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New Jersey Court of Errors and Appeals

E. & M. Land Co.,
Prosecutor-Appellee,

vs.

The Board of Adjustment of the City of Newark, N. J., and Frederic Bigelow, Superintendent of Buildings of the City of Newark,
Defendants-Appellants.

On Certiorari.

(Custer Place.)

On Appeal from Supreme Court.

BRIEF OF DEFENDANTS-APPELLANTS.

This is an appeal from a judgment of the Supreme Court setting aside the action of the Board of Adjustment in affirming the refusal of the Superintendent of Buildings to issue a permit to the prosecutor to erect a building of non-fireproof construction, three stories in height, at No. 10 Custer Place, in the City of Newark, New Jersey, which building is designed to be occupied as a tenement house for 12 families.

The contemplated building violating the provisions of the Zoning Ordinance of the City of Newark, the Superintendent of Buildings rejected the application. Thereupon, the applicant applied to the Board of Adjustment for a variation of the ordinance so as to permit of the construction of its proposed building, which application, after hearing had and testimony taken, was also denied. The applicant now seeks to review this action of the Board.

The building violates the ordinance in that it exceeds the height of buildings permitted in the

section in which it is planned to erect the building; in that it violates the area provisions of said ordinance, and in that the number of families to be housed in the building creates a maximum congestion of over four times that permitted by the ordinance.

The Board also found, according to its resolution, paragraphs M and N, page 13 of the State of Case, that the non-fireproof construction of the building constituted a fire menace and that the structure violated the Building Code of the city with respect to the provisions for stairways and constituted a real hazard from this standpoint.

The Board also found, as will appear from its said resolution, that the property upon which it is desired to build the tenement house in question is part of a tract of land extending from Renner avenue on the north to the county line on the south, and from Elizabeth avenue on the east to Bergen street and the line paralleling it on the west, which was laid out as restricted property about twenty years ago, restricted to one, and on a few streets, to two-family houses. That the City of Newark planned and developed its water, sewer, streets, police and fire facilities in accordance with the planned and proposed restricted residence development; that the tract had been developed in accordance with the original plan, and all but about 200 lots of the 700 or more contained in the development built upon in accordance with the restrictions; that upon a part of the tract the restrictions have expired and that while the water, sewer, fire and police facilities are adequate for present needs and to the development of the tract in accordance with the original plan, the variance of that plan by permitting the erection of tenements throughout

the tract would result in undue strain upon the aforementioned facilities and require extensive and costly expansion; that buildings of this kind in a neighborhood like the one in question would seriously interfere with the health, safety and welfare of the community.

These findings were based upon testimony of experts and others taken under oath before the Board.

The prosecutor also filed an application for a permit for the erection of a building at Nos. 459-461 Elizabeth avenue, in the City of Newark, which building is designed to be occupied as a tenement house for 12 families.

Loretta Realty Company filed an application for a permit for the erection of a building of non-fireproof construction, three stories in height, at Lyons avenue and Porter Place, in the City of Newark, New Jersey, designed to be occupied as a tenement house for 40 families.

It is stipulated (State of Case, p. 81), that the State of Case and Briefs to be used in this argument may also be used in the cases affecting Elizabeth avenue, and counsel for the Loretta Realty Company has also stipulated that the facts in the case of E. & M. Land Company, *vs.* The Board of Adjustment of the City of Newark, New Jersey, *et al.*, be considered as part of the record in the case where the Loretta Realty Company is prosecutor.

It is respectfully requested that this brief be used as if it had been filed in each of the above cases.

ARGUMENT.

The question of the right of a municipality to zone its territory is one of not only vital but general interest on the part, not only of the municipal authorities but of the people generally. The interest of the people is not to be wondered at, involving as does the question of zoning the life or death of carefully planned and constructed residence and home communities, the destruction of values in the interest of more or less selfish interlopers. Nor is interest in the question limited to New Jersey. The interest is nation-wide and the decision of the questions involved by no means unanimous. In recent decisions the Courts of New York and Ohio both upheld zoning laws as a valid exercise of the police power, adopting a broad-visioned interpretation of the meaning of public welfare, and following similar interpretations and findings in many other states.

These decisions, of course, cannot govern in view of the different result arrived at by our Courts and would not be adverted to at all save for the facts that it is conceived that our Courts have not yet decided a case such as the one involved in the present issue, and except for the fact that, as the defendants understand it, each case of zoning stands upon its own facts.

In other words, each zoning case is being disposed of upon its own particular peculiar facts and no widespread sweeping principle has as yet been enunciated which could be automatically and conclusively applied to all other sets of facts as a solution thereof.

For instance, it is true that the Supreme Court and the Court of Errors and Appeals on different grounds hold that a store in Nutley

could be constructed in a residence district, but neither Court decided that any kind of a store could be erected in any kind of a residence district. All either Court decided was that *that* store could be erected in *that* district. Had it appeared that that store was in fact a saloon, the result would have been quite different, and it would not have been quite different simply because of prohibition, but because the facts would then have shown that such a store would be inimical to the health, safety and welfare of the adjoining community. So again, had it appeared that the store proposed would sell dangerous or inflammable materials, or would otherwise be dangerous to health or safety, the result would have been different. Again, regulations of the city prohibiting the erection of garages, public garages, in residence sections have been upheld, while in other instances where a number of private garages were to be erected, the Court has decided differently.

To state it in other words, at least as matters now stand, each case must be decided upon the particular facts involved and tested by the rule governing the application of the police power, to wit, will the proposed edifice interfere with the health, comfort, safety or welfare of the community? The right of a man to use his property as he sees fit is limited by the right of society, through the exercise of the police power to interfere with such use of property by the individual where it endangers or threatens the public safety, health, comfort or welfare. And our zoning legislation is a delegation of power to the municipalities to exercise such police power. Certain methods of its exercise have been prescribed by the statute and the Courts have held that the machinery so set up

must, at least in some cases, be availed of prior to application to the Courts.

As a consequence the applicant here having been denied his permit by the Superintendent of Buildings, availed himself of the machinery provided by statute and appealed to the Board of Adjustment. Having availed himself of the machinery, he must comply with it, and the statute gives only the following jurisdiction to the Board:

> "(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 this act or of any ordinance adopted pursuant thereto.
>
> (2) To hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance.
>
> (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."

It must be quite evident that upon the appellant rests the burden of establishing his claim to the permit.

In *Portnoff* v. *Bigelow,* Vol. 4, No. 25, N. J. Advanced Reports, page 539, the Supreme Court held:

> "Relators' claim is, and must be, that the provisions of the zoning ordinance, so far as the same affect the property in question, are an unreasonable exercise of the police power. A zoning ordinance, like other ordinances, may be reasonable in

> some aspects and unreasonable in others. The presumption is that it is reasonable, and the burden of proving it otherwise is on the prosecutor. Neumann *v.* Hoboken, 82 *Id.* 275, 278, and cases cited; Hench *v.* East Orange, 2 N. J. Mis. R. 510."

Under which of the three subdivisions is his appeal taken? So far as the testimony and records show, he did not specify the grounds of his appeal, as required by the statute, Chapter 146 of the Laws of 1924, page 327.

It is quite evident that the appeal was not taken under Section 1, for the Superintendent of Buildings, in denying the permit under the Zoning Ordinance, instead of committing an error, was doing what the ordinance required. It is conceivable that, in enforcing the ordinance, a subordinate official may make an error in determining what the ordinance means, but that is not this case, since the application was for a permit to erect a many-family tenement in a residence district, something clearly and definitely prohibited by the ordinance. The jurisdiction given by paragraph 1, therefore, is not that of which the applicant apparently avails himself.

