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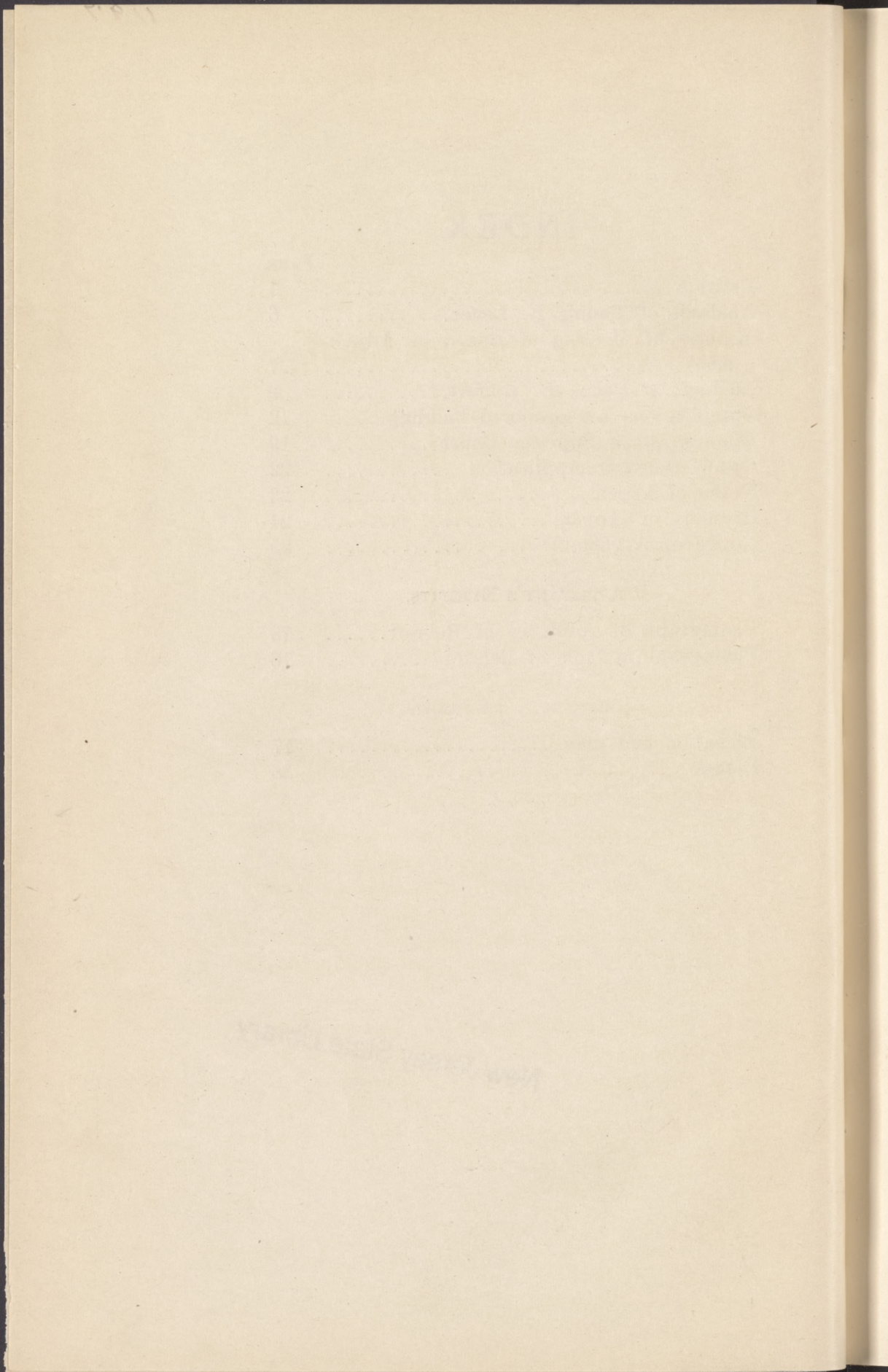
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New Jersey State Library



PETITION.

Filed November 6, 1930.

New Jersey Supreme Court

In the Matter of the Application for a Rule to Show Cause why a Writ of Mandamus should not issue, directing Frank B. Moffett, the Building Inspector of the Town of Westfield, New Jersey, to issue a building permit to Salvatore Mannino.

10

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

20

The petition of Salvatore Mannino, of the Town of Westfield, County of Union, and State of New Jersey, respectfully shows that:

(1) Your petitioner is, together with his wife, Giovannina Mannino, an owner by the entirety of certain premises known and designated as No. 113 Park street, in the Town of Westfield, County of Union, and State of New Jersey. A front view of the premises is shown in the photograph attached hereto.

30

(2) Your petitioner wishes to erect on said premises an addition to his present garage. It is his present purpose to use this addition as a tool house for the storage of tools used in his occupation, but no application for such use has been made.

40

Petition.

(3) Your petitioner earns his living by cutting, rolling, and otherwise tending, lawns, making gardens, building driveways, making concrete walks, and miscellaneous work of the general character of the above in the Town of Westfield. He has been doing work of this character for over
10 twenty years.

(4) Your petitioner has seven children, of whom five are boys and two are girls. Two of the boys, aged respectively nineteen years and seventeen years, are now old enough to help your petitioner when not attending school. In addition, when work is active petitioner hires one or more men to help him.

(5) In and about the occupation of petitioner
20 it is necessary to provide such tools as hoes, rakes, hedge clippers, lawn mowers, wheelbarrows, and so forth, and for more than twenty years last past petitioner has kept such tools on his premises without objection or complaint. As his boys have grown older, and as his work has increased, the number of such tools has necessarily increased. The character of the tools is shown by the photograph attached hereto.

(6) It has also been necessary for petitioner
30 to increase his equipment, and his work, to meet increasing taxes, expenditures for the support of his family, and the upkeep of his property. Incidentally it may be noted that his oldest daughter is attending the Newark Normal School, and his oldest son the Newark Business College.

(7) On or about September 4, 1930, your
40 petitioner submitted to Frank B. Moffett, Building Inspector of the Town of Westfield, specification and plans for a tool house for the

Petition.

storage of his tools, and filed an application for a permit for the erection of the structure, and paid the required fee therefor.

(8) Subsequently, said Frank B. Moffett informed your petitioner that the proposed use of the building for the storage of his tools and equipment was a business use, and that *such use* came within the ban of the zoning ordinance of the Town of Westfield, passed and adopted December 5, 1921, wherein it is provided, in section 2, sub-section (9), applicable to Residence A Districts, that "accessory uses shall not include business uses." 10

(9) No objection is made to the plans and specifications submitted, which said plans and specifications comply with the requirements of the Building Code. 20

(10) Your petitioner lives in a Residence A District.

(11) The zoning ordinance provides that in the Residence A District, among other uses, there may be a golf grounds and club house, play grounds, farms, truck gardens, and *commercial* nurseries or greenhouses.

(12) The zoning ordinance also provides that there may be carried on, in Residence A Districts, "accessory uses, customary in connection with or incident to the above uses and located on the same lot with them." But, "accessory uses shall not include business uses." 30

(13) Petitioner's lands begin 161 feet from the westerly side of Central avenue. For a depth of 150 feet the premises fronting on Central avenue are in the Business District, so that 40

Petition.

petitioner's lands almost abut on a Business District.

10 (14) Petitioner has not made any application for any specific use of said proposed structure. It is his present intention to use same as a tool house, and he believes that such use is a lawful use, but that question will be raised only when, and if, application for such use shall be made. It is not petitioner's intention to put the structure to any unlawful use. If it shall appear, hereafter, that a proposed use is unlawful of course such purpose will be abandoned.

20 (15) In any event, petitioner desires to erect the structure for the erection of which a permit has been requested, and if, hereafter, its use as a tool house is found to be unlawful, then petitioner will take the risk of finding a lawful use therefor.

(16) Your petitioner insists that, as the building proposed does not violate any ordinance of the municipality, the said Building Inspector had no right to refuse the permit applied for, but that he was bound to issue such permit, and his refusal is a denial of the rights of the petitioner in the premises.

