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ALTERNATIVE WRIT OF MANDAMUS.

STATE OF NEW JERSEY, *ss.*

To the Borough of Bradley Beach, New Jersey; Frank C. Borden, Jr.; (L. S.) Bernard V. Poland, and John Rogers, Board of Commissioners; and William P. Megill, Inspector of Buildings.

GREETING: WHEREAS, Thomas F. Somers, Jr., Trustee under the last will and testament of Thomas F. Somers, deceased, applied to William P. Megill, Inspector of Buildings of the Borough of Bradley Beach, and The Borough of Bradley Beach, New Jersey; Frank C. Borden, Jr., Bernard V. Poland, and John Rogers, Board of Commissioners, for a building permit to erect a gasoline and oil filling station at the southwest corner of Ocean and Fifth avenues, in the Borough of Bradley Beach, New Jersey, in accordance with the plans and specifications accompanying said application; and

WHEREAS, it is represented to us that the said William P. Megill, Inspector of Buildings of the Borough of Bradley Beach; and The Borough of Bradley Beach, New Jersey; Frank C. Borden, Jr., Bernard V. Poland, and John Rogers, Board of Commissioners, refused to issue said permit, on the sole ground that the application of Thomas F. Somers, Jr., Trustee as aforesaid, was for a permit to erect a building for commercial use in a non-commercial zone; and

WHEREAS, it is charged and insisted before us that the ordinance in the Borough of Bradley Beach, entitled, "An Ordinance of the Borough of Bradley Beach, dividing the Borough into districts and regulating the uses for which buildings within such districts may or may not be

erected or altered, and designating the trades and industries that shall be excluded from such districts; and regulating the number of houses that may be erected on a lot," is illegal, in that said ordinance fails to make provision for the appointment of a Board of Adjustment, as required by Section 9, Chapter 274 of the Laws of 1928, and because there is no Board of Adjustment in the Borough of Bradley Beach; and

WHEREAS, it has been represented to us that the effect of enforcing said Ordinance so as to prevent the said Thomas F. Somers, Jr., Trustee as aforesaid, from erecting the said gasoline and oil filling station would be to deprive said Thomas F. Somers, Jr., Trustee under the last will and testament of Thomas F. Somers, deceased, of the right to possess, enjoy and protect property, which deprivation is violative of the First Clause of Article I of the Constitution of the State of New Jersey, and would be a taking of the private property of the said Thomas F. Somers, Jr., Trustee as aforesaid, for public use, without just compensation, in violation of the Sixteenth Paragraph of Article I of the Constitution of New Jersey, and would be violative also of the Fourteenth Amendment of the Constitution of the United States; all as by the complaint of the said Thomas F. Somers, Jr., we have understood;

WE, THEREFORE, being willing that due and speedy justice should be done in this behalf,

COMMAND and STRICTLY ENJOIN YOU, that immediately after receipt of this writ, you do issue to the said Thomas F. Somers, Jr., Trustee as aforesaid, a permit to erect the building aforesaid, in accordance with the application, plans and specifications filed with you, or cause to us of the contrary therefor signify, lest in your

default complaint should come to us repeated; and how you shall execute this, our command, certify to our Justices of our Supreme Court of Judicature, at Trenton, upon the 10th day of September, Nineteen Hundred and Thirty-four, together with this, our writ, and this in nowise omit, at your peril.

WITNESS, the Honorable THOMAS F. BROGAN, Chief Justice of our Supreme Court, at Trenton, this 21st day of August, Nineteen Hundred and Thirty-four.

FRED L. BLOODGOOD,
Clerk.

On motion of
LIONEL P. KRISTELLER,
Attorney for Relator.

STIPULATION OF FACTS.

New Jersey Supreme Court

THOMAS F. SOMERS, JR., Trustee under the Last Will and Testament of Thomas F. Somers, deceased, *Relator,* *vs.* THE BOROUGH OF BRADLEY BEACH, NEW JERSEY; FRANK C. BORDEN, JR., *et al.*, *Respondents.*	*On Application for Mandamus.* *Stipulation of Facts.*

The parties hereto by their respective attorneys do hereby STIPULATE and AGREE that the following facts shall constitute a special case agreed upon by the parties hereto, to be argued and submitted to the New Jersey Supreme Court. The facts agreed upon are:

1. That Thomas F. Somers, Jr., is the sole Executor and Trustee under the Last Will and Testament of Thomas F. Somers, deceased.

2. That as such Trustee, he is the owner of a certain lot of land, located at the southwest corner of Ocean avenue and Fifth avenue, in the Borough of Bradley Beach, County of Monmouth, and State of New Jersey, and more particularly described as follows:

> "Known and designated as lots numbered Fifty-two, fifty-three, fifty-four and fifty-five (#52, 53, 54 and 55), on a map of Bradley Beach, N. J. of the Brinley Tract entitled,

'Map of property situated at Bradley Beach, Ocean Township, Monmouth County, N. J.'

BEGINNING at the intersection of the westerly line of Ocean avenue, and the southerly line of Fifth avenue; thence running west and along the said side of Fifth avenue two hundred and nine and seventy-two hundredths feet to the westerly line of Lot #52 aforesaid; thence running southerly and at right angles of Fifth avenue one hundred and fifty feet; thence running easterly at right angles to the second course fifty-four and eighty-two hundredths feet; thence running north and along the easterly line of Lot #72, four and seventy-four hundredths feet; thence running east and at right angles to Ocean avenue one hundred and fifty feet to the west line of Ocean avenue; and thence running north along said side of Ocean avenue one hundred and fifty and sixteen hundredths feet to the point and place of BEGINNING."

3. That on the twenty-seventh day of January, 1920, the Board of Commissioners of the Borough of Bradley Beach, adopted an Ordinance entitled, "An Ordinance Relating to the construction, alteration and repair of buildings, fire escapes, bill-boards, signboards and other structures, and providing for a building line in the Borough of Bradley Beach," and said Ordinance is still in effect; the pertinent portions of Sections 1 and 3, being hereto annexed, marked Exhibit "1," and hereby expressly referred to as if herein set forth fully and at length.

4. Among other things, the position of Inspector of Buildings was created by said Ordinance, and his duties are therein set forth to receive plans and specifications for the erection, alteration or repairs of buildings, to examine same, and if they conform to the requirements of

the aforementioned Ordinance so to report to the Board of Commissioners of Bradley Beach. Upon receipt by the said Board of Commissioners of the report of the Inspector of Buildings, the Ordinance provides that the said Board of Commissioners shall issue a permit to the applicant for such erection, alteration or repairs to buildings.

5. The Board of Commissioners of Bradley Beach thereafter, on the eleventh day of December, 1923, adopted an Ordinance entitled, "An Ordinance of the Borough of Bradley Beach, dividing the Borough into districts and regulating the uses for which buildings within such districts may or may not be erected or altered, and designating the trades and industries that shall be excluded from such districts; and regulating the number of houses that may be erected on a lot," commonly known as a "Zoning Ordinance," which regulates and restricts the locations and uses of buildings, regulates and limits the height thereof, and establishes two types of building zones designated respectively as the "commercial" and "non-commercial" zones, a copy of which Zoning Ordinance is hereto annexed, marked Exhibit "2," and hereby expressly referred to as if herein set forth fully and at length.

6. That the premises owned by petitioner are within a district designated by the aforesaid "Zoning Ordinance" as a "non-commercial" zone.

7. That for a long time prior to December 11, 1923, and ever since, said premises have been dedicated to commercial purposes (not in conformity with said Zoning Ordinance since its passage), in that they have been used as tennis

courts, open to the public, for hire, and for the sale to the public of cigars, cigarettes, refreshments and beverages.

8. That on February 27, 1934, William P. Megill was and since that date has continued to be, and now is the Inspector of Buildings of the Borough of Bradley Beach.

9. That on March 13, 1934, Frank C. Borden, Jr., Bernard V. Poland, and John Rogers were and since that date, have continued to constitute the Board of Commissioners of the Borough of Bradley Beach.

10. That on February 27, 1934, the aforementioned "Building Ordinance" and "Zoning Ordinance" were in full force and effect, and since then have not in any way been amended, abrogated or repealed, as affects the merits of this application.

11. That on February 27, 1934, your petitioner, Thomas F. Somers, Jr., Trustee under the last Will and Testament of Thomas F. Somers, deceased, endeavored to apply to the said William P. Megill, Inspector of Buildings of the Borough of Bradley Beach, for permission to erect a gasoline and oil filling station on the aforementioned premises, but the said William P. Megill was outside the State of New Jersey at the time, and actually in the State of Florida. That acting on the advice of Frank C. Borden, Jr., Mayor of the Borough of Bradley Beach, and one of the Commissioners, relator presented his application to the Board of Commissioners of the Borough of Bradley Beach at the meeting of the Board of Commissioners on February 27, 1934, a copy of which application is hereto an-

nexed, marked Exhibit "3," and hereby referred to as if herein set forth fully and at length, and said application was accompanied by plans and specifications, as required by said ordinance. Said plans and specifications were not considered or approved by the Board of Commissioners but the application for a permit was considered and rejected on March 13, 1934 because it was sought to erect a commercial structure in a non-commercial zone.

12. That on March 13, 1934, the Board of Commissioners of the Borough of Bradley Beach considered the application of petitioner for a permit to erect a gasoline and oil-filling station on the location described above, and rejected the same, informing petitioner that his application was refused for the reason that the application was for a permit to erect a building for a commercial use in a non-commercial zone, copies of the notice of said rejection and the reasons therefor being annexed hereto, marked Exhibit "4" and Exhibit "5," and hereby expressly referred to as if herein set forth fully and at length.

13. That the premises on Ocean avenue, directly opposite the premises of petitioner, are used for commercial purposes, in that there have been erected thereon for upward of twenty-five years, public bath-houses and refreshment stands, vending ice cream, beverages, cigars, cigarettes, sandwiches and frankfurters to the public.

14. Petitioner desires to erect a gasoline and oil-filling station, photostatic sketch of which is hereto annexed, marked Exhibit "6,' and hereby expressly referred to as if herein set forth.

15. That there are no business enterprises conducted or maintained on that part of Ocean

avenue in the Borough of Bradley Beach designated within Zone 4, non-commercial, except hotels and boarding houses which are permitted under provisions of Section 8 of the Zoning Ordinance. There are no gasoline or oil-filling stations on that part of Ocean avenue in the Borough of Bradley Beach located within Zone 4, non-commercial, but on that part of Ocean avenue at the northern end of the Borough, outside of Zone 4, there are commercial enterprises, and one gasoline and oil-filling station, six blocks north of relator's property.

16. That the premises on the east side of Ocean avenue opposite and abutting the premises of relator and within 150 feet of the proposed structure and use, are in an area not designated as a commercial zone, but in a zone specifically excepted from the area designated as a non-commercial zone. All of said territory is owned by the Borough of Bradley Beach and is used exclusively for public purposes and such businesses are permitted and conducted thereon as tend to promote the general welfare of The Borough of Bradley Beach. All businesses conducted therein are of a refreshment or refreshing nature, and which are necessary for the accommodation of the residents and guests of The Borough of Bradley Beach in their use of the beachfront for bathing and other recreational purposes. The premises on Ocean avenue directly opposite the premises of petitioner have long been used for the purposes for which they are now being used. These premises were privately owned for a great many years by James A. Bradley, who either conducted the bathhouses and stores himself, or leased them to others, and such a business was conducted thereon long before the adoption of the Ordinance

above mentioned on December 11, 1923, and the Borough since acquiring title to said premises some 12 or 15 years ago, has continued to use said premises for the same purposes as they were previously used by James A. Bradley.

17. Annexed hereto are seven photographs of the premises in question and neighboring property marked Exhibits "7" to "13" inclusive.

18. The premises of relator are not situate within 150 feet of the boundary line of any district in The Borough of Bradley Beach zoned for commercial purposes, except that the proposed structure and use on relator's premises abut and are within 150 feet of premises mentioned in paragraph #16 hereof, owned by The Borough of Bradley Beach situate on the east side of Ocean avenue immediately opposite premises of relator, and which premises of The Borough of Bradley Beach are used for recreational purposes, and which premises are not designated in a commerial zone but are specifically excepted from an area designated as a non-commercial zone.

19. The governing body of Bradley Beach has at no time provided for the appointment of a Board of Adjustment or a Board analogous thereto in character, clothed with the judicial power of a Board of Adjustment, to review the granting or refusing of building permits by Building Inspectors or Superintendents of Buildings.

Dated: December 20, 1934.

LIONEL P. KRISTELLER,
Attorney of Relator.

JOSEPH R. MEGILL,
Attorney of Respondents.

RETURN TO ALTERNATIVE WRIT OF MANDAMUS.

To the Honorable Justices of the Supreme Court of New Jersey:

We, William P. Megill, Inspector of Buildings of The Borough of Bradley Beach, and The Borough of Bradley Beach, New Jersey; Frank C. Borden, Jr., Bernard V. Poland and John Rogers, Board of Commissioners of The Borough of Bradley Beach, to whom said writ is directed, do herewith make return thereto to your Honors, as therein commanded, and assert and certify that the statements set forth in said writ are not all true; that we have no knowledge whether the relator is the owner of land described in the writ.

