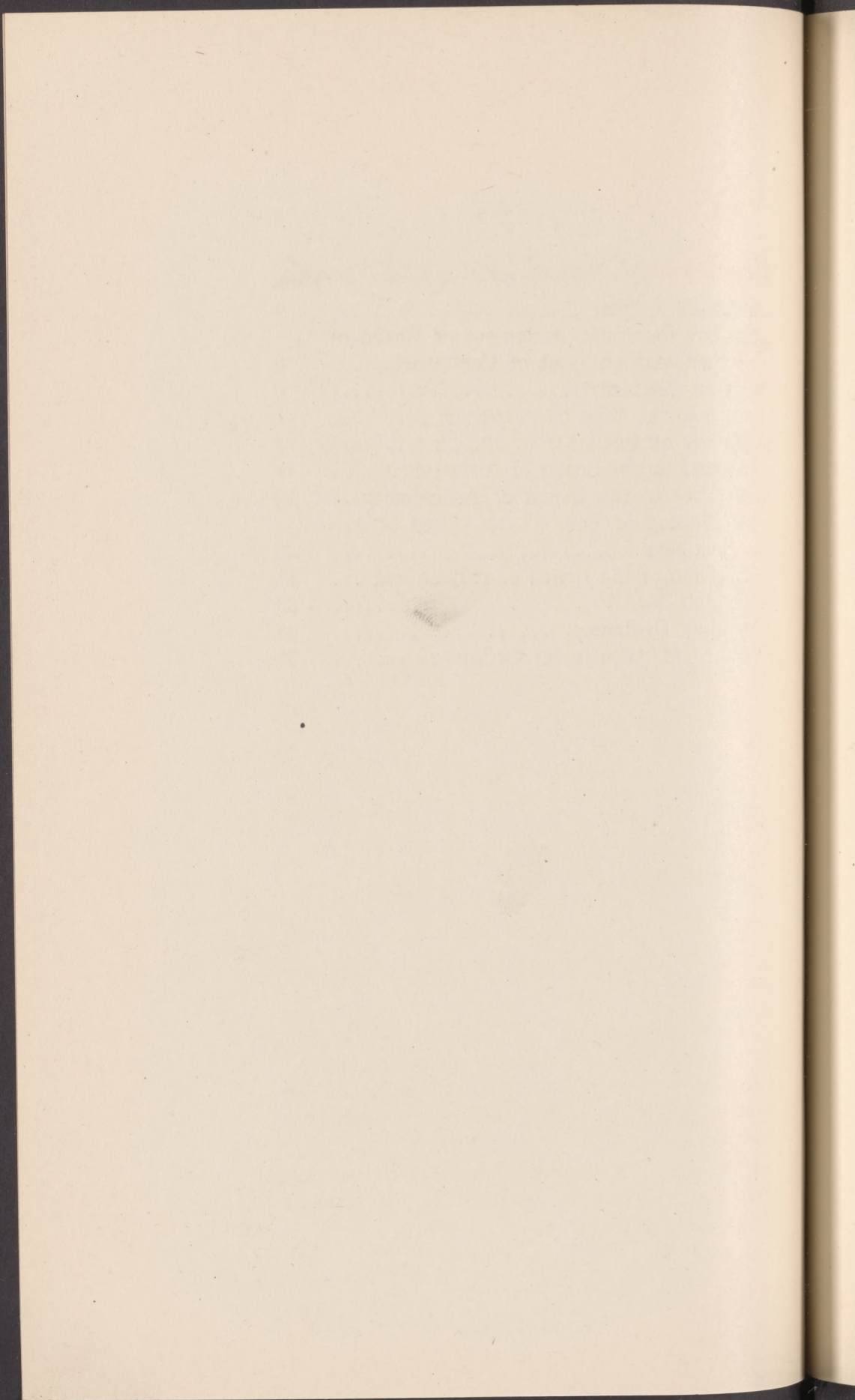


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*Notice of Appeal.*

## New Jersey Court of Errors and Appeals

ALEXANDER PRINCE,  
*Defendant-in-Error,*

*vs.*

BOARD OF ADJUSTMENT OF THE  
TOWN OF MONTCLAIR, *et al.*,  
*Plaintiffs-in-Error.*

*Notice  
of Appeal.*

10

### NOTICE AND GROUNDS OF APPEAL.

Filed June 30, 1925.

NEW JERSEY SUPREME COURT.

20

ALEXANDER PRINCE,  
*Defendant-in-Error,*

*vs.*

BOARD OF ADJUSTMENT OF THE  
TOWN OF MONTCLAIR, *et al.*,  
*Plaintiffs-in-Error.*

*Notice of  
Appeal from  
Judgment of  
Supreme  
Court on  
Certiorari.*

To Messrs. Fast & Fast, attorneys of defendant-  
in-error.

30

Take notice, that the respondents, below, the  
plaintiffs-in-error, appeal to the Court of Errors  
and Appeals from the whole of the judgment en-  
tered in the above-stated case on the following  
grounds:

1. Because the Supreme Court erred in setting  
aside the judgment of the Board of Adjustment  
of the Town of Montclair.

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*Notice of Appeal.*

2. Because the Zoning Ordinance of the Town of Montclair as applicable to the above-entitled cause is constitutional.

3. Because the reasons presented by the Board of Adjustment as a basis for its judgment are tenable.

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GEORGE R. BEACH,  
Attorney for and Counsel  
of Appellant.

Endorsed:

Sat below *JJ.* Kalisch, Black and Campbell.

Service of copy of within Notice of Appeal acknowledged this thirteenth day of June, 1925.

20

FAST & FAST,  
Attorneys for Defendant-in-Error.

Filed July 14, 1925,

THOMAS F. MARTIN, Clerk.

30

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*Rule Reversing Judgment of Board of Adjustment.*

**RULE REVERSING JUDGMENT.**

Entered June 22, 1925.

NEW JERSEY SUPREME COURT.

ALEXANDER PRINCE,	}	<i>Prosecutor,</i>	<i>Writ of</i>	<i>Certiorari.</i>	10
vs.					
WILLIAM H. SENIOR, Inspector of Buildings of the Town of Montclair, and the TOWN OF MONTCLAIR,	}	<i>Defendants.</i>	<i>Rule for</i>	<i>Reversing</i>	<i>Judgment</i>
			<i>of the Board</i>	<i>of</i>	<i>Adjustment</i>
			<i>of the Town</i>	<i>of Montclair.</i>	

The Court, having inspected the transcript and proceedings of the Board of Adjustment of the Town of Montclair returned with the certiorari in this cause and the reason for reversing the judgment below, and heard the argument of counsel therein, and having duly considered the same; it is on this twenty-second day of June, 1925, 20

ORDERED that the judgment of the Board of Adjustment of the Town of Montclair, be reversed, set aside, made void and for nothing holden, with costs. 30

Entered June 22, 1925.

On motion of Attorneys for  
Alexander Prince,  
Prosecutor.

*Rule Reversing Judgment of Board of Adjustment.*

I, EDWARD J. KELLEHER, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the notice of appeal filed and also of a rule entered in the minutes of the Court in the above-stated cause.

10

(SEAL)

In testimony whereof I have set my hand and seal of said Court at Trenton, this second day of July A. D. nineteen hundred and twenty-five.

EDWARD J. KELLEHER,  
Clerk.

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*Opinion of Supreme Court.*

**OPINION OF SUPREME COURT.**

Filed May 18, 1925.

NEW JERSEY SUPREME COURT.

No. 253, January Term, 1925.

ALEXANDER PRINCE,

*Prosecutor,*

*vs.*

BOARD OF ADJUSTMENT OF THE  
TOWN OF MONTCLAIR, *et als.*,  
*Respondents.*

10

Submitted January Term, 1925; decided May 18, 1925.

On certiorari.

20

Before Justices Kalisch, Black and Campbell.

For prosecutor, Fast & Fast.

For respondent, George S. Harris.

*Per Curiam:*

The prosecutor applied to the building inspector of Montclair for a permit to erect, in front of and attached, in part to a frame dwelling house situated on his lot, 123 Watchung avenue, an addition to contain three stores. The dwelling is occupied by three families. A garage to house two motor cars is erected on the rear of the lot. The permit was refused upon the ground that the uses to which the proposed building would be put and to which it was designed to be put, did not conform to the requirements of the Zoning Ordinance of Montclair. Under such ordinance the land is located in a suburban zone restricted against buildings to be used for business purposes. In fact one-half of the block in which prosecutor's land is located is zoned for business purposes, and the other half, that in

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*Opinion of Supreme Court.*

which his lot is located, is zoned against such purposes.

After such refusal, prosecutor appealed to the Board of Adjustment and that body refused the permit. He then obtained a rule to show cause why mandamus should not be issued directed to the building inspector. Upon the return of such rule the respondent urged that the remedy was  
 10 by certiorari to review the findings of the Board of Adjustment and this Court so held.

Thereupon a writ of certiorari was sued out and brings before us the proceedings and judgment of the Board of Adjustment.

It is conceded that the plans for the proposed building or addition are in compliance with the building code of Montclair.

Twenty-eight reasons are presented by the Board of Adjustment as the basis for its judgment.

To us none of these seem tenable.

20 It may well be that the proposed construction may increase the fire hazard and therefore the public safety but that would be a proper subject for regulation by the building code or perhaps by the Zoning Ordinance in prohibiting the erection of a building of such character, that is by attaching an addition to be used for stores to a frame dwelling house.

But this is not the prohibition of the building code nor of the Zoning Ordinance.

The latter absolutely and unqualifiedly prohibits any and all buildings to be used for business purposes in the zone which includes  
 30 prosecutor's property.

We think in that respect the ordinance is unreasonable and therefore unenforceable and presents no basis for the refusal of the permit to prosecutor. This feature of these ordinances has so frequently been passed upon by this Court as not to require citation of authority other than that of *Ignaciuinas v. Nutley*, 125 Atl. Rep. 121.

The judgment of the Board of Adjustment must be set aside, with costs.

*Writ of Certiorari.*

**WRIT OF CERTIORARI.**

**NEW JERSEY SUPREME COURT.**

STATE OF NEW JERSEY, <i>ex rel.</i> , ALEXANDER PRINCE, <div style="text-align: right;"><i>Relator,</i></div>	}	10
<i>vs.</i>		
WILLIAM H. SENIOR, Inspector of Buildings of the Town of Montclair, and the TOWN OF MONTCLAIR, <div style="text-align: right;"><i>Defendants.</i></div>	}	On Mandamus.
<i>vs.</i>		
ALEXANDER PRINCE, <div style="text-align: right;"><i>Prosecutor,</i></div>	}	20
<i>vs.</i>		
THE TOWN OF MONTCLAIR, and BOARD OF ADJUSTMENT OF THE TOWN OF MONTCLAIR, <div style="text-align: right;"><i>Defendants.</i></div>	}	Writ of Certiorari.
<i>vs.</i>		

Application having been made in open court on the fourth day of December, 1924, for a writ of mandamus or alternately a writ of certiorari, and the Court having agreed thereto, and having allowed a writ of certiorari, and it also being agreed, in open court, by both Louis A. Fast, representing Alexander Prince, the prosecutor, and George S. Harris, Assistant Town Attorney of the Town of Montclair, representing the Town of Montclair and the Board of Adjustment of the Town of Montclair, therefore, we being willing to be certified of the judgment, order and proceedings given or made by the Board of Adjust-

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*Writ of Certiorari.*

10 ment of the Town of Montclair, in the County of Essex, in certain proceedings wherein the Board of Adjustment of the Town of Montclair upheld the decision of William H. Senior, Inspector of Buildings of the Town of Montclair, in refusing the application of Alexander Prince for a permit to erect on premises at 123 Watchung avenue, Montclair, Essex County, New Jersey, three stores as stated in the said permit:

20 We do command that the judgment, order and all proceedings in the aforesaid action, before the said Board of Adjustment of the Town of Montclair, Essex County, New Jersey, holden before you, the said Board of Adjustment of the Town of Montclair, wherein Alexander Prince was the appellant, and William H. Senior, Inspector of Buildings of the Town of Montclair, was respondent, together with all papers and things touching and concerning the same, be certified and sent under your seal to our Justices of our Supreme Court of Judicature, at Trenton, on the sixth day of January, next.

Consent to the order is hereby given.

GEORGE S. HARRIS.

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*Return to Writ.*

**RETURN TO THE WRIT.**

NEW JERSEY SUPREME COURT.