30 Petitioner, therefore, prays that a Writ of Mandamus may issue out of and under the seal of this Honorable Court, directed to said Frank B. Moffett, Building Inspector of the Town of Westfield, commanding and enjoining said Building Inspector to issue a building permit granting permission to your petitioner to erect the structure described in the application, specification, and the plan heretofore filed with said building inspector.

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Petition.

And your petitioner will ever pray, etc.

SALVATORE MANNINO,
Petitioner.

VERIFICATION.

10

STATE OF NEW JERSEY. }
COUNTY OF UNION. } ss.

SALVATORE MANNINO, being duly sworn, deposes and says that he has had read and explained to him the foregoing petition; that as to the facts therein stated of which he has personal knowledge he knows them to be true, and as to facts resting on information and belief he believes them to be true.

20

SALVATORE MANNINO.

Subscribed and sworn before
me this 30th day of October,
1930.

ALAN BRUCE CONLIN,
M. C. C. of N. J.

30

40

AFFIDAVIT OF DENNIS N. LEVER.

NEW JERSEY SUPREME COURT.

10	SALVATORE MANNINO, <i>Relator,</i> <i>vs.</i> FRANK B. MOFFETT, Building In- specter of the Town of West- field, <i>Respondent.</i>	<i>On</i> <i>Mandamus.</i> <i>Affidavit.</i>
----	--	---

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

20 DENNIS N. LEVER, of full age, being duly sworn according to law, on his oath deposes and says:

I am secretary of the Board of Adjustment of the Town of Westfield. Appended to this affidavit is a true copy of the minutes of a meeting of the said Board of Adjustment held on August 27, 1930. At that meeting I heard James Mannino, who appeared on behalf of Salvatore Mannino, say that his sister who attended Normal School at Newark needed a car for the purpose of getting back and forth to school and that they wanted to build an extension on the present garage in order to accommodate such additional car. Also, I heard Mannino say, in reply to a question, that two of the three cars which were at that time stored in said garage were trucks.

DENNIS N. LEVER.

Minutes of Meeting of Board of Adjustment.

Sworn and subscribed before
me this 2nd day of December,
1930.

CHARLES CLARK,
Notary Public for New Jersey.

10

**MINUTES OF MEETING OF BOARD
OF ADJUSTMENT.**

HELD WEDNESDAY EVENING, AUGUST 27th, 1930.

PRESENT: Chairman Nichols, Mr. Hanford and
Mr. Lever.

The Chairman stated the appeal to be con-
sidered was one filed by Salvatore Mannino,
wherein he requests permission to erect a build- 20
ing at 113 Park street, to be used as a four-car
garage, which is in violation of the terms of
Section 2, Paragraph 10 of General Ordinance
No. 286.

Mr. James Mannino appeared on behalf of
Salvatore Mannino, the appellant in this case.

Proof of service of notice on all property
owners was submitted and accepted.

There were no appearances opposing the ap- 30
plication.

Mr. Mannino stated it was their intention to
use the proposed building for the housing of two
commercial cars and two passenger cars.

The Chairman informed Mr. Mannino that
under the Zoning Ordinance, it was not per-
missible to house more than one commercial
vehicle on the premises and informed him that
at the present time he was violating the Zoning
Ordinance. 40

Minutes of Meeting of Board of Adjustment.

It was on motion by Mr. Hanford, duly seconded by Mr. Lever, that the application for permission to erect a four-car garage at 113 Park street, be denied.

The vote on the above was as follows: Yeas 3; Nays 0.

10

The Secretary informed the Board that the appeal filed by Frank Paumi for permission to erect a garage, packing shed and heating unit at 120 Livingston street, had been withdrawn.

Adjournment duly taken.

D. N. LEVER.
Secretary.

20

30

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AFFIDAVIT OF FRANK B. MOFFETT.

NEW JERSEY SUPREME COURT.

SALVATORE MANNINO,

Relator,

vs.

FRANK B. MOFFETT, Building Inspector of the Town of Westfield.

On

Mandamus.

Affidavit.

10

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

FRANK B. MOFFETT, of full age, being duly sworn according to law, on his oath deposes and says:

20

1. I am Inspector of Buildings of the Town of Westfield, New Jersey.

2. On or about August 21, 1930, Salvatore Mannino presented to me an application for a permit for the alteration and extension of the garage building on the rear of his property at No. 113 Park street, Westfield. Schedule "A" hereto annexed is a true copy of the application which he filed on that occasion, and there is also appended to this affidavit a copy of the plan which he submitted therewith.

30

3. Section 2 of General Ordinance No. 286 of the Town of Westfield entitled "An Ordinance establishing building districts and restrictions in the Town of Westfield" provides that no garage within any "A" Residence District as indicated on the Building Zone Map shall provide space

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Affidavit of Frank B. Moffett.

for more than three motor vehicles and the same ordinance further provides that not more than one vehicle in any such garage may be a commercial vehicle. Mannino's said property was and is within an "A" Residence District and the garage which he desires to extend for the purpose of storing another automobile was already occupied by three automobiles for which sufficient space was therein already provided, and two of these three vehicles were commercial vehicles. In accordance with said provisions of said ordinance I refused the permit.

4. From my refusal to grant the permit, Mannino appealed to the Board of Adjustment of the Town of Westfield, and such proceedings were thereafter had upon such appeal that the application for the permit was denied by the Board.

5. When Mannino presented the petition upon which is based this application for a Writ of Mandamus, I observed that the plan appended thereto, a copy of which is hereto attached, was similar, in essential respects, to that which accompanied his application of August 12, 1930, for a permit to extend his garage, and decided that, notwithstanding he now professes to want to build a tool house, Mr. Mannino was endeavoring, by indirection, to obtain what the Inspector of Buildings and the Board of Adjustment had been obliged to deny him.

6. It is for this reason as well as because I consider that such a tool house as the petitioner describes in his new application is not such an accessory use as is permitted in an "A" Residential District that I have declined to grant the permit which he seeks.

Affidavit of Frank B. Moffett.

7. On September 10, 1930, Salvatore Mannino sent me with a photograph such as that which is attached to the petition, a letter reading as follows:

"September 10, 1930.

Mr. Frank B. Moffett,
Building Inspector,
Westfield, N. J.

10

Dear Sir:

When you were at the house early this week you asked me about my tools. I hand you herewith a photograph showing the most of my tools, but in addition I expect soon to buy a small concrete mixer.

Yours truly,

20

(Signed) Salvatore Mannino."

FRANK B. MOFFETT.

Sworn and subscribed before me
this 2nd day of December,
1930.

CHARLES CLARK,

Notary Public for New Jersey.

30

SPECIFICATIONS FOR PROPOSED BUILDING.

DETAILED STATEMENT OF SPECIFICA- TIONS FOR THE ALTERATION, REPAIR, OR EXTENSION OF BUILDINGS

- 10 *Description of Present Building and Lot*
- Zone
District,
Class 4th
- Location On What Street or Avenue and
 the number thereof? 113 Park
 Street.
- Number of How many buildings? One.
Buildings
- 20 Size of Lot Size of lot 60 feet front; 75 feet
 rear; 320 feet deep;
- Size of Size of building or buildings 30
Building feet front; 30 feet rear; 20 feet
 deep;
 Number of stories in height? One.
 Height from curb level to mean
 level of roof? 20.
- 30 Foundations Thickness of foundation walls one
 half foot. Material of founda-
 tion walls Cinder Blocks
- Upper Walls Thickness of upper walls one-half
 foot Material of upper walls
 block If independent or party
 walls wall & window
- Material Material of front wooden doors If
of Front ashlar No.

Specifications for Proposed Building.

Style of Roof	Is roof flat, peak or Mansard?	
	Peak Is the building on the front or rear of lot? Rear Is there any other building on the lot? House If so, state size, and how occupied 40x39 occupied by owner.	10
Size of Present Extension	Size of present extension, if any 10 feet front; 20 feet deep; 12 feet high. Thickness and material of foundation walls one half foot. Thickness and material of upper walls X	
	<i>If Extended on Front Side or Rear.</i>	
Re: New Work	Location of extension side of present garage	20
Size	Number of feet front 9 feet rear; 20 feet deep. Number of feet in height 8 ft.; stories in height—	
Kind of Foundation	Material of foundation walls cinder blocks. Thickness of walls one-half foot Depths of walls 2½ below surface of ground.	
Material of Upper Walls	How will the extension be connected with the present or main building? Will be connected by cinder, blocks, garage door & roof.	30
Kind of Roof	Will the roof be flat, peak or Mansard? Flat. What will be the material of roofing? Asbestos roofing paper.	