It is not true that the relator applied to William P. Megill, Inspector of Buildings of The Borough of Bradley Beach, for a building permit for the erection of a gasoline and oil filling station at the southwest corner of Ocean and Fifth avenues, in the Borough of Bradley Beach, New Jersey. It is true, however, that the relator did apply to Frank C. Borden, Jr., Bernard V. Poland and John Rogers, the Board of Commissioners of The Borough of Bradley Beach, for a building permit to erect a gasoline and oil filling station at said location.

It is untrue that William P. Megill, Inspector of Buildings of The Borough of Bradley Beach, refused to issue said permit. It is true, however, that Frank C. Borden, Bernard V. Poland and John Rogers, the Board of Commissioners of The Borough of Bradley Beach, refused to issue said permit, but not on the sole ground that the

application of relator was for permit to erect a building for commercial use in a non-commercial zone. Said permit was refused by the said Board of Commissioners because the relator failed to comply with the requirements of an Ordinance entitled "An Ordinance relating to the construction, alteration and repair of building fire escapes, bill-boards, sign-boards and other structures, and providing for a building line in The Borough of Bradley Beach," adopted February 3, 1920, and because the permit applied for was for the erection of a building for commercial use in a non-commercial zone. Said application was denied by Frank C. Borden, Bernard V. Poland and John Rogers, the Board of Commissioners of The Borough of Bradley Beach, on every ground of illegality under the then existing law. These statements apply as well to the respondent The Borough of Bradley Beach.

It is not true that the Ordinance of The Borough of Bradley Beach entitled "An Ordinance of The Borough of Bradley Beach dividing the Borough into districts and regulating the uses for which buildings in such districts may or may not be erected or altered, and designating the trades and industries that shall be excluded from said districts; and regulating the number of houses that may be erected on a lot," is illegal. It is on the contrary, true that said ordinance is necessary to the preservation of the health, morals, welfare, safety and general good of the The Borough of Bradley Beach, and is, therefore, a valid exercise of the authority granted to said Borough by the Legislature of New Jersey.

It is not true that the effect of enforcing said last mentioned Ordinance so as to prevent relator

from erecting the said gasoline and oil filling station would be to deprive relator of the right to possess, enjoy and protect property in violation of the Constitution of the State of New Jersey and of the Fourteenth Amendment of the Constitution of the United States.

These respondents further certify that the erection of a gasoline and oil filling station if erected as applied for, would in that particular location, be a menace to the safety of motorists operating on the highway, and of pedestrians passing over and upon the side-walks adjoining said property on the north and east, since its erection is contemplated in a strictly residential section of The Borough of Bradley Beach and at a location where traffic is highly congested during the months of June, July, August and September of each year.

These respondents further certify that the locality in which the relator seeks to erect said gasoline and oil filling station is one wholly built up and occupied by private dwellings, with the exception of a few small boarding and rooming houses which was permitted under the provisions of said Ordinance, and which were being conducted as such prior to the passage thereof, and that the erection of said gasoline and oil filling station would tend to depreciate the value of said property, would affect the health of the residents in bringing in their midst noise, congestion of traffic, increase the fire hazard, endanger lives and bring in other deleterious influence.

These respondents therefore humbly pray that said writ be dismissed, and that they be relieved from the command therein given.

THE BOROUGH OF BRADLEY BEACH,

By FRANK C. BORDEN, JR.,
Mayor.

FRANK C. BORDEN, JR.,
BERNARD V. POLAND,
JOHN ROGERS,
Commissioners.

WILLIAM P. MEGILL,
Inspector of Buildings.

Attest:

FREDERIC P. REICHEY,
Borough Clerk.

JOSEPH R. MEGILL,
Attorney for Respondents.

DEMURRER TO WRIT.

Thomas F. Somers, Jr., Trustee under the last will and testament of Thomas F. Somers, deceased, the relator, by Lionel P. Kristeller, his attorney, comes and says that the said alternative writ of mandamus issued herein, should not be dismissed for that;

The return to the said writ by the said respondents and the matters set forth therein are, as the same set forth, not sufficient in law.

WHEREFORE, your relator prays that a peremptory writ of mandamus do issue herein directed to The Borough of Bradley Beach, New Jersey; Frank C. Borden, Jr., Bernard V. Poland, and John Rogers, Board of Commissioners; and William P. Megill, Inspector of Buildings of Bradley Beach, New Jersey, in conformity with the terms of the alternative writ heretofore issued.

Dated, December 21, 1934.

LIONEL P. KRISTELLER,
Attorney of Relator.

Exhibit 1.

EXHIBIT 1.

AN ORDINANCE

Relating to the Construction, Alteration and Repair of Building, Fire Escapes, Bill-Boards, Sign-Boards and Other Structures and Providing for a Building Line of the Borough of Bradley Beach.

Be it ordained by the Board of Commissioners of the Borough of Bradley Beach as follows:

1. There shall be appointed by the Board of Commissioners of the Borough of Bradley Beach an officer to be designated as Inspector of Buildings, who shall hold office for the term of one year; said Inspector shall be an architect, carpenter or mechanic; the said Inspector of Buildings is hereby charged with the performance of all services necessary to the strict enforcement of this and other ordinances of the Borough of Bradley Beach relating to the erection, construction and alteration of buildings therein and all buildings, chimneys and structures which have become dangerous or unsafe and with the duty of seeing that proper precautions are taken for the protection of life and property. * * *

Section 2. * * *

SECTION 3.

* * * * * * *

Before the erection, construction or alteration of any building or part of any building, structure or part of any structure is commenced, the owner or persons authorized or having control of the same shall make application to the Inspector of

Exhibit 1.

Buildings for a permit for that purpose; and shall furnish the Inspector of Buildings with a written statement of the location and intended use of the proposed building or structure which shall be delivered to the said Inspector and remain in his custody. The applicant shall also file with the Inspector of Buildings the plans and specifications for the proposed building or structure. If it shall appear to the said Inspector of Buildings that this and other Ordinances of the Borough are complied with, then he shall so report to the Board of Commissioners. No oversight on the part of the Inspector of Buildings shall legalize the erection and construction of any building not in conformity with this Ordinance. If the Inspector of Buildings shall report to the Board of Commissioners that the application is satisfactory, the Board of Commissioners shall order a permit to issue and the Borough Clerk shall then issue a permit to the applicant. It shall not be lawful to proceed to construct, alter or repair any building or structure within the Borough of Bradley Beach without having first obtained a written permit as above provided. Every permit so issued shall be subject to revocation by the Board of Commissioners should the Board become convinced upon recommendation from the Inspector of Buildings that the work done under said permit is proceeding in violation of the Ordinances of the Borough. Revocation of a permit shall be in writing and shall be served on the owner, superintendent or contractor in charge of the work or posted on the property. The Board of Commissioners may order such revocation by resolution and may instruct the Inspector of Buildings to serve the said notice and from and after such revocation of

Exhibit 2.

permit all contractors performing any work in or about the said structure, building or premises shall be subject to a fine as herein provided.

* * * * * * *

Approved January 27, 1920.

EXHIBIT 2.

An Ordinance of the Borough of Bradley Beach dividing the Borough into districts and regulating the uses for which buildings within such districts may or may not be erected or altered and designating the trades and industries that shall be excluded from such districts; and regulating the number of houses that may be erected on a lot.

WHEREAS, pursuant to the provisions of an Act of the Legislature of the State of New Jersey entitled "An Act to Enable Boroughs to Regulate and Limit the height and bulk of Building, to Regulate and Determine the Area of Yards, Courts and other open spaces and to Regulate and Restrict the Location of Trades and Industries" approved March 21, 1922 and constituting Chapter 279 of the Laws of 1922, the Board of Commissioners of the Borough of Bradley Beach did by ordinance create a commission known as the "Commission on Building Districts and Restrictions"; and

WHEREAS, such Commission did in accordance with the provisions of the said statute above referred to make a tentative report dividing the Borough of Bradley Beach into districts and regulating the uses for which buildings might not be erected and designating the trades and indus-

Exhibit 2.

tries that might be excluded from such districts; and

WHEREAS, the said Commission on Building Districts and Restrictions did hold a public hearing on the said report at the Borough Hall, Main Street, Tuesday, the 20th day of November 1923 at eight o'clock P. M., after due public notice of the said hearing; and

WHEREAS, the said Commission has filed its final report with this Board of Commissioners pursuant to the adoption of such tentative report and pursuant to the said hearings;

Now, in accordance with the terms and provisions of the said final report:

BE IT ORDAINED by the Board of Commissioners of the Borough of Bradley Beach as follows:

1. For the purpose of promoting the public health, safety and general welfare, the Borough of Bradley Beach shall be divided into zones which shall be designated "commercial" and "non-commercial" zones.

2. It is further ordained that the said zones are hereby determined to promote the public health, safety and welfare and to insure the most desirable use for which the land of each district or zone may be adapted and to tend to conserve the value of the buildings and enhance the value of land throughout the Borough.

3. Trades and industries, business shops and all commercial activities not in themselves nuisances shall be permitted in those zones known as commercial zones; but nothing herein contained shall be deemed to permit the conduct or operation of any illegal or unlawful businesses, trades or industries in said commercial zone, nor the

Exhibit 2.

maintaining or carrying on of any business, trade or occupation which shall be a public or private nuisance.

4. In non-commercial zones no business, trade or industry of any sort or kind whatsoever shall be conducted or carried on; but nothing herein contained shall be deemed to prevent the operation in such non-commercial zones of hotels or boarding-houses or rooming houses and there may be conducted and operated in the buildings occupied by such hotels, boarding houses or rooming houses, barber shops, cigar stands, boot-black stands and restaurants.

5. *Commercial Zone No. 1.* All that territory lying and being in the Borough of Bradley Beach bounded on the south by the southerly line of the Borough; on the north by the northerly line of the Borough; on the west by the tracks of the New York and Long Branch Railroad and on the east by a line running parallel with Main Street and one hundred and fifty (150) feet east of the easterly curb line of Main Street shall be known and designated as Commercial Zone No. 1.

6. *Commercial Zone No. 2.* All that territory lying within the limits of the Borough of Bradley Beach beginning at a point in the southerly line of Newark Avenue two hundred and fifty (250) feet east of the southeast corner of Newark Avenue and Central Avenue and extending thence (1) southerly one hundred (100) feet to a point; thence (2) westerly parallel with the southerly line of Newark Avenue five hundred and sixty (560) feet more or less to a point; thence (3) northerly at right angles to the line last above mentioned across Newark Avenue and one hundred (100) feet north of the northerly line of

Exhibit 2.

Newark Avenue to a point; thence (4) easterly parallel with the northerly line of Newark Avenue five hundred and sixty (560) feet to a point; thence (5) southerly again at right angles to the northerly line of Newark Avenue one hundred and fifty (150) feet more or less to the point or place of beginning shall be known and designated as Commercial Zone No. 2.

7. *Commercial Zone No. 3.* All that territory lying within the limits of the Borough of Bradley Beach beginning at point in the westerly line of Ocean Avenue distant one hundred (100) feet north from the northwesterly corner of Ocean Avenue and Newark Avenue and extending thence (1) westerly at right angles to the westerly line of Ocean Avenue one hundred (100) feet to a point; thence (2) southerly and at right angles to the line last above mentioned and parallel with the westerly line of Ocean Avenue two hundred and sixty (260) feet to a point; thence (3) at right angles with the line last above mentioned in an easterly direction one hundred (100) feet to the westerly line of Ocean Avenue; thence (4) northerly along the westerly line of Ocean Avenue two hundred sixty (260) feet more or less to the point or place of beginning shall be known and designated as Commercial Zone No. 3.

8. *Zone No. 4—Non-Commercial.* All the remaining territory lying within the limits of the Borough of Bradley Beach, but outside the three commercial zones above described shall be known and designated as Zone No. 4—Non-Commercial; excepting the land lying between the easterly line of Ocean Avenue on the west, the high water mark of the Atlantic Ocean on the east and be-

tween the northerly and southerly line of the Borough.

9. Be it further ordained that throughout the entire length of Ocean Avenue on the westerly side thereof and on all other streets in the Borough of Bradley Beach within the territory bounded and described as follows, to wit: On the south by the southerly line of the Borough; on the east by the easterly side of Ocean Avenue; on the north by a line running equidistant between the northerly side of Brinley Avenue and the southerly side of LaReine Avenue and from a point on the east at the easterly line of Ocean Avenue to a point on the west at the westerly side of Main Street equidistant between the northerly line of Brinley Avenue and the southerly line of Main Street not more than one dwelling house shall be built hereafter on each lot of fifty (50) feet frontage. Throughout the remainder of the Borough not more than one dwelling house shall be erected on each lot of twenty five (25) feet frontage.

10. This ordinance shall take effect when finally passed and published according to law.

Approved December 11, 1923.

Exhibit 3.

EXHIBIT 3.

BOROUGH OF BRADLEY BEACH, N. J.

Application For Building Permit

No..... Date 2/27 1934

The undersigned, in compliance with the Building Ordinance, hereby makes application for a permit for the following building operation:

1. State Kind of Building Operation High class gasoline Service Station
2. Location Southwest corner of Ocean and 5th Avenue
3. Lot Number 16 and 17
4. Estimated Cost 1500.00
5. Permit Cost.....
6. Contractor.....

I hereby agree to strictly comply with all the terms of the Ordinance of Bradley Beach relating to buildings.

Signed Estate of Thomas F. Somers

Thos. F. Somers Jr. extr.
Owner.

Exhibit 4.

EXHIBIT 4.