Paragraph 2 gives the Board the power to hear and decide special exceptions to the terms of the ordinance upon which such Board is required to pass under such ordinance. Clearly, the appeal is not taken under this section, for the Board of Adjustment is not by this section given authority to destroy the ordinance.

We then come to Section 3, the last and only section under which any jurisdiction would exist to hear this appeal. That section permits the Board, in specific cases, to authorize "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." Not one scintilla of evidence was produced by the applicant either to bring himself within the two preceding paragraphs or to bring himself within the benefits of this paragraph.

The burden was upon the applicant to show, in order to justify the desired variance:

1. That such variance would not be contrary to the public interest.

2. That owing to the special conditions a literal enforcement of the provisions of the ordinance would result in unnecessary hardship, and

3. That the spirit of the ordinance would be observed and substantial justice would be done by granting this permit.

We repeat that no evidence was offered by the applicant to bring himself within the equities of this provision. On the contrary, the papers sent up by the Superintendent of Buildings, and which, with the plans constituted the entire case of the applicant, on their face showed that it would be contrary to the public interest to grant this permit; no special hardship would result if the permit were denied; and neither the spirit of the ordinance would be observed nor substantial justice done if the permit were granted. This, of itself, is seems to us, is enough to deny the relief which this applicant seeks. *The validity of the ordinance was recognized by him, and he sought equitable relief under it, and yet he failed to offer any evidence to justify the grant-*

ing of such relief. In its absence, therefore, we respectfully submit that the Board could not do anything else but sustain the findings of the Superintendent of Buildings.

But, over and beyond this, the objectors went ahead, while insisting that the applicant should offer testimony that the building would not affect the public welfare, &c., and offered abundant evidence to demonstrate that the applicant was not entitled to the benefits of the variance claimed. It is submitted that not only was it shown that the city, in restricting this particular section to residence development properly exercised its police power, but that the Superintendent of Buildings, in carrying out the ordinance as he did in this case was duly and properly exercising the police power, and, finally, that the evidence demonstrated clearly and plainly that it would be contrary to the public interest, to the spirit of the ordinance and to substantial justice, to grant the permit, while no hardship would result in its denial. Moreever, the moving papers to the Board distinctly prayed for a variation of the ordinance.

No case, we feel safe in saying, has been presented to the Courts exactly like the instant case. The testimony shows that over twenty years ago a farming section of our city was laid out for a residence development; that such territory ultimately extended from Meeker avenue on the north to practically the city line on the south, and from Elizabeth avenue on the east to beyond Bergen street on the west, and with subsequent other developments, now to Clinton Place; that this development was for one and two family residences on substantial size lots, with ample air space, a development distinctly uncongested, with limited fire hazard,

attracting a class and type of people requiring but limited police protection; that in the years succeeding this sane, sanitary, healthful, non-hazardous development, five hundred or more houses of the type required by the building restrictions governing the tract were erected, and are now occupied; that the restrictions on part of this territory have expired, while on a good part of the tract the restrictions have some years to run; that so successful was this development that five hundred out of the seven hundred lots have been built upon, leaving about two hundred lots, distributed throughout the tract, open for possible adverse development. It, therefore, appears that a number of these lots are probable tenement house sites, and since the filing of the first application for a tenement permit in the section in question many other applications have been filed.

It was shown that the city, with commendable far-sightedness, recognizing the benefits which its citizens would acquire as the result of a restricted development such as proposed, followed in the wake, if not in the lead, but certainly keeping pace with the said development, in the laying of water and sewer facilities appropriate to the type of development, in laying water and sewer pipes fit for use in a residence section, that they had proceeded in developing governmental facilities of this kind having in mind the uncongested character of the neighborhood and that eventually it would be built up with one and two family houses and never having in mind such a congested development as would result, if apartment houses were permitted in this section.

It was further shown that as with the water and sewer facilities, so with the fire facilities,

they, too, had been in accord with the character of the development; that the same size and character of fire facilities are not required in a section of this kind as would be required in a tenement house section, or an otherwise congested center; that the present territory of the existing firehouse in this section is very wide and broad and must be increased measurably, both in the number of men, the number of firehouses, the number and character of hydrants and type and character of water pressure, if the character of this residence section is to be changed.

Moreover, it was shown that the water and sewer facilities, while adequate for the old contemplated development, would soon have to be increased if the character of the development was to change and apartment houses were to be erected throughout the community; that to accomplish such changes would mean the tearing up of pavements, the laying of new pipes, all at considerable expense, considerable inconvenience, considerable discomfort and the necessary increased danger to people in the use of streets and in the use of their homes, while wholesale changes of this kind are made.

Furthermore, it was shown that the water pressure, while adequate at present, could soon be made inadequate both in the use in the home and in the use for fire purposes by the erection of many-family edifices on lots planned for single families.

Beyond this it was shown that tenement houses of this character constitute fire hazards far in excess of the neighboring dwellings in this section. The Board had the testimony of the expert, Chief Fisher, who, with great detail,

demonstrated why edifices of this kind are considered, by the men who know, fire fighters, dangerous from the standpoint of fire and fighting fire. He told of the many cellars with their many family accumulation of rubbish. He told of the extra lighting, the extra gas meters, the height of the building, the number of families thrown together with the consequent danger of panic, the multiplying by reason of bringing so many families together of the danger of carelessness and mistake and pictured a real danger to the community. It would seem difficult to escape from the convincing logic of his testimony, added to which was his statement that the fire facilities in this section are not adequate to meet a development of this kind and could not be made adequate without many and expensive changes, the furnishing of which, however, would not alter the fact that such tenements are extra-hazardous from the standpoint of fire. Their size, area, height, make them difficult to cope with in case of fire, their general construction and the construction of this house in particular, the chief pointed out constituted a real danger.

There was also submitted to the Board the testimony of an experienced police officer, Captain Ebert, who told in plain language why tenements of this kind are inimical to the comfort, safety and welfare of the community, in that they bring together a class and type more evil, if not more criminal, than abide as a rule in one and two family houses. He told that the average occupant of a one-family house owns the house, or if he does not own it, the owner is careful whom he puts in it, that the average owner of the two-family house is likewise an occupant and consequently careful as to the

other occupant. It is well known that in an apartment house the owner rarely lives in it, generally erects it from the standpoint of investment, money, material gain, rarely sees those who occupy his building, cares less about them and is willing to put almost anyone in who can pay the price. The captain told of the vice conditions which he found in tenements and that much of the vice of the community can be traced to places of that type. He told how difficult it was to exercise surveillance over places of this type and that the present police facilities may not be sufficient to police and govern this territory if its character was to be changed as proposed.

It was also established that the school facilities in this territory are wholly inadequate, that the present school, the Peshine Avenue (Berkeley) School, is overcrowded; that the children attend only part time; that the new school on Maple avenue, although increased in size since construction was begun, will be full when completed, and no plans for another school have been considered.

These facts uncontroverted, it is submitted amply justified the Board in its finding of fact and the conclusion it drew therefrom, namely, that it would not grant the application for a variation of the ordinance, but would sustain the Superintendent of Buildings, and that the said facts indicated that to allow of the construction of such a building would be to endanger the safety and certainly the welfare of the community in question. The finding, being based upon facts, not merely upon wordy objections; upon evidence, not merely protests, it is respectfully submitted should not be disturbed, merely because this Court, hearing the same facts, might have drawn other conclusions.