Specifications for Proposed Building.

Beams Kind and size of floor beams X no beams, concrete floor. Kind and size of roof beams or rafters 2x6.

Cost Estimated cost \$75.00.

10 How will building be occupied when altered?
Automobile.

If for garage, state number of cars to be housed.
One.

Owner	A. S. Mannino	Address	113 Park Street
Architect	Owner		"
Mason	Owner		"
Carpenter	Owner		"

20

AFFIDAVIT.

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

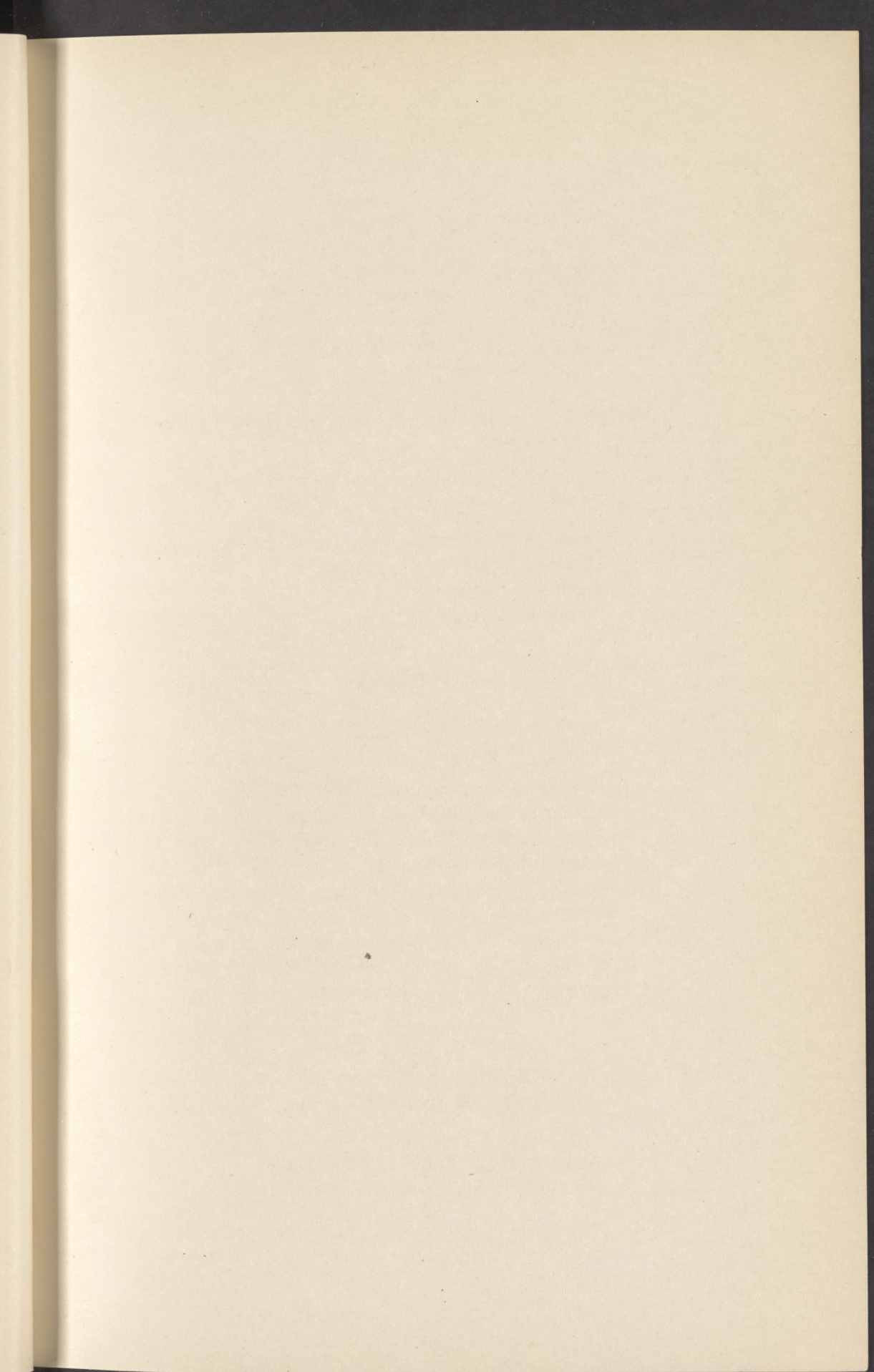
30 JAMES MANNINO, being sworn on his oath according to law, deposes and says that he is the person making the within application; that he resides at No. 113 Park St., in the Town of Westfield, and that he is the owner of the building or structure proposed to be build and constructed on the premises within referred to, and that the statements herein contained are correct and true in all particulars.

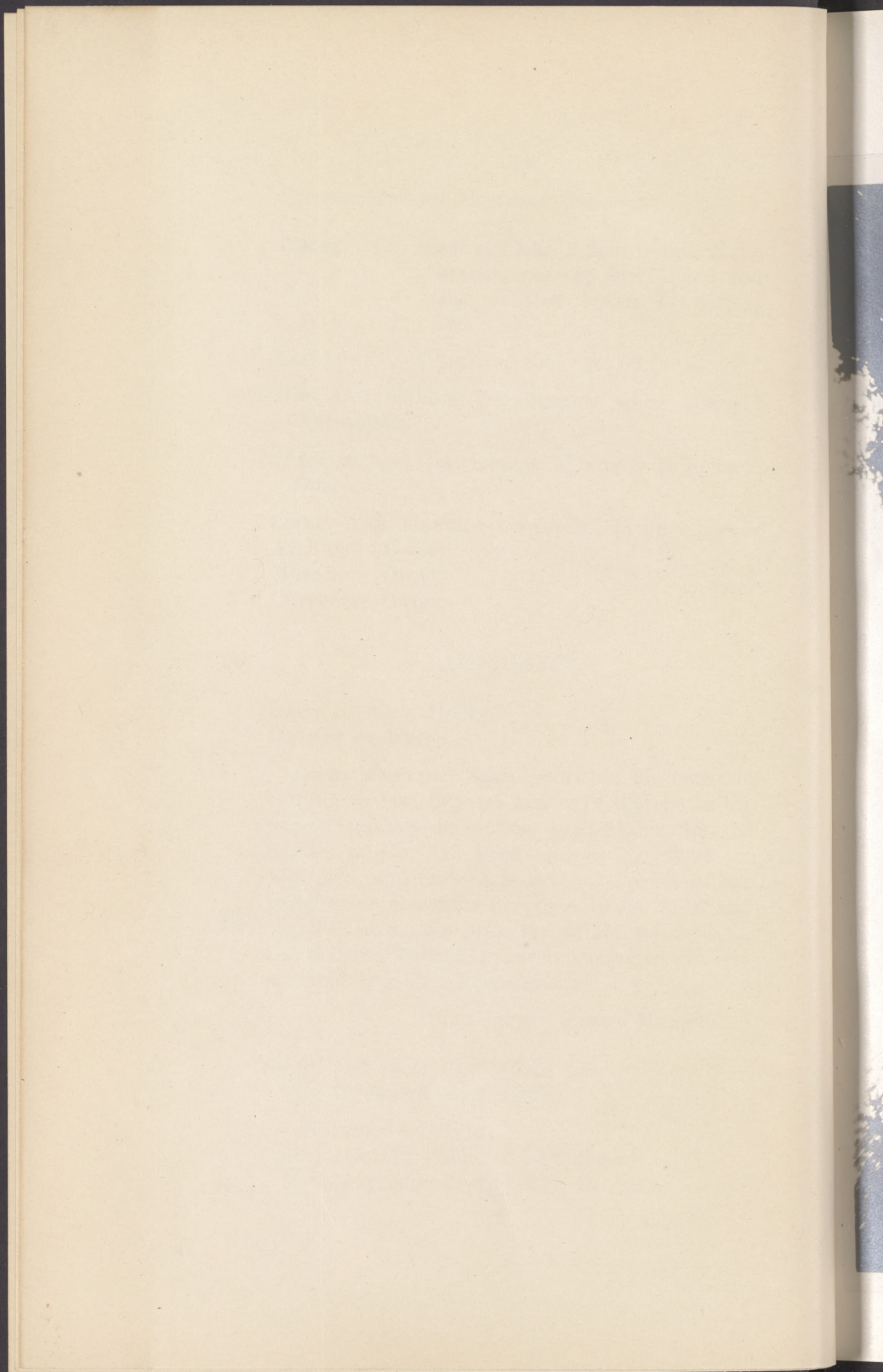
Sign here James Mannino.

