this brief that part of the opinion :

“It may not be amiss to briefly restate a few fundamental and familiar principles which ought not to be lost sight of in dealing with the question which this record presents. It must be remembered that the *writ of mandamus* is not a writ of right granted as of course, but it is one which is allowed ‘only at the discretion of the Court to whom the application is made. This discretion will not be exercised in favor of applicants unless some *just* or *useful* purpose may be answered by the writ.’ *Booze vs. Humbird*, 27 *Md.* 4. It is also well settled that the relator’s right which is sought to be enforced must be a clear, distinct legal right; *State ex rel. O’Neill vs. Register et al.*, 59 *Md.* 287; and that it must be certain and free from doubt. Mandamus is an extraordinary process, ‘and if the *right be doubtful*, or the duty discretionary, or of a nature to require the exercise of judgment * * * this writ will not be granted * * * . And it will not be allowed unless the Court is satisfied that it is necessary to secure the ends of justice.’ *George’s Creek Co. vs. Co. Coms.*, 59 *Md.* 259; *State, etc., vs. Latrobe*, 81 *Md.* 222. The writ ‘is based upon reasons of justice and public policy to preserve peace, order and good government’ (*Poe’s Pr. sec. 708*), and obviously, therefore, will never be granted when those ends would be subverted or might be frustrated.”

It is, therefore, contended that the order of the Court of Common Pleas in this case was correct and should be affirmed.

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