It will probably be argued that these fire and school and water and other facilities must be increased. Well and good. But when? How long will it take to do it and what must the community do in the meantime? Water and sewer facilities cannot be laid throughout that vast territory in a week, or a month, or even a year. Fire facilities cannot be secured within any such short period of time. It takes time to erect firehouses, to install new fire hydrants and to secure the necessary apparatus to meet the increased need. It takes time to build new police stations and to increase police facilities, and especially it takes time to increase educational facilities. Can all these increased facilities be secured withn a reasonably short space of time? It is submitted that they cannot be. It would take $1,000,000 or more to make the changes which the change in this section will require. Where will the money be secured from? Where will the city get the money to build the new schools, the new firehouses, the new police stations and the new water facilities, and *when* will it get it? And, when it secures it, how long will it take before they are completed and in use?

And what will the people in this community do in the meantime?

It is all very well to say that none of these increased facilities will be required because of the granting of the permit in this case. That may be so, although the testimony clearly indicated that there is at least a doubt as to the water and sewer facilities and that the tenement will undoubtedly be a fire hazard, but let us assume that all these increased facilities will not be necessary as the result of this apartment. How does that answer the community

problem? For the granting of the permit in this case establishes a precedent, and if this applicant is entitled to construct his apartment at Porter and Lyons avenue, so are the other applicants entitled to permits to construct such tenements on other proposed sites in this Weequahic section, so will others who are perhaps awaiting the decision of this Court only to flood and overcome the city with applications for apartments on every available site in the Weequahic neighborhood. With the granting of one permit the damage has been done, the section destroyed, congestion resultant, and the City of Newark committed to expenditures far in excess of any hope of increased ratables obtained through the erection of these and other tenements. For every apartment erected a community is destroyed, for every apartment erected a series of one and two family houses depreciate in valuation and their ratables must come down. The granting of this permit means letting the City of Newark in for an expenditure which may mayhap exceed $1,000,000 before the necessary facilities are completed. Is it not, then, a proper exercise of the police power, on the part of the city, to say that the erection of this edifice will interfere with the comfort, the safety, and, certainly, the welfare of its people.

It is not asked in this case that property rights be limited in the interest of things aesthetic. Here is a real, substantial condition which property owners in the Weequahic section are asking to be protected against. If ever there was a condition where the welfare of the community dictated the limitation in the use of a man of his property, this is the case. Does he not threaten, does he not endanger the public safety and the public welfare, on the face of the

testimony in this case, and if so, the action of the Board of Adjustment in denying the application should be upheld.

There is a marked distinction between the situation created by the application of a Zoning Law to a section of a city, unrestricted and devoted not wholly to residence purposes and entirely open to the construction of stores, tenements or other edifices, and the situation created by the application of a Zoning Law to a long restricted residence district, which has been almost completely developed in accordance with the restrictions, which has been developed governmentally in keeping with the restricted character of the development, and in which the zoning regulations are practically in continuance of the restrictions which existed in such territory.

It may be argued with some show of logic that in the former case the limitation placed upon the use of the individual's property is an arbitrary one; that something is taken from him, not in the interest of a clearly-defined welfare of the community as a whole, but certainly this same argument cannot be made in the other case, for there the limitation is not arbitrary in that it merely seeks to preserve the status, seeks to keep matters as they are, while those who oppose the zoning desire an advantage above that of their neighbors.

In the first case it may be that the Zoning Law forbids what the owner theretofore had a perfect right to do. In the second case, the Zoning Law having been adopted and applied before the expiraton of any restrictions and before the purchase by this prosecutor, he purchased subject to the asserted right of the city to keep and preserve the residence neighborhood. Can it be that the effort of an individual

to destroy this status is not against the welfare of the community, whether welfare is measured narrowly and from an individualistic standpoint, or broadly and from a future and society standpoint. It is submitted that no matter how measured, the welfare of the community is infringed upon.

But even on the narrower ground, which the Board proceeded under, in view of the Chapter 146 of the Laws of 1924, has it not been demonstrated that the granting of this permit would be contrary to the public interest? Has it not been demonstrated that the spirit of the ordinance would be observed and substantial justice done if the permit were denied? Has it not been demonstrated that there are no special conditions under which a literal enforcement of the ordinance would result in unnecessary hardship to the prosecutor? It is respectfully submitted that it has been so demonstrated, despite the fact that the burden was upon the prosecutor to show the contrary.

But if there is any question whether there is unnecessary hardship on the prosecutor, then we must remember that he purchased this tract of land as the restrictions were coming to an end and after the Zoning Law had endeavored to keep up the restrictions in the community and after the city had indicated its policy toward this section. In other words, he bought with notice, not only that the restrictions were expiring, but that the city had adopted a protective policy toward this section, clearly indicating that it was considerate of the wishes, the hopes, the desires, the homes of the people in the neighborhood.

And, lastly, the testimony of the Superintendent of Buildings shows that the proposed build-

ing violates the provisions as to area and height in the Zoning Ordinance adopted and designated in the interest of the health and the safety and the welfare of the community. It is well known that the less congested a section the greater probability of improved health conditions and the provisions in the interest of area were designed to prevent overcrowding in a section, and to give plenty of air and light. Chief Fisher testified that the greater the height of a building, the more difficult the fighting of fire in it. And so, in that interest, the height of buildings is limited by the Zoning Ordinance, and this building violates such provision. In other respects, it violates the Zoning Ordinance and it is submitted that such regulations are reasonable and proper in the interest of the safety and welfare and health of the community. Certainly, having been adopted by the city, it presumably stands as proper and reasonable, and if unreasonable and improper, the burden was upon the prosecutor to demonstrate it, a burden which he did not even attempt to assume.

Portnoff v. *Bigelow, supra.*

In conclusion, it is submitted:

1. That the prosecutor failed to sustain the burden of showing that he was entitled to relief from the Board of Adjustment against the act of the Superintendent, in that no error was shown on the part of that official in the enforcement of the ordinance.

2. That he failed to sustain the burden of proving that the granting of this permit would not be contrary to the public interest, or that its refusal was not in the interest of substantial justice and in the spirit of the ordinance, and he did not prove that the denial of this permit would work an unnecessary hardship upon him.

3. That as the prosecutor evidently recognized the validity of the ordinance and sought the equitable relief which Section 3 of the act relating to the powers of the Board of Adjustment granted to the Board, and as he failed to bring himself within that section, he is not entitled to a reversal of the findings and conclusions of the Board.

4. That the objectors demonstrated, as a fact, by competent evidence, that the granting of this permit would seriously interfere with the health, the safety and certainly the welfare of this community and of the City of Newark.

And that as the lands in question are a part of a large section of the City of Newark, extending probably a mile along Elizabeth avenue, which was restricted years ago, largely built upon in accordance with the restrictions, developed governmentally by the city in accordance with such restricted residence development, and zoned so as to continue such development in anticipation of the expiration of the restrictions on part of the tract; that this case is not within the rationale of prior decisions of this Court and the action of the Board of Adjustment should be upheld as a reasonable effort on the part of a municipality to keep intact a large, uncongested, non-hazardous residence community, a reasonable exercise of the police power in the interest of the safety and real welfare of the Weequahic community and the City of Newark as a whole.

Respectfully submitted,

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BRIEF FOR PROSECUTOR-RESPONDENT.

Statement.

This is a zoning case. Following what was the approved practice at the time (*Steinberg* v. *Bigelow,* 131 Atl. 114; *Herman* v. *Board of Adjustment,* 131 Atl. 116) proceedings were commenced by certiorari to review the decision of the Board of Adjustment in this case declining to issue permits on Custer Place and Elizabeth avenue. The Court of Errors has since indicated that mandamus is the proper remedy. Counsel has the assurance of the attorneys for the respondents, that no point will be made of this, but that respondents will obey the order finally resulting from the present proceedings. (Also see Case, p. 78, ll. 12-18.) There were two writs of certiorari taken out, one for a proposed building on Custer Place and one for the buildings on Elizabeth avenue. The facts in the arguments are the same, and they will be included in one brief.