Sworn and subscribed before me
this 12 day of Aug. 1930.

BURTON D. SETTLE,
(SEAL) Notary Public of New Jersey.

40 My commission expires Feb. 10, 1935.





Photograph of residence of Relator.



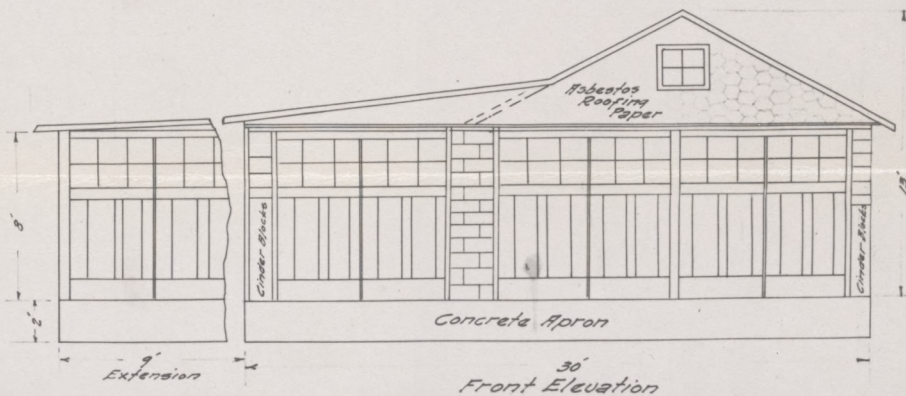
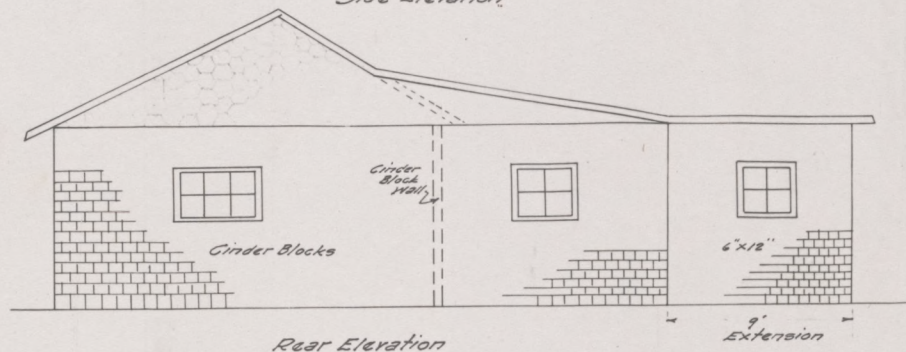
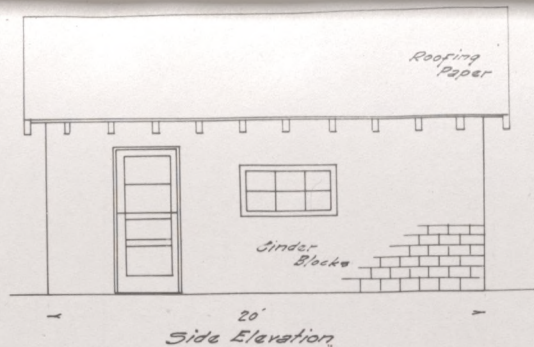
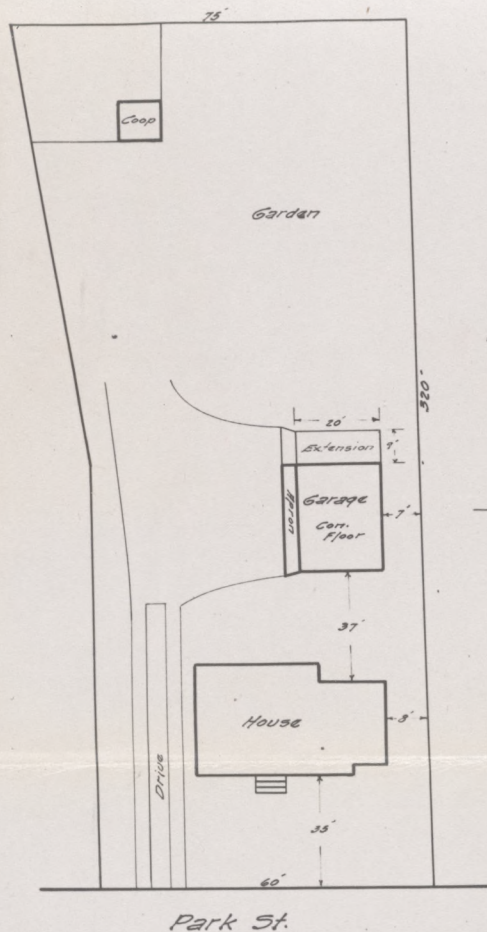
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Photograph of William J. Dickinson

Photograph of tools of Relator.

16

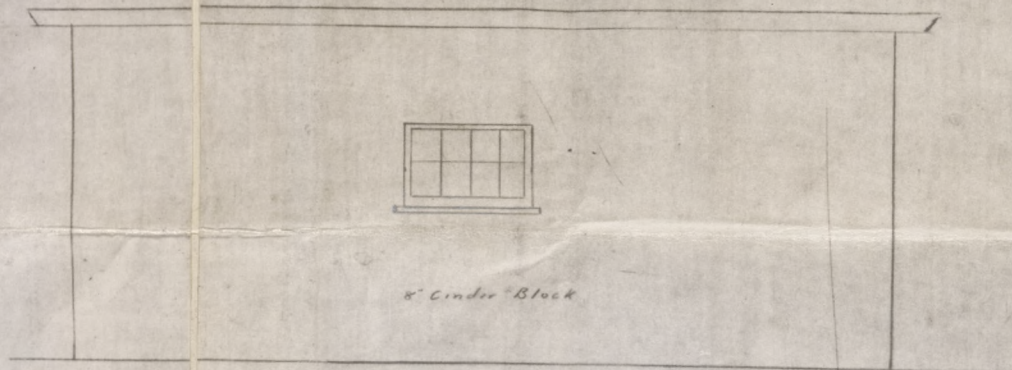
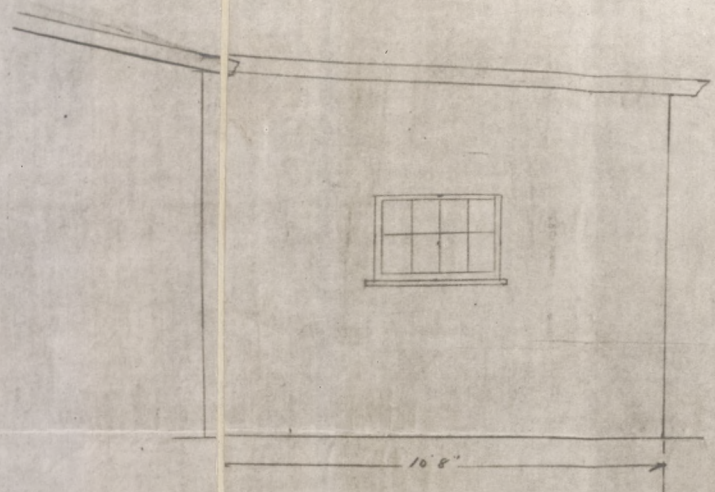