ALEXANDER PRINCE,

*Prosecutor,*

*vs.*

TOWN OF MONTCLAIR and BOARD  
OF ADJUSTMENT OF THE TOWN  
OF MONTCLAIR,

*Defendants.*

*On  
Certiorari.*

*Return to  
the Writ.*

10

I, HARRY TRIPPETT, do herewith send to the Supreme Court of the State of New Jersey the judgment, order and all proceedings before the Board of Adjustment of the Town of Montclair, in the County of Essex, wherein the Board of Adjustment of the Town of Montclair heard and determined the appeal of Alexander Prince from the decision of the Inspector of Buildings of the Town of Montclair refusing to grant a permit from the application of said Alexander Prince for the erection of a building in the said Town of Montclair, together with all papers and things touching and concerning the same, as by the writ of certiorari sealed the 18th day of December, 1924, before the Honorable Samuel Kalisch, Justice of the Supreme Court, I am commanded to do.

20

30

I certify that I am the Secretary of the Board of Adjustment of the Town of Montclair, in the County of Essex, and that the following are true copies of all proceedings, judgments, orders, etc., of the said Board of Adjustment and that to-

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*Return—Report of Inspector of Buildings.*

gether they constitute the entire record of the proceedings in the above-entitled action.

Signed this 5th day of January, 1925, and sealed with the seal of the Town of Montclair, in the County of Essex.

(SEAL)

HARRY TRIPPETT.

10

No. —

REPORT TO THE INSPECTOR OF BUILDINGS  
of the  
Construction of New Buildings by the owner,  
Architect or Builder

Montclair, N. J., July 29 1924

20 The undersigned in compliance with the Building Ordinance, files the following report of a new Brick, Stone or Concrete Building:

Reported by Michael B. Silverstein

The following information is required for the Construction of New Buildings:

1. Number of Buildings to be erected one Location 123 Watchung Ave.

2. Map — Block — Lot Number —

30 3. Size of Main Building 58x51' 6" feet; number of stories one height of building 12 feet

4. Depth of Foundation 7'0 feet; thickness 12 inches; material concrete

5. Mortar for foundation cement; cellar or trench wall cellar

6. Footing or Base Course; width 22 inches; thickness 10 inches; material concrete

40 7. If piers, columns or posts are used, state what kind no columns

*Return—Report of Inspector of Buildings.*

8. Thickness of outside walls; 1st story 8 inches; 2d — inches; 3d — inches; 4th — inches; 5th — inches; material —

9. Thickness of inside partition walls; 1st story — inches; 2d — inches; 3d — inches; 4th — inches; 5th — inches; material —

10

10. Material of roof and style; also cornices and appendages Five ply tar gravel brick cornice

11. Material of timber hem.; bearing partition walls —

12. Size of floor beam, 1st tier 2x10 inches; 2d tier — inches; 3d tier — inches 4th tier — inches; 5th tier — inches.

13. Girders; of what material and size to support floors 6x8 how supported Lally col.

20

14. Iron Girders supporting walls, depth —; weight per yard —; how supported Lally Col.

15. Iron or Steel construction —

16. Distance of woodwork from inside of any flue 6 inches; size of flue linings 8x8 inches

17. Distance of beams or headers from outside of chimney or flue 2 inches

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18. Distance chimney projects inside of building 8 inches

19. Chimney, where started from foundation

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

21. Height of ceilings; 1st story 11-6 feet; 2d — feet; 3d — feet; 4th — feet; 5th — feet; skylight? —; scuttle? —; elevator? —; dumbwaiter? —

40

*Return—Report of Inspector of Buildings.*

22. Size and number of wood ceilings —  
metal ceilings —

23. Openings for doors and windows. State whether arched, or lintels to be used. If lintels are used, material Arched size —

24. Hall partitions; how fireproofed —  
10 bridging —

25. Distance from building line, front on line  
feet; — side — feet; — side — feet

## Extensions or Wings

26. Size of extensions or wings — number  
stories — height of building — feet

27. Depth of foundation walls — feet;  
thickness — inches; material —

28. Footing on base course, width —  
20 inches; thickness — inches; material —

29. If piers, columns or posts are used, state  
what kind —; cellar or trench walls —

30. Thickness of outside walls; 1st story —  
inches; 2d — inches; 3d — inches; 4th —  
inches; 5th — inches; material —

31. Thickness of inside partition walls; 1st  
story — inches; 2d — inches; 3d — inches;  
4th — inches; 5th — inches; material —

30 32. Proposed use of building Stores. This  
is a front addition to present frame building.

Estimated cost (exclusive of lot) of each build-  
ing separate \$7,000.

I hereby agree to construct the above de-  
scribed building in accordance with this appli-  
cation and with the specifications and plans sub-  
mitted herewith, to comply with all the provi-  
sions of the Building Code and to notify the  
Inspector of Buildings when footings are

*Return—Appeal to Board of Adjustment.*

started. The statement of estimated cost is correct.

Alexander Prince, 123 Watchung Ave.  
By Michael B. Silverstein, Authorized Agent.

Copy of Exhibit #2—Nov. 20th, 1924.

10

In the matter of the application  
of Alexander Prince on an  
appeal from the decision of  
the Building Inspector.

*To William H. Senior, Inspector of Buildings  
of Montclair, N. J.*

Alexander Prince, who made an application 20  
for a permit for the erection of a one story store  
building at 123 Watchung Avenue, Montclair,  
N. J., does hereby appeal from your decision  
denying the application for a permit to building  
a one story building at 123 Watchung Avenue,  
Montclair, N. J.

Let this be a notice of the appeal to the Board  
of Adjustment, of Montclair, N. J.

Dated, Newark, N. J., October 1st, 1924.

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ALEXANDER PRINCE,  
By LOUIS A. FAST, Attorney.

Certified a true copy of the original applica-  
tion, bearing the signatures on file in my office.

HARRY TRIPPETT,  
Secretary, Board of Adjustment,  
Montclair, N. J.

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*Return—Minutes of Board of Adjustment.*

Extract from Minutes of Meeting of the Board of Adjustment of the Town of Montclair, October 16th, 1924.

10 “Action on the pending appeal of Peter Scola, Alexander Prince and Allison P. Clark was postponed until the next regular meeting, November 6th.”

Extract from Minutes of Meeting of the Board of Adjustment of the Town of Montclair, November 6th, 1924.

“The Chairman said that the Board would now take up the pending appeal of Max L. Rudensy, and that the pending appeals of Alexander Prince and William H. D. & Annie R. Horton would have to go over until November 20th.”

20 Extract from Minutes of Meeting of the Board of Adjustment of the Town of Montclair, November 20th, 1924.

30 The Board next took up the application of *Alexander Prince*, who appealed to them for permission to erect a one-story store building, 58x 51½ feet, at #123 Watchung Avenue (Map 27, Block A., Lot 12), to be constructed of brick and cement blocks, to contain 3 stores, 12 feet in front of present frame building in which he resides.

40 Louis A. Fast, attorney for Mr. Prince, called Mr. Prince as his first witness, who, being duly sworn, said in answer to questions, that he had made application for a permit to build at 121 to 123 Watchung Avenue, Montclair, three stores. That the said property is between Park Street and North Fullerton Avenue and that there are eight stores now on said block, three next to his house and five more to the corner of Park Street.

*Return—Minutes of Board of Adjustment.*

Mr. Fast submitted a painting of the proposed buildings which Mr. Prince contemplated erecting, and the same being identified by Mr. Prince as a picture of his proposed building, was offered in evidence and marked "Exhibit #1 of Nov. 20th, 1924."

Continuing, Mr. Prince said that right next to his premises is a butcher shop, next to that a bank (The Montclair National Bank), next to the bank a hardware and house furnishing store, next to that a real estate office, next to the real estate office a delicatessen store, then a vegetable store, a butcher shop and then a grocery store, all of which are being used as such. That his property was about 200 feet from the corner of Park Street, and not from North Fullerton Avenue. That the frontage of his property is 75 feet and that next east of his house is a two family house and another two family house is on the corner of North Fullerton Avenue.

In answer to questions by Ignatius a Scannell, attorney for the objectors, Mr. Prince said that he occupied his own house at 123 Watchung avenue, with two other families, one of which occupied the top floor and the other two rooms on the second floor. That his house is of frame covered with stucco; that in the rear of the house, about 100 feet distant, there is a two car garage occupied by one of his own cars and one belonging to a party who paid rent for the privilege. That adjoining his proposed stores and the butcher store to the west is a driveway 8 or 9 feet wide, and to that extent the picture is incorrect as it shows his stores abutting the butcher shop. That he had resided at 123 Watchung Avenue since May, 1923.

*Return—Minutes of Board of Adjustment.*

10 Mr. Scannell said he had examined the record of the transfer personally and that deed of this property from Harry S. Merrielles and Glenna E. Marrielles, his wife, dated November 17th, 1922, conveys the property subject to the effect, if any, of the zoning ordinance or ordinances of the Town of Montclair and the supplements and amendments. The document referred to was received in evidence and marked "Exhibit #2 of November 20th, 1924."

Mr. Prince continuing, said that at the time he took title to the property he knew that the Town of Montclair had been zoned and that his property was in the suburban zone. That he examined the deed at the time of the transfer, but was sure he could build when he wanted to.

20 Mr. Fast said this is the first intimation he has had of the clause in the deed and asked when this particular block was cut off into a suburban section. The Secretary of the Board replied, when the original ordinance was adopted in 1921.

Mr. Prince continued that there were other stores in his neighborhood, about 200 feet away, on Park Street 25 or more and on Fairfield Street about 400 feet approximately.

30 In answer to further questions, Mr. Prince said it was his purpose to build the stores in front of his existing house, leaving the house where it is, and to continue to reside therein. That from the driveway to the west, the three stores will extend across the front of his property and right in front of his residence, and the stores will communicate with the front part of the house, becoming practically an extension of that building, two of the stores up against the house and one against the present driveway.

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*Return—Minutes of Board of Adjustment.*

That there would be an opening behind one store and the other two will be attached to the house.

William H. Senior, being duly sworn, said that he is the Inspector of Buildings of the Town of Montclair, that the proposed store building, aside from the zoning laws, complies in all respects with the Building Code, that all the stores now built in the Watchung section are in the business zone, that the street on which it is proposed to erect these stores is part in the business zone and part in the suburban zone. That during the past year or so there have been three dwelling houses built on North Fullerton avenue between Watchung avenue and Fairfield street, all of good and substantial construction, and that these dwellings together with those now in process of construction, complete that block of residential buildings. 10

That the erection of the proposed three stores on Watchung avenue would, be considered, increase the fire risk of dwelling houses in the immediate vicinity very much; that, in case a fire should arise in these stores and be communicated to the other buildings, it would clean out the block on a windy night. That the erection of the proposed three stores would also make the traffic conditions more dangerous, and that, with the present conditions, he often had to go to the corner to get around a block. That the same fire risk of stores in front of a frame building exists on the premises to the west of the Prince property. That both owners had automobiles and oil and gasoline would naturally be kept around the place for emergencies. That on inspection he had found cans of gasoline in some stores. That the fire insurance premiums are greater on stores than on dwelling houses. 20 30 40

*Return—Minutes of Board of Adjustment.*

In answer to a question, Mr. Senior said that he had received an application for the erection of another store building in the Watchung district just outside the business zone on Park street adjoining the Fallon residence, within the past forty-eight hours.

10 Michael B. Silverstein, being duly sworn, said that he was the architect who prepared the specifications for the Prince stores. That the present frame residence is located about in the middle of the lot facing Watchung avenue and it is proposed to erect the three stores in front of said frame building. Two of the said stores will be attached to it. The store walls are of hollow tile, the ceiling of metal covered front. The cellars are to be in the front of the stores and about fifteen feet from the house cellar, and  
20 not connected therewith. The upper part of the stores goes to the dwelling house and that he did not see any fire hazard to any extent. That his experience was that there were fewer fires in stores than in dwelling houses, although he admitted the risk was greater in stores. That the proposed store building would not take away the entrances or exits to the house in the rear, nor obstruct them in any way. That there is  
30 a passageway from the porch to the street on the Prince property and on the other side a driveway belonging to the adjoining owner. That there was a space of  $17\frac{1}{2}$  feet from the easterly wall of the proposed stores to the easterly boundary of the lot, which space allowed entrance to the garage in the rear of the house.

Mr. Scannell then said, "I move that the appeal be dismissed and the application denied on the ground that it should be against the policy of this Town to grant applications of this type.  
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*Return—Minutes of Board of Adjustment.*

Here is a man who already has two frame buildings on his lot. He has in one of them three families. In the rear of the first building, a frame garage, which he rents out to one car, and has another car occupying same. He builds stores in front of these. It is obvious that it is going to increase the fire risk of the community. It is further obvious that stores of that type and character will make the adjoining property valueless except for similar construction, and similar construction will practically form a continuous line of stores along Watchung avenue and frame buildings in the rear, which would be a fire hazard to the community. I reserve my right to put witnesses on.” 10

Chairman Hoadley replied, “Won’t you call your witnesses and put your case in?” 20

Mr. Scannell then called J. A. E. Stewart, who being duly sworn, said that he is president of the Watchung Improvement Association, a civic association formed for the betterment of the Watchung district, the bounds of said district being North Fullerton Avenue, Ridgewood Avenue, Chestnut Street and Bellevue Avenue. That, when the application of Mr. Prince to erect the proposed stores was brought to their attention, they called a meeting of the Executive Committee and passed a resolution, on October 25, 1924, a copy of which was forwarded to Mr. Hoadley, the president of this Board. That, after the adoption of the resolution, and circulated among the owners and residents of the Watchung neighborhood, under his personal supervision, and was signed by about four hundred, a great many of whom he had personally requested to sign it, and that he did not meet a single person who refused to sign the petition or expressed views contrary to the prayer of the petition. 30  
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*Return—Minutes of Board of Adjustment.*

Mr. Scannell then offered the petition in evidence, the title of which was read as follows:

“TO THE BOARD OF ADJUSTMENT OF THE  
TOWN OF MONTCLAIR.