Facts.

The facts are stipulated (Case, p. 12-23). According to those facts, prosecutor was the owner of certain land in the Weequahic Park section of Newark, particularly described therein. That the prosecutor caused plans and specifications to be prepared for the erection of a three-story brick apartment house forty feet high, designed for the occupancy of twelve families. These plans were approved by the Tenement House Commission; thereafter an application was made in due form, to the respondent, Frederic Bigelow, Superintendent of Buildings of the City of Newark, and the necessary fees tendered. The Superintendent of Buildings declined to issue a permit, because of Section 7, paragraph A, and Section 16 of the Zoning Ordinance of the City of Newark. In rejecting the plans, he wrote on the back of the plans as follows: "Rejected, area exceeded for number of families, height exceeded, lot area exceeded; side yard to be provided."

It is a fact, as shown, that the *sole* reason for declining the permit was because it violated certain sections of the Zoning Ordinance. This is mentioned in particular, because in paragraph M in the return made by the respondent, the Board of Adjustment, they have indicated that the proposed building violated the Building Code in other respects. This was never mentioned before this return was made; the permit was not rejected on this ground; the prosecutor was always ready, and is ready to make any changes, and in all respects to comply with the Building Code. The only issue here is the zoning part of the ordinance.

It is admitted (p. 16, l. 25) that the ordinance said to be violated divides the city into five dis-

tricts limiting the height and bulk. These districts vary from a height of thirty feet to one hundred and fifty feet. Prosecutor's property is in the thirty-feet height district. The ordinance divides the city, so far as the area of yards and the number of families is concerned, into five districts, to wit, A, B, C, D and E. In the A district, the building can occupy ninety per cent. of the lot, and there can be one hundred and forty families. In the E district, on the other hand, which is the district in which prosecutor's land is located, the proposed building can only occupy thirty-five per cent. of the land, and can only house twenty-five families.

It is manifest, without any argument, and of course, thoroughly understood among real estate men and builders, that this arbitrary division is to forbid the erection of apartment houses in this section where the prosecutor's land is. Sixty-five per cent. of the land cannot be used. He cannot build over thirty feet in height. Analyzing the provisions of the ordinance, he cannot house more than twelve families. This practically confiscates prosecutor's land; the division into districts is arbitrary and illusory. There is not one bit of evidence before the Court to show that it is necessary to protect the health, welfare, safety or morals of the community. It also appears from the state of the case (p. 22) that Elizabeth avenue, which goes past prosecutor's premises, is a main thoroughfare of the City of Newark, running from Newark to Elizabeth. It is very wide and heavy and constant traffic passes over it. The Elizabeth, Union and Mt. Prospect trolleys pass over it. That there are two lines of jitneys, and that this road leads directly to the shore resorts, and is almost always crowded with traffic. That on Meeker ave-

nue, one hundred feet away, there is a four-story brick apartment containing thirty-six families and eight stores. Next north of that building is a public garage; and directly across the street from prosecutor's property, on the east corner of Elizabeth avenue and Meeker avenue, there is a structure used for many years as a saloon and bowling alley, and now used for business, and next adjoining that structure are four stores and another public garage. That directly opposite prosecutor's property is a trolley station and a few hundred feet away is the railroad station of the Lehigh Valley Railroad, so that this particular section is right in the very march of progress.

The argument of the objectors, represented by the respondents, is set out on page 21 and also the testimony in another case, which it was stipulated would be printed as testimony in this case. They say that prosecutor's property is part of a very large tract, which for many years was restricted to one and two-family houses; that although these restrictions ran out on January 1, 1925, the city had very properly planned its sewer facilities, its prospective school accommodations, its fire and police facilities to take care of a one and two-family residential section. That it is unfair to compel the city to perhaps tear up its present sewers and to assess the inhabitants at large, in order to provide increased facilities, because prosecutor selfishly desires to erect apartment houses on his property instead of one and two-family houses.

Again they say that the fire hazard is greater and that adequate provision has not been made for taking care of such increased hazard. A more startling revelation is made; by the mere *ipse dixit* of a police officer, it is said that apartment houses promote immorality.

ARGUMENT.

Practically all of the arguments raised are answered by adjudicated cases.

The leading case is *Ignaciunas* v. *Risley,* 98 N. J. L., page 712 (Affirmed by the Court of Errors, 99 N. J. L., p. 389).

Let us look briefly into some of the objections.

Appellant in its brief indicates that the prosecutor is dilinquent in not specifying fixed grounds of appeal to the Adjustment Board. That seems unnecessary (see *State* v. *Binda,* 3 Misc., p. 420; *State* v. *Binda,* 3 Misc. p. 422). Prosecutor applied to the Board of Adjustment for relief and received none. It was therefore in a position to seek relief in the Supreme Court attacking the reasonableness of the ordinance, and of its application to prosecutor; and also attacking the ordinance as applied to prosecutor, as unconstitutional. (See Reasons, pp. 9-11.)

Increased fire hazard; lack of school facilities; lack of sewerage facilities.

The objection advanced by the respondents seems to have been met fairly and squarely by the Supreme Court in the case of *Ingersoll* v. *Village of South Orange,* 3 Misc. Reports (N. J.), 335; also *Eaton* v. *Village of South Orange,* 3 Misc. Reports, Vol. 3, page 957. The arguments fall almost by their mere statement. It would mean that the city could never grow. It would be as sensible to pass an ordinance saying that when the population of Newark reached 500,000, no further buildings could be built. Moreover, why would not the same arguments apply to any other part of the city and prevent the natural shifting of business and population centres.

Immorality.

The argument based on a police officer's testimony, that apartments promote immorality, is as false as it is ridiculous. If, however, it is a fact, why is a large apartment house in the Weequahic Park section any more immoral than it would be in the downtown section of Newark, or any other sections where apartment houses are allowed. If apartment houses, as such, are immoral, then they should not be built anywhere.

Height and Area.

The ordinance here is met by the decisions in the case of *Plymouth Co.* v. *Bigelow,* 129 Atl. 203, and *Jersey Land Co.* v. *Scott,* 126 Atl. 123. In the latter case, Justice Minturn says,

> "The height of the structure contemplated here is four stories. The ordinance in question forbidding the construction of such a building seems to be wholly unnecessary within the comprehension of the statute, for the public safety, public health or the general welfare in this particular community. That its presence may not recommend it to other residents in the neighborhood, presents no basis for regarding the erection of the building as opposed to the general welfare. The height of the building cannot, in any sense, be regarded as endangering the public safety, nor can it be reasonably contended that the health of the community could be injuriously affected thereby."

On the question of restricted area, see the opinion of Chief Justice Gummere in *Scola* v. *Senior, Inspector of Montclair,* 130 Atl. 886.

Restrictions.

Much of appellant's brief is devoted to the "commendable foresight of the City in recognizing the benefits accruing from a large area built up under private restrictions." These restrictions are a matter of record and expired by their terms almost two years ago. If these permits were granted, appellant says, more will be granted in this locality and the City will be called upon unexpectedly to spend a large amount of money to meet alleged need of greater school facilities, fire and police protection. The City knew when these restrictions were about to expire as well as everybody else. Why speak of foresight?

It takes but little ingenuity, after reading the evidence, to surmise that the owners of these "700 lots now built upon" hope in this way to enjoy in effect the continuance of private restrictions, the expiring of which their foresight did not provide against.

It is respectfully submitted that the decision of the Supreme Court in setting aside the action of the Board of Adjustment and Superintendent of Buildings of the City of Newark should be affirmed with costs.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

E. & M. Land Co., *Prosecutor-Appellee,* *vs.* The Board of Adjustment of the City of Newark, N. J., and Frederic Bigelow, Superintendent of Buildings of the City of Newark, *Defendants-Appellants.*	*On Certiorari.* *(Custer Place.)* *On Appeal from Supreme Court.*

BRIEF OF DEFENDANTS-APPELLANTS.