Office of the
BOARD OF COMMISSIONERS
Bradley Beach, New Jersey

FRANK C. BORDEN, Jr., Mayor
Director Department of Public Affairs and Public Safety
BERNARD V. POLAND
Director of Revenue and Finance
JOHN ROGERS
Director of Streets and Public Improvements
FREDERIC P. REICHEY
Borough Clerk and Collector
FRANCIS X. HUGGINS
Deputy Clerk-Collector

March 15, 1934

Mr. Thomas F. Somers, Jr.
14 E. 47th St.,
N. Y. C.

Dear Mr. Somers:—

This will acknowledge yours of the 1st. inst. addressed to Mayor Borden and the Board of Commissioners, relative to a permit for improvement at the South-west corner of Ocean and Fifth Avenues and after due consideration I have been instructed by the Board of Commissioners to advise that your application is denied because, it would be in violation of the Borough's zoning Ordinances. I have also been instructed to return your application and plans which you will find enclosed herewith.

Very truly yours,

F. P. Reichey
Borough Clerk

FPR/MG

Exhibit 5.

EXHIBIT 5.

Office of the
BOARD OF COMMISSIONERS
BRADLEY BEACH, NEW JERSEY

FRANK C. BORDEN, Jr., Mayor
Director Department of Public Affairs and Public Safety
BERNARD V. POLAND
Director of Revenue and Finance
JOHN ROGERS
Director of Streets and Public Improvements
FREDERIC P. REICHEY
Borough Clerk and Collector
FRANCIS X. HUGGINS
Deputy Clerk-Collector

March 16, 1934

Mr. Thomas F. Somers, Jr.
14 E. 47th St.,
N. Y. C.

Dear Sir:—

I beg to acknowledge yours of the 15th inst. and in reply thereto you are advised that the following is a true and correct copy of that portion of the minutes of the Borough of Bradley Beach relating to your application for a permit:

"When the application of Thomas F. Somers, Jr. for the establishment of a Gasoline station at Fifth and Ocean Avenues was taken up for consideration, Mr. John U. G. Riley protested the issuance of a permit on the grounds that that type of business would be objectionable for that section of the Borough. Mayor Borden advised Mr. Riley that under the present Ordinances it would be impossible to grant a permit.

Motion by Rogers and seconded by Poland that Mr. Somer's application be rejected and his plans returned."

Borden	yea	
Poland	yea	Carried.
Rogers	yea	

Exhibit 5.

I am also returning your check for $1.00 as there is no charge for the information desired.

Very truly yours,

F. P. Reichey
Borough Clerk
By M. G.

FPR/MG

ORDER DISMISSING ALTERNATIVE WRIT.

This matter coming on to be heard before the Supreme Court on the opening day of the January 1935 Term in the presence of Lionel P. Kristeller by Saul J. Zucker, attorney of relator and Joseph R. Megill, attorney of respondents, and the Court having heard argument upon the application for a peremptory writ and having considered the same and having concluded to dismiss the application without opinion, it is this 16th day of January, 1935

ORDERED that the alternative writ herein be and the same is hereby dismissed and judgment entered in favor of respondents and against relator dismissing the demurrer filed to the return to the alternative writ.

THOMAS J. BROGAN,
For the Court.

Judgment.

JUDGMENT.

And now at this day to wit, the sixteenth day of January, in the year 1935, before the Justices of the Supreme Court of New Jersey at Trenton aforesaid, comes as well the said Thomas F. Somers, Jr., Trustee under the Last Will and Testament of Thomas F. Somers, deceased, Relator as the said The Borough of Bradley Beach, New Jersey, Frank C. Borden, Jr., Bernard V. Poland and John Rogers, Board of Commissioners; and William P. Megill, Inspector of Buildings Respondents, by their attorneys aforesaid,

Whereupon all and singular the premises aforementioned being seen and by the said Court now here fully understood and mature deliberation thereupon had, it appears to the Court here that the Return to the Alternative Writ of Mandamus by the respondents presented and by the said relator demurred, is good and sufficient in law and that the demurrer thereto is not well taken and that said demurrer should be overruled.

Whereupon it is adjudged that the said demurrer to the Return be overruled and that the Alternative Writ of Mandamus be dismissed and that the said respondents, The Borough of Bradley Beach, New Jersey, Frank C. Borden, Jr., Bernard V. Poland and John Rogers, Board of Commissioners and William P. Megill, Inspector of Buildings do recover of the said relator Thomas F. Somers, Jr., Trustee under the Last Will and Testament of Thomas F. Somers, deceased, their costs.

Judgment entered and signed January 16, 1935.

Notice of Appeal.

NOTICE OF APPEAL.

To Joseph R. Megill, Esq., attorney of Respondents, Electric Building, Asbury Park, N. J.

Sir:

PLEASE TAKE NOTICE, that Thomas F. Somers, Jr., Trustee, etc., the relator above named, does hereby appeal to the New Jersey Court of Errors and Appeals in the last resort in all causes, from the whole of the judgment entered in the above entitled cause on the sixteenth day of January, 1935 in favor of respondents and against the relator.

Dated January 17, 1935.

LIONEL P. KRISTELLER,
Attorney of Relator.

GROUNDS OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THOMAS F. SOMERS, JR., Trustee, etc., *Relator-Appellant,* *vs.* THE BOROUGH OF BRADLEY BEACH, NEW JERSEY, *et al.*, *Respondents-Appellees.*	*On Appeal from New Jersey Supreme Court.* *Grounds of Appeal.*

Thomas F. Somers, Jr., Trustee, etc., the appellant, does hereby specify the following as the grounds of appeal herein:

1. The Supreme Court erred in denying the peremptory writ of mandamus.

2. The Supreme Court erred in dismissing the alternative writ of mandamus heretofore allowed in this cause.

3. The Supreme Court erred in refusing to direct appellees to issue a building permit to appellant, appellees having denied the permit upon the sole ground that appellant sought to erect a building for "commercial" use in a "non-commercial" zone in violation of the "Zoning Ordinance" of Bradley Beach; whereas the said "Zoning Ordinance" was unenforcible because the said Borough had failed to appoint a Board of Adjustment or a Board analogous thereto, to review the granting or refusing of the building permits.

4. The Supreme Court erred in refusing to direct appellees to issue a building permit to

appellant, appellees having denied the permit upon the sole ground that appellant sought to erect a building for "commercial" use in a "non-commercial" zone in violation of the "Zoning Ordinance" of Bradley Beach; whereas the said "Zoning Ordinance" was unenforcible against appellant, since appellant desired to continue a non-conforming use in a "non-commercial" zone, which non-conforming commercial use was in existence when the aforesaid "Zoning Ordinance" was adopted.

5. The Supreme Court erred in refusing to direct appellees to issue a building permit to appellant, appellees having denied the permit upon the sole ground that appellant sought to erect a building for "commercial" use in a "non-commercial" zone in violation of the "Zoning Ordinance" of Bradley Beach, whereas such refusal and denial,

(a) violate appellant's rights under the first paragraph of Article No. 1 of the Constitution of the State of New Jersey,

(b) constitute the taking of private property of appellant for public use without just compensation in violation of the 16th paragraph of Article No. 1 of the Constitution of the State of New Jersey, and

(c) violate Section No. 1 of the 14th Amendment of the Constitution of the United States in that it deprives appellant of his property without due process of law.

Dated: January 21, 1935.

LIONEL P. KRISTELLER,
Attorney for and of Counsel
with Relator-Appellant.

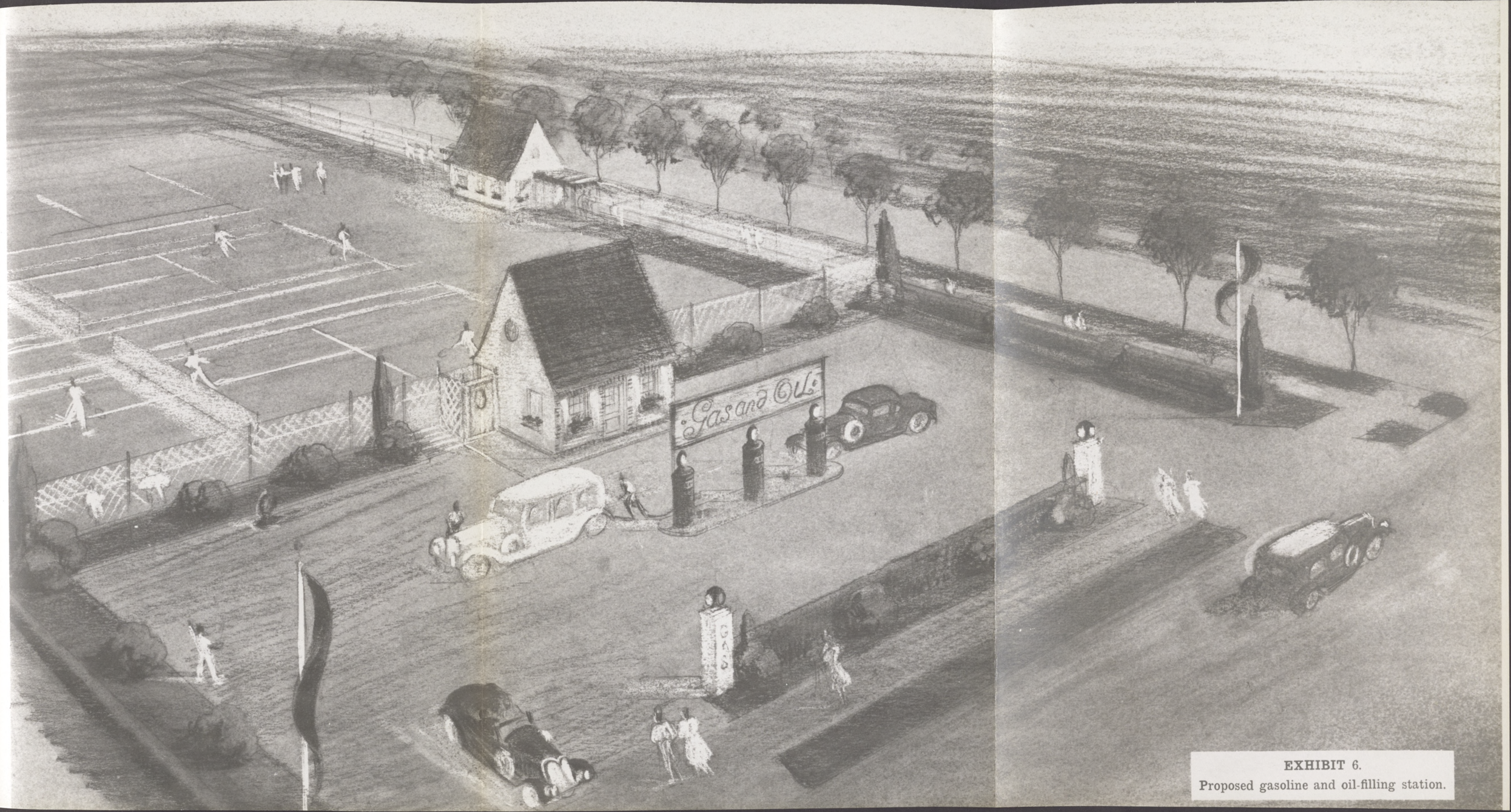

EXHIBIT 6.
Proposed gasoline and oil-filling station.

EXHIBIT 7.

Northwest and southwest corners of Ocean and Fifth avenues—southwest corner being premises in question; now used as "public tennis courts."

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

New Jersey Court of Errors and Appeals

THOMAS F. SOMERS, JR., Trustee under the last will and testament of Thomas F. Somers, deceased, *Relator-Appellant,* *vs.* THE BOROUGH OF BRADLEY BEACH, NEW JERSEY; FRANK C. BORDEN, JR., BERNARD V. POLAND, and JOHN ROGERS, Board of Commissioners; and WILLIAM P. MEGILL, Inspector of Buildings, *Respondents-Appellees.*	*On Mandamus.* *On Appeal from Supreme Court.*

APPELLANT'S BRIEF.

(Italics ours, unless otherwise noted.)

Statement.

This is an appeal from a judgment of the Supreme Court dismissing the Alternative Writ and denying a Peremptory Writ of Mandamus commanding the Inspector of Buildings, and the Board of Commissioners of the Borough of Bradley Beach to issue a permit to appellant for the erection of a gasoline and oil filling station, on premises located at the southwest corner of Ocean and Fifth avenues, Bradley Beach, New Jersey.

An Alternative Writ of Mandamus issued out of the Supreme Court (S. C. p. 1) to which appellees filed their return (S. C. p. 11). The parties have stipulated the essential and ma-

terial facts to be submitted for the determination of their respective rights (S. C. p. 4). There is, therefore, no factual issue in dispute.

The Supreme Court rendered no opinion upon dismissing the Alternative Writ allowed by Perskie, *J.*, being of the opinion that the case presented sufficient questions to have the merits decided by this Court promptly. The argument before the Supreme Court took place January 16, 1935, and the present appeal has been diligently prosecuted within less than three weeks so that the questions involved will be speedily determined.

In view of the allowance of the Alternative Writ in the first instance, the dismissal is merely *pro forma* denial of relief. The meritorious questions raised in the Supreme Court must be considered and decided by this Court as if it were the Court of original jurisdiction. This Court does not have the benefit of an opinion by the Supreme Court on the merits.

Facts.