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The Journal of the

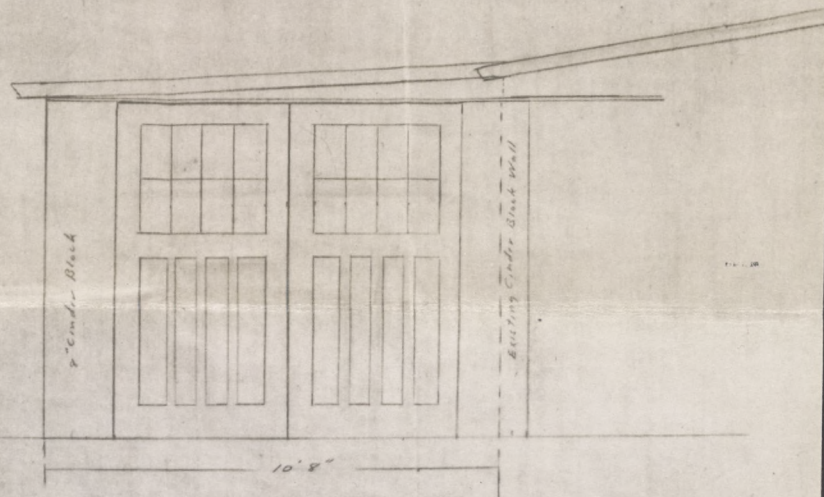
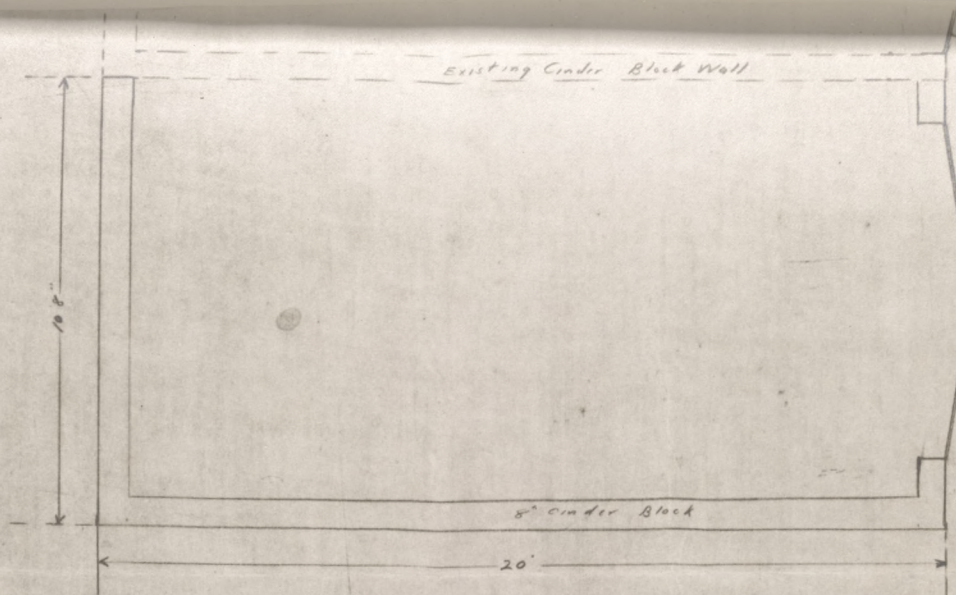


THE END OF THE WORLD

Existing Under Black Wall



Scale: $\frac{1}{2}$ inch to 1 ft



Details.

ON APPLICATION FOR MANDAMUS.

NEW JERSEY SUPREME COURT.

NO. 201, JANUARY TERM, 1931.

SALVATOR MANNNO,

*Relator,**vs.*FRANK B. MOFFETT, Building In-
specter of the Town of West-
field,*Respondent.**On
Mandamus.*

10

On application for mandamus.

Argued January 20, 1931; de-
cided before Justices Parker,
Campbell and Bodine.

20

For applicant, E. A. Merrill

For respondent, Paul Q. Oliver.

PER CURIAM:

On August 21, 1930, the applicant, so called relator, made application to the building inspector of Westfield for a permit for an addition and alteration to a garage then existing on his lands. This was denied because the Zoning Ordinance provided that no garage within any "A" residential district, such as the land in question are located in, shall provide space for more than three motor vehicles and the garage already erected upon such lands was then occupied by three automobiles, two of which were commercial vehicles, and this in violation of the terms and uses permitted by such ordinance. Upon such refusal the land owner appealed

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Opinion of Supreme Court.

to the Board of Adjustment before which he was represented by his son, who speaking for him, stated that the extension for which the permit was asked was for the purpose of making additional room in the garage for another car.

10 On August 27, 1930, the Board of Adjustment denied the application.

Subsequently, on September 4, 1930, a new application was made to the Building Inspector for a permit to erect an extension to the garage.

The plan attached to such application was similar in all essentials to that attached to the first application.

This application was also denied.

20 Petitioner now, and we think evasively, asserts that the proposed extension is for the purpose of storing tools used by him in his occupation as a gardener. We are not satisfied that his representations are bona fide. This application for a writ of mandamus, or a rule to show cause, was made to a member of this court and denied.

It comes, now, to the court with no greater genuineness of purpose.

30 Paragraph 14 of the petition, so speaks, by the following language:—

“Petitioner has not made any application for any specific use of said proposed structure. It is his present intention to use the same as a tool house, and he believes that such use is a lawful use, but that question will be raised only when, and if, application for such use shall be made. It is not petitioner’s intention to put the structure to any unlawful use. If it shall appear, hereafter, that a proposed use is unlawful, of course, such purpose will be abandoned”.

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Opinion of Supreme Court.

One seeking the assistance of this court, through its prerogative writ of mandamus, must establish his right thereto and that by frankness and straight forward assertion of believable facts.

The application is denied, with costs.

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ORDER DENYING MANDAMUS.

NEW JERSEY SUPREME COURT.

10	SALVATORE MANNINO, <i>vs.</i> FRANK B. MOFFETT, Building In- spector of the Town of West- field, <i>Respondent.</i>	} <i>On</i> } <i>Application</i> } <i>for</i> } <i>Mandamus.</i> } <i>Order</i> } <i>Denying</i> } <i>Application.</i>
----	--	--

20 This matter having come on to be heard at the present term of the court in the presence of E. A. Merrill, attorney for the applicant, and Paul Q. Oliver, attorney for the respondent; and the petition and affidavits having been read and the arguments of counsel having been heard and considered:

It is on this 17th day of February, 1931, ordered that the application for a rule to show cause why a writ of mandamus should not be issued in the above stated matter, be and the same hereby is denied with costs.

30 Entered: Feb. 17, 1931.

On motion of

PAUL Q. OLIVER,
Attorney for Respondent.

NOTICE OF APPEAL.

Filed February 28, 1931.

NEW JERSEY SUPREME COURT.

SALVATORE MANNINO,
Applicant-Appellant,
*vs.*FRANK B. MOFFETT, Building In-
 spector of the Town of West-
 field,*Respondent.*
 On
Application
for a Rule to
Show Cause
in Mandamus.
Notice of
Appeal.

10

TAKE NOTICE that the applicant, Salvatore Mannino, appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause on the ground that the Court denied the application of this applicant for a rule to show cause whereas the application should have been granted.

20

E. A. MERRILL,
 Attorney for and of counsel
 with Applicant-Appellant.

30

To Mr. Paul Q. Oliver, Westfield, New Jersey,
 Attorney for and of Counsel with Respondent.

40

GROUND S OF APPEAL.

Filed March 2, 1931.

NEW JERSEY COURT OF ERRORS AND APPEALS.

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SALVATORE MANNINO,
Applicant-Appellant,

vs.

FRANK B. MOFFETT, Building In-
spector of the Town of West-
field,

Respondent.

*Grounds of
Appeal.*

20

The above named applicant-appellant, Salva-
tore Mannino, assigns the following grounds of
appeal from the judgment of the New Jersey
Supreme Court in this matter:

Because the Supreme Court denied the appli-
cation of the applicant for a rule to show cause
why an alternative or peremptory writ of man-
damus should not issue compelling the re-
spondent to issue to the applicant a building
permit, whereas the Supreme Court should have

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granted the application.