10 “We, the undersigned, being advised that an appeal has been made to this Honorable Board by Alexander Prince to permit the erection of certain stores in front of a private residence known as No. 125 Watchung Avenue, situated in what is now a part of the suburban zone in the Town of Montclair, do hereby petition this Board to dismiss said appeal as we are convinced that the erection of said stores would be inimical to the health, safety and general welfare of the Watchung community.

20 “We feel that practically all of the residents of the immediate and adjacent neighborhood live in this community because of the exceptionally salutary conditions afforded by the present restrictions limiting the buildings therein erected to residences; that the thirty-eight stores in the Watchung Plaza center now available for business are sufficient for all needs of this community; that there is further space available in the present business zone; and that an extension of business into the existing suburban zone would cause unnecessary congestion, changing the character of the entire neighborhood to that of the overcrowded cities, to avoid which most of our people reside in Montclair at the present time.

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“We further feel that the traffic along Watchung avenue at or about the Plaza and the present business buildings is at the pres-

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*Return—Minutes of Board of Adjustment.*

ent time so congested that any further increase would make this community substantially less safe.

“We understand that the proposed stores would extend in a continuous line in front of a frame building now erected in the rear of the lot at 123 Watchung Avenue; that the stores adjacent thereto on the west are in front of a frame building in the rear thereof; and we are convinced that the construction of stores on the front of a lot with a frame building in the rear thereof constitutes a fire hazard which should be absolutely dis-  
countenanced.”

10

The petition was admitted and marked “Exhibit No. 3, November 20, 1924,” over the objection of Mr. Fast, on the ground that this Board should determine the appeal solely on the testimony as to whether these proposed buildings would in any way interfere with the health, with the safety and the general welfare of the community. That Mr. Prince was not a member of said association, could not be heard there, and the petitioners could not be questioned or cross examined.

20

Mr. Murray replied that, of course, the petition won't have the same weight of persons produced here. That he thought it was a perfectly proper petition to be presented to the Board and that the Board ought to give it such weight as it is entitled to.

30

Mr. Scannell then called Jethro Gibbs, who being duly sworn, said he is the Chief of the Fire Department of the Town of Montclair. That in his opinion the erection of the proposed store building in front of the frame residence at 123 Watchung Avenue, would increase the fire

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*Return—Minutes of Board of Adjustment.*

10 hazard materially, because the stores would prevent getting at the rear building from the front as they can at present, while the stores themselves would add a certain amount of hazard in themselves. That there were, according to the records, more fires in stores than in dwelling  
10 houses. That the erection of these three stores would add to the fire risk of the entire neighborhood. That at present if the firemen could not get through the doorway into the residence, they would have to make another entrance in some other part of the building, and the erection of stores in front of the building would naturally make this more difficult.

In answer to a question from Mr. Fast, the Chief said that he knew the major portion of the block was in the business zone.

20 Continuing, the witness said that in Montclair we have very carefully studied out fire zones, called fire limits which are primarily around the business zones, to protect the lives of the people and property by requiring fireproof buildings to be erected therein. That they were created for the purpose of erecting less hazardous buildings in the more congested areas.

30 The Chief said that the residence to the west of the Prince house already had stores built in front of it, and the risk for those people would be very much increased by the erection of stores in front of the Prince house as well, and that he would not be surprised if the insurance would jump 100%.

40 In answer to further questions the witness said that his department is equipped with safety apparatus for the saving of the lives of people in the buildings—if they can get to them, and that he considered the building of these stores

*Return—Minutes of Board of Adjustment.*

in front of residences jeopardized the safety of the lives of the people in the latter; that in his opinion it is wiser to have business buildings in a zone together where they can be watched and gotten at readily, than to have them scattered around through the dwelling parts of the Town, from the fire risk point of view.

Henry M. Robinson, being duly sworn said that he is the Commissioner of Public Safety of Montclair; that as such it is his duty to acquaint himself with traffic conditions in various parts of the Town; that he is familiar with the traffic conditions at or about Park Street and Watchung Avenue, which is bad, largely due to the converging of the several streets from north and south, the traffic from all of which has to pass under the viaduct of the Erie Railroad at said point, the traffic converging there makes the condition very serious. That every store erected in a congested district adds to the congestion. That the tracks are there and the added cars, other people and delivery wagons require more police protection; that the pedestrians have to be protected. That the trouble is enhanced, in this particular location, by the presence of the Watchung School Building, directly back of the property, five or six hundred children going back and forth daily. That his department have to maintain a police force for the care of these children and that every additional wagon or vehicle that goes through there increases that hazard. The more stores put up there, the less the safety for the children can be guaranteed.

Mr. Fast here suggested that the Town widen the streets and Mr. Robinson replied that, of course, that would be more expense and probably increase traffic as well as have a tendency

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*Return—Minutes of Board of Adjustment.*

to increase the number of cars parked along the curb. That the parking could be regulated but that parking isn't the difficult situation. It is the cars that come and go, to and from the stores that mean congestion.

10 J. A. E. Stewart, being recalled, said there are thirty-eight stores in the Watchung business zone at present; two are being built, two garages, one bank. That two of those completed are vacant and there is further space available for other stores in this business zone.

In reply to questions by Mr. Fast, Mr. Stewart said there are two hundred and sixty-five members in the Watchung Improvement Association. That the matter of Mr. Prince's application was never brought before said association as a body.  
20 That there were about twelve members of the Executive Committee, and that there were about fifteen members present at the meeting when the resolution was introduced.

Mr. Scannell said he would like the Board to consider the evidence of the Superintendent of Schools, who had promised to be present, but had not yet arrived, and to save time, Mr. Scannell said that Mr. Pickell would testify that he is the Superintendent of Schools in the Town  
30 of Montclair; that he is familiar with the Watchung district and particularly in connection with the Watchung school at North Fullerton Avenue two blocks south of the proposed stores. That there are at present in the Watchung school, approximately five hundred children. That alterations and additions are now being made to the school building so that it will accommodate about six hundred and fifty children; and from examining personally the territory covered by the school district and the houses  
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*Return—Minutes of Board of Adjustment.*

which are being constructed, in the opinion of the superintendent; the school additions will be filled with scholars almost as soon as completed. That the school is for elementary grades and that there are young children attending it. That it is necessary for all the children west of the Erie Railroad to go under the viaduct at Watchung Avenue crossed by the Erie Railroad tracks. To do this they must cross over Park street, which is a street of great traffic, and must go down along Fairfield Street through the present business zone. All the children north of Watchung Avenue and those from the south side of Wildwood Avenue and from as far as Grove Street will come down either along Park Street or Fullerton Avenue to the corner of Fullerton and Watchung Avenues and will then proceed across Watchung and down through the block between Watchung and Fairfield on North Fullerton Avenue. It is the opinion of the Superintendent that any stores approaching North Fullerton Avenue or bringing the business district in nearer to North Fullerton Avenue will be an appreciable hazard, threatening the lives of those children. That this is not a mere conjecture on his part, as one child was very seriously hurt about a year and a half ago by being struck by a car at the corner of Park Street and Watchung Avenue and there have been several serious accidents, automobile accidents, in which children have been injured or killed in heavy traffic in this general neighborhood; though not at this particular point.

Mr. Fast said he was perfectly willing to admit that the foregoing will be the testimony of the Superintendent of Schools and that the most rigid cross examination would not shake that story.

*Return—Minutes of Board of Adjustment.*

Mr. Scannell said the Superintendent would further testify that the playground of the Watchung School is across North Fullerton Avenue from the school, and Mr. Fast said he assumed that to be a fact.

10 Mr. Scannell said that for the purpose of record, it is stipulated that the statement of Superintendent Pickell will be accepted as his evidence.

Mr. Fast said that before he came to this Board he had a writ of mandamus and a rule to show cause, advised by the Chief Justice. That he met Mr. Beach, whom he has known for a long time, and at his suggestion we simply got an adjournment on the application until the matter was presented before this Board.

20 Mr. Fast said he thought the statutes give this honorable body a right to consider appeals from the decisions of the Inspector of Buildings. I think (he said) that is what they provide and that you are to consider whether the application in any way interferes with the health, general safety and welfare of the community. I think from the construction of the statute, you must also consider the present neighborhood. One of the provisions of the statute is you can take into consideration  
 30 the existing buildings in which the application is made. Now, in this particular block, I maintain that they used an arbitrary method in doing it. If, for example, they went to the end of the block; if they said this block on Watchung Avenue must be a business street or this side of the block must be a business street, then, I would say, in their discretion, they would have that right; but when they take a street, a block, and cut it up, especially when the majority of the buildings in that  
 40 block contain stores, then I maintain it is an

*Return—Minutes of Board of Adjustment.*

arbitrary act on the part of the Commissioners, that does not carry with it the present precedent or right. I maintain that such an act confiscates our property. We are not allowed to use our property. As long as we have followed the building code, and from the testimony of Mr. Senior we have followed the building code in the plans and specifications, I maintain that our rights, our property is being confiscated without due process of law. Now there has been testimony of increase in fire risk. I think Mr. Hoadley will bear me out that any sort of building placed on the lots will be some kind of risk, some kind of additional risk that wasn't there before. It is only reasonable to presuppose that if you should put these stores in front of the dwelling house, of course, you won't have the open space you had before. We have followed the building code of this Town. If that building code needs amendments, that is something to be taken up at a future time. If this is a congested district, without attempting to lay any criticism anywhere, I think something is wrong somewhere. I think steps should be taken to prevent traffic in the district, make it a one-way street; a great many things could be done. These three stores won't materially change the conditions that now exist. As long as the three stores won't endanger to any great extent, greater than now, the health, safety and general welfare of the district, I think our appeal should be granted. I think there has been no testimony which would in any way show that the erection of the three stores would endanger the health, safety and general welfare of the community.

Mr. Scannell said—This applicant bought the property with his eyes open. He bought the

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*Return—Minutes of Board of Adjustment.*

property in a suburban zone. He bought the property knowing the business zone extended to his line. I don't think he should come before the Board and complain of the zoning ordinance. There seems to be a boundary line to everything. If a man acquires a piece of property which ad-  
10 joins an established zone, he, of all men, has the least right to complain that his property is not in the adjoining zone. As to health, safety and general welfare, I think there is ample testimony that it would increase the fire hazard, not only in this particular section, not only to the occupants of the frame houses and the particular stores, but that it would endanger the lives of the people and form a hazard to the occupants of the adjoining buildings. It is  
20 shown, and it is not contradicted, that the children of the Watchung school have to travel through this district. It is shown without contradiction that the bringing of stores nearer to North Fullerton Avenue will more particularly endanger the lives of the children. Some have been killed, some have been injured, in recent times. I don't think the Board should further extend the business zone into an avenue and highway where small children must necessarily go to  
30 school; and bringing of that business property towards North Fullerton Avenue will bring it towards the avenue through which a great portion of the children have to go in order to reach school.

Mr. Murray moved that the appeal of the applicant be denied and the decision of the Inspector of Buildings in the Town of Montclair be affirmed upon the ground that the facts disclosed by the testimony indicate that the provisions of the ordinance, in this case, come within the police  
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*Return—Minutes of Board of Adjustment.*

powers of the Town of Montclair, and are not arbitrary and do not work an injustice or hardship to the applicant. The motion was carried. Ayes—Messrs. Brewer, Crane, Hoadley, Murray and Tallmadge; nays—none.

Mr. Fast said that his understanding with Mr. Marsden does not preclude his mandamus proceeding, that he maintained then and maintains now that the statute under which this Board is created and the ordinances pursuant to that statute, does not operate against us because it gives to the Board of five men selected by the governing body of Montclair the right to arbitrarily, (and he said this in a legal sense), take away the rights of the property holders in this jurisdiction. I want the record to indicate that that is my position. I did not attempt to waive my rights under the mandamus proceedings. 10 20

Chairman Hoadley replied that the Board is not aware of any agreement; it does not affirm or deny it.

Mr. Brewer moved that the meeting adjourn. The motion was carried—ayes—Messrs. Brewer, Crane, Hoadley, Murray and Tallmadge; nays—none. Time 11:15 P. M.

HARRY TRIPPET, 30  
Secretary.