On or about February 27, 1934, Thomas F. Somers, Jr., as Trustee under his father's will, applied to the Borough of Bradley Beach for the permit in question (S. C. p. 23). In Bradley Beach every application for a building permit must be presented to the Board of Commissioners (S. C. p. 17, l. 12). On March 13, 1934 (S. C. p. 8, ll. 10-27), the Board of Commissioners considered the application, denied the permit, and notified appellant in writing that the sole ground of the refusal was *that the erection of a filling station on the premises in question would violate the "Zoning Ordinance" of the Borough* (S. C. p. 24; S. C. p. 8, ll. 10-13).

The "Zoning Ordinance" in question (S. C. p. 18) was adopted December 11, 1923. Only two types of zones, designated respectively as "*Commercial*" and "*Non-Commercial,*" are provided (S. C. p. 19, ll. 21-25). The premises in question are located in an area designated as a "Non-Commercial" zone. The premises directly across the street on Ocean avenue, abutting relator's premises, and within 150 feet of the proposed structure and use, are used for commercial purposes (S. C. p. 9, l. 16). These abutting premises are in an area, not specifically designated as a "commercial zone," but specifically excepted from the area designated as a "non-commercial zone" (S. C. p. 21, l. 37), *and are, therefore, in the unzoned area.* Upon this unzoned area, there could be erected any type of commercial structure or use, not of itself a nuisance. This all important fact—*that Somers' property abuts an unzoned area*—will be adverted to later in this brief when reference is made to the relief which might have afforded Somers by an appeal to a Board of Adjustment to review the denial of the permit in the first instance.

The Borough of Bradley Beach has never provided for a board of adjustment or similar body (S. C. p. 10, Stip. Par. 19) as expressly required by the "Enabling Act" (P. L. 1928, Chapter 274, Sec. 9) passed by the Legislature pursuant to the Constitutional Amendment (P. L. 1928, p. 820) permitting the adoption of Zoning Ordinances. *This Act constitutes the sole authority to zone the Borough, and unless strictly complied with, the zoning program is a nullity.*

The premises upon which it is proposed to erect the filling station are now being, and for

upwards of twenty-five years last past have been, used as public tennis courts for hire. During that period there has always been sold on the premises tennis equipment, cigars, cigarettes, refreshments, and beverages, thus clearly dedicating these premises to commercial uses (S. C. p. 6, Stip. Par. 7).

The unzoned area on Ocean avenue across the street from Somers' property have been used for upwards of twenty-five years for public bath-houses, and refreshment stands, vending ice cream, beverages, cigars, cigarettes, sandwiches, frankfurters and other articles for recreational purposes (S. C. p. 8, Stip. Par. 13). This unzoned area abuts Somers' premises, and is in an area definitely permitting the existence of commercial enterprises (S. C. p. 21, l. 37). These commercial enterprises are operated by both the Borough of Bradley Beach and its tenants and concessionaires.

The filling station which appellant proposes to erect, will be attractive and of a substantial and high character. It will not detract from the character of the tennis court property, but will add beauty to its present appearance (See Exhibits 6 and 7).

The stipulated facts leave but two questions for judicial determination. Briefly stated they are as follows:

Statement of Questions Involved.

1. May a municipality, alleging as its sole ground for refusing a building permit, non-compliance with its "Zoning Ordinance," legally refuse the building permit, where the municipality has failed to provide for the appointment

of a Board of Adjustment, or a Board analogous thereto in character, to review the granting or refusing of building permits? (See P. L. 1928, Chap. 274, Sec. 9, p. 698.)

2. May a municipality, claiming non-compliance with its "Zoning Ordinance," which limits the use of land within the municipality only to "Commercial" or "Non-Commercial" uses, legally refuse to issue a building permit, where the applicant desires to continue a non-conforming use in a non-commercial zone, which non-conforming commercial use was in existence when the municipal Zoning Ordinance was adopted? (See P. L. 1928, Chap. 274, Sec. 11, p. 703.)

LAW.

POINT I.

The failure of Bradley Beach to provide for a Board of Adjustment deprives appellant of a specific method of review provided by the Legislature in the "Enabling Act," and precludes the Borough from refusing appellant a permit on the ground that the proposed use of his premises does not conform to the Borough's "Zoning Ordinance"; such refusal violates appellant's rights under both the State and Federal Constitutions.

At the outset, certain facts must be conceded:

First: Substantial property rights guaranteed by the State and Federal Constitutions are involved. The policy of the law in interpreting Constitutions has been to favor the free and untrammeled right of any landowner to use his property as he wills, as long as he does not encroach upon the rights of his neighbors or the

public, whose rights the law will just as jealously guard and protect. See *Durkin Lumber Co.* v. *Fitzsimmons,* 106 N. J. L. 183, at 189, where Case, *J.,* writing for this Court, said:

> "It is also to be remembered that the use of property is one of the essential attributes of ownership. Ownership without use is fatuous. True, every owner holds his property subject to the implied condition that it will not be used for the injury of others, and also subject to a degree of municipal control in the interest of the common good."

With the advent of the Constitutional Amendment authorizing the adoption of Zoning Ordinances, certain rights of landowners were taken away. If zoning restrictions against the use of land are to be enforced, it must be only after all constitutional and statutory requirements imposed upon the various municipalities have been met and complied with.

If appellant's contentions are sound, to refuse him relief is violative of the First Paragraph of Article I of the Constitution of the State of New Jersey dealing with the ownership of property, and is a taking of the private property of appellant for public use without just compensation, in violation of the Sixteenth Paragraph of Article I of the Constitution of the State of New Jersey, and is violative also of Section 1 of the Fourteenth Amendment of the Constitution of the United States (deprivation of property without due process of law).

Second: Under Sec. 7, of P. L. 1928, Chap. 274, previously adopted Zoning Ordinances, continue in effect "*except insofar as they are inconsistent with the provisions of this act, until they shall have been amended,* * * *, *by the governing body* * * *." Consequently, if the 1923 Zon-

ing Ordinance of Bradley Beach is inconsistent with the 1928 State "Enabling Act," in that the Borough has failed to create a Board of Adjustment, then the Zoning Ordinance invoked to deny Somers his permit *does not continue to be in effect.*

Third: Neither the Board of Commissioners of Bradley Beach nor the Courts are a Board of Adjustment as contemplated under the 1928 "Enabling Act." Under this Statute, the Board of Adjustment (P. L. 1928, Chap. 274, Sec. 9)

> *"shall consist of five members who shall not hold any elective office or position under the municipality."*

The Board of Commissioners consists of *three* members who are elected to their office by the voters of the Borough, and are not eligible for appointment to a Board of Adjustment. The Judges of the Courts are appointed by the Governor of the State, and, therefore, cannot provide the statutory right of review.

The necessity of compliance with this requirement of the Statute was adverted to by Supreme Court in *Smith* v. *Kearny,* 6 Misc. 954, at 957:

> "Further, the act of 1924, supra, was repealed by chapter 274, Pamph. L. 1928, which again provides for the appointment of a board of adjustment by the governing body or board of public works, as did the act of 1924, but with the further provision that such board 'shall consist of five members who shall not hold any elective office or position under the municipality' * * *
>
> It seems to us perfectly clear, also, that if the zoning board of appeals, created by the Kearny ordinance of 1922, founded upon the act of 1921, did not lose its standing by the act of 1924 repealing the act of 1921, it did become defunct by the act of 1928, and again the proceedings before it and its judg-

ment are without legal effect and value and must be set aside."

Fourth: The failure of the Borough of Bradley Beach to appoint a Board of Adjustment, subjects the refusal of the permit to review *by mandamus only.*

This specific point was considered by the Supreme Court in *Goldberg* v. *Jersey City,* 6 Misc. 564, where the city urged that the refusal of the permit should have been reviewed by certiorari and not by mandamus. In deciding that mandamus was the proper and only method of review, there being no Board of Adjustment to which an appeal could be taken, the Court at page 566 said:

> "A complete answer to this contention seems to us to be, *that since there is no Board of Adjustment of Jersey City, or a Board analogous thereto in character, clothed with the judicial power of a Board of Adjustment, to review the granting or refusing of building permits by building inspectors or superintendents of buildings, and as the Board of Commissioners of Jersey City is not clothed by legislative enactment with any judicial powers to review the action of the superintendent or to relax or broaden the scope of the Building Ordinance, its refusal, therefore, to grant the relator's application is subject to mandamus proceedings.*"

The foregoing four propositions are fundamental, and should be constantly borne in mind during a consideration of the issues in the case at bar.

The sole authority for the Borough to enact and enforce a zoning ordinance is derived from Chapter 274, P. L. 1928. Section 9 of this Act makes it *mandatory* upon every municipality

enacting a zoning ordinance to set up a Board of Adjustment consisting of five citizens who do not hold any elective office or position in the municipality:

> "9. Board of Adjustment. *The governing body* or board of public works, *shall provide for the appointment of a board of adjustment* and in the regulations and restrictions adopted pursuant to the authority of this act shall provide that the said board of adjustment may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained.
>
> *The board of adjustment shall consist of five members, who shall not hold any elective office or position under the municipality,* each to be appointed for such term as the governing body or board of public works, may prescribe and be removable for cause by the governing body, or board of public works, upon written charges and after public hearing. * * *"

Any municipality which fails to provide for a Board of Adjustment in strict compliance with the Statute, is unable to enforce its zoning ordinance. To all intents and purposes, the zoning ordinance is absolutely void and of no effect.

By the Constitutional Amendment and "Enabling Act," the Legislature practically established a contract between the public and the municipalities. In effect it was as follows:

> In consideration of the public releasing their constitutional rights to use their property as they see fit, and subjecting it to Zoning Ordinances, the municipalities, to protect against capricious, unreasonable and unwarranted interpretations by building inspectors, agree to establish Boards of Ad-

justment, to which aggrieved property owners could appeal adverse decisions of building inspectors, and obtain an independent hearing before an independent Body, without resorting to the Courts.

The failure of Bradley Beach to appoint a Board of Adjustment was a breach of its contract. Consequently, it cannot enforce the Zoning Ordinance against appellant.

An analysis of the 1928 "Enabling Act," insofar as it provides for the appointment of a Board of Adjustment, the procedure before it, and the powers which it exercises, will be helpful in ascertaining to what extent the failure of Bradley Beach to appoint a Board of Adjustment deprived appellant of a review before a Statutory Body provided by the Legislature. This Body, acting in a judicial capacity, considers the questions presented to it differently from the manner in which the Courts view them. Under the additional method of review before a Board of Adjustment, however, the questions are considered in the light of all local surrounding circumstances.

Section 9 of the "Enabling Act," entitled, "Board of Adjustment," prescribes the procedure for the Board. The Chairman of the Board has the power to issue subpoenas for the attendance of witnesses, the production of records, and may administer oaths. For failure of a witness to attend, application may be made to the Supreme Court for an order compelling attendance. Minutes of the proceedings before the Board are to be accurately kept and maintained, filed in the office of the Board, and always open to inspection to the public as public records.

The delegation of such power to a Board of Adjustment, and the imposition to conduct its

proceedings in a judicial manner, make it a quasi-judicial body similar to an intermediate court of review. This view was adopted in *Hendey* v. *Ackerman*, 103 N. J. L. 305, where Campbell, *J.*, now Chancellor, writing the opinion for the Supreme Court, said:

> "It is the undoubted purpose of the Statutes, creating Boards of Adjustment, to make them quasi judicial bodies, and that they are to proceed in a judicial manner to pass upon and render judgment in those matters which, by Statute, they are given jurisdiction of."

To the same effect see *Feldman & Pivnick* v. *Board of Adjustment of East Orange*, 6 Misc. 520, in which the Court held:

> "The powers of the Board of Adjustment were defined by Chapter 146 (P. L. 1924, p. 324), and Chapter 315 (P. L. 1926, p. 526). * * *
>
> Such Board, when it acts, acts judicially on a lawful ascertainment of facts. Bilt-Well Co. *v.* Dowling, 5 Misc. 180."

The same holding is found in:

Ewald v. *Board of Adjustment of Leonia*, 6 Misc. 532;

Benbak Construction v. *Board of Adjustment of Orange*, 6 Misc. 543;

Fonda v. *O'Donohue*, 109 N. J. L. 584.

Section 9 further authorizes appeals by any person aggrieved by any decision of an administrative officer, where the interpretation of the Zoning Ordinance in connection with the issuing of building permits is involved. This feature further lends judicial atmosphere to the Board of Adjustment, and makes it an intermediate tribunal of review.

The 1928 Act provides that the Board of Adjustment shall fix a date for its hearings, and that at least five days prior to the hearing, the appellant must give personal notice to all property owners within 200 feet of the property to be affected by the appeal. In this last respect the 1928 Act is different from the prior acts. This evinces a definite legislative intent that persons directly interested in the specific appeal receive notice to properly protect their interests at the hearing before the Board of Adjustment.

So much for the general attributes of a Board of Adjustment. We now come to the powers which are given to the Board of Adjustment under the 1928 "Enabling Act."

These powers are grouped into four classes, as Subdivisions 1, 2, 3 and 4 in Section 9 of the Act.

"1."

> "To *hear and decide appeals* where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any ordinance adopted or in force pursuant to this act."

In this classification is comprehended appeals from decisions of the administrative officer, which are arbitrary, capricious or palpably contrary to his duties as set forth in the ordinance. Under this classification, the Board acts strictly as an appellate tribunal, and has the power to definitely reverse the administrative official.

"2."

"To *hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance,* provided that no such exception shall be made to grant or allow a structure or use in a district restricted against such structure or use unless the lands in respect of which the exception is made abut a district in which such structure or use is authorized by the zoning ordinance, and provided further that no such structure or use shall be allowed more than one hundred and fifty (150) feet beyond the boundary line of the district in which such structure or use is authorized by the zoning ordinance."