This is an appeal from a judgment of the Supreme Court setting aside the action of the Board of Adjustment in affirming the refusal of the Superintendent of Buildings to issue a permit to the prosecutor to erect a building of non-fireproof construction, three stories in height, at No. 10 Custer Place, in the City of Newark, New Jersey, which building is designed to be occupied as a tenement house for 12 families.

The contemplated building violating the provisions of the Zoning Ordinance of the City of Newark, the Superintendent of Buildings rejected the application. Thereupon, the applicant applied to the Board of Adjustment for a variation of the ordinance so as to permit of the construction of its proposed building, which application, after hearing had and testimony taken, was also denied. The applicant now seeks to review this action of the Board.

The building violates the ordinance in that it exceeds the height of buildings permitted in the

section in which it is planned to erect the building; in that it violates the area provisions of said ordinance, and in that the number of families to be housed in the building creates a maximum congestion of over four times that permitted by the ordinance.

The Board also found, according to its resolution, paragraphs M and N, page 13 of the State of Case, that the non-fireproof construction of the building constituted a fire menace and that the structure violated the Building Code of the city with respect to the provisions for stairways and constituted a real hazard from this standpoint.

The Board also found, as will appear from its said resolution, that the property upon which it is desired to build the tenement house in question is part of a tract of land extending from Renner avenue on the north to the county line on the south, and from Elizabeth avenue on the east to Bergen street and the line paralleling it on the west, which was laid out as restricted property about twenty years ago, restricted to one, and on a few streets, to two-family houses. That the City of Newark planned and developed its water, sewer, streets, police and fire facilities in accordance with the planned and proposed restricted residence development; that the tract had been developed in accordance with the original plan, and all but about 200 lots of the 700 or more contained in the development built upon in accordance with the restrictions; that upon a part of the tract the restrictions have expired and that while the water, sewer, fire and police facilities are adequate for present needs and to the development of the tract in accordance with the original plan, the variance of that plan by permitting the erection of tenements throughout

the tract would result in undue strain upon the aforementioned facilities and require extensive and costly expansion; that buildings of this kind in a neighborhood like the one in question would seriously interfere with the health, safety and welfare of the community.

These findings were based upon testimony of experts and others taken under oath before the Board.

The prosecutor also filed an application for a permit for the erection of a building at Nos. 459-461 Elizabeth avenue, in the City of Newark, which building is designed to be occupied as a tenement house for 12 families.

Loretta Realty Company filed an application for a permit for the erection of a building of non-fireproof construction, three stories in height, at Lyons avenue and Porter Place, in the City of Newark, New Jersey, designed to be occupied as a tenement house for 40 families.

It is stipulated (State of Case, p. 81), that the State of Case and Briefs to be used in this argument may also be used in the cases affecting Elizabeth avenue, and counsel for the Loretta Realty Company has also stipulated that the facts in the case of E. & M. Land Company, *vs.* The Board of Adjustment of the City of Newark, New Jersey, *et al.*, be considered as part of the record in the case where the Loretta Realty Company is prosecutor.

It is respectfully requested that this brief be used as if it had been filed in each of the above cases.

ARGUMENT.

The question of the right of a municipality to zone its territory is one of not only vital but general interest on the part, not only of the municipal authorities but of the people generally. The interest of the people is not to be wondered at, involving as does the question of zoning the life or death of carefully planned and constructed residence and home communities, the destruction of values in the interest of more or less selfish interlopers. Nor is interest in the question limited to New Jersey. The interest is nation-wide and the decision of the questions involved by no means unanimous. In recent decisions the Courts of New York and Ohio both upheld zoning laws as a valid exercise of the police power, adopting a broad-visioned interpretation of the meaning of public welfare, and following similar interpretations and findings in many other states.

These decisions, of course, cannot govern in view of the different result arrived at by our Courts and would not be adverted to at all save for the facts that it is conceived that our Courts have not yet decided a case such as the one involved in the present issue, and except for the fact that, as the defendants understand it, each case of zoning stands upon its own facts.

In other words, each zoning case is being disposed of upon its own particular peculiar facts and no widespread sweeping principle has as yet been enunciated which could be automatically and conclusively applied to all other sets of facts as a solution thereof.

For instance, it is true that the Supreme Court and the Court of Errors and Appeals on different grounds hold that a store in Nutley

could be constructed in a residence district, but neither Court decided that any kind of a store could be erected in any kind of a residence district. All either Court decided was that *that* store could be erected in *that* district. Had it appeared that that store was in fact a saloon, the result would have been quite different, and it would not have been quite different simply because of prohibition, but because the facts would then have shown that such a store would be inimical to the health, safety and welfare of the adjoining community. So again, had it appeared that the store proposed would sell dangerous or inflammable materials, or would otherwise be dangerous to health or safety, the result would have been different. Again, regulations of the city prohibiting the erection of garages, public garages, in residence sections have been upheld, while in other instances where a number of private garages were to be erected, the Court has decided differently.

To state it in other words, at least as matters now stand, each case must be decided upon the particular facts involved and tested by the rule governing the application of the police power, to wit, will the proposed edifice interfere with the health, comfort, safety or welfare of the community? The right of a man to use his property as he sees fit is limited by the right of society, through the exercise of the police power to interfere with such use of property by the individual where it endangers or threatens the public safety, health, comfort or welfare. And our zoning legislation is a delegation of power to the municipalities to exercise such police power. Certain methods of its exercise have been prescribed by the statute and the Courts have held that the machinery so set up

must, at least in some cases, be availed of prior to application to the Courts.

As a consequence the applicant here having been denied his permit by the Superintendent of Buildings, availed himself of the machinery provided by statute and appealed to the Board of Adjustment. Having availed himself of the machinery, he must comply with it, and the statute gives only the following jurisdiction to the Board:

> "(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 this act or of any ordinance adopted pursuant thereto.
>
> (2) To hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance.
>
> (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."

It must be quite evident that upon the appellant rests the burden of establishing his claim to the permit.

In *Portnoff* v. *Bigelow,* Vol. 4, No. 25, N. J. Advanced Reports, page 539, the Supreme Court held:

> "Relators' claim is, and must be, that the provisions of the zoning ordinance, so far as the same affect the property in question, are an unreasonable exercise of the police power. A zoning ordinance, like other ordinances, may be reasonable in

some aspects and unreasonable in others. The presumption is that it is reasonable, and the burden of proving it otherwise is on the prosecutor. Neumann *v.* Hoboken, 82 *Id.* 275, 278, and cases cited; Hench *v.* East Orange, 2 N. J. Mis. R. 510."

Under which of the three subdivisions is his appeal taken? So far as the testimony and records show, he did not specify the grounds of his appeal, as required by the statute, Chapter 146 of the Laws of 1924, page 327.

It is quite evident that the appeal was not taken under Section 1, for the Superintendent of Buildings, in denying the permit under the Zoning Ordinance, instead of committing an error, was doing what the ordinance required. It is conceivable that, in enforcing the ordinance, a subordinate official may make an error in determining what the ordinance means, but that is not this case, since the application was for a permit to erect a many-family tenement in a residence district, something clearly and definitely prohibited by the ordinance. The jurisdiction given by paragraph 1, therefore, is not that of which the applicant apparently avails himself.

Paragraph 2 gives the Board the power to hear and decide special exceptions to the terms of the ordinance upon which such Board is required to pass under such ordinance. Clearly, the appeal is not taken under this section, for the Board of Adjustment is not by this section given authority to destroy the ordinance.