*Return—Finding of Fact.*

BOARD OF ADJUSTMENT OF THE TOWN  
OF MONTCLAIR,  
IN THE COUNTY OF ESSEX.

10	ALEXANDER PRINCE,  <div style="text-align: right;"><i>Appellant,</i></div>	}	
	<i>vs.</i>		<i>On Appeal.</i>
	WILLIAM SENIOR, Inspector of Buildings of the Town of Montclair, and the TOWN OF MONTCLAIR,  <div style="text-align: right;"><i>Defendants.</i></div>		<i>Finding of Fact.</i>

20 The Board of Adjustment of the Town of Montclair, in the County of Essex, New Jersey, hereby find and determine in the above-stated case the following facts:

1. Alexander Prince applied to the Inspector of Buildings of the Town of Montclair for a permit to erect three stores at Nos. 121-123 Wat-chung avenue, Montclair, premises owned by the applicant.

30 2. The permit was refused by the Inspector of Buildings on the ground that the proposed erection was to be made in a suburban zone which forbids the erection of stores and which requires that two side yards shall be provided on every lot, the least dimension of one of which shall be four feet and of the other not less than eight feet nor less than four inches for every foot of building height.

40 3. The zoning ordinance of the Town of Montclair was passed in 1921 after protracted hearings and expert supervisions of Mr. H. B. Swan, zoning expert of New York City.

*Return—Finding of Fact.*

4. The block in which this proposed erection is to take place is approximately divided equally between the business zone and the suburban zone.

5. That part of the block which is nearest the Erie Railroad station and to the west is in the business zone.

6. That part of the block which is furthest away from the Erie Railroad station bordering on North Fullerton avenue is in the suburban zone. 10

7. North Fullerton avenue is entirely built up with residences of substantial construction.

8. Two blocks south from the proposed construction is the Watchung School, an elementary school, housing at present more than five hundred children.

9. The Superintendent of Schools testifies that alterations are being made and additions are being made to the present school for the accommodation of six hundred fifty pupils which accommodations will be filled as soon as completed. 20

10. The school district is divided roughly into two parts, one east of the railroad and one west.

11. All of the children on the west of the track, numbering approximately one-half of all the children attending the school, must pass under the viaduct at Watchung avenue and as a result go through this district on their way to school. 30

12. All of the children to the north of Watchung avenue as far as Wildwood avenue, four blocks away, and as far east as Grove street, six blocks away, must pass near the location of the proposed store.

13. The traffic congestion of this portion of the town, due to the railroad station one block west, is very great. 40

*Return—Finding of Fact.*

14. The erection of these stores would increase this congestion and would thereby endanger the lives of children who must pass this point to get to school.

15. Automobile accidents in which children have been injured or killed have already occurred  
10 in this neighborhood.

16. The proposed erection of the three stores is to be in front of a frame dwelling house now occupying the land.

17. The said dwelling house is now occupied by three families.

18. The proposed stores will occupy all of the front of the block except a ten foot driveway on one side and two of these stores will abut upon  
20 and be attached to the dwelling house.

19. A garage occupied by two cars is in the rear of said dwelling house on the same lot.

20. As a result of such location and such congestion the fire hazard will be materially increased.

21. Firemen will be hindered by such an erection in fighting a fire should one break out in the dwelling house or garage in the rear.

22. Insurance rates are higher on business  
30 places than on dwellings.

23. The entire community represented by Mr. Stewart, president of the Watchung Improvement Association, and numbering more than four hundred, are opposed to the extension of the business zone.

24. There is in the business zone adequate store facilities and vacant stores.

25. There is in the business zone vacant land  
40 for the erection of further stores.

*Return—Decision of Board of Adjustment.*

26. Said Alexander Prince bought the property subsequent to the enactment of the zoning ordinance.

27. He knew at the time of purchase that the land was in the suburban zone and he knew that the suburban zone prohibited the erection of buildings for stores. 10

28. His deed contains the following clause, "subject to the effect, if any, of the zoning ordinance of the Town of Montclair, its supplements and amendments."

Board of Adjustment of the Town of Montclair, in the County of Essex, New Jersey.

By:

FREDERICK HOADLEY,  
F. LAYTON BREWER,  
WEBSTER TALLMADGE, 20  
I. SEYMOUR CRANE,  
GEO. WELWOOD MURRAY.

*Re Alexander Prince  
Decision of Board of Adjustment.*

ALEXANDER PRINCE, as owner of premises designated on the tax map of the Town of Montclair for the year 1924, as Map 27, Block A, Lot 12, having heretofore made application to the Inspector of Buildings of the Town of Montclair for a permit to erect a one-story building 58 x 51½ feet on above mentioned premises, to be constructed of brick and cement blocks, to contain three stores twelve feet in front of present frame building, and said Inspector of Buildings having denied the same and thereafter the said Alexander Prince having duly filed an appeal from the decision of the said Inspector of Build- 30  
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*Return—Decision of Board of Adjustment.*

ings on the first day of October, 1924, said appeal coming on to be heard before the Board of Adjustment of the Town of Montclair, in the County of Essex, on the twentieth day of November, 1924, after hearing the parties in interest and after due consideration,

10 IT IS, on this twentieth day of November, 1924,

DECIDED AND DETERMINED that the decision of the Inspector of Buildings of the Town of Montclair, in refusing to issue a permit for the erection of a one-story building 58 x 51½ feet on above mentioned premises, to be constructed of brick and cement blocks, to contain three stores twelve feet in front of present frame building, and to be located on premises designated on the 1924 tax map of the Town of Montclair for the year 1924, as Map 27, Block A, Lot 12, based on  
20 the plans as filed, be and the same hereby is affirmed.

Board of Adjustment of the Town of Montclair, in the County of Essex, New Jersey.

By:

30 FREDERICK HOADLEY,  
F. LAYTON BREWER,  
WEBSTER TALLMADGE,  
I. SEYMOUR CRANE,  
GEO. WELWOOD MURRAY,

Certified a true copy of the original order, bearing the signatures on file in my office.

HARRY TRIPPETT,  
Secretary, Board of Adjustment,  
Montclair, N. J.

*Return—Exhibit No. 3.*

COPY OF HEAD OF EXHIBIT #3

NOVEMBER 20, 1924.

TO THE BOARD OF ADJUSTMENT  
OF THE TOWN OF MONTCLAIR.

We, the undersigned, being advised that an appeal has been made to this Honorable Board by Alexander Prince to permit the erection of certain stores in front of a private residence known as No. 123 Watchung Avenue, situated in what is now a part of the suburban zone in the Town of Montclair, do hereby petition this Board to dismiss said appeal as we are convinced that the erection of said stores would be inimical to the health, safety and general welfare of the Watchung community. 10

We feel that practically all of the residents of the immediate and adjacent neighborhood live in this community because of the exceptionally salutary conditions afforded by the present restrictions limiting the buildings therein erected to residences; that the thirty-eight stores in the Watchung Plaza center now available for business are sufficient for all the needs of this community; that there is further space available in the present business zone; and that an extension of business into the existing suburban zone would cause unnecessary congestion, changing the character of the entire neighborhood to that of the overcrowded cities, to avoid which most of our people reside in Montclair at the present time. 20 30

We further feel that an extension of the business zone to the east on Watchung Avenue would certainly result in the west side of North Fullerton Avenue between Watchung and Fairfield Avenues becoming a solidly business section; 40

*Return—Exhibit No. 3.*

that North Fullerton Avenue at this point is a highway through which a large percentage of the children travel to and from the Watchung public school; and that the heavy traffic incidental to this business would render this section decidedly unsafe, particularly for these school children.

10

We further feel that the traffic along Watchung avenue at or about the Plaza and the present business building is at the present time so congested that any further increase would make this community substantially less safe.

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We understand that the proposed stores would extend in a continuous line in front of a frame building now erected in the rear of the lot at 123 Watchung Avenue; that the stores adjacent thereto on the west are in front of a frame building similarly situated; that all other stores erected to the east would have similar frame buildings in the rear thereof; and we are convinced that the construction of stores on the front of a lot with a frame building in the rear thereof constitutes a fire hazard which should be absolutely discountenanced.

Certified a true copy of the original petition bearing the signatures on file in my office.

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HARRY TRIPPETT,  
Secretary, Board of Adjustment,  
Montclair, N. J.

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*Return—Zoning Ordinance.*

SECTIONS OF THE ZONING ORDINANCE  
OF THE TOWN OF MONTCLAIR  
RELEVANT TO THE ISSUE.

An ordinance establishing building zones and regulations and providing penalties for their violation.

The Board of Commissioners of the Town of Montclair, in the County of Essex, do ordain as follows: 10

Section 1. Kinds of Districts:

(a) For the purpose of regulating and restricting the location of trades and industries and the location of buildings designed for specified uses, for the purpose of regulating and limiting the height and bulk of buildings hereafter erected, and for the purpose of regulating and determining the area of yards, courts and other open spaces for buildings hereinafter erected, the Town of Montclair is hereby divided into eight classes of zones: 20

- (1) Villa zones;
- (2) Suburban zones;
- (3) Two-family detached house zones;
- (4) Two-family semi-detached house zones;
- (5) Apartment house zones No. 1;
- (6) Apartment house zones No. 2; 30
- (7) Business zones;
- (8) Industrial zones;

as shown on the building zone map which accompanies this ordinance and is hereby declared to be a part hereof. The zones designated on said map are hereby established. The zone designations which accompany said building zone map are hereby declared to be a part thereof. No building or premises shall be erected or used for any purpose other than a purpose permitted 40

*Return—Zoning Ordinance.*

in the zone in which such building or premises is located. No building or part of a building shall be erected except in conformity with the regulations herein prescribed for the zone in which such building is located.

10 (b) All applications for building permits must be accompanied by a plan of the plot upon which the proposed building is to be constructed, showing thereon the exact size, shape and location of said proposed building, and said plan shall be drawn to an indicated scale.

Section 2. Use Regulations Controlling Residence Zones.

20 In a villa zone, a suburban zone, a two-family detached house zone, a two-family semi-detached house zone, an apartment house zone No. 1, and an apartment house zone No. 2, no building or premises shall be used and no building shall be erected which is arranged, intended or designed to be used, except for one or more of the following uses:

- 30 1. Dwellings or tenements, including the office of a physician, surgeon, dentist, artist or musician when situated in the same dwelling or apartment used by such physician, surgeon, dentist, artist or musician as his private dwelling.
2. Boarding houses.
3. Hotels.
4. Churches.
5. Schools, libraries or public museums.
6. Hospitals and sanitariums.
7. Clubs, excepting clubs the chief activity of which is a service customarily carried on as a business.

*Return—Zoning Ordinance.*

8. Philanthropic or eleemosynary uses or institutions, other than correctional institutions.

9. Railroad passenger stations.

10. Farming, truck gardening, nurseries or greenhouses.

11. Accessory uses customarily incident to the above uses, the term accessory use, however, not including a business or any building or use not located on the same lot with the building or use to which it is accessory. A garage or a group of garages for more than three motor vehicles shall not be permitted as an accessory use. 10

Section 4. Height and Area Regulations Controlling Suburban Zones.

(a) Height. 20

No building shall be erected to a height in excess of thirty-five feet.

(b) Building area.

No building shall occupy more than thirty per cent. of the area of the lot at the curb level.

(c) Number of families housed.

No dwelling or tenement house shall hereafter be erected or altered to accommodate or make provision for more than ten families on any acre of land or more than a proportional part of an acre of land. The maximum number of families which may hereafter be housed on any plot of ground shall not exceed the integral number obtained by multiplying the acreage of such plot, exclusive of the area within street lines by ten. The limitation imposed by this section shall, however, not prohibit the erection of a one-family house on any plot containing at the time of the passage of this ordinance an area of less than one-tenth of an acre. 30 40

*Return—Zoning Ordinance.*

## (d) Rear yards.

The least dimension of a rear yard at the curb level shall be not less than twenty-five per cent. of the depth of the lot, but need not exceed twenty-five feet at such level. In no case shall such least dimension be less than six inches for each foot of building height.

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## (e) Front yards.

Where at least one-half of the buildings situated on either side of the street between two intersecting streets conform to a minimum setback line no new building shall be erected and no existing building shall be reconstructed or altered to project beyond such setback line. The foregoing rule shall, however, in no case be applied so as to keep the street wall or walls of buildings more than twenty-five feet back from the street line. Where there is no existing building in the block, no new building shall be erected with its street wall nearer than twenty-five feet to the street line.

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## (f) Side yards.

Two side yards shall be provided on every lot. The least dimension of one side yard shall be not less than four feet. The least dimension of the other side yard shall not be less than eight feet nor less than four inches for each foot of building height.

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## (g) Inner courts.

The least dimension of an inner court at its lowest level shall be not less than six feet. In no case shall such least dimension be less than four inches for each foot of building height. The minimum area of an inner court shall be not less than twice the square of its required least dimension.