In this classification is comprehended applications to modify the Zoning Ordinance, provided the excepted area abuts or is within 150 feet of an area where such excepted structure or use is actually authorized by the Zoning Ordinance. This sub-division does not contemplate variations in specific individual cases. It refers to action by the Board of Adjustment in generally changing 100 feet or so of a restricted area to permit of structures and uses permitted in an adjoining area, regardless of whether individual property owners are particularly interested in the changes.

"3."

"To *authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest,* where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done; and provided, that no such variance shall be made to grant or allow a structure or use in a district restricted against such structure or use unless the lands in re-

spect of which the variance is made abut a district in which such structure or use is authorized by the zoning ordinance; and provided, further, that no such structure or use shall be allowed more than one hundred and fifty (150) feet beyond the boundary line of the district in which such structure or use is authorized by the zoning ordinance."

In this classification is comprehended appeals in individual *specific cases,* where owing to special conditions, a literal enforcement of the ordinance will result in unnecessary hardship to the individual property owner. Under this subdivision, as under the second, the Board of Adjustment has the power to actually change the terms of the Zoning Ordinance. The restrictive features so far as they affect the specific individual may thus be released.

Had there been a Board of Adjustment in Bradley Beach, Somers could have appealed to it from the refusal of a permit, and could have applied for relief under this sub-division. The failure of the Borough to provide a Board of Adjustment deprived him of this substantial right.

"4."

"To *recommend in writing* to the governing board or board of public works, *upon appeal in specific cases, that a structure or use be allowed in a district restricted against such structure or use* where the lands in respect of which such recommendation is made do not abut a district in which such structure or use is authorized by the zoning ordinance or where such lands are more than one hundred and fifty (150) feet beyond the boundary line of the district in which such structure or use is allowed by the zoning ordinance. Whereupon, the governing body or board of public works may, by resolution,

> approve or disapprove such recommendation; and in case such recommendation shall be approved by the governing body or board of public works, then the administrative officer in charge of granting permits shall forthwith issue a permit for such structure or use."

In this classification is comprehended the appeal of a specific individual whose property does not abut or lie within 150 feet of an area where the prohibited structure or use is authorized. *In these cases the Board of Adjustment may not vary the Zoning Ordinance*—as is permitted under the second and third sub-divisions. *It may only recommend* to the Governing Body *that the restrictive features of the Zoning Ordinance be repealed or modified.* The Governing Body may adopt or reject the recommendation. For a discussion of the rights and powers of a Board of Adjustment, under this fourth sub-division, see *Fonda* v. *O'Donohue,* 109 N. J. L. 584.

Therefore, the failure of a municipality to create a Board of Adjustment with the powers conferred by the 1928 "Enabling Act" deprives a property owner of a method of review—distinct from an appeal to the Courts. Every owner of property which is subject to the restrictive features of a Zoning Ordinance, has the right, unquestionably since 1928, to have his application for release of his property from these restrictions considered and acted upon by an independent tribunal, namely—a Board of Adjustment. He is entitled to this review before a Board of Adjustment, none of whose members hold any elective position under the municipality, before being compelled to resort to the courts for relief.

The practice now recognized is to exhaust the remedies before the Board of Adjustment before applying to the courts for relief. *This being so, the failure of the Borough of Bradley Beach to appoint a Board of Adjustment has prevented appellant from his intermediate review.*

It is no answer to say that the present legal proceedings before the Supreme Court and this Court are equivalent to a hearing before a Board of Adjustment. The "Enabling Act" requires that the Board of Adjustment shall consist of men *appointed by the Governing Body of the municipality.* The Supreme and this Court are not so appointed.

Such limitation on the membership of a Board of Adjustment is important because it is contemplated that in the appointment, the Governing Body will select those men familiar with the municipality, its zoning needs, and the information necessary to the adoption of reasonable variances. While the Courts may have a general knowledge of conditions in Bradley Beach, it is submitted that they do not have the specialized knowledge of the needs and requirements of the municipality, and its inhabitants as would a Board appointed by its Governing Body.

It follows, therefore, that resort to the Courts in the first instance does not give to the property owner, aggrieved by a decision of a building inspector, the type of review guaranteed by the Legislature in the "Enabling Act." Appellee's dereliction in failing to observe the mandate to appoint a Board of Adjustment, nullifies the Zoning Ordinance, and leaves appellant's property unrestricted.

We have demonstrated the absolute necessity of a municipality appointing a Board of Adjust-

ment, if it desires to enforce its Zoning Ordinance. We shall now show that the Supreme Court has heretofore held that a zoning ordinance is unenforceable if the municipality, contrary to the express mandatory provision contained in the "Enabling Act," fails to appoint a Board of Adjustment.

In *Haberland* v. *Maplewood,* 5 Misc. 97 (1927) the property owner applied to the municipality for a permit to erect a building containing stores, in a district zoned against stores. The proofs failed to show that the Governing Body of Maplewood had appointed a Board of Adjustment. In the absence of such proof, *the Court granted a peremptory writ of mandamus,* saying:

> "The state of case, however, does not bring before us the zoning ordinance of the township, *nor have we before us any proof that such ordinance makes provision for a Board of Adjustment,* and, therefore, we are unable to determine whether the rule laid down by Chancellor Development Corp. *v.* Senior, 4 Misc. 633, applies."

The rule enunciated in *Chancellor Development Corp.* v. *Senior,* is that where a Board of Adjustment exists, the applicant must review the action of the Board of Adjustment by certiorari, and not the refusal of the permit by the Building Inspector by mandamus. The language of the late Chief Justice GUMMERE, in the *Chancellor case, supra,* is particularly apt:

> "This seems to me not to be a case for an alternative writ for the purpose of reviewing the action of the Inspector, but for a certiorari to review the action of the Board of Adjustment."

The *Haberland case, supra,* is authority for appellant's contention that the failure to have a Board of Adjustment invalidates and renders

unenforceable the Zoning Ordinance of Bradley Beach. The peremptory writ of mandamus should therefor have been issued herein in the Supreme Court.

A later case, and one decided after the adoption of the Constitutional Amendment, and the 1928 "Enabling Act," is *Smith* v. *Kearny,* 6 Misc. 954. In that case the Building Inspector of Kearny refused a permit, on the ground that the contemplated use was contrary to the Zoning Ordinance. The owner then appealed to the "Zoning Board of Appeals," which was the reviewing tribunal under the 1921 or 1924 Acts. This Board reversed the Building Inspector, who then issued the permit. A neighboring landowner thereupon obtained a writ of certiorari to review the proceedings of the "Board of Appeals." One of the grounds urged by the prosecutor to set aside the action of that Board as set out in the Supreme Court opinion, at page 957, was:

> "The first contention of the prosecutor under this point is that the Act of 1924 abolished the Board of Appeals then in existence, and as Kearny never amended or changed its ordinance, nor made any appointment of a Board of Adjustment, there was no legal body or Board to which the appeal in question could be taken."

The Supreme Court considered this point and held that the failure of the municipality to create a Board of Adjustment, in accordance with the mandatory provisions of the 1928 "Enabling Act" invalidated the action of the "Board of Appeals" organized under the earlier act. In passing upon this particular point urged by the prosecutor, the Court, at page 958, said:

> *"It seems to us perfectly clear, also, that if the Zoning Board of Appeals, created by*

the Kearny Ordinance of 1922, founded upon the Act of 1921, did not lose its standing by the Act of 1924 repealing the Act of 1921, it would become defunct by the Act of 1928, and again the proceedings before it, and its judgment are without legal effect and value and must be set aside.''

The opinion at page 959 also discusses the power of a municipality with respect to its limitations in enforcing Zoning Ordinances in the following language:

> ''It must be kept in mind that after the adoption of the amendment to the constitution respecting zoning, the legislative effort was to make such constitutional provision effective and to protect the several municipalities in the benefits to be derived therefrom, and that such legislative effort was this act of 1928.
>
> *We think that but for paragraph 4 of section 9 of the act of 1928 there was no power in any board or body, however legally qualified, to act as expressed by the judgment before us,* and that the zoning board of appeals made no effort or pretense of acting thereunder, and, therefore, if a legally-constituted body, its proceedings and judgment were illegal and must be set aside.''

No municipality can use such parts of a Statute as suit its convenience, and disregard the remaining provisions thereof. Since a zoning ordinance can seriously restrict the use to which private property may be put, every safeguard which the Legislature sets up must be observed to the letter, or the whole ordinance fails. A Zoning Ordinance contemplated by the 1928 Act can be enforced only if the municipality carries out all the mandatory provisions of that Act among which is the mandate to appoint a Board of Adjustment.

Having shown by the decisions that the failure of a municipality to appoint a Board of Adjustment renders its Zoning Ordinance unenforceable, we now consider the reasons underlying these decisions. While it is true that the 1928 "Enabling Act" contains the mandatory provision requiring municipalities to appoint Boards of Adjustment, and while it is true that that Act, by Section 7 invalidates previously adopted Zoning Ordinances, if they are inconsistent with its mandatory provisions, there are still other underlying reasons why the failure to appoint a Board of Adjustment invalidates the Zoning Ordinance.

Under sub-division "3" of Section 9, appellant would have the right of appeal to the Board of Adjustment to obtain a specific exception, releasing his property from the operation of the Zoning Ordinance. Appellant could present evidence there to show that a literal enforcement of the provisions of the Ordinance would result in unnecessary hardship, and that the spirit of the Ordinance would be observed and substantial justice done, notwithstanding the release of his specific property from the effect of the Ordinance. Appellant's property, which has been dedicated to commercial uses for the past 25 years, abuts and is within 150 feet of the unzoned area directly across the street. In this unzoned area any commercial use may be maintained. Had Bradley Beach appointed a Board of Adjustment, appellant could have shown that the change of one part of his property from public tennis courts, to a filling station would not materially change the appearance of the property. An inspection of Exhibits 7 and 8 show that, if anything, appellant's property would have been beautified by the erection of the

filling station. The contemplated use would have involved only, cementing the easterly end and erecting a small but attractive building, at a cost of about $1,500.00. Appellant could have urged with a great deal of force, that the property used as public tennis courts and the sale of cigars, cigarettes, beverages, and tennis equipment, yielded very little revenue—in fact, not enough to pay the municipal taxes. Appellant could have shown that with the erection of the filling station on only a small portion of his property, he would be able to derive sufficient income to pay the municipal taxes.

There is nothing sacreligious in the erection of a gasoline station, despite the fact that municipalities, and even the courts on occasion, have treated this business as an enterprise to be shunned. The erection of a decent filling station is not a detriment to the neighborhood, but a distinct benefit to it.

The failure of the Borough to permit of a review by a Board of Adjustment, constitutes the deprivation of property without due process. If there had been a Board of Adjustment, and if they had decided to grant a permit to appellant, the only method of review thereafter would have been by certiorari. The denial to appellant of his right to have the action of the Building Inspector reviewed by a Board of Adjustment, and the denial to appellant of his right to seek a specific exception to the Zoning Ordinance under sub-division "3" of Section 9 of the "Enabling Act," are denials of his constitutional rights.

In Bradley Beach there is no Board of Adjustment. Consequently there is no legally enforceable zoning ordinance. There being in effect no valid zoning ordinance, relator is en-

titled to the writ of this Court directing the Inspector of Buildings to issue the permit.

The only reason given for the refusal to issue the permit (S. C. p. 24) was the non-compliance with the 1923 existing Zoning Ordinance. But if the reasoning herein is sound, and the Zoning Ordinance is inoperative, the reason is frivolous, and the permit should have been granted.

For the foregoing reasons the refusal of the Supreme Court to grant the peremptory writ of mandamus in this case constitutes reversible error.

POINT II.

A permit should be issued to appellant as the premises were dedicated to a non-conforming use prior to the passage of the Bradley Beach Zoning Ordinance in 1923.

If by any stretch of the imagination it is conceivable that the "Zoning Ordinance" of Bradley Beach is valid, notwithstanding the absence of a Board of Adjustment, appellant is still entitled to his permit, on the ground that the contemplated use of the premises is merely a continuation of the use of said premises for *commercial purposes* to which the premises have been dedicated for the past twenty-five years.

Section 11 of the 1928 "Enabling Act" provides as follows:

> "* * * any non-conforming use or structure existing at the time of the passage of an ordinance may be continued upon the lot or in the building so occupied * * *."

The "Enabling Act" has been interpreted to mean that the non-conforming use to be continued must have been in existence at the time it became

effective, (April 3, 1928), and not when the local Zoning Ordinance was passed (*Durkin Lumber Co.* v. *Fitzsimmons,* 106 N. J. L. 183; E. & A. 1929):

> "We conclude that the Statute is not retrospective, and that such life as was given by it to the ordinance under review was congenital with, and did not antedate, the Statute."

The stipulated facts in this case are that the commercial use of the premises in question have been maintained not only since the Statute was enacted (April 3, 1928) but since a date long prior to passage of the local Zoning Ordinance (Dec. 11, 1923) (S. C. p. 6, l. 36).

The "Zoning Ordinance" classifies Bradley Beach into "commercial" and "non-commercial" zones only. In this respect the "Zoning Ordinance" under consideration differs from the usual "Zoning Ordinance" found in most municipalities. The usual ordinance contemplates and provides for as many as eight or ten zones, some of which are commonly termed:

1. One-family residential.
2. Two-family residential.
3. Three-family residential.
4. Apartment house.
5. Stores.
6. Light industrial.
7. Heavy industrial.
8. Obnoxious industrial.