We then come to Section 3, the last and only section under which any jurisdiction would exist to hear this appeal. That section permits the Board, in specific cases, to authorize "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." Not one scintilla of evidence was produced by the applicant either to bring himself within the two preceding paragraphs or to bring himself within the benefits of this paragraph.

The burden was upon the applicant to show, in order to justify the desired variance:

1. That such variance would not be contrary to the public interest.

2. That owing to the special conditions a literal enforcement of the provisions of the ordinance would result in unnecessary hardship, and

3. That the spirit of the ordinance would be observed and substantial justice would be done by granting this permit.

We repeat that no evidence was offered by the applicant to bring himself within the equities of this provision. On the contrary, the papers sent up by the Superintendent of Buildings, and which, with the plans constituted the entire case of the applicant, on their face showed that it would be contrary to the public interest to grant this permit; no special hardship would result if the permit were denied; and neither the spirit of the ordinance would be observed nor substantial justice done if the permit were granted. This, of itself, is seems to us, is enough to deny the relief which this applicant seeks. *The validity of the ordinance was recognized by him, and he sought equitable relief under it, and yet he failed to offer any evidence to justify the grant-*

ing of such relief. In its absence, therefore, we respectfully submit that the Board could not do anything else but sustain the findings of the Superintendent of Buildings.

But, over and beyond this, the objectors went ahead, while insisting that the applicant should offer testimony that the building would not affect the public welfare, &c., and offered abundant evidence to demonstrate that the applicant was not entitled to the benefits of the variance claimed. It is submitted that not only was it shown that the city, in restricting this particular section to residence development properly exercised its police power, but that the Superintendent of Buildings, in carrying out the ordinance as he did in this case was duly and properly exercising the police power, and, finally, that the evidence demonstrated clearly and plainly that it would be contrary to the public interest, to the spirit of the ordinance and to substantial justice, to grant the permit, while no hardship would result in its denial. Moreever, the moving papers to the Board distinctly prayed for a variation of the ordinance.

No case, we feel safe in saying, has been presented to the Courts exactly like the instant case. The testimony shows that over twenty years ago a farming section of our city was laid out for a residence development; that such territory ultimately extended from Meeker avenue on the north to practically the city line on the south, and from Elizabeth avenue on the east to beyond Bergen street on the west, and with subsequent other developments, now to Clinton Place; that this development was for one and two family residences on substantial size lots, with ample air space, a development distinctly uncongested, with limited fire hazard,

attracting a class and type of people requiring but limited police protection; that in the years succeeding this sane, sanitary, healthful, non-hazardous development, five hundred or more houses of the type required by the building restrictions governing the tract were erected, and are now occupied; that the restrictions on part of this territory have expired, while on a good part of the tract the restrictions have some years to run; that so successful was this development that five hundred out of the seven hundred lots have been built upon, leaving about two hundred lots, distributed throughout the tract, open for possible adverse development. It, therefore, appears that a number of these lots are probable tenement house sites, and since the filing of the first application for a tenement permit in the section in question many other applications have been filed.

It was shown that the city, with commendable far-sightedness, recognizing the benefits which its citizens would acquire as the result of a restricted development such as proposed, followed in the wake, if not in the lead, but certainly keeping pace with the said development, in the laying of water and sewer facilities appropriate to the type of development, in laying water and sewer pipes fit for use in a residence section, that they had proceeded in developing governmental facilities of this kind having in mind the uncongested character of the neighborhood and that eventually it would be built up with one and two family houses and never having in mind such a congested development as would result, if apartment houses were permitted in this section.

It was further shown that as with the water and sewer facilities, so with the fire facilities,

they, too, had been in accord with the character of the development; that the same size and character of fire facilities are not required in a section of this kind as would be required in a tenement house section, or an otherwise congested center; that the present territory of the existing firehouse in this section is very wide and broad and must be increased measurably, both in the number of men, the number of firehouses, the number and character of hydrants and type and character of water pressure, if the character of this residence section is to be changed.

Moreover, it was shown that the water and sewer facilities, while adequate for the old contemplated development, would soon have to be increased if the character of the development was to change and apartment houses were to be erected throughout the community; that to accomplish such changes would mean the tearing up of pavements, the laying of new pipes, all at considerable expense, considerable inconvenience, considerable discomfort and the necessary increased danger to people in the use of streets and in the use of their homes, while wholesale changes of this kind are made.

Furthermore, it was shown that the water pressure, while adequate at present, could soon be made inadequate both in the use in the home and in the use for fire purposes by the erection of many-family edifices on lots planned for single families.

Beyond this it was shown that tenement houses of this character constitute fire hazards far in excess of the neighboring dwellings in this section. The Board had the testimony of the expert, Chief Fisher, who, with great detail,

demonstrated why edifices of this kind are considered, by the men who know, fire fighters, dangerous from the standpoint of fire and fighting fire. He told of the many cellars with their many family accumulation of rubbish. He told of the extra lighting, the extra gas meters, the height of the building, the number of families thrown together with the consequent danger of panic, the multiplying by reason of bringing so many families together of the danger of carelessness and mistake and pictured a real danger to the community. It would seem difficult to escape from the convincing logic of his testimony, added to which was his statement that the fire facilities in this section are not adequate to meet a development of this kind and could not be made adequate without many and expensive changes, the furnishing of which, however, would not alter the fact that such tenements are extra-hazardous from the standpoint of fire. Their size, area, height, make them difficult to cope with in case of fire, their general construction and the construction of this house in particular, the chief pointed out constituted a real danger.

There was also submitted to the Board the testimony of an experienced police officer, Captain Ebert, who told in plain language why tenements of this kind are inimical to the comfort, safety and welfare of the community, in that they bring together a class and type more evil, if not more criminal, than abide as a rule in one and two family houses. He told that the average occupant of a one-family house owns the house, or if he does not own it, the owner is careful whom he puts in it, that the average owner of the two-family house is likewise an occupant and consequently careful as to the

other occupant. It is well known that in an apartment house the owner rarely lives in it, generally erects it from the standpoint of investment, money, material gain, rarely sees those who occupy his building, cares less about them and is willing to put almost anyone in who can pay the price. The captain told of the vice conditions which he found in tenements and that much of the vice of the community can be traced to places of that type. He told how difficult it was to exercise surveillance over places of this type and that the present police facilities may not be sufficient to police and govern this territory if its character was to be changed as proposed.

It was also established that the school facilities in this territory are wholly inadequate, that the present school, the Peshine Avenue (Berkeley) School, is overcrowded; that the children attend only part time; that the new school on Maple avenue, although increased in size since construction was begun, will be full when completed, and no plans for another school have been considered.

These facts uncontroverted, it is submitted amply justified the Board in its finding of fact and the conclusion it drew therefrom, namely, that it would not grant the application for a variation of the ordinance, but would sustain the Superintendent of Buildings, and that the said facts indicated that to allow of the construction of such a building would be to endanger the safety and certainly the welfare of the community in question. The finding, being based upon facts, not merely upon wordy objections; upon evidence, not merely protests, it is respectfully submitted should not be disturbed, merely because this Court, hearing the same facts, might have drawn other conclusions.

It will probably be argued that these fire and school and water and other facilities must be increased. Well and good. But when? How long will it take to do it and what must the community do in the meantime? Water and sewer facilities cannot be laid throughout that vast territory in a week, or a month, or even a year. Fire facilities cannot be secured within any such short period of time. It takes time to erect firehouses, to install new fire hydrants and to secure the necessary apparatus to meet the increased need. It takes time to build new police stations and to increase police facilities, and especially it takes time to increase educational facilities. Can all these increased facilities be secured withn a reasonably short space of time? It is submitted that they cannot be. It would take $1,000,000 or more to make the changes which the change in this section will require. Where will the money be secured from? Where will the city get the money to build the new schools, the new firehouses, the new police stations and the new water facilities, and *when* will it get it? And, when it secures it, how long will it take before they are completed and in use?