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*Return—Board of Adjustment Ordinance.*

## (h) Outer courts.

The least dimension of an outer court at its lowest level shall be not less than the minimum width required in the case of the wider side yard for a building of like height.

## Section 21. Enforcement Penalties.

This ordinance shall be enforced by the building inspector. The general agent, architect, builder, contractor or any other person who knowingly commits, takes part or assists in any violation of this ordinance, or who maintains any building or premises in which any violation of this ordinance shall exist, shall for each and every violation, and for each and every day that such violation continues, be subjected to a fine of not more than fifty dollars.

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An ordinance to amend an ordinance entitled "An Ordinance Establishing Building Zones and Regulations, and Providing Penalties for Their Violation," adopted May 19, 1921, by providing for a Board of Adjustment in conformance with the provisions of Chapter 146, Laws of New Jersey, 1924.

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The Board of Commissioners of the Town of Montclair, in the County of Essex, do ordain as follows:

Section 1. That an ordinance entitled "An ordinance establishing building zones and regulations, and providing penalties for their violation," adopted May 19, 1921, be amended by amending section 15 thereof so as to read as follows:

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## Section 15. BOARD OF ADJUSTMENT.

A Board of Adjustment is hereby established which shall, in appropriate cases and subject to appropriate conditions and safeguards, make spe-

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*Return—Board of Adjustment Ordinance.*

cial exceptions to the terms of the above-quoted ordinance adopted May 19, 1921, and the amendments thereof and the supplements thereto, in harmony with the general purpose and intent of said ordinance and in accordance with general or specific rules therein contained.

10 Said Board of Adjustment shall consist of five members who shall be appointed by the Board of Commissioners of the Town of Montclair by resolution. Of the original appointees to such board, one member shall be appointed for a term of one year, two members for the term of two years and two members for a term of three years. The successors of the original appointees shall be appointed for a term of three years. All appointments to fill vacancies shall be filled for  
20 the unexpired term of the member whose term becomes vacant.

Any member of said Board of Adjustment may be removed for cause by the said Board of Commissioners upon written charges and after public hearing.

No member of the Board of Adjustment shall receive any compensation for his services.

30 The Board of Adjustment shall choose its own chairman and vice-chairman, who shall preside in the absence of the chairman. In the absence of both the chairman and vice-chairman, the board shall choose one of its number as acting chairman. Such chairman or the party acting in his stead during his absence, may administer oaths and compel the attendance of witnesses.

40 The Town Clerk shall be the secretary of the board and shall take minutes of all its meetings. The office of the Town Clerk shall be the office of the board. The Clerk shall be the official custodian of all its minutes, records and other docu-

*Return—Board of Adjustment Ordinance.*

ments. In case of the absence of said Clerk from any meeting or meetings, then the board shall choose some one of its members to act as secretary to the board during his absence.

The presence of three members shall be necessary to constitute a quorum and the concurring vote of three members of the board shall be necessary to reverse any order, requirement, decision or determination of any administrative officer or to decide in favor of the appeal of any matter upon which it is required to pass in accordance with the provisions of the above-mentioned ordinance adopted May 19, 1921, and amendments thereof and supplements thereto, or to effect any variation in said ordinance.

10

Meetings of the board shall be held at the call of the chairman and at such other times as the board may determine. All meetings of the board shall be open to the public.

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The board shall keep minutes of its proceedings showing the vote of each member upon each question, or if absent or failing to vote, indicating such action, and shall keep records of its examinations and other official action, all of which shall be immediately filed in the office of the board and shall be kept as a public record.

The board shall make such other organization rules and regulations for procedure not inconsistent with the above entitled ordinance adopted May 19, 1921, or any of its amendments or supplements, or the said Chapter 146, Laws of New Jersey, 1924.

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Appeals to the Board of Adjustment may be taken by any person aggrieved or affected by the decision of the administrative officer provided in the said ordinance of May 19, 1921, of which this ordinance is an amendment.

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*Return—Board of Adjustment Ordinance.*

The Board of Adjustment shall, in compliance with the provisions of Chapter 146, Laws of New Jersey, 1924, make rules and lay down procedure for taking such appeal.

10      Within a reasonable time after the hearing accorded on any appeal the board shall make its decision. Said decision shall be forthwith filed in the office of the said Board of Adjustment and shall be indexed by the clerk for ready reference. The Clerk shall also mark the date of filing in said office.

The Board of Adjustment shall have the following powers:

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 the said  
20 Chapter 146, Laws of New Jersey, 1924, or of any ordinance adopted pursuant thereto, or the aforesaid ordinance adopted May 19, 1921.

2. To hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance.

30      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.

40      In exercising the above mentioned powers such board may, in conformity with the provisions of the above mentioned act, reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from and may

*Return—Board of Adjustment Ordinance.*

make such order, requirement, decision or determination as ought to be made, and to that end have all the powers of the officer from whom the appeal is taken.

4. Where a zone boundary line divides a lot in a single ownership at the time of the passage of this ordinance, permit a use authorized on either portion of such lot to extend to the entire lot, but not more than twenty-five feet beyond the boundary line of the zone in which such use is authorized. 10

5. Permit the extension of a non-conforming use or building upon the lot occupied by such use or building at the time of the passage of this ordinance.

6. Permit the erection of an additional building upon a lot occupied at the time of the adoption or the ordinance of which this is amended, to wit., May 19, 1921, by a business or industrial establishment and which additional building is a part of such establishment where carrying out the strict letter of the provision of the ordinance would result in practical difficulties or unnecessary hardships. 20

7. Grant in undeveloped sections of the town temporary and conditional permits for not more than two years for structures and uses in contravention of the use regulations controlling residence zones. 30

8. Exempt a proposed building, either in whole or in part, from the front yard requirement. This relief, however, shall be granted only in such cases where, to require the proposed building to be erected in conformance with the established setback line would work unnecessary hardship to the owner without any compensating benefit to the community. 40

*Return—Board of Adjustment Ordinance.*

9. Permit in a business zone, subject to the prohibition of Section XIV, the construction, extension, alteration or conversion of a building intended for the storage of motor vehicles or for a motor vehicle service station.

Adopted July 1, 1924.

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NEW JERSEY COURT OF ERRORS AND APPEALS

ALEXANDER PRINCE

*Prosecutor,  
Respondent,*

vs.

TOWN OF MONTCLAIR and  
the BOARD OF ADJUST-  
MENT OF THE TOWN OF  
MONTCLAIR.

*Defendants,  
Appellants.*

*On Mandamus*

*In Certiorari  
On Appeal from  
Supreme Court*

BRIEF OF RESPONDENT

This action is before this Court on an appeal from the decision of the New Jersey Supreme Court, which Court reversed the judgment of the Board of Adjustment of the Town of Montclair (State of Case, p. 3.) It should be borne in mind that originally the proceedings were entitled "in Mandamus" proceedings (State of Case, p. 5.), and that because of the point raised by the Assistant Town Attorney of the Town of Montclair before the Supreme Court that Chapter 146 of the Pamphlet Laws of 1924 required that the proceedings in the nature of an appeal should be in certiorari, that the Supreme Court permitted the instant respondent to entitle his proceedings alternately "On Mandamus" and "In Certiorari" (State of Case p. 5), permitting thereby the issue to be heard, and so that, the facts and the law could be squarely put up to this Court, and ground has been urged for a reversal on that account. We say only this in passing, that in the event of the affirmance by this Court of the decision of the Supreme Court, that the order may be so moulded requiring the Inspector of Buildings of the town of Montclair to issue the permit, without the necessity of again starting mandamus proceedings.

THE DECISION OF THE SUPREME COURT  
REVERSING THE DECISION OF THE BOARD  
OF ADJUSTMENT OF THE TOWN OF MONT-  
CLAIR SHOULD BE AFFIRMED.

Our distinguished friends representing the defendants-appellants, urge the reversal by this Court of the lower court's findings, and have urged, in that behalf, two main reasons. We think that it would be easier to present our arguments by following the argument in the brief of the appellants *seriatim*.

We desire to call the Court's attention to an apparent error in the statement of a fact, as shown on page ten of appellants' brief. It is suggested therein that the contemplated building to be erected, is on a street wholly residential, completely built up with residences of a most substantial character. The fact is that next to the premises is a butcher shop, next to that the Montclair National Bank, next to that a hardware and house furnishing store, next to that a real estate office, then a vegetable store, a butcher shop and then a grocery store, and that the property is about two hundred feet from the corner of Park Street, and a small distance from the way station of the Erie Railroad (State of Case p. 13). These business properties adjoin Mr. Prince's property.

The Supreme Court said in the case of Plymouth Company vs City of Newark in 2 N. J. Misc. Rep., p. 711, "Upon what sound practical theory one of the leading business arteries of a populous city may be severed and the undeveloped severed part restricted to residential use, and thereby barring the street to further business extension and development is beyond the power of plain sense to discover. We think this attempted classification of South Orange Avenue is purely arbitrary. In order to warrant

such a classification it must be made to appear in what way the health, safety or general welfare of the public is conserved or advanced by the restriction. This has not been done. On the contrary, in the light of the agreed state of facts, it appears to us that to restrict four or five blocks of this business thoroughfare to residential use, is an act against the general welfare of the public and serves none of the ends contemplated by the statute. A business artery, leading from the heart of a growing and thriving city, cannot properly have an impasse created to bar its further progress and improvement, by a zoning ordinance, unless it clearly appears that the restriction is within the authorization of the statute, for example, necessary to conserve the health, safety and general welfare of the public."

In the case of *Kosloy vs. Quigley*, Inspector of Buildings of the City of Paterson, which is an unreported case, decided November 8, 1922, it was held that where the relator applied for a permit to alter a residence into a shop and dwelling combined, and the locality was composed of stores and dwelling houses, as the case sub judice, and the permit was refused because the City had adopted a zoning ordinance which placed relator's property in a residential zone, that such action was without warrant in law, because, as the Court said, "The relator is deprived of the use of his property, not necessary to the preservation of the public health, safety and general welfare, and the prohibition of the intended use of the property is not, in our opinion, valid exercise of the police power."

We desire to call the Court's attention to the case of *Reimer vs. Dallas* 3 N. J. Adv. Rep. 1302, and the case of *Levy vs. Mravlag* 96 N. J. L. 367, which are cases along the same line. In the *Reimer v Dallas* case, the court said that just because a section of a borough is used for residential purposes, and garage are not, as a rule, of an appealing type of architecture, that this did not supply sufficient

grounds for withholding permits to build garages, provided the plans and specifications conform to the building code.

The Supreme Court, in the case of *Eaton vs. South Orange* 3 N. J. Misc. Rep. 957, said that it was not a valid exercise of the police power to make such provision in the Town Zoning Act allowing set backs. Our State Court has held in the case of *Passaic vs. Paterson Bill Posting Co.* 72 N. J. L. 285, that a city ordinance requiring that sign or bill boards shall be constructed not less than ten feet from the street line, is a regulation not reasonably necessary for the public safety and cannot be justified as an exercise of the police power. Even the fact that there is considerable traffic, automobile or otherwise, does not justify the restriction in question. By that same deduction, that requirement in the Montclair ordinances as to area restriction, cannot possibly be presumed to be reasonable, as that, in no way, can affect the public safety of passers-by on foot or auto, while in the *Eaton vs. South Orange* case, it would the more likely affect the public than the instant case.

Our distinguished friend, in arguing the case of Montclair and its zoning ordinances, fears that the erection of client's stores will be extremely hazardous because of its fire risk, and that it would endanger the lives of the three families in the rear of the proposed building. If the codes of the Town of Montclair do not sufficiently protect the lives of its inhabitants, no one is to be blamed for it but the town itself. Without admitting, and surely denying the allegation that these buildings of Mr. Princes' would jeopardize the lives of the families in the rear of the proposed building, we would respectfully urge the Court to set aside the Town's reasoning because, as this Court has said in the case of *Ingersoll vs. So. Orange* 128 Atl. Rep. 393, in

which the Supreme Court's opinion was taken as the opinion of this Court, that it is the plain duty resting upon the municipal authorities to furnish and to provide to its inhabitants reasonably proper and adequate fire protection. The Court said, "We think it would be unreasonable to hold that the adequacy of such a department should be maintained by restricting building and construction but that, on the contrary, such adequacy should be maintained and keep step with increases in buildings and resulting increases of fire hazards by increasing and enlarging the fire department in men, apparatus and efficiency." The reasoning in this case was subsequently followed in *Williams vs. Gage* 3 N. J. Misc. Rep. 1099.

It is also urged by our distinguished adversaries, that the contemplated building would increase the insurance rates in the neighborhood. We desire to call your Honors' attention to the case of *State vs. Dowling* 3 N. J. Misc. Rep. 338, where it was held that the refusal to grant a permit to build a business stable was improper, although the annual rates for insurance for a brick stable was ninety-one cents per hundred dollars, as to eighteen and one-half cents for frame dwellings, and thirteen cents for brick dwellings; and that relator's fifty horse-drawn milk wagons would leave the stable between 1:30 and 4 A. M., returning between 10 A. M. and 2 P. M.