Bradley Beach has seen fit to designate only two type of zones: "commercial" and "non-commercial." This nomenclature was of the Borough's own choosing, and the Borough cannot complain of any logical results flowing from such designations.

It is appellant's contention under the peculiar zoning of Bradley Beach, that *any* commercial

enterprise may be maintained in the "*Commercial*" zone. By the same token, if property is lawfully used for commercial purposes in a non-commercial zone, *any* commercial use may be continued on the premises in that zone. It can not be seriously argued that the *identical* use would have to be continued to make it lawful.

If a man operated a drug store in Bradley Beach as a previously existing non-conforming use, could it be seriously urged that the store could not be changed to a grocery or butcher shop?

And if a man operated a factory in Bradley Beach, manufacturing pajamas as a previously existing non-conforming use, could it be seriously urged that the factory was limited to the manufacture of pajamas, and could not be changed to the manufacture of overcoats, or shoes, golf sticks, cigars or soap?

In the case at bar all that appellant desires to do in order to receive a reasonable rental income in order to defray taxes is to change a small part of his property, dedicated for the past twenty-five years to commercial uses, from public tennis courts and the sale of cigars, cigarettes, beverages, and tennis equipment to a filling station. *The previously existing non-conforming use was commercial. The contemplated use is commercial.* By every rule of construction, appellant should be granted a permit. Realizing that any zoning ordinance is a restriction on ownership of property, the construction of an ordinance or the statute should not be strained to deprive appellant of the lawful and legitimate use of his property.

Appellant should be entitled to continue the previous non-conforming commercial use of his property, and the permit should be granted.

CONCLUSION.

The failure of the Borough to create a Board of Adjustment, and the commercial use of appellant's property having been maintained as a non-conforming use from a date prior to the passage of the local Zoning Ordinance (1923) and the "Enabling Act" (1928) preclude the Borough from refusing appellant a permit, and this Court should reverse the judgment of the Supreme Court, to the end that a peremptory writ of mandamus issue.

LIONEL P. KRISTELLER,
Attorney for and of Counsel,
with Appellant.

February, 1935 Term.

JACOB L. NEWMAN,
SAUL J. ZUCKER,
On the Brief.

New Jersey Court of Errors and Appeals

THOMAS F. SOMERS, JR., Trustee under the Last Will and Testament of THOMAS F. SOMERS, deceased,
Relator-Appellant,

vs.

THE BOROUGH OF BRADLEY BEACH, NEW JERSEY; FRANK C. BORDEN, JR., BERNARD V. POLAND AND JOHN ROGERS, Board of Commissioners; and WILLIAM P. MEGILL, Inspector of Buildings,
Respondents-Appellees.

On Mandamus. On Appeal from Supreme Court.

RESPONDENTS-APPELLEES' BRIEF

Statement.

This is an appeal from a judgment of the Supreme Court dismissing the alternative writ and denying a peremptory writ of mandamus commanding the Inspector of Buildings and the Board of Commissioners to issue a permit to the relator-appellant to erect a gasoline and oil-filling station on premises located at the southwest corner of Ocean and Fifth Avenues, in The Borough of Bradley Beach, New Jersey.

The respondents-appellees oppose the application of relator-appellant for said peremptory writ of mandamus to compel them to issue a permit for the erection of a gasoline and oil-filling station at the location indicated. The relator-appellant seeks to compel respondents-appellees to issue a

permit for the erection of a gasoline and oil-filling station at the southwest corner of Fifth and Ocean Avenues, in The Borough of Bradley Beach, New Jersey, which location is in a non-commercial zone under a zoning ordinance enacted by the Board of Commissioners of The Borough on December 11, 1923.

For many years prior to the passage of said zoning ordinance and continuously until the present time, relator-appellant's premises were used as public tennis courts for which a fee was charged. There was also sold on said premises during said period cigars, cigarettes and soft drinks, all in connection with the use of said premises as public tennis courts.

Across Ocean Avenue from relator-appellant's premises and to the east thereof, is the boardwalk and buildings erected on the plot lying between the easterly side of Ocean Avenue and the strand. The entire plot, together with the buildings erected thereon, is owned and controlled by The Borough of Bradley Beach, and the businesses conducted thereon are either conducted by the Borough itself or leased to various tenants for bath houses and the sale of refreshments and food to be immediately consumed upon the premises, and for the sale of articles used for recreational purposes. No stores for the sale of clothing, groceries, meats, provisions, automobile supplies or any other article or thing of purely a commercial nature, are permitted on this plot of land which lies between Ocean Avenue and the strand, but only such business is conducted thereon as is intended to promote the recreational and pleasure features of the beach and boardwalk.

The territory upon which said boardwalk and buildings are erected lying between the easterly side of Ocean Avenue and the strand is not within any zone, but has been used for recreational, pleas-

ure and bathing purposes for many years prior to the adoption of the zoning ordinance in 1923 and down to the present time.

ARGUMENT

POINT I.

The failure of the Borough of Bradley Beach to appoint a Board of Adjustment does not give the Relator-Appellant the right to erect a building for commercial purposes in a non-commercial zone, nor the right to conduct a commercial enterprise in a non-commercial zone.

Relator-appellant contends that because The Borough of Bradley Beach has never provided for the appointment of a Board of Adjustment, the zoning ordinance adopted by The Borough in 1923 is of no force or effect, and for this reason relator-appellant is entitled to erect a building or structure on his premises situate wholly within a non-commercial zone, and to conduct thereon the business of a gasoline and oil-filling station, even though the said ordinance provides that "no business, trade or industry of any sort or kind whatsoever shall be conducted or carried on" in a non-commercial zone (paragraph 4, page 20 S. C.)

The zoning ordinance of The Borough of Bradley Beach adopted on December 11, 1923, was adopted prior to the Constitutional Amendment of 1927, and the Enabling Act adopted by the Legislature in 1928, and at the time of the adoption by The Borough of Bradley Beach of its zoning ordinance, no Board of Adjustment was required.

Section 7 of chapter 274 of the Laws of 1928, at page 698, saves existing ordinances in the following language:

> "7. Existing Zoning Ordinances Saved. Whenever any municipality shall have

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

The zoning ordinance of The Borough of Bradley Beach is not *inconsistent* with the provisions of Chapter 274 of the Laws of 1928, commonly referred to as the "Enabling Act," but is fully in accord therewith. The members of the Legislature in considering this Act, and particularly with reference to section 7 thereof, no doubt had in mind that the various zoning ordinances passed by the various municipalities prior to consideration by the Legislature of the act, would not meet all the requirements of the provisions of the act, and they, no doubt, fully intended that where zoning ordinances or sections thereof, were not repugnant to the provisions of the act, all such ordinances should remain in full force and effect. This is indicated by the language of the act which expressly states that *all such ordinances shall remain in full force and effect, except insofar as they are inconsistent with the provisions of the Act* (Chapter 274 of the Laws of 1928, Sec. 7).

The argument of the relator-appellant that The Borough of Bradley Beach had no Board of Adjustment, and consequently for that reason relator-appellant is entitled to a permit for the erection of a gasoline and oil-filling station loses its force

in the light of the provisions of the Act of 1928. Certainly the zoning ordinance of The Borough of Bradley Beach is not repugnant to the Enabling Act of 1928, and it is respectfully submitted that the ordinance is in full force and effect.

Relator-appellant apparently confuses the term "inconsistent" as expressed in Section 7 of said Enabling Act. The ordinance of The Borough of Bradley Beach is not inconsistent with the Act, but possibly may not have exercised all the powers provided for under said Enabling Act in that it did not provide for the appointment of a Board of Adjustment. Certainly the failure of said ordinance to provide for a Board of Adjustment does not indicate that said ordinance is inconsistent with said Enabling Act of 1928.

If all zoning ordinances enacted before 1928, which fail to provide for boards of adjustment, or boards analagous thereto in character, clothed with the judicial power of the Board of Adjustment to review the granting and refusing all building permits, are to be adjudicated as inconsistent with said Enabling Act of 1928, then it is manifest that all ordinances passed prior to 1928, have no force or effect.

Respondent-appellant in his brief has cited several New Jersey cases wherein it appears that the ordinances did not provide for a Board of Adjustment, which, he argues, support his contention that the zoning ordinance of The Borough of Bradley Beach is void. Analysis of these cases, however, clearly indicate that the failure to appoint Boards of Adjustment in no way invalidate the zoning ordinances.

One of the cases cited and upon which respondent-appellant relies, is Smith v. Kearny, 6 Misc. 954. In that case the zoning ordinance of Kearny, which was adopted in 1922, provided for a zoning board of appeals. Inasmuch as the Act of 1924, and subsequent acts, repealed the provisions of the

zoning acts insofar as they related to zoning boards of appeals, said zoning boards of appeal were illegally constituted. In that case the zoning board of appeals overruled the decision of the Superintendent of Buildings of Kearny refusing to grant a permit for the erection of an apartment house. The Prosecutor applied for a writ of certiorari and the court held that the zoning board of appeals as constituted in April 1928, the date o fits decision, was illegally constituted, and consequently any decision of said board in overruling the Superintendent of Buildings, was null and void.

If the contention of the relator-appellant in the case at bar is correct, the Town of Kearny in the Smith case would have been obliged to issue a permit for the erection of said apartment building, because of the failure of Kearny's ordinance to provide for the appointment of a Board of Adjustment. The decision of the court, however, was diametrically opposed to the contention of the relator-appellant.

Another case cited by relator-appellant is that of Goldberg v. Mayor and Aldermen of Jersey City, et als, 6 Misc. 564. This case is not dispositive of the contention of the relator that the failure of Jersey City to appoint a Board of Adjustment automatically precluded Jersey City from enforcing its zoning ordinance.

That case was simply a question of procedure, whether or not certiorari or mandamus was the proper remedy to pursue upon the refusal to grant a permit. In that case it was stated that there was no Board of Adjustment in Jersey City or board analagous thereto in character, but the court did not for that reason hold that the zoning ordinance was invalid. On the contrary, the cases in this state clearly indicate that the lack of a Board of Adjustment under any zoning ordinance is no reason for the granting of a permit where said permit is in violation of a zoning ordinance.

In the case of Hansbury Construction Company, Relator, v. Jefferson D. Miller, et als, 6 Misc. 604, the court took cognizance of the fact that there was no Board of Adjustment, and notwithstanding this, the court failed to express any opinion as to whether or not a zoning ordinance adopted prior to the zoning act would be null and void because of the failure to create a Board of Adjustment. At page 605 the court said:

> "The power to issue a writ of mandamus is a discretionary one. We feel it would be an abuse of power for this court to direct a municipality to grant a permit for the erection of a building, the existence of which, if erected, has already been declared by legal authority to be improper for the safety of the community."

The foregoing case and the cases previously cited, are conclusive of the fact that it is not essential that a Board of Adjustment be in existence in order that a zoning ordinance enacted prior to the adoption of the Enabling Act of 1928 may remain in full force and effect.

In none of the cases cited *supra,* is there any criticism by the court of the fact that there were no Boards of Adjustment in the municipalities therein affected.

In the Smith v. Kearny case, supra, the court expressly states:

> "It must be kept in mind that after adoption of the amendment of the constitution respecting zoning, the legislative effort was to make such constitutional provisions effective and to protect the several municipalities in the benefits to be derived therefrom, and that such legislative effort was this act of 1928."

See also Koplin v. Village of South Orange, 6 Misc. Re., p. 489, affirmed by the Court of Errors and Appeals, 105 L. 492.

See also Durkin Lumber Co. vs. Fitzsimmons, 106 L. 183, at page 190, in which this Court said:

> "Section 3 authorizes municipalities to pass zoning ordinances within the larger field authorized by the constitutional amendment, and Section 7 merely saves the municipality from the unnecessary machinery of a re-enactment where there is an existing ordinance. Such ordinance is made to continue in effect as if * * * adopted under the provisions of this act.' It could not, certainly, be adopted under the provisions of the act prior to the passage thereof. For such extension of power and breadth as depends upon the statute the ordinance became effective contemporaneously with the statute, namely, April 3d, 1928, as though adopted on that date."

Respondent-appellees' maintain that even if a Board of Adjustment had been in existence in The Borough of Bradley Beach, the relator-appellant could not possibly have been granted any relief by said Board because relator-appellant's premises are not within 150 feet of the boundary line of any district in The Borough of Bradley Beach zoned for commercial purposes (see paragraph 18, p. 10, S. C.).

Paragraphs 2, 3 and 4 of Section 9 of Chapter 274 of Laws of 1928, prescribing the powers which the Board of Adjustment could exercise in the case sub judice show that such Board would be without power to grant a permit to relator-appellant, because of the fact that the premises of relator-appellant are not within 150 feet of the boundary line of a district in which such structure or use desired by relator-appellant is authorized

by the zoning ordinance, and, therefore, no Board of Adjustment would have the power to relax the provisions of the zoning ordinance of The Borough of Bradley Beach.

Under paragraph 4 of Section 9, the only province of such Board of Adjustment in considering the case sub judice would be to make such recommendation as they might see fit to the Board of Commissioners of The Borough of Bradley Beach, which recommendation the Board of Commissioners would not be obliged to adopt. The application of relator-appellant for a permit was presented to the Board of Commissioners of The Borough of Bradley Beach, and said Board refused to grant the permit for the reason that the granting of same would be in violation of the zoning ordinance of said Borough. Therefore, the only thing a Board of Adjustment could do, would be to make a recommendation to the Board of Commissioners, which already has passed upon said permit and refused to grant same.