E. A. MERRILL,

Attorney for and of Counsel
with Applicant-Appellant.

NOTICE.

Filed March 4, 1931.

**NEW JERSEY COURT OF ERRORS
AND APPEALS.**

SALVATORE MANNINO,
Applicant-Appellant,

vs.

FRANK B. MOFFETT, Building In-
specter of the Town of West-
field,

*Respondent.***10***On Appeal
Notice.*

TAKE NOTICE that the above appeal will be 20
moved for argument on Tuesday, May 19, 1931,
at 11:00 o'clock in the forenoon, or as soon
thereafter as counsel may be heard.

E. A. MERRILL,
Attorney for and of Counsel
with Applicant-Appellant.

To Mr. Paul Q. Oliver, Westfield, New Jersey,
Attorney for and of Counsel with Re-
spondent.

30**40**

NOTICE OF MOTION TO DISMISS WRIT.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

SALVATORE MANNINO,

Applicant-Appellant,

vs.

FRANK B. MOFFETT, Building
Inspector of the Town of
Westfield,

Respondent.

*Notice of
Motion to
Dismiss
Writ.*

10

SIR:

TAKE NOTICE that on Tuesday, the 19th day
of May, 1931, at 11:00 o'clock in the forenoon or
as soon thereafter as counsel may be heard, I
shall move before the Court of Errors and Ap-
peals, at the State House in the City of Trenton,
for the dismissal of this appeal on the ground
that the order of the Supreme Court which the
applicant-appellant seeks to review is not review-
able on error.

20

Very respectfully yours,

PAUL Q. OLIVER,

Attorney for and of Counsel

with the Respondent.

30

To Earle A. Merrill, Esq., attorney for applicant-
appellant.

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NOTES ON THE HISTORY OF THE

REPUBLIC OF THE UNITED STATES

AND TERRITORIES

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REPUBLIC OF THE UNITED STATES

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AND TERRITORIES

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

New Jersey Court of Errors and Appeals

SALVATORE MANNINO,
Applicant-Appellant,

vs.

FRANK B. MOFFETT, Building In-
spector of the Town of West-
field,
Respondent.

BRIEF OF THE APPLICANT-APPELLANT.

Statement.

This is an appeal from an order of the Supreme Court denying a petition for a rule to show cause why a writ of mandamus should not issue, directing Frank B. Moffett, the Building Inspector of the Town of Westfield, to issue to the applicant a building permit to erect an addition to his existing garage. The specifications and plans submitted to the building inspector complied in all respects with the building code. The application was merely for a permit to *build*—it did not include any request for a certificate of occupancy authorizing a particular “*use*.”

The order of the Supreme Court denies to the appellant a substantial legal right, and it bases the denial of the right not upon issues of law or of fact, but solely upon innuendo in the respondent’s brief in the Supreme Court, found in the following paragraphs:

“Relator permits himself to go to the extent of admitting that he wishes to erect an addition to his present garage, but says that it is his *present purpose* or *present intention* to use the addition as a tool house. This

man, who is unable to read (see verification on p. 5 of the case), had a definite purpose in building this addition, so why the qualifying word? He swears that it was explained to him, but to lawyers it needs no explanation. The subtle language is employed in a desperate effort to bring the case within the rule of the two cases that are mentioned in the opening paragraphs of relator's brief.

"The permit was refused primarily because the Inspector of Buildings was convinced that Mannino was endeavoring to trick him into granting a permit for the construction of the same building for which a permit had already been refused."

These innuendos are not argument, they are not law, they are not relevant, and they are not true. Had the rule to show cause been allowed they would have been met and refuted by deposition. That opportunity having been denied it is both necessary and proper to meet them here.

But, first, as to the merits of appellant's case.

POINT I.

Appellant has been denied a substantial, legal, right.

That the appellant has a right to *erect* the proposed structure is not denied. No objection is raised as to the structure itself. It conforms to the requirements of the building code. In at least two reported cases the Supreme Court has passed upon this precise issue, and decided it in favor of the contention of appellant.

In *English v. Asbury Park*, 115 A. 64 (not officially reported), the Court said:

"A man has a right to put up a building on his own property no matter what he may intend to use it for thereafter. If the build-

ing in itself, that is in its structural part, does not infringe the ordinance, he must of course take his chances of getting a permit thereafter to run a garage or to keep gasoline only. Until, however, he does this it is open to him to change his intention."

In *McAllister v. Moffett*, 142 A. 556; VI Misc. 692 (not officially reported), the Court said:

"The tract of land upon which the building is erected is in a residence district known as Class 'A,' in which a dwelling for one family only can be used. The zoning ordinance does not prohibit any particular construction. It goes to use only. Because a dwelling house by reason of alterations might be made use of as a two family dwelling house is not, in our opinion, sufficient ground for the refusal of a permit. The refusal infers that an unlawful use is intended. If, after the alteration was made, there was an attempt to use the property as a two family house in violation of the zoning ordinance such a use could be prevented by appropriate procedure."

As pointed out by this Court in *Fortesque v. Carroll*, 76 N. J. E. 583, it is one thing to restrict the kind of a structure which may be erected; it is another, and quite different, proposition to restrict the use to which a particular structure may be put. The two forms of restriction are "essentially distinct," one from the other.

We are here concerned only with the structure itself, and that is unobjectionable. No application for a certificate of occupancy for a particular "use" has been made; that question was not before the building inspector, it was not before the Supreme Court, and it is not before this Court.

As to the granting or refusing of a building permit the duty of the building inspector was

ministerial only; the application meeting all the conditions of the building code he was without discretionary power and *must* issue the permit.

POINT II.

Motive cannot bar the exercise of a right.

The purpose, or motive, of the appellant in limiting his present application to a *building permit* only, and leaving for further consideration any application for a certificate of occupancy for a particular "*use*," will be discussed later in order to disabuse the mind of the Court of any idea that the appellant desires to "evade" anything. It will now suffice to cite *Davis v. Flagg*, 35 N. J. E. 491, where this Court said:

"The legal pursuit of one's right, no matter what may be the motive of the prompter of the action, cannot be deemed either illegal or inequitable";

which was cited with approval by this Court in *South Jersey Title & Finance Co. v. Ireland*, 138 A. 898 (not officially reported); and *Edelman v. Dunn*, IX Adv. Rep. 85; 153 A. 524 (not officially reported), where this Court, restating the rule, said:

"the legality of an act cannot be changed or affected by the motive with which it is done";

and *Matter of Skinner & Eddy Corp.*, 265 U. S. 86; 68 L. Ed. 912, where the Court said that the right there in question,

"if it exists, is absolute. It does not depend on the reasons which the plaintiff offers for his action. The fact that he may not have disclosed all his reasons, or may not have given the right one, cannot affect his right."

This last cited case was in *mandamus*.

POINT III.

To grant or to deny the application for the rule was not a matter of discretion.

There is no legal discretion to deny a substantial, legal, right. Admittedly the structure proposed complies with the building code; the right to build it is a substantial legal right, and the refusal to issue a building permit was a denial of that right. The appellant, therefore, is entitled to a review of that action, and no such review has been had. *Tweddell v. Orange*, 95 N. J. L. 327.

Except for the innuendo the rule must have been allowed, and, therefore, we now pass to a discussion of the proceedings appealed from as affected by such innuendo.

POINT IV.

The prior application for a permit is here irrelevant and immaterial.

The application made on August 21, 1930, included, as well, an application for a specified use. It was denied because of the proposed use, and not because of any objection to the structure as such. The record was introduced because put forward by respondent as a part of his case, although neither relevant nor material. There was no proof of any existing violation of any ordinance. There was no proof or suggestion of any proceedings on any charge of a violation of any ordinance, but had there been, and had there been a *conviction* of a violation, it could not have affected the applicant's right to have his application considered on its merits.

That the applicant had the right to change his former intention and the right to limit his new application to a building permit, are too clear to require argument.

POINT V.

Appellant has not been "evasive."