We maintain that the finding of the Board of Adjustment that the prosecutor in this case is not acting in good faith, is without any foundation, and in that connection, we desire to cite the case of *Cooper Lumber Co. vs. Dammers* 125 Atl. Rep. 325, where the relator applied for a permit to erect certain structures for lumber purposes. It was refused because it was a residential zone. In the neighborhood, there was only a single dwelling, near the river, and used by many industries around there.

The section had little value for residential purposes. That ordinance was declared to have been unwarranted, because it deprived the relator of a use for property for which it is best fitted, and to deprive him of a part of the value of his property, and that the use to which he desires to put it is not one which is in any sense detrimental to the public health, safety and general welfare, and that such an ordinance deprived the relator of his right of private property, guaranteed him by the Federal and State Constitutions. In this connection, we cite the case of *Ignaciunas vs. Risley*, 98 N. J. L. 712.

The respondent in the Copper case set up that the purpose of the ordinance was to beautify, in time, that portion of the bank of the Passaic River, in which neighborhood was located relator's contemplated place of buisness.

Our friends on the other side say that Prince bought the property subject to the effect, if any, of the Zoning Ordinances of Montclair, and for that reason he should be precluded from raising any objection to the ordinance. Surely, this argument cannot be seriously upheld. The very words "if any" were put in because the zoning ordinance of Montclair, notwithstanding that it was compiled by a distinguished zoning expert, had no effect, and it was added in for the obvious reason of saving the grantor harmless and not to restrict the grantee, otherwise the word "if any" would not have been incorporated in the deed.

It is urged that the discretion of the Board of Adjustment should not be disturbed.

In the case of *Builders Co. vs. Bigelow* 128 Atl. Rep. 887, it was urged by the respondent that the relator was bound by the decision of the Board of Adjustment. It was held in that case that such point had been ruled adversely to respondent, in *Falco vs. Kaltenbach* Id 333, *Becker vs. Dowling* Id

338, Union County vs. Kaltenbach Id 341, and Nelson Building Co vs. Binda Id 419. This case was cited and followed in Shapiro vs. Brennan Id 543.

Kanterowitz vs. Bigelow N. J. Adv. Rep. 1791, following Losick vs Binda, decided by the Court of Errors and Appeals on the 19th of October, 1925, 3 N. J. Adv. Rep. 1691, held that the sole function of the Board of Adjustment is to grant modifications of valid zoning regulations where it is apperant that unnecessary hardship would result to a particular owner if the provisions thereof were literally enforced against him; that it was not a function of the Board to serve as an appellate body for the purpose of reviewing the legal or equitable character of the superintendent's acts in allowing or rejecting an application for a builder's permit, and that the legal or constitutional question involved in the refusal of the building inspector to grant the permit was not a subject matter for its determination, but must be presented for its consideration, as heretofore, to the proper legal forum.

The Court, in the case of Steinberg vs Bigelow 3 N. J. Misc. Rep. 1233, said that the legislature could not by the enactment of a statute confer upon a municipality any power, the exercise of which would deprive an owner of property the right guaranteed him by the Constitution, citing H. Krumgold & Son vs Jersey City, a Court of Errors and Appeals decision, 3 N. J. Adv. Rep. 1546. The case is cited and followed in Chancellor Development Corporation vs Newark, Id. page 1235, and Herman and Co. vs Newark Id 1237.

The Board of Adjustment, in the Chancellor Development Corporation vs. Newark case, was reversed although there is a constant flow of heavy traffic through Lyons Avenue at all times, and that a hospital was proposed in the very immediate neighborhood. Following the same line of reason-

ing, we desire to cite the case of Kaycoff vs Kaltenschach, 3 N. J. Misc. Rep. 963, which held that the right to review was not lost, although the relator had petitioned the Board of Adjustment.

My good and industrious friends on the other side have quoted our distinguished Chief Justice in the Ignacinas vs Town of Nutley case, 125 Atl. page 121, as to the rights and the powers of the Legislature to regulate the use to which a property owner may put his property. Surely, the Chief Justice expounded the proper interpretation of the law and stated that the legislature could grant power to municipalities to regulate the use of property of an individual to the extent of prohibiting its use for a particular purpose, and that such regulation must be designed to promote public health, safety and general welfare. There has not been given one sensible reason to show that Mr. Prince's contemplated stores would, in the least, interfere with the public health, safety and general welfare. The act may be Constitutional. Nevertheless, it is not applicable to this instant case because of the limitation placed by our Courts on the rights of the Legislature to interfere with the rights of the use of one's property.

Our Courts have merely upheld the sound and sensible doctrine expounded in both the Federal and State Constitutions. It was contended that the instant case differed with the Nutley case in three vital distinctions. That legal evidence was heard as the basis for finding of facts, and that the prosecutor has not complied with the set-back or area regulations of the suburban zone.

We respectfully refer the Courts' attention to the cases previously cited in reply to these two principals.

May we respectfully refresh counsel's opinion by citing the case of Peter Scola vs William H. Senior, Inspector of Buildings of the Town of Montclair, and the Board of Adjustment of Montclair 3 N. J. Adv. Rep. 1800, where Chief Justice Gummere said, "That the sole ground upon which the refusal of the Inspector of Buildings to grant the prosecutor's application was rested afforded no legal basis for his action, has been determined by numerous decisions, both of this Court and the Court of Errors and Appeals."

"As to the action of the Board of Adjustment in attempting to curtail the full enjoyment and user of the prosecutor's property by prohibiting him from erecting his building within fifteen feet of the exterior line of Walnut Street, or within seven feet of the exterior line of Pine Street, it is enough to say that an arbitrary limitation of this kind upon the prosecutor's user of his premises was without legal justification, and therefore invalid." *Passaic vs Paterson Bill Posting Co.* 72 N. J. L. 285; *Romar Realty Co. vs Haddonfield*, 96 Id. 118.

This case is practically the same as the instant case.

We do not suppose that we need reply to counsel's correct interpretation of the law that the Constitutionality of Zoning Act has not been upheld by our State Courts, but we do feel in passing, that our State Courts have stood by the Constitution in so far as this question is concerned, and that they feel that the guaranties created by that sacred instrument shall remain inviolate. We need not tell this Honorable Court what its powers are, but we should like to quote from 15 Corpus Juris 925, that the courts of each state are free to decide for themselves questions as to the construction of the Constitutional or Statutory provisions of their own

states, or questions under the common law, or commercial law, and are not bound by the decisions of courts of other states on similar questions.

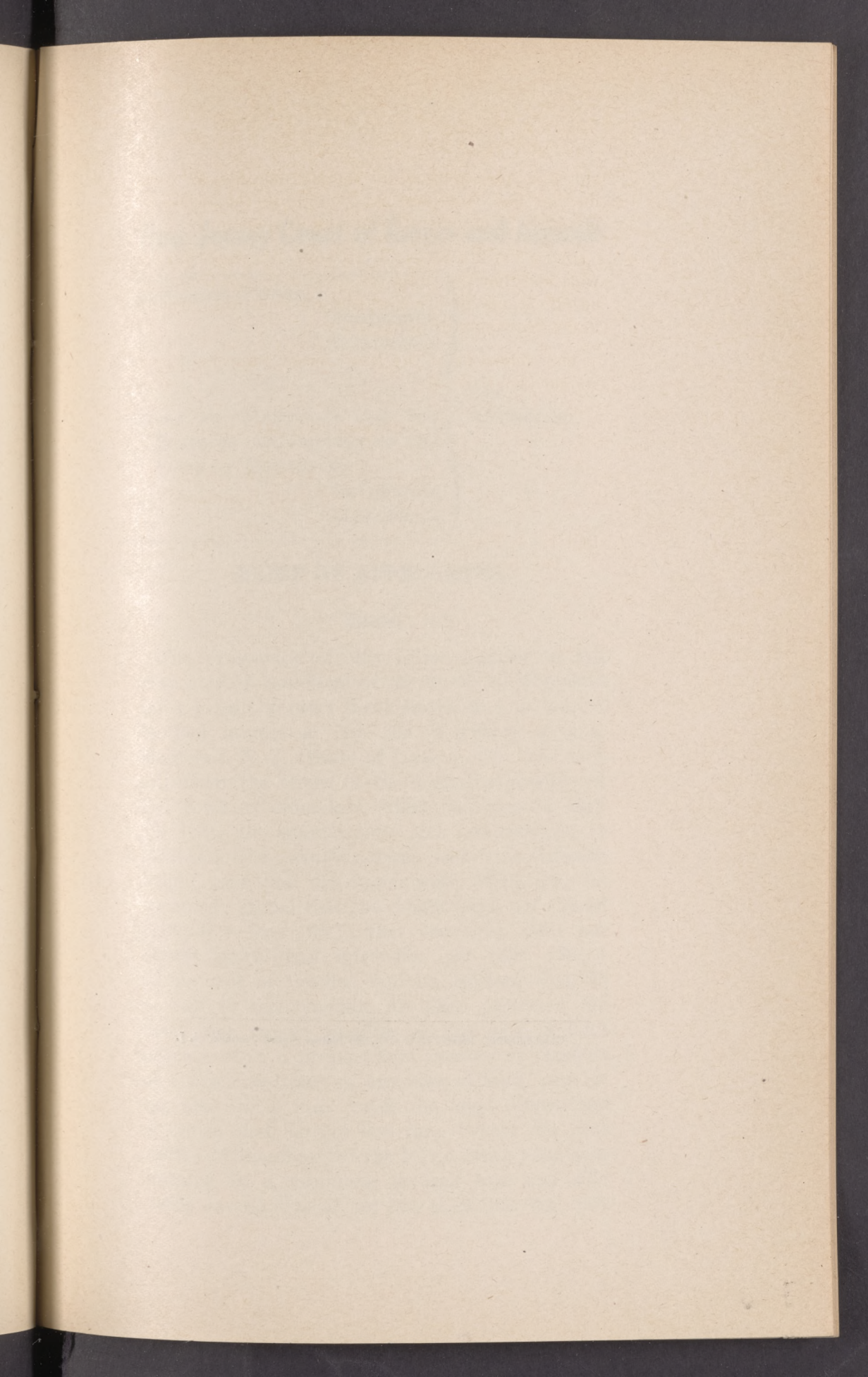
In re Verdun 89 N. J. L. 1697 Atl. Rep. 783, it was held that the court of one state is not bound by adjudications in other states on questions arising under the Constitutional laws.

The judgment of the New Jersey Supreme Court should be affirmed.

Respectfully submitted

FAST & FAST,  
Attorneys of Respondent.

LOUIS A. FAST,  
On the Brief.



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COZZILINO PRINTING CO., 265 Halsey Street, Newark, N. J.

## New Jersey Court of Errors and Appeals

ALEXANDER PRINCE,

Prosecutor,  
*Respondent,*

*vs.*

TOWN OF MONTCLAIR and the  
BOARD OF ADJUSTMENT OF THE  
TOWN OF MONTCLAIR,

Defendants,  
*Appellants.*

*On  
Certiorari.*

### BRIEF OF APPELLANTS.

#### Facts.

The prosecutor of this action applied to the Inspector of Buildings of the Town of Montclair for a permit to erect three stores on a lot owned by him located at No. 123 Watchung avenue, Montclair, N. J. (State of Case, p. 8). The said lot, under the terms of the zoning ordinance of the Town of Montclair, which was passed May 19, 1921, its supplements and amendments, is located in the suburban zone, such zone contains height, area and use regulations, which are, respectively stated that the height shall not exceed thirty-five feet (35'); that the area shall not occupy more than thirty-five per cent. (35%) of the area of the lot; that no building shall be erected to accommodate or make provision for more than twenty families on any acre of land or more than a proportional number of families on a fractional part of any acre of land; providing also for a rear yard, the least dimensions of which shall be not less than twenty per cent (20%) of the depth of the lot; a front yard conforming to a minimum setback line and side yards on one side of not less than four feet (4')

and on the other side of not less than eight feet (8'); and providing that no building shall be used or erected which is arranged, intended or designed to be used for a store (see zoning ordinance, State of Case, p. 35).

The Inspector of Buildings of the Town of Montclair, finding that the building for which a permit was sought, was designed to be used as a store and that it did not comply with the provisions of the ordinance as above set forth with regard to setback line, front yard, side yard or rear yard, nor did it comply with the provisions for restricting the number of families to be housed, refused to issue the permit to the prosecutor.

The prosecutor thereafter appealed to the Board of Adjustment of the Town of Montclair, which was created by ordinance of the Board of Commissioners of the Town of Montclair, adopted July 1, 1924, pursuant to the enabling act of the Laws of 1924, Chapter 146, to be found on page 324 of the Pamphlet Laws of 1924 (see State of Case, p. 11).