Relator-appellant in his brief, argues, among other things, that his premises abut certain premises of The Borough of Bradley Beach which are not in any zone, either commercial or non-commercial. Certain portions of these premises referred to by relator-appellant, are operated by The Boough of Bradley Beach, and other portions are leased to various lessees. These premises constitute the bathing facilities and recreational features of said Borough. Moreover, relator-appellant's premises do not abut any of said premises of The Borough of Bradley Beach. Relator-appellant's premises are on the westerly side of Ocean Avenue, and the Boardwalk and other buildings referred to as belonging to The Borough of Bradley Beach are on the easterly side of Ocean Avenue (Paragraph 18, p. 10, S. C.).

POINT II.

Relator is not entitled to permit for the erection thereon of Gasoline and Oil-filling Station and the use of said premises as and for a Gasoline and Oil-filling Station because premises were devoted to a non-conforming use prior to the passage of the Zoning Ordinance in 1923.

Relator-appellant's premises have been dedicated to a non-conforming use for a long time prior to December 11, 1923, (the date of the adoption of the Borough's Zoning Ordinance) and ever since, in that they have been used as tennis courts open to the public for hire and for the sale to the public of cigars, cigarettes, refreshments and beverages (see paragraph 7, p. 6 S. C.)

Section 11 of the Enabling Act of 1928 provides for non-conforming building and uses as follows:

> "Any non-conforming use or structure existing at the time of the passage of an ordinance may be continued upon the lot or in the building so occupied, and any such structure may be restored or repaired in the event of partial destruction thereof."

Relator-appellant's premises are situated wholly within a non-commercial zone. The business conducted thereon is that of tennis courts in connection with which are sold cigars, cigarettes, tobacco, soft drinks and other refreshments for the accommodation of those persons who patronize the tennis courts.

Relator-appellant argues that because his premises have been used for commercial purposes, as stipulated in paragraph 7, p. 6 S. C. of the stipulation of facts, his premises can now be used for any commercial purpose whatsoever. Section 11 of

the Enabling Act of 1928, permits the continuance of any non-conforming use or structure existing at the time of the passage of the Zoning Ordinance. The statute has been interpreted to mean that the non-conforming use entitled to continue must have been in existence at the time the statute became effective (April 3, 1928), and not when the original Zoning Ordinance was passed (Durkin Lumber Company vs. Fitzsimmons, 106 L. 183, Court of Errors and Appeals). The court said at page 189 of the Durking Lumber Company case, near the bottom of the page:

> "With respect to the construction of buildings the rule was established in *Rohrs* vs. *Zabriskie,* 102 Id. 473; and approved in *Koplin* vs. *South Orange,* 6 N. J. Misc. R. 489, that a writ of *mandamus* being discretionary, there can be no vested rights that control the exercise of that discretion, unless a permit is issued and work is actually commenced thereunder. Recognizing that the granting of a permit and the subsequent beginning of work thereunder do clothe the owner with certain rights against municipal interference this court very recently, in two instances, refused a municipality the privilege of revoking a permit theretofore given. Saline Freeman vs. Frank Hague et al.; Lehigh Valley Railroad Company vs. Mayor and Aldermen of Jersey City et al. It seems that a logical application of the same principle is to recognize the right to continue, as against subsequent zoning interference, a use that was actually instituted, that was lawful when instituted and that has been actively and constantly maintained. We consider that the statute does precisely that."

In the instant case a gasoline station or a similar business or commercial use has never been con-

ducted on or made of relator-appellant's premises, and while Bradley Beach is zoned into "commercial" and "non-commercial" zones, nevertheless it certainly cannot be said that because tennis courts are being operated or conducted on relator-appellant's premises as a non-conforming use and may be considered as a commercial business or enterprise, that the character of that commercial business or enterprise can be so changed that a gasoline and oil filling station can be conducted thereon under the original and preexisting non-conforming use as contemplated under the provisions of Section 11 of the Enabling Act of 1928.

It is relator-appellant's contention that under the Zoning Ordinance of Bradley Beach and Section 11 of the Enabling Act of 1928 that because relator-appellant's premises may now being used or devoted to a commercial use or purpose that his premises can be used for any commercial use or purpose whatsoever. He argues that a drug store could be erected and conducted thereon. He attempts to draw an analogy between a man operating a factory in Bradley Beach manufacturing pajamas as a previously existing non-conforming use and one who manufactures overcoats, shoes, golf sticks, cigars or soap.

Manifestly, respondents-appellees are not confronted with such a situation. Relator-appellant's property is now being used and has for some time past been used for tennis courts and now he wishes to change the character of the business to be conducted thereon to that of a gasoline and oil-filling station. If he can conduct a gasoline and oil filling station thereon, then can it be said that he could not erect and conduct thereon a garage, a saw mill or some other business of a similar nature.

Respondent-appellees maintain that Section 11 of the Enabling Act of 1928 means that the specific use to which the property had been put prior to the

adoption of the Act can be continued thereon, but that the premises cannot be put to a use different from that to which the premises had been previously devoted. (See Durkin Lumber Company vs. Fitzsimmons 106 Law p. 183.) (See also Provident Institution for Savings vs. Castles 168 Atl. p. 169.)

POINT III.

A Gasoline and Oil-filling Station is such a business that it has been held to be the subject or regulation under the Police power.

The use of relator-appellant's premises in a highly residential neighborhood (see exhibits 7 to 13, S. C.) would bring into the neighborhood extra hazards by reason of the combustible and inflammable materials and commodities which would naturally be sold and dispensed at a gasoline and oil-filling station. The neighborhood is devoted to private dwellings, some small boarding houses, and one large hotel. Relator-appellant's premises are situate on the west side of Ocean Avenue and the south side of Fifth Avenue. The beachfront, bath houses and refreshment stands owned and controlled by The Borough of Bradley Beach, are located on lands of the Borough situate on the east side of Ocean Avenue and across Ocean Avenue from relator-appellant's premises.

Bradley Beach is a seashore and summer resort where thousands of persons come for pleasure and recreation during June, July, August and September in each year. Ocean Avenue, the street upon which relator-appellant's premises front, is one of the two main thoroughfares running through The Borough of Bradley Beach, and a large number of the residents, guests and visitors of Bradley Beach make use of Ocean Avenue in going to the beachfront and returning therefrom. During these summer months, Ocean Avenue and Fifth Avenue,

which intersects Ocean Avenue at right angles thereto, where relator-appellant's premises are situate, is highly congested with traffic. Many automobiles make use of these streets, and on Saturdays and Sundays during the summer season, automobiles are parked solidly along both sides of Ocean Avenue and on both sides of Fifth Avenue and the other Avenues running east and west for almost the entire block nearest to the ocean. Pedestrians make use of the sidewalks both on Ocean Avenue and on Fifth Avenue, and will be interfered with and endangered by automobiles passing to and fro over the sidewalk between the street and the filling station if it is permitted to be erected upon relator-appellant's premises. These conditions would make it extra hazardous for pedestrians to make use of the sidewalks at this location, and would endanger persons using the highway with automobiles because of the fact that automobiles would naturally be passing from the street to the filling station through traffic and return again after having been served at the gasoline and oil-filling station. Noises, which naturally would be incident to the changing of tires and minor repairs to automobiles, would tend to disturb the peace and quiet of the neighborhood.

In the case of Hall v. Mayor and Aldermen of Jersey City, 6 Misc. Rep. p. 558, the Supreme Court said at page 559:

> "It is a matter of common observance that the crossing of sidewalks by motor cars for the purpose of being served by gasoline stations, or for any other purpose, is an added danger to the pedestrian who is entitled to the free use of the public sidewalk."

In the case of Interstate Oil Co. v. City of Orange, et al, 165 A., p. 99, 11 Misc. 89, the court said:

> "The permit having then been finally refused, prosecutor on December 17, obtained

this rule to show cause. We are now asked to make it absolute, in the face of an ordinance clearly within the general police power as regards the public safety, in embryo at the time the relator corporation was organized and passed a month before this application was made. A gasoline station is not merely a fire risk, and within the police power in that regard (see Neumann v. Hoboken, 82 N. J. Law 275, 82 A. 511), but it is recognized as a danger to pedestrians entitled to use the sidewalks, when so arranged, as is generally the case, as to require cars to cross the sidewalk when entering and leaving. Hall v. Jersey City, 142 A. 344, 6 N. J. Misc. 558; Ninth Street Improvement Co. v. Ocean City, 90 N. J. Law 107, 109, 100 A. 568. When this writ was applied for, the ordinance was an accomplished fact, and if it does not indeed bar the action of this court, it would be an abuse of our power to disregard it. Koplin v. South Orange, 142 A. 235, 6 N. J. Misc. 489, affirmed 105 N J. Law 492, 144 A. 920. In the case of A. G. Construction Co. v. Scott, 104 N. J. Law 596, 141 A. 760, mandamus proceedings had been begun before the constitutional amendment permitting zoning had been adopted. This case is not in that class for the very obvious reason that the police power exists here as a matter of common law, and had been exercised before the first court move was made."

Under the authority of the Interstate Oil Co. v. City of Orange, *supra,* The Borough of Bradley Beach did not exceed its power and authority in adopting its zoning ordinance under which it refused the relator-appellant a permit to erect a gasoline and oil-filling station within the zone designated as "non-commercial," and even though its ordinance did not create or provide for a Board of

Adjustment, the Borough had authority under its police power delegated to it by the Legislature to refuse to grant such permit.

In the case of Bouer, Relator, v. Mayor and Aldermen of Jersey City, et al, Respondents, 6 Misc. 519, a writ to compel Jersey City to permit erection of an ornamental drive-in gasoline station was denied. The Supreme Court said at page 519:

> "It is stipulated that the premises in question were zoned by the zoning ordinance of Jersey City 'as a residential district,' and apparently the application was denied because it was in conflict with the provisions of the ordinance, and also on account of increased fire hazards."

CONCLUSION

Neither the failure of the Borough of Bradley Beach to create a board of adjustment, nor the commercial use of Relator-appellant's property as tennis courts prior to the adoption of Respondents-appellees' ordinance in 1923, entitles the Relator-appellant to the permit sought. For these reasons, and for the further reason that the business sought to be conducted on Relator-appellant's premises is that of a Gasoline and Oil-filling Station, which is an extra hazardous business and dangerous to the inhabitants of the community and to pedestrians who are entitled to the free use of the public sidewalk, which extra hazardous business the Borough of Bradley Beach has authority to regulate under its police power, the judgment of the Supreme Court should be affirmed and Relator-appellant's application for peremptory writ of mandamus denied.

Respectfully submitted,
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with Respondents-Appellees.

On the Brief,
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New Jersey Court of Errors and Appeals

THOMAS F. SOMERS, JR., Trustee under the last will and testament of Thomas F. Somers, deceased, *Relator-Appellant,* *vs.* THE BOROUGH OF BRADLEY BEACH, NEW JERSEY; FRANK C. BORDEN, JR., BERNARD V. POLAND, and JOHN ROGERS, Board of Commissioners; and WILLIAM P. MEGILL, Inspector of Buildings, *Respondents-Appellees.*	*On Mandamus.* *On Appeal from Supreme Court.*

REPLY BRIEF OF APPELLANT.

Statement.

Appellees' brief contains references and excerpts from a number of cases, to substantiate the refusal of the building permit to Somers. A reading of these excerpts may prove misleading and confusing if not considered with the context of the opinions from which the excerpts are taken. A brief reference to the facts in these cases will show that these cases do not sustain the position maintained by appellees but are actual authority for the arguments propounded by appellant in his main brief.

Reply to Point I in Respondents' Brief.

Smith v. *Kearny,* 6 Misc. 954.

Appellant cited this case in its main brief in support of the proposition that the failure of the Borough of Bradley Beach to appoint a Board of Adjustment in accordance with the legislative mandate contained in P. L. 1928, 696, was fatal to the enforcement of its zoning ordinance. Appellant still maintains that the case is authority for that proposition. Appellees in their brief on page 6, say:

> "If the contention of the relator-appellant in the case at bar is correct, the Town of Kearny in the Smith case would have been obliged to issue a permit for the erection of said apartment building, because of the failure of Kearny's ordinance to provide for the appointment of a Board of Adjustment. The decision of the court, however, was diametrically opposed to the contention of the relator-appellant."

Appellees' analysis of the holding of that case is illogical. Appellees say that the Supreme Court would not order a building permit to be issued to the land owner whose property was the subject of the litigation, and that therefore the case is authority for the proposition that the appointment of a Board of Adjustment is not essential to the enforcement of the zoning ordinances.

The issue of the building permit was not directly brought before the Supreme Court. The only matter litigated was the propriety of the zoning board of appeals appointed under an act specifically repealed by the 1928 Act. The Writ of Certiorari brought up before the Supreme Court for review only the action of a defunct zoning board of appeals which had directed the

issuance of a building permit after the previous refusal by the Building Inspector in the first instance. Whether the particular property owner subsequently procured a building permit from the Town of Kearny for the reasons urged by appellant in this case—that the failure to appoint a Board of Adjustment, rendered the zoning ordinance unenforcible—does not appear. In the proceedings then before the Supreme Court on certiorari, no decision could have been rendered directing a permit to be issued. The Supreme Court could merely affirm or set aside the proceedings of the Statutory Body then under review. The Court did set aside the proceedings of the defunct Zoning Board of Appeals on the theory that since the 1928 Act was effective, the only tribunal which could review the acts of Building Inspectors, or could vary zoning ordinances, would have to be one appointed in strict accordance with the provisions of the 1928 Act.