And what will the people in this community do in the meantime?

It is all very well to say that none of these increased facilities will be required because of the granting of the permit in this case. That may be so, although the testimony clearly indicated that there is at least a doubt as to the water and sewer facilities and that the tenement will undoubtedly be a fire hazard, but let us assume that all these increased facilities will not be necessary as the result of this apartment. How does that answer the community

problem? For the granting of the permit in this case establishes a precedent, and if this applicant is entitled to construct his apartment at Porter and Lyons avenue, so are the other applicants entitled to permits to construct such tenements on other proposed sites in this Weequahic section, so will others who are perhaps awaiting the decision of this Court only to flood and overcome the city with applications for apartments on every available site in the Weequahic neighborhood. With the granting of one permit the damage has been done, the section destroyed, congestion resultant, and the City of Newark committed to expenditures far in excess of any hope of increased ratables obtained through the erection of these and other tenements. For every apartment erected a community is destroyed, for every apartment erected a series of one and two family houses depreciate in valuation and their ratables must come down. The granting of this permit means letting the City of Newark in for an expenditure which may mayhap exceed $1,000,000 before the necessary facilities are completed. Is it not, then, a proper exercise of the police power, on the part of the city, to say that the erection of this edifice will interfere with the comfort, the safety, and, certainly, the welfare of its people.

It is not asked in this case that property rights be limited in the interest of things aesthetic. Here is a real, substantial condition which property owners in the Weequahic section are asking to be protected against. If ever there was a condition where the welfare of the community dictated the limitation in the use of a man of his property, this is the case. Does he not threaten, does he not endanger the public safety and the public welfare, on the face of the

testimony in this case, and if so, the action of the Board of Adjustment in denying the application should be upheld.

There is a marked distinction between the situation created by the application of a Zoning Law to a section of a city, unrestricted and devoted not wholly to residence purposes and entirely open to the construction of stores, tenements or other edifices, and the situation created by the application of a Zoning Law to a long restricted residence district, which has been almost completely developed in accordance with the restrictions, which has been developed governmentally in keeping with the restricted character of the development, and in which the zoning regulations are practically in continuance of the restrictions which existed in such territory.

It may be argued with some show of logic that in the former case the limitation placed upon the use of the individual's property is an arbitrary one; that something is taken from him, not in the interest of a clearly-defined welfare of the community as a whole, but certainly this same argument cannot be made in the other case, for there the limitation is not arbitrary in that it merely seeks to preserve the status, seeks to keep matters as they are, while those who oppose the zoning desire an advantage above that of their neighbors.

In the first case it may be that the Zoning Law forbids what the owner theretofore had a perfect right to do. In the second case, the Zoning Law having been adopted and applied before the expiraton of any restrictions and before the purchase by this prosecutor, he purchased subject to the asserted right of the city to keep and preserve the residence neighborhood. Can it be that the effort of an individual

to destroy this status is not against the welfare of the community, whether welfare is measured narrowly and from an individualistic standpoint, or broadly and from a future and society standpoint. It is submitted that no matter how measured, the welfare of the community is infringed upon.

But even on the narrower ground, which the Board proceeded under, in view of the Chapter 146 of the Laws of 1924, has it not been demonstrated that the granting of this permit would be contrary to the public interest? Has it not been demonstrated that the spirit of the ordinance would be observed and substantial justice done if the permit were denied? Has it not been demonstrated that there are no special conditions under which a literal enforcement of the ordinance would result in unnecessary hardship to the prosecutor? It is respectfully submitted that it has been so demonstrated, despite the fact that the burden was upon the prosecutor to show the contrary.

But if there is any question whether there is unnecessary hardship on the prosecutor, then we must remember that he purchased this tract of land as the restrictions were coming to an end and after the Zoning Law had endeavored to keep up the restrictions in the community and after the city had indicated its policy toward this section. In other words, he bought with notice, not only that the restrictions were expiring, but that the city had adopted a protective policy toward this section, clearly indicating that it was considerate of the wishes, the hopes, the desires, the homes of the people in the neighborhood.

And, lastly, the testimony of the Superintendent of Buildings shows that the proposed build-

ing violates the provisions as to area and height in the Zoning Ordinance adopted and designated in the interest of the health and the safety and the welfare of the community. It is well known that the less congested a section the greater probability of improved health conditions and the provisions in the interest of area were designed to prevent overcrowding in a section, and to give plenty of air and light. Chief Fisher testified that the greater the height of a building, the more difficult the fighting of fire in it. And so, in that interest, the height of buildings is limited by the Zoning Ordinance, and this building violates such provision. In other respects, it violates the Zoning Ordinance and it is submitted that such regulations are reasonable and proper in the interest of the safety and welfare and health of the community. Certainly, having been adopted by the city, it presumably stands as proper and reasonable, and if unreasonable and improper, the burden was upon the prosecutor to demonstrate it, a burden which he did not even attempt to assume.

Portnoff v. *Bigelow, supra.*

In conclusion, it is submitted:

1. That the prosecutor failed to sustain the burden of showing that he was entitled to relief from the Board of Adjustment against the act of the Superintendent, in that no error was shown on the part of that official in the enforcement of the ordinance.

2. That he failed to sustain the burden of proving that the granting of this permit would not be contrary to the public interest, or that its refusal was not in the interest of substantial justice and in the spirit of the ordinance, and he did not prove that the denial of this permit would work an unnecessary hardship upon him.

3. That as the prosecutor evidently recognized the validity of the ordinance and sought the equitable relief which Section 3 of the act relating to the powers of the Board of Adjustment granted to the Board, and as he failed to bring himself within that section, he is not entitled to a reversal of the findings and conclusions of the Board.

4. That the objectors demonstrated, as a fact, by competent evidence, that the granting of this permit would seriously interfere with the health, the safety and certainly the welfare of this community and of the City of Newark.

And that as the lands in question are a part of a large section of the City of Newark, extending probably a mile along Elizabeth avenue, which was restricted years ago, largely built upon in accordance with the restrictions, developed governmentally by the city in accordance with such restricted residence development, and zoned so as to continue such development in anticipation of the expiration of the restrictions on part of the tract; that this case is not within the rationale of prior decisions of this Court and the action of the Board of Adjustment should be upheld as a reasonable effort on the part of a municipality to keep intact a large, uncongested, non-hazardous residence community, a reasonable exercise of the police power in the interest of the safety and real welfare of the Weequahic community and the City of Newark as a whole.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

E. & M. Land Co., *Prosecutor-Respondent,* *vs.* The Board of Adjustment of the City of Newark, N. J., and Frederic Bigelow, Superintendent of Buildings of the City of Newark, *Defendants-Appellants.*	*On Certiorari.* *On Appeal from Supreme Court.*

BRIEF FOR PROSECUTOR-RESPONDENT.

Statement.

This is a zoning case. Following what was the approved practice at the time (*Steinberg* v. *Bigelow,* 131 Atl. 114; *Herman* v. *Board of Adjustment,* 131 Atl. 116) proceedings were commenced by certiorari to review the decision of the Board of Adjustment in this case declining to issue permits on Custer Place and Elizabeth avenue. The Court of Errors has since indicated that mandamus is the proper remedy. Counsel has the assurance of the attorneys for the respondents, that no point will be made of this, but that respondents will obey the order finally resulting from the present proceedings. (Also see Case, p. 78, ll. 12-18.) There were two writs of certiorari taken out, one for a proposed building on Custer Place and one for the buildings on Elizabeth avenue. The facts in the arguments are the same, and they will be included in one brief.