Pursuant to the powers granted said Board of Adjustment by said enabling act and the ordinance passed pursuant to such enabling act, the Board of Adjustment proceeded to hear and determine the said appeal and in the determination heard the sworn testimony of several persons acquainted with the facts, together with the prosecutor and his witnesses, and examined the plans and specifications and drawings for the building for which the permit had been refused (see State of Case, pp. 12 to 27, inclusive). After such hearing the said Board of Adjustment drew up and executed the finding of fact (see State of Case, p. 28) upon which their decision was based,

and came to the decision which was duly executed and signed in accordance with the provisions of the ordinance and statute affirming the decision of the Inspector of Buildings in refusing to grant the permit to the prosecutor (State of Case, p. 31, l. 28). The facts which were found by the Board of Adjustment are as follows (see finding of fact in State of Case, pp. 28 to 31, inclusive):

1. Alexander Prince applied to the Inspector of Buildings of the Town of Montclair for a permit to erect three stores at Nos. 121-123 Watchung avenue, Montclair, premises owned by the applicant.

2. The permit was refused by the Inspector of Buildings on the ground that the proposed erection was to be made in a suburban zone which forbids the erection of stores and which requires that two side yards shall be provided on every lot, the least dimension of one of which shall be four feet and of the other not less than eight feet nor less than four inches for every foot of building height.

3. The zoning ordinance of the Town of Montclair was passed in 1921 after protracted hearings and expert supervision of Mr. H. B. Swan, zoning expert of New York City.

4. The block in which this proposed erection is to take place is approximately divided equally between the business zone and the suburban zone.

5. That part of the block which is nearest the Erie Railroad station and to the west is in the business zone.

6. That part of the block which is furthest away from the Erie Railroad station bordering

on North Fullerton avenue is in the suburban zone.

7. North Fullerton avenue is entirely built up with residences of substantial construction.

8. Two blocks south from the proposed construction is the Watchung School, an elementary school housing at present more than five hundred children.

9. The Superintendent of Schools testifies that alterations are being made and additions are being made to the present school for the accommodation of six hundred fifty pupils, which accommodations will be filled as soon as completed.

10. The School District is divided roughly into two parts, one east of the railroad and one west.

11. All of the children on the west of the track, numbering approximately one-half of all the children attending the school, must pass under the viaduct at Watchung avenue and as a result go through this district on their way to school.

12. All of the children to the north of Watchung avenue as far as Wildwood avenue, four blocks away, and as far east as Grove street, six blocks away, must pass near the location of the proposed stores.

13. The traffic congestion of this portion of the Town, due to the railroad station one block west, is very great.

14. The erection of these stores would increase this congestion and would thereby endanger the lives of children who must pass this point to get to school.

15. Automobile accidents in which children have been injured or killed have already occurred in this neighborhood.

16. The proposed erection of the three stores is to be in front of a frame dwelling house now occupying the land.

17. The said dwelling house is now occupied by three families.

18. The proposed stores will occupy all of the front of the lot except a ten-foot driveway on one side and two of these stores will abut upon and be attached to the dwelling house.

19. A garage occupied by two cars is in the rear of said dwelling house on the same lot.

20. As a result of such location and such congestion the fire hazard will be materially increased.

21. Firemen will be hindered by such an erection in fighting a fire should one break out in the dwelling house or garage in the rear.

22. Insurance rates are higher on business places than on dwellings.

23. The entire community represented by Mr. Stewart, president of the Watchung Improvement Association, and numbering more than four hundred, are opposed to the extension of the business zone.

24. There are in the business zone adequate store facilities and vacant stores.

25. There is in the business zone vacant land for the erection of further stores.

26. Said Alexander Prince bought the property subsequent to the enactment of the zoning ordinance.

27. He knew at the time of purchase that the land was in the suburban zone and he knew that the suburban zone prohibited the erection of buildings for stores.

28. His deed contains the following clause, "subject to the effect, if any, of the zoning ordinance of the Town of Montclair, its supplements and amendments."

Thereafter, the prosecutor applied to the New Jersey Supreme Court for a writ of certiorari and said writ was sealed on December 18, 1924, returnable January 6, 1925 (State of Case, p. 5), and on that said date the return to the writ certified by Harry Trippett, secretary of the Board of Adjustment and Clerk of the Town of Montclair, was made to the said court, which return consisted of the application made to the Inspector of Buildings, the appeal to the Board of Adjustment, the testimony taken before such Board in its hearings, the plans, specifications, zoning ordinance, drawing of the building and petition of the nearby residents, finding of fact and decision of said Board of Adjustment, all of which constituted the entire record of the proceedings before such Board of Adjustment and were returned to that Honorable Court as by that Court was commanded (State of Case, pp. 7 to 44, inclusive).

Thereafter, the matter having been duly brought on for hearing before Justices Kalisch, Black and Campbell of the New Jersey Supreme Court, and the said Justices having heard arguments of counsel thereon, the said Court on June 22, 1925, made an order reversing the judgment of the Board of Adjustment of the Town of Montclair (State of Case, p. 3).

### QUESTION.

Was the ruling of the Supreme Court of New Jersey reversing the decision of the Board of Adjustment of the Town of Montclair erroneous?

### CONCLUSION.

The rule of the Supreme Court of New Jersey reversing the decision of the Board of Adjustment of the Town of Montclair was erroneous and should be reversed and made for nothing holden.

### First Reason.

The action of the Board of Adjustment of the Town of Montclair relating to the appeal of the defendant-in-error from the decision of the Inspector of Buildings of the Town of Montclair in refusing to grant him a permit to erect the building in question was strictly in compliance with the laws of the State of New Jersey and the ordinances passed by the Board of Commissioners of the Town of Montclair pursuant to such laws.

An examination of Chapter 146 of the Pamphlet Laws of 1924 will disclose that this law consolidates the provisions of prior enabling acts for zoning and expressly repeals prior acts. By this enabling act of 1924 the Legislature empowered the governing body of the municipality to establish zones in said municipality whereby to regulate and restrict "the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population and the location and use of buildings, structures and land for trade, industry, residence or other pur-

poses;" and further, "to facilitate the adequate provisions of transportation, water, sewerage, schools, parks and other public requirements \* \* \* with a view to conserving the value of the buildings and encouraging the most appropriate use of lands throughout such municipality." Said law further provides that wherever any municipality shall have adopted an ordinance for any of the purposes covered by this act, such ordinance shall be deemed to have been adopted under the provisions of this act and it shall not be necessary in such cases for the governing body \* \* \* to appoint a zoning commission as herein provided. All such ordinances shall remain in full force and effect, except so far as they shall be inconsistent with the provisions of this act, until they shall have been amended, altered or repealed by the governing body \* \* \*"

The Board of Commissioners of the Town of Montclair passed its zoning ordinance May 19, 1921 (State of Case, pp. 35 to 39, inclusive). This ordinance was passed after the most exhaustive studies by the foremost expert at that time in the country, Mr. H. B. Swan, zoning expert for the City of New York, and after all of the citizens of the Town were given repeated hearings for the purpose of establishing throughout the entire municipality the fairest, most equitable, most reasonable divisions having regard to the existing situation and the prospective needs and the health, safety and general welfare of the entire community of Montclair. It was not a haphazard or arbitrary action on the part of the governing body of the Town, but was undertaken with a full realization of the responsibility which rested upon such governing body to provide in the most adequate manner for the general welfare (State of Case, p. 28, l. 37).

Said law further provides that the governing body "shall provide for the appointment of the Board of Adjustment, and under the regulations and restrictions adopted, pursuant to the authority of this act which provides that the said Board of Adjustment shall, 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 the general or specific rules therein contained."

The law further provides that when any person is aggrieved by the action of any municipal officer, appeal from such decision "shall be taken within a reasonable time" to said Board of Adjustment, and that said Board shall hear such appeal and make a decision within a reasonable time and that such decision may confirm, reverse, or modify the decision of the said municipal officer.

The Board of Commissioners of the Town of Montclair, pursuant to the authority granted by this act, on July 1, 1924, adopted an ordinance exactly in accordance with the provisions of the statute providing for such Board of Adjustment to whom appeal should be made by persons aggrieved by the decision of any municipal officer, and laid down by said ordinance, in accordance with the statute, the method by which the appeal should be taken and the rules and regulations governing said Board of Adjustment as will more particularly appear by the terms of said ordinance (State of Case, p. 39, ll. 21 to 44 inclusive).

An examination of the proceedings in the return to the writ of certiorari as commanded by the Supreme Court (State of Case, pp. 7 to 44)

will disclose that the provisions of the statute above referred to and of the ordinance of the Town of Montclair creating the Board of Adjustment were strictly complied with so far as forms and procedure are concerned.

Not only were the forms and procedure of the statute and ordinance complied with by the Board of Adjustment in refusing to reverse the decision of the Inspector of Buildings of the Town of Montclair, but the authority exercised by such Board was in accordance with the spirit of the statute and the ordinances.

The purpose of the statute and of the ordinances, if valid, the Courts of this and of every other State have said, is to promote the health, safety or general welfare of the community.

An examination of the finding of facts upon which the Board of Adjustment based its decision (State of Case, pp. 28 to 31) will disclose that in this particular case the part of the block now in the business zone is nearest to and adjoins a small way station of the Erie Railroad (State of Case, p. 29, l. 7). The part of the block which is in the suburban zone, where buildings are to be erected for residence purposes, and where, to prevent congestion, certain setback lines and side and rear open spaces are established, is on a street wholly residential, completely built up with residences of a most substantial character (State of Case, p. 29, ll. 10 to 15). Moreover, on this street, North Fullerton avenue, two blocks from the site where this proposed erection is to take place, is located a large elementary school, at least half of the pupils of which must pass on the street which has been reserved for residences, and upon which this proposed erection is attempting to encroach (State of Case, p. 29, l. 15).

It will be further noted that this proposed erection for three stores covering the entire frontage of the lot, except ten feet, will be attached to a dwelling house of frame, now occupied by three families (State of Case, p. 30, ll. 11 to 22). The best expert advice of the Town declares that such an erection will be extremely hazardous because of its fire risk, that the efforts of the Fire Department are bound to be seriously impeded should a fire break out, endangering the lives of three families in the rear of this proposed building (State of Case, p. 19, l. 35). In fact, a fire did break out in the cellar of this identical frame residence, and due to its accessibility, unhampered by the presence of these stores, the Fire Department was able to cope with the situation. It is no answer to say that the Town of Montclair, or any other town, has previously allowed such a dangerous construction to take place. Common sense tells anybody that when you have three stores attached to a residence, the hazard of fire is multiplied by four, since there are four opportunities and probably more for carelessness where only one existed before. The evidence before the Board of Adjustment and the finding of fact of such Board show conclusively that the insurance rates for premises upon business buildings are higher and directly bear this contention out.

It must not be overlooked that, should this permit be granted, it would lead immediately to the granting of a permit to the adjoining owner, and that the line having been broken, the very condition which the Town seeks so strenuously to avoid in this particular location would be thrust upon it. The Board of Adjustment found as a fact that there was ample vacant land in the business zone in this locality for the

erection of stores, and that there are vacant stores already erected which could be occupied for business purposes.

The Board of Adjustment found as a fact that the prosecutor in this case is not acting in good faith (State of Case, p. 31, l. 1). He testified that he took the property subsequent to the enactment of the zoning law and the zoning ordinance. He admitted that his grantor, specifically in the deed, sold the property "subject to the effect, if any, of the zoning ordinance of Montclair." (See State of Case, p. 14, l. 14.)

It may be admitted that, had it not been for this clause, he took the rights which his grantors had, but his grantor specifically limited those rights by the above mentioned clause and the present prosecutor, instead of suffering any injustice, instead of being deprived of his property without due process of law, is attempting to realize on a real estate speculation manipulated against the citizens of Montclair who bought their homes in reliance upon the statutes of the State and the ordinances of the Town and in this case sold their home subject to such laws. Such a man should be estopped from attempting to induce the Supreme Court to overthrow the decision of the Board of Adjustment.

In considering whether or not the Supreme Court should substitute its opinion for the opinion of the Board of Adjustment, certain facts should receive careful consideration and certain adjudications of the Court should serve as precedents. It was the intent of the Legislature in providing for this Board of Adjustment to provide an impartial tribunal familiar with the local situation which, after hearing, would be in a position to vary when necessary the strict terms

of the ordinance. Such a Board is now universally considered absolutely necessary to the safe operation of a zoning ordinance. See *People, ex rel., Sheldon v. Board of Appeals*, 234 N. Y. 484; *In re permit to American Reduction Company*, Municipal Law Report (Pa. Vol. 15, No. 8, April, 1924). It is the safety valve of the zoning plan. A zoning ordinance, like a steam boiler, will sooner or later blow up if there is no safety valve. Where there is a functioning Board of Adjustment to which every aggrieved applicant for a permit may resort, litigation automatically assumes the form of court review of the discretion of the Board and so, the Courts become helpers in carrying out the intentions of the zoning plan.