In its opinion the Supreme Court says:

"Petitioner now, and we think evasively, asserts that the proposed extension is for the purpose of storing tools used by him in his occupation as a gardener. We are not satisfied that his representations are *bona fide*" (Case, p. 20, l. 18).

That assertion was not "evasive," and it is "*bona fide*." As evidence of the necessity for storage space a photograph of appellant's tools was included in the State of Case filed with the Supreme Court, and is included in the State of Case submitted herewith. It was further pointed out that appellant intended to add a small concrete mixer.

And may counsel respectfully observe that, without committing the Court to the granting of even an *alternative* writ, the granting of the rule applied for would have permitted appellant to meet the innuendo in respondent's brief, improper and irrelevant as it was. Obviously, it makes no practical, and no legal, difference whether the appellant leaves his tools where they are, and puts an automobile in the extension, or puts the automobile where the tools now are and moves the tools to the extension.

There has not been, and is not now, any evasion or concealment as to the nature of appellant's purpose in limiting his present application to a *building* permit, and excluding from present

consideration the question of "use." His purpose was, and is, to test any assertion of a right under the police power to bar an owner from keeping the tools of his lawful trade on his own premises, if such test becomes necessary.

POINT VI.

The building inspector had no right to bar appellant from ascertaining his right to a particular **"USE"** by denying a permit to **BUILD**.

In his affidavit the building inspector says:

"I consider that such tool house as the petitioner describes in his new application is not such accessory use as is permitted in an 'A' residence district";

and further gives that as one of the reasons why

"I have declined to grant the permit (to build) which he (the appellant) seeks" (Case, p. 10, l. 36).

Although, as already stated, the question of "use" was not an issue, nevertheless, as the prospective "use" as a tool house loomed in the background and was objected to by the building inspector, over one-half of the brief in the Supreme Court was devoted to a discussion of that topic. That argument will not be repeated here, as it is not yet relevant or material, but that there may be no misunderstanding here (as there is not in the mind of the building inspector), may counsel repeat that if the building inspector shall deny to this appellant a certificate of occupancy to use this extension as a tool house the right to deny such "use" will certainly be challenged, and the challenge is not to be barred by denying the right to build at all.

We now come to the consideration of the Court's comment on paragraph 14 of the petition to the Supreme Court.

POINT VII.

Petitioner's statement was frank and straightforward.

Paragraph 14 of the petition to the Supreme Court was as follows:

"Petitioner has not made any application for any specific use of said proposed structure. It is his present intention to use the same as a tool house, and he believes that such use is a lawful use, but that question will be raised only when, and if, application for such use shall be made. It is not petitioner's intention to put the structure to any unlawful use. If it shall appear, hereafter, that a proposed use is unlawful, of course, such purpose will be abandoned" (Case, p. 4, l. 6; p. 20, l. 31).

The comment on this paragraph, contained in the opinion of the Supreme Court was that:

"One seeking the assistance of this court, through its prerogative writ of mandamus, must establish his right thereto and that by frankness and straightforward assertion of believable facts" (Case, p. 21, l. 5).

Petitioner stands by every word of that paragraph, exactly as written. It is "his present intention to use the same (the extension) as a tool house"; he "believes that such use is a lawful use"; "if it shall appear, hereafter," that such use is unlawful his present purpose to so use it "will be abandoned."

But, that purpose certainly will *not* be abandoned merely upon the contrary opinion of the building inspector, or upon the negative finding

of the Board of Adjustment. Before the petitioner, or his counsel, accepts as *res adjudicata* the pronouncement that a resident in an "A" district cannot lawfully keep *in a suitable building* upon his premises the tools whereby he earns an honest livelihood, where such keeping is not a nuisance, it must be established by a court of competent jurisdiction. That is the frank, the straightforward, and the unequivocal meaning of the statement of appellant's "present intention," and the condition upon which it may be abandoned.

Doubtless, the Court are aware of an important and significant difference between the earlier and the present zoning acts. Counsel has had occasion, in a former proceeding, to comment upon it. Nevertheless, because of its collateral bearing upon the issue here raised, the attention of the Court is again directed to the fact that the zoning act now in force affects only "*buildings and structures*"—in that respect following the language of the zoning amendment; the prior act included, as well, the use of "*land*" apart from any structure thereon. The omission was deliberate and intentional. There is, then, neither an act of the Legislature nor an ordinance of the municipality in any way restricting the right of an owner to keep his tools on *the open part* of his lands; the restriction affects only his right to protect such tools from the weather, thieves and other misfortune by putting over them such protective covering as shall come within the definition of a "building or structure." The right of appellant to own his own tools, and to store them *in the open* on his land, so long as it does not constitute a nuisance, cannot be questioned. The threat of the building inspector is that, if appellant shall erect this proposed structure, and

shall then apply for a certificate of occupancy permitting him to move his tools into it from the open lot, such certificate will be refused on the ground that such "use" of the structure is a "business use" and prohibited by the zoning ordinance. In the meantime, however, no objection is now made, or ever has been made, to the use of the present building for the same purpose. It is believed by counsel that such position is indefensible, and will not and cannot be sustained if brought to a test.

And finally,

POINT VIII.

Counsel raises a point of personal privilege.

Counsel for respondent, in the excerpt cited from his brief in the Supreme Court, states that the petitioner "is unable to read," and voices a suspicion that the language of the petition has some "subtle" meaning. His suspicion is quite unfounded. The petitioner can both read and write the English language, but not fluently. His counsel, therefore, literally "read and explained" to him each several paragraph of the petition so that he might understand just what it meant. This being a verification under oath, and not a mere pleading, counsel deemed such precaution a proper one to take.

The suggestion of a purpose to "trick" the building inspector into granting a permit is as absurd as it is unfair and uncalled for. Not only were the plans and specifications for the building submitted to the building inspector, but if, at any time, imperfections were discovered he had ample power to insist upon their correction.

It is difficult to avoid the conclusion that the obvious innuendo was intended to prejudice the mind of the Court, and support is lent to such conclusion by the unfavorable comment of the Court as expressed in their opinion.

In form the critical language of the Court is directed to the petitioner. In fact, however, it is a rather severe reflection upon counsel for petitioner, and must be so considered by all who read the published report. Counsel feels that, aside from the merits of the case from the standpoint of the appellant, he may reasonably ask that the judgment of the Supreme Court be reversed, and the rule applied for be allowed, to the end that he may have the opportunity, denied by the order of the Court, to meet what he deems to be unjust animadversions.

Not to lose sight of the merits of the issue of law, however, counsel again reminds the Court that the appellant has applied only for a permit to *build*, that he has a right to apply for such permit without committing himself to any specific "use," that the right to build is a substantial, legal, right, that there is no defect in such application, that the building inspector was without discretion to deny the application, that appellant has not yet made his application for a certificate of occupancy for a specified "use," that until such application is made any question of "use" is a moot question and outside the consideration of the Court, and that respondent has not offered a single meritorious reason in support of his action in denying the application for the permit.

Furthermore, the order denying the rule violates that fundamental and necessary attribute of every judicial determination—the right of a party to his day in court and to be heard. The

order bars the appellant from presenting his proof by way either of testimony or deposition. There was a denial of that "due process" which is guaranteed by the Constitution. It comes within the condemnation expressed in the following cases:

"It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and *has been afforded an opportunity to be heard*. Judgment without such citation *and* opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered." (Italics mine.) *Galpin v. Page*, 85 U. S. 18, 21 L. Ed. 959.

"Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal." *Windsor v. McVeigh*, 93 U. S. 274, 23 L. Ed. 914.

"To say that courts have inherent power * * * to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends." *Hovey v. Elliott*, 167 U. S. 407, 42 L. Ed. 215.

This Court should, therefore, reverse and set aside the order of the Supreme Court, and direct the allowance of a rule to show cause, or, if it

appears that in any event *mandamus* must issue,
direct the writ to issue.

Respectfully submitted,

E. A. MERRILL,
Attorney of and of Counsel with
Applicant-Appellant.

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New Jersey Court of Errors and Appeals

SALVATORE MANNINO,
Applicant-Appellant,

vs.

FRANK B. MOFFETT, Building In-
specter of the Town of West-
field,

Respondent.

APPELLANT'S REPLY BRIEF.