Facts.

The facts are stipulated (Case, p. 12-23). According to those facts, prosecutor was the owner of certain land in the Weequahic Park section of Newark, particularly described therein. That the prosecutor caused plans and specifications to be prepared for the erection of a three-story brick apartment house forty feet high, designed for the occupancy of twelve families. These plans were approved by the Tenement House Commission; thereafter an application was made in due form, to the respondent, Frederic Bigelow, Superintendent of Buildings of the City of Newark, and the necessary fees tendered. The Superintendent of Buildings declined to issue a permit, because of Section 7, paragraph A, and Section 16 of the Zoning Ordinance of the City of Newark. In rejecting the plans, he wrote on the back of the plans as follows: "Rejected, area exceeded for number of families, height exceeded, lot area exceeded; side yard to be provided."

It is a fact, as shown, that the *sole* reason for declining the permit was because it violated certain sections of the Zoning Ordinance. This is mentioned in particular, because in paragraph M in the return made by the respondent, the Board of Adjustment, they have indicated that the proposed building violated the Building Code in other respects. This was never mentioned before this return was made; the permit was not rejected on this ground; the prosecutor was always ready, and is ready to make any changes, and in all respects to comply with the Building Code. The only issue here is the zoning part of the ordinance.

It is admitted (p. 16, l. 25) that the ordinance said to be violated divides the city into five dis-

tricts limiting the height and bulk. These districts vary from a height of thirty feet to one hundred and fifty feet. Prosecutor's property is in the thirty-feet height district. The ordinance divides the city, so far as the area of yards and the number of families is concerned, into five districts, to wit, A, B, C, D and E. In the A district, the building can occupy ninety per cent. of the lot, and there can be one hundred and forty families. In the E district, on the other hand, which is the district in which prosecutor's land is located, the proposed building can only occupy thirty-five per cent. of the land, and can only house twenty-five families.

It is manifest, without any argument, and of course, thoroughly understood among real estate men and builders, that this arbitrary division is to forbid the erection of apartment houses in this section where the prosecutor's land is. Sixty-five per cent. of the land cannot be used. He cannot build over thirty feet in height. Analyzing the provisions of the ordinance, he cannot house more than twelve families. This practically confiscates prosecutor's land; the division into districts is arbitrary and illusory. There is not one bit of evidence before the Court to show that it is necessary to protect the health, welfare, safety or morals of the community. It also appears from the state of the case (p. 22) that Elizabeth avenue, which goes past prosecutor's premises, is a main thoroughfare of the City of Newark, running from Newark to Elizabeth. It is very wide and heavy and constant traffic passes over it. The Elizabeth, Union and Mt. Prospect trolleys pass over it. That there are two lines of jitneys, and that this road leads directly to the shore resorts, and is almost always crowded with traffic. That on Meeker ave-

nue, one hundred feet away, there is a four-story brick apartment containing thirty-six families and eight stores. Next north of that building is a public garage; and directly across the street from prosecutor's property, on the east corner of Elizabeth avenue and Meeker avenue, there is a structure used for many years as a saloon and bowling alley, and now used for business, and next adjoining that structure are four stores and another public garage. That directly opposite prosecutor's property is a trolley station and a few hundred feet away is the railroad station of the Lehigh Valley Railroad, so that this particular section is right in the very march of progress.

The argument of the objectors, represented by the respondents, is set out on page 21 and also the testimony in another case, which it was stipulated would be printed as testimony in this case. They say that prosecutor's property is part of a very large tract, which for many years was restricted to one and two-family houses; that although these restrictions ran out on January 1, 1925, the city had very properly planned its sewer facilities, its prospective school accommodations, its fire and police facilities to take care of a one and two-family residential section. That it is unfair to compel the city to perhaps tear up its present sewers and to assess the inhabitants at large, in order to provide increased facilities, because prosecutor selfishly desires to erect apartment houses on his property instead of one and two-family houses.

Again they say that the fire hazard is greater and that adequate provision has not been made for taking care of such increased hazard. A more startling revelation is made; by the mere *ipse dixit* of a police officer, it is said that apartment houses promote immorality.

ARGUMENT.

Practically all of the arguments raised are answered by adjudicated cases.

The leading case is *Ignaciunas* v. *Risley,* 98 N. J. L., page 712 (Affirmed by the Court of Errors, 99 N. J. L., p. 389).

Let us look briefly into some of the objections.

Appellant in its brief indicates that the prosecutor is dilinquent in not specifying fixed grounds of appeal to the Adjustment Board. That seems unnecessary (see *State* v. *Binda,* 3 Misc., p. 420; *State* v. *Binda,* 3 Misc. p. 422). Prosecutor applied to the Board of Adjustment for relief and received none. It was therefore in a position to seek relief in the Supreme Court attacking the reasonableness of the ordinance, and of its application to prosecutor; and also attacking the ordinance as applied to prosecutor, as unconstitutional. (See Reasons, pp. 9-11.)

Increased fire hazard; lack of school facilities; lack of sewerage facilities.

The objection advanced by the respondents seems to have been met fairly and squarely by the Supreme Court in the case of *Ingersoll* v. *Village of South Orange,* 3 Misc. Reports (N. J.), 335; also *Eaton* v. *Village of South Orange,* 3 Misc. Reports, Vol. 3, page 957. The arguments fall almost by their mere statement. It would mean that the city could never grow. It would be as sensible to pass an ordinance saying that when the population of Newark reached 500,000, no further buildings could be built. Moreover, why would not the same arguments apply to any other part of the city and prevent the natural shifting of business and population centres.

Immorality.

The argument based on a police officer's testimony, that apartments promote immorality, is as false as it is ridiculous. If, however, it is a fact, why is a large apartment house in the Weequahic Park section any more immoral than it would be in the downtown section of Newark, or any other sections where apartment houses are allowed. If apartment houses, as such, are immoral, then they should not be built anywhere.

Height and Area.

The ordinance here is met by the decisions in the case of *Plymouth Co.* v. *Bigelow,* 129 Atl. 203, and *Jersey Land Co.* v. *Scott,* 126 Atl. 123. In the latter case, Justice Minturn says,

> "The height of the structure contemplated here is four stories. The ordinance in question forbidding the construction of such a building seems to be wholly unnecessary within the comprehension of the statute, for the public safety, public health or the general welfare in this particular community. That its presence may not recommend it to other residents in the neighborhood, presents no basis for regarding the erection of the building as opposed to the general welfare. The height of the building cannot, in any sense, be regarded as endangering the public safety, nor can it be reasonably contended that the health of the community could be injuriously affected thereby."

On the question of restricted area, see the opinion of Chief Justice Gummere in *Scola* v. *Senior, Inspector of Montclair,* 130 Atl. 886.

Restrictions.

Much of appellant's brief is devoted to the "commendable foresight of the City in recognizing the benefits accruing from a large area built up under private restrictions." These restrictions are a matter of record and expired by their terms almost two years ago. If these permits were granted, appellant says, more will be granted in this locality and the City will be called upon unexpectedly to spend a large amount of money to meet alleged need of greater school facilities, fire and police protection. The City knew when these restrictions were about to expire as well as everybody else. Why speak of foresight?

It takes but little ingenuity, after reading the evidence, to surmise that the owners of these "700 lots now built upon" hope in this way to enjoy in effect the continuance of private restrictions, the expiring of which their foresight did not provide against.

It is respectfully submitted that the decision of the Supreme Court in setting aside the action of the Board of Adjustment and Superintendent of Buildings of the City of Newark should be affirmed with costs.

Respectfully submitted,

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