Koplan v. *South Orange,* 6 Misc. 489.

The right to a review of an appeal to a statutory tribunal—Board of Adjustment—prior to resorting to the Courts for relief was not involved in this case. The principal question before the Court was whether a land owner, having obtained a Rule to Show Cause (prior to the passage of the 1928 Act) why a Writ of Mandamus should not issue directing the issuance of a permit, was entitled to his Writ after the passage of the 1928 Act. The Court held that inasmuch as no legal rights had vested prior to the passage of the statute, there was no obligation on the Court to order the permit to issue.

The question of the unenforcibility of the zoning ordinance because of the failure to appoint a Board of Adjustment, was not before the Court

by the pleadings, nor was it considered by the Court.

Appellees state on page 9 of their brief that Somers' property does not abut, nor is it within 150 feet of a zone where the proposed use is permitted under the zoning ordinance. Both parties admit that the property on the east side of Ocean avenue directly opposite Somers' property is unzoned (S. C. 10, Stip. par. 18). This unzoned area is specifically excepted from the rigorous restrictions of the zoning ordinance by virtue of the provisions of paragraph 8 of the Borough Zoning Ordinance (S. C. 21, l. 37). Somers' property extends to the center line of Ocean avenue. The property directly across the street likewise extends to the center line of Ocean avenue. *Somers' property therefore immediately abuts this unzoned area* in which there is no restriction whatsoever, upon the uses to which this property may be put. Appellees' statements that appellant's property does not abut or is not within 150 feet of an unzoned area, is directly contrary to the 16th paragraph of the Stipulation of Facts (S. C. 9, l. 16).

Appellant contends that the references to the cases in appellees' brief do not substantiate their theory of the case. Appellant has argued in his main brief that the failure to appoint a Board of Adjustment prevents the Borough from enforcing the restrictive provision of its zoning ordinance.

If the cases already cited were not sufficient authority to support this position, appellant begs leave to refer to a few additional decisions which emphasize just as strongly, the mandatory provision of the 1928 Act, with respect to appointing a Board of Adjustment. In referring to such

a statutory tribunal, Vice-Chancellor Berry, in *Ostrowsky* v. *Newark,* 102 N. J. Eq. 169, said:

> "One of the purposes of this legislative enactment was to provide a special tribunal for reviewing acts of officers charged with the duty of issuing building permits without resort in the first instance to courts of law, and thus to insure prompt correction of errors which otherwise would be impossible because of the numerous delays incident to technical procedure in the courts."

The effect of his decision in dismissing an application for an injunction to restrain the City of Newark from interfering with progress under an ill-advised building permit, was a recognition that adequate relief could be had by the complainants by an appeal to the Board of Adjustment of the City of Newark. In the case at bar, appeal to a Board of Adjustment was denied appellant. This deprivation of an appeal to a statutory tribunal composed of men holding no other position in the municipality and which could exercise a discretion based upon a consideration of all circumstances in the case was a deprivation of a substantial right invalidating the effect of the zoning ordinance.

Before this statutory tribunal, appellant could have produced evidence showing unnecessary hardship, which he sustains by virtue of a literal enforcement of the zoning ordinance, and in all likelihood could convince this Board, composed of practical business men, to vary the rigorous provisions of the zoning ordinance as it affected his property and yet maintain the spirit of the ordinance.

In *Schumacher* v. *Union City,* 9 Misc. 492, an application for a permit for a gasoline station was denied by the Building Inspector. The appli-

cant took an appeal before the Board of Adjustment. The Board of Adjustment recommended to the governing body that the zoning ordinance be modified to permit of such a use on the applicant's property. The Court refused to direct the issuance of a building permit because the application to the Board of Adjustment had been made under the wrong subdivision of Section 9 of the 1928 Act. The premises in question were within 150 feet of an area where the prohibited use was permitted. The applicant should have applied for a variance of the zoning ordinance by the Board of Adjustment itself, rather than for a recommendation by the Board of Adjustment to the governing body to have the zoning ordinance changed.

In disposing of the matter and in affirming the necessity of exhausting remedies before the Board of Adjustment, the Court held:

> "To sum up the situation, while we think there is much that can be said respecting the unreasonableness of the zoning ordinance respecting this particular plot and the block in which it is situated, nevertheless we think the writ applied for should not be granted for the reason that we think the clear legislative purpose, and a reasonable and proper one, is *that this court should not be called upon to review such ordinances until proper and sufficient appeals have been passed upon by boards of adjustment.*
>
> This clearly was not done here, and we think the applicant should be left to his remedy by proper proceedings upon proper notice to the Board of Adjustment after a new application to the building inspector and city commissioners under the building code and zoning ordinance" (154 Atl. 408).

In *Allen* v. *Paterson,* 99 N. J. L. 532, application was made by a property owner to a Board

of Zoning Appeals (prior to the 1928 Act), to have the rigor of the zoning ordinance released to permit him to build a garage for personal use upon his residential property. The zoning ordinance would have prevented this. Other property owners in the neighborhood had had the foresight to build their garages prior to the passage of the zoning ordinance. The Zoning Board of Appeals recommended a variance of the zoning ordinance to permit the erection of the private garage. Neighborhood property owners reviewed this action by certiorari. In commenting upon the functions of a Board of Adjustment, the late Justice Minturn said:

> "The power to pass the modification of the zoning ordinance was thus apparently conceded by the Legislature, and this power, in the absence of direct legislation, may be exercised by resolution, by the ministerial or administrative body to which the power was confided by the local lawmaking body. Harcourt *v.* Asbury Park, 62 N. J. Law 158, 40 Atl. 690.
>
> This concession of power in the Board of Public Works necessarily reposed in them or their ministerial subordinates, *a discretion which they might exercise in the interests of justice and fair play to property owners,* who by reason of previously acquired locations, or the peculiarity of their situations, might be deprived under the general prohibition of the ordinance of the absolute right of a property owner to employ his property for such uses as might not be inconsistent with the public rights, and not incompatible with the proper and legal enforcement of the letter and spirit of the ordinance. Any other construction of the act and the ordinance, apparently in the legislative view, would be tantamount to the deprivation of the property rights of the citizen without due process of law" (121 Atl. 611).

This case amply bears out appellant's contention throughout, that depriving him of his application to a Board of Adjustment to vary the zoning ordinance, is depriving him of a substantial right and nullifies the effect of the zoning ordinance.

The necessity of having a Board of Adjustment which may carry out the statutory guaranty to the owners of the property, subject to a zoning ordinance, is recognized in a Rhode Island case, *Richard* v. *Board of Review of Woonsocket,* 129 Atl. 736. In that case, a property owner appealed to a Board of Adjustment to review the refusal of the Building Inspector to grant a permit. The Board of Review tabled the appeal indefinitely. The Supreme Court of Rhode Island held that the tabling of the appeal indefinitely amounted to the denial of the right of appeal guaranteed to the property owner by the Statute. The proceedings before the Board of Review were quashed and the record remitted to be proceeded with in accordance with law.

The strong language of the Court indicates the manner in which Rhode Island treats the denial of a statutory right of appeal:

> *"Their vote to table the appeal indefinitely was equivalent to denying the appeal.*
>
> The statute relating to the procedure of the board of review in hearing appeals above referred to is so clear and simple that it does not require construction or interpretation. The requirements of the statute as to notice and hearing must be complied with by the board of review before they can decide an appeal. In the petitioner's case they have not done so.
>
> The record of the board of review, voting to table indefinitely the appeal of the petitioner from the decision of the inspector of

> buildings is quashed. The record certified to this court is returned to said board of review for further proceedings in accordance with law'' (129 Atl. 736).

To the same effect, see *Heffernan* v. *Zoning Board of Review of the City of Cranston, R. I.,* 142 Atl. 479.

The inability of the Court to substitute itself for the statutory tribunal of a Board of Adjustment contemplated by the 1928 Act, is apparent by observing the refusal of the Courts to substitute their judgment for the judgment of another body fixed by contract.

Reference is here made to *Goerke Kirch Company* v. *Goerke Kirch Holding Company,* decided by this Court on February 4, 1935. In that case the landlord and tenant had agreed that the fair, minimum, net, annual rental under a lease for a five-year period was to be fixed by arbitration before a board of arbitrators composed of three members of the Elizabeth, New Jersey, Real Estate Board selected by the president of that Board. An award was made by the arbitrators, but it was set aside because the arbitrators had acted illegally. By that date, the time within which the arbitration was to have been completed, had expired and no further arbitrators could be appointed. Application was made to the Court of Chancery to fix the fair rental for the period. This was done in the Chancery Court, but on appeal, the decree of the Chancery Court was reversed on the ground that the Court was without jurisdiction. This Court held that when the parties to the lease stipulated that the fair, minimum, net annual rental was to be fixed by members of the Elizabeth Real Estate Board, there was no other body in contemplation of the parties equally qualified to perform that duty.

Justice Heher, writing the opinion of this Court, said:

> "The tenant was apparently a victim of the current trade depression, and the agreement in question was devised to effect a financial rehabilitation, and to enable it to continue business. In the existing abnormal circumstances, it was deemed the part of prudence to have the rental determined by real estate experts of the vicinage chosen not by the parties, but by the Chief Executive Officer of the local real estate board."

The result of the dismissal of the bill in Chancery was that the entire arbitration agreement had failed. Inasmuch as arbitration before a group contemplated by the arbitration agreement could not be performed, the Court was without power to substitute its knowledge for the specialized knowledge of the men of Elizabeth.

The logic of this opinion is irresistible if applied in supporting the contention urged by appellant. Neither this Court, nor the Supreme Court could substitute their opinions for the opinion of a Board of Adjustment, who would be composed of men of the vicinage, and before whom appellant could have produced testimony and arguments to vary the zoning ordinance. The discretion which that Board might have exercised, is very different from the action which this Court or the Supreme Court would take. The denial to appellant of his review before such a tribunal, deprived him of his right guaranteed by the Statute. This deprivation of a right of appeal—additional to resort to the Court—is fatal to the enforcement of the Borough Zoning Ordinance.

Reply to Point III in Appellees' Brief.

Appellees attempt to justify their position on the theory that the refusal of the permit to appellant is within the proper exercise of the police power of the Borough. The answer to this contention is two-fold.

First, the denial of the permit in the first instance was not based upon the exercise of the police power of the Borough, but upon the non-conformity of the proposed use to the Zoning Ordinance of the Borough. Having rested the refusal of the permit upon this sole ground, respondents are not permitted at this late date, to urge a new reason for denying a permit to appellant.

This proposition is recognized in *Hirschorn* v. *Castles,* 113 N. J. Law 277, where, upon an application for a gasoline permit, the municipality urged before the Supreme Court for the first time, that the applicant's interest in the land was not such as entitled him to a permit. In disposing of this contention adverse to the municipality, Justice Heher said:

> "Respondents urged for the first time on the argument that relator's interest in the lands in question is not such as to entitle him to the permit sought. The denial of the permit was not rested upon this ground, and it is not set up by way of justification, or otherwise, in the return. In the circumstances, respondents are not entitled to have it considered here. Compare Reimer *v.* Dallas, supra. Such a rule is a primary requisite to orderly and just procedure.
>
> The demurrer will therefore be sustained, and a peremptory writ of *mandamus* awarded."

Second, appellees have not reserved unto themselves by the passage of an ordinance, the right to regulate the number and location of gasoline stations within the Borough limits. Without the reservation of such power, the Borough may not rely for the refusal of a permit to appellant, upon the claim of a proper exercise of police power. In the *Hirschorn* case (*supra*), Justice Heher adverted to the right of a municipality to regulate the number and location of gasoline stations but stated that the right of such control would have to be reserved by such municipality. The only method of reserving this right is by the passage of an ordinance setting forth the reservation. Bradley Beach has not reserved unto itself the right to control the number or location of gasoline stations.

The language of Justice Heher was:

> "We are not to be understood, by the citation of this line of cases, as challenging, by implication, the power of the municipal governing body to reserve, in the exercise of the authority *conferred by the Zoning Act* (*Pamph. L. 1928, p. 696*) control over the number and location of gasoline service stations in the zones in which they are not prohibited by the terms of the zoning ordinance. It may well be that, due to the traffic, fire and other hazards incident to the operation of such stations, this use is subject to special regulation. *But there was no such reservation of control in the instant case,* and we are not, therefore, required to pursue the matter further."

Appellees have cited to support their contention that the refusal of a permit for a filling station is within the regulatory powers of the Borough under its police power, the following cases. *Hall* v. *Jersey City,* 6 Misc. 558; *Inter-*

state Oil Co. v. *Orange,* 11 Misc. 89; and *Bouer* v. *Jersey City,* 6 Misc. 519.

In each of these cases there was a distinct ordinance reserving to the municipality the right to control the number and location of filling stations or an ordinance (amounting to the same thing) requiring applicants to obtain consent from the governing body before obtaining a permit for a filling station. Bradley Beach has provided for no such reservation. Therefore, it is improper to base the refusal of the permit to Somers upon the exercise of the police power of the Borough.

Respectfully submitted,

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February 1935, Term.

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On the Brief.