Respondent does not now, in his memorandum, and at no time has he, made any attempt to meet the "points" argued by appellant in his brief.

Respondent's argument and the cases he cites do not even remotely touch the question raised by the appellant. The cases cited by respondent refer to situations where a rule to show cause has been awarded, or a writ of mandamus refused. Here, it was the rule itself which was denied. And not only is there a constitutional question involved, but it is one of the most fundamental of constitutional questions—the right to be heard.

As stated in appellant's brief, and here repeated to give it added emphasis:

"The order denying the rule violates that fundamental and necessary attribute of every judicial determination—the right of a party to his day in court and to be heard. The order bars the appellant from presenting his proof either by way of testimony or deposition. There was a denial of that 'due process' which is guaranteed by the Constitution."

In the consideration of this constitutional question the following citations are pertinent.

In *Trustees v. Saratoga etc. Co.*, 190 N. Y. 562, the Court of Appeals of New York denied a motion to dismiss an appeal coming up from the Appellate Division, where the Court remarked that property can be taken only by due process of law, and held that:

“to make effectual this constitutional protection the appellant must have the *right to appeal* to the court whenever it is claimed that its constitutional rights are invaded.” 122 A. D. 203; 107 N. Y. S. 341-351.

“An appeal on the question of constitutionality of either procedure or result *must always be permitted* when fundamental rights are involved.” *Mott—Due Process of Law*—p. 239.

What the building inspector claims is, in effect, a *discretionary power* to divest appellant of a substantial property right. The Supreme Court has denied appellant his right to be heard thereon, notwithstanding the rule that “substantial rights of property cannot be impaired without an opportunity being given to the defendant to present his case.” *Mott—Due Process of Law*—p. 217.

As to “due process”

“its fundamental requirement is an opportunity for a *hearing and defense*.” *Ballard v. Hunter*, 204 U. S. 241—51 L. Ed. 461-472.

“There are certain immutable principles of justice which inhere in the very idea of free government, which no state can disregard. An example is found in the principle that no man shall be condemned in his person or property without due notice and an *opportunity to be heard* in his own defense.” 6 R. C. L. 435, Tit. Const. Law.

Respectfully submitted,

E. A. MERRILL,
Attorney for and of Counsel
with Applicant-Appellant.

New Jersey Court of Errors and Appeals

SALVATORE MANNINO,
Applicant-Appellant,

vs.

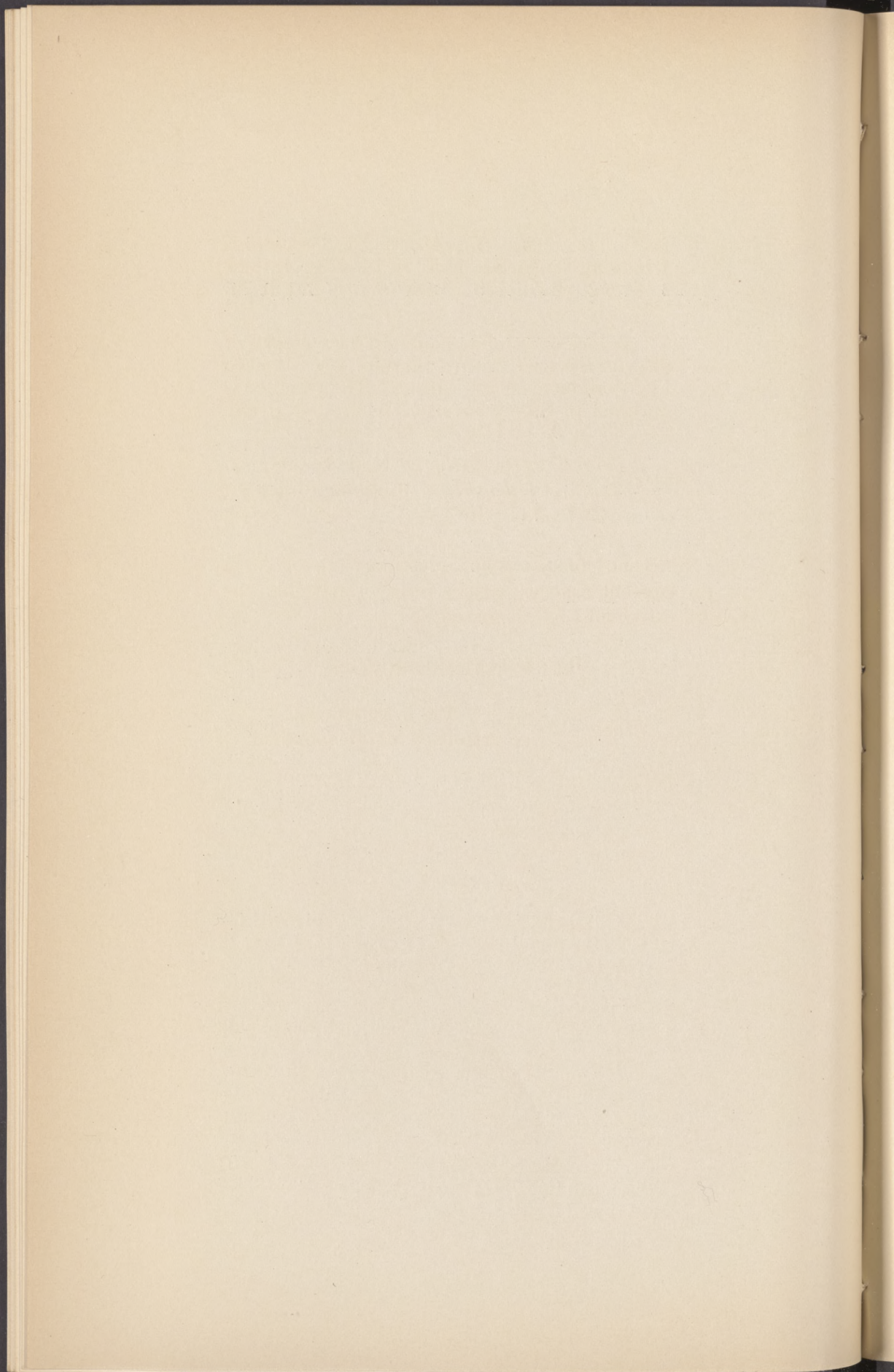
FRANK B. MOFFETT, Building In-
specter of the Town of West-
field,

Respondent.

Memorandum on
Motion to Dis-
miss Appeal.

Following the suggestion contained in the closing words of the opinion of this Court in the case of *American Transportation Company vs. The New York, Susquehanna and Western Railroad Company*, 59 N. J. L. 156, the respondent has given notice of a motion to dismiss this appeal on the ground that the order of the Supreme Court which the appellant seeks to review is not reviewable on error. A copy of the notice appears at the end of the State of Case.

“Where the Supreme Court on the return of a rule to show cause awards or refuses a writ of peremptory *mandamus* without the prior award of an alternative writ, the rule is firmly settled that to that action a writ of error, or, under present practice, an appeal, will not lie, except by virtue of a statute in cases of denial of the writ, where a constitutional question is involved, a condition which does not exist here. Comp. Stat., p. 3216, §6; *Layton v. State*, 28 N. J. L. 575; *American Transportation Co. v. New York, Susquehanna and Western Railroad Co.*, 59 *Id.* 156; *Paterson v. Shields*, *Id.* 426; *Kenny v. Hud-*



speth, *Id.* 504, 527; Morris & Cummings Dredging Co. *v.* Bayonne, 76 *Id.* 573; Matlack *v.* Lloyd, 82 *Id.* 739; Browne *v.* King, 91 *Id.* 317."

"Where an issue is made up on a record of alternative writ, return thereto, &c., followed by a judgment, error will lie. The practice is outlined in *Silverthorne v. Warren Railroad Co.*, 33 N. J. L. 178, and later cases."

Trinkle v. Donnelly, 98 N. J. L. 298;
Neptune Township v. Mannion, Collector,
73 N. J. L. 816.

Since no constitutional question is involved in the present case we respectfully submit that the appeal should be dismissed.

Respectfully submitted,

PAUL Q. OLIVER,
Attorney of Respondent.