Under the statute in force prior to 1924 the Enabling Act itself gave no power to the Board of Appeals to vary, but the municipality within vague limits was authorized and expected to clothe the Board with its proper powers. This, however, has been remedied in the 1924 Enabling Act.

As to the exercise of the discretion plainly given to this Board of Adjustment by the statute and by the ordinance, certain precedents, firmly established by the Courts of this State, will undoubtedly govern this Honorable Court.

If the inferior tribunal did not transcend its authority, acts done by it in the exercise of its discretion, are not subject to review unless that discretion was abused. *Parsell v. State*, 30 N. J. L. 530; *State v. Bergen*, 24 N. J. L. 548; *Philbrow v. Voorhees*, 12 N. J. L. 69.

The correctness of the decision below must be determined from the ultimate facts appearing in the record, and evidence which is made a part

of the record cannot be examined to determine whether or not it justified the findings upon which the decision was made. *State v. Block*, 63 N. J. L. 508; *Reiber v. Curtis*, 55 N. J. L. 87.

The weight or sufficiency of the evidence as to the facts upon which the determination below was based will not be considered, if there was any evidence to support the findings. *State v. Ohl*, 58 N. J. L. 557; *State v. Board of Public Works*, 57 N. J. L. 580; *Wescott v. Sharp*, 50 N. J. L. 392; *Beach v. Mullin*, 34 N. J. L. 343; *Jeffrey v. Owen*, 41 N. J. L. 260; *State v. Hudson City*, 32 N. J. L. 365. Further cases illustrating the attitudes of the Courts in these respects are *Yellow Pine Company v. Board of Assessors*, 72 N. J. L. 182; *McGovern v. Board of Public Works*, 57 N. J. L. 580; *Bellis v. Phillips*, 28 N. J. L. 125; *Independence v. Pompton*, 9 N. J. L. 209; *Woolcott v. Mount*, 36 N. J. L. 262; *Scott v. Beatty*, 23 N. J. L. 256; *State v. Schuelster*, 60 N. J. L. 132.

### Second Reason.

The Enabling Act of 1924 and the ordinances of the Town of Montclair pursuant to which the Board of Adjustment of the Town of Montclair rendered its decision in the above-entitled case are valid.

It will not be seriously contended in the light of the opinion of the Court of Errors and Appeals in the case of *Ignaciuinas v. Town of Nutley*, 125 Atl., p. 121, that there is any doubt about the validity of the Enabling Act of 1924. Chief Justice Gummere said "The Legislature in its grant of power to the several municipalities of the State to regulate the use to which a property owner may put his property even to the extent of prohibiting its use for a particular

purpose limited that power by the provision of the statute that such regulation must be designed to promote the public health, safety and general welfare. If, therefore, the ordinance, in its application to the property owner of any particular property does not come within the limitation of the statute, to that extent it is without legal justification and void." The provision of the 1924 Enabling Act is in effect the same as the one upon which the Court passed in the Nutley case, *supra*. It is designed to promote the public health, safety and general welfare and accordingly if such design is within the purview of any particular case it comes within the statute and will be upheld.

We have, then, to consider the sole question of whether or not the provision of the zoning ordinance of the Town of Montclair in this particular case comes within the design of the statute and is for the purpose of promoting the public health, safety and general welfare, or, stated more succinctly, whether such ordinance is within the police powers as delegated by the Legislature to the legislative authority of the Town of Montclair.

The fact must not be lost sight of that in the Nutley case, *supra*, the Court said, "that the mere erection of this building \* \* \* is likely to be injurious to the health and safety of the residents of the Town is asserted, but practically not argued by counsel \* \* \*. The bald assertion of counsel is that the mere presence of a store building in the so-called residence district of Nutley is in itself a menace to the public health and the public safety."

It must further be remembered that in the Nutley case every provision of the ordinance for

suburban zones was met in the application made, except that it did not conform to the "use" regulation.

Now at the beginning of our consideration of this case, we find three vital distinctions between our case and the Nutley case. We find that the Court does not have to rely upon assertion; we find that legal evidence was heard as a basis for the finding of facts and we find that certain definite facts were found by the inferior tribunal; we find further, that the prosecutor in this case has not complied with the setback or area regulations of the suburban zone.

The Supreme Court, in rendering its opinion, completely ignored all the reasonable requirements of the Zoning Ordinance of the Town of Montclair pertaining to suburban zones in the Town of Montclair such as front and rear and side yard spaces, none of which the defendant-in-error, under his application, complies with. On the contrary, the Supreme Court confined their considerations solely to the use to be made of the building proposed to be erected. This, obviously, is only one of the many considerations. While it may be that the building complies with the building code so far as structure is concerned, yet other factors in the application, besides the proposed use, to wit: the area and location of the proposed building, should have received the careful consideration of the Supreme Court.

While it may be true that the bald assertion that the erection of such building in the suburban zone will affect the health, safety and general welfare of the people is such an assertion as cannot be given any consideration; it certainly is equally true that it cannot be said as a matter

of law that when the fact appears that this erection will occupy almost the entire frontage of the lot; will be attached to a frame residence housing three families, thereby increasing the fire hazard; is within two blocks of a great primary school half of the pupils of which must pass by or near such proposed erection—it cannot be said as a matter of law in the face of these facts that such an erection will not affect the health, safety or welfare of the general community.

It can safely be said that the constitutionality of zoning which is based upon an adequate enabling act has been upheld by the Courts of every State where it has been tested except in the State of New Jersey.

The contention that this statement is too broad and that the Courts of Missouri, Texas and California have declared against zoning is unfounded. The answer is that St. Louis, where the Missouri adverse cases arose, zoned without a State Enabling Act for zoning. See *City of St. Louis v. Everaiff*, 256 S. W. 489; *Better Built Home and Mortgage Company v. McKelvey*, 276 S. W. 495. Dallas, where the Texas cases arose, had no State Enabling Act for zoning, no zoning maps and no comprehensive ordinance. *Spann v. City of Dallas*, 235 S. W. 513. Los Angeles, where the California cases arose, had no Board of Appeals, and its zoning was piecemeal, *Miller v. Board of Public Works of Los Angeles*, District Court of Appeal, Second Appellate District, Division 2, December 21, 1923.

In these three cities the Courts, in refusing to uphold the zoning ordinances, discussed in *obiter dicta* the whole subject of zoning; largely from the point of view of common law nuisance. These Courts did not have before them State Enabling

Acts for zoning, expressing the intention of the Legislature and, of course, in future determinations are not bound by the *obiter dicta* inserted in prior cases before adequate Enabling Acts for zoning were passed.

The entire field of zoning outside of the subject of use has been upheld by the Courts throughout the country. This embraces the subjects of height, area and bulk, courts and yards. Especially has this been true where the municipality has been empowered to zone for height or area and has framed its regulations with some relation to access of light and air, fire protection, or facility for fighting fire. See *Welch v. Swazey*, 214 U. S. 91; *Cliffside Park Realty Co. v. Borough of Cliffside Park*, 114 Atl. 797; *Klefsch v. Wisconsin Telephone Company*, 195 N. W. 544.

The true issue, of course, is the reasonableness of the plan. Now, in the present case, we find that after exhaustive hearings the entire Town of Montclair was planned with reference to the needs of the entire community. It was planned under expert supervision. The territory of the Town available for the development was measured, the number of persons living and working within the territory during the life of the ordinance was estimated, the distribution of the future residential, business, industrial and public structures with a view to economic, topographic, and social facts of the territory within the Town, applying recognized principles of health, safety, convenience, was considered.

Intelligent and honest men believe that such a comprehensive zoning plan does promote the public health, safety, order and convenience and welfare, and this is attested by the opinions of lawyers, real estate operators, physicians, hous-

ing experts, accident insurance actuaries, the Police and Fire Chiefs, besides the zoning experts themselves. The wastes of excessive congestion of today are due to a hodge podge development producing spots of uncontrollable traffic congestion, or throwing together into an indiscriminate mass types of traffic which would automatically separate themselves in some degree of segregation in the developments along the highway.

Judged by the standard of real, substantial relationship to the promotion of welfare, or by the standard of appropriateness as a means, or by the standard of honest, careful and intelligent legislators' belief in this appropriateness, zoning plainly measures up to the standard. Few indeed are the legislative measures, either state or municipal, which are preceded by so careful and thorough a study of the facts as here given to the carefully wrought out zoning plan for the Town of Montclair.

The reducing of the constitutional law of property regulation to the law of nuisances by this Honorable Court is a failure to regard the principle which has so well been expressed by the United States Supreme Court in the case of *Bacon v. Walker*, 204 U. S. 311.

“That power (police power) is not confined to the suppression of what is offensive, disorderly or unsanitary. It extends to so dealing with the conditions which exist in the state as to bring out of them the greatest welfare of its people.”

The police power acts not only negatively, but also constructively and affirmatively for the promotion of the public welfare. We quote from a recent New York decision, *Wulfsohn v. Burden*, Court of Appeals, Released December 2, 1925:

“Of course, zoning regulations are an exercise of the police power and as we ap-

proach the decision of this question we must realize that the application of the police power has been greatly extended during a comparatively recent period and that while the fundamental rule must be observed that there is some evil existent or reasonably to be apprehended which the police power may be invoked to prevent and that the remedy proposed must be generally adapted to the purpose, the limit upon conditions held to come within this rule has been greatly enlarged. It is not limited to regulations designed to promote public health, public morals or public safety or to the suppression of what is offensive, disorderly or unsanitary, but extends to so dealing with conditions which exist as to bring out of them the greatest welfare of the people by promoting public convenience or general prosperity. (*Bacon v. Walker*, 204 U. S. 311, 317, 318.)

“Being designed to promote public convenience or general prosperity as well as public health, public morals or public safety the validity of a police regulation must depend upon the circumstances of each case and the character of the regulation for the purpose of determining whether it is arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose. (*C. B. & Q. Ry. Co. v. Drainage Commrs.*, 200 U. S. 561.) The field of regulation constantly widens into new regions. The question (of regulation) in a broad and definite sense is one of degree. Changing economic conditions, temporary or permanent, may make necessary or beneficial the right of public regulation. (*People, ex rel. Durham Realty Corp. v. La Fetra*, 230 N. Y. 429; *affd.*, in principle, 257 U. S. 665.) While the validity of police regulation certainly is not to be rested simply upon popular opinion it has been said that it has been ‘put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong

and preponderant opinion to be greatly and immediately necessary to the public welfare.' (*Noble State Bank v. Haskell*, 219 U. S. 104, 575.)

“Acting in accordance with these general principles, courts on the whole have been consistently and sensibly progressive in adjusting the use of land in thickly populated districts to the necessities and conditions created by congested and complex conditions by upholding as a constitutional exercise of the police power zoning ordinances passed under state authority to regulate the use of land in urban districts. What was once a matter of voluntary submission to restrictive covenants in grants has become a matter of compulsory obedience to ordinances having the force of statutes. It has come about that 40 states have passed laws authorizing zoning ordinances which in one form and another had, in January, 1925, been adopted by 320 municipalities. Commencing, generally speaking, where restrictive covenants commonly stopped, with the exclusion from residential districts of factories and business buildings, these regulations have developed until as in the present case they create residential districts in a large sense limited to private dwellings as distinguished from hotels and apartment houses. Thus far they have been sustained as being conducive to public health, safety and morals. With few exceptions courts have not been ready to say that they might be sustained merely because they preserved the aesthetic appearance of a private residential district and prevented its appearance from being blotched by the erection of some incongruous structure whereby the value of all neighboring property was impaired. The Supreme Court of the United States has, however, gone so far as to approve in substance the views of the Massachusetts Supreme Court that aesthetic consideration might be considered as auxiliary of what thus far

have been regarded by the courts as more effective and sufficient reasons. (*Welch v. Swasey*, 193 Mass. 364; *Welch v. Swasey*, 214 U. S. 91, 108.)

“In attempting to apply all of these principles to the present case, we deem it unnecessary to consider the proposition that zoning authorities may establish residential districts. This court has so definitely approved that proposition that we may take its decision as a starting point in the consideration of the further questions now before us. (*Lincoln Trust Co. v. Williams Bldg. Corp.*, 229 N. Y. 313.)”

It will be noted that the Montclair zoning ordinance does not restrict itself to a prohibition upon use merely, but relies also upon bulk and area restrictions. It will be noted that the plan is comprehensive, embracing the entire territory of the Town. The failure to realize the significance of the comprehensive aspect of such an ordinance in some cases has led courts into the illogical attitude of keeping their eyes solely on the particular piece of property of the prosecutor and the immediately adjacent or neighboring lots, thus permitting the constitutionality of the plan of the Town of Montclair to turn exclusively upon evidence concerning a very small part of its territory. The question arises whether the effect of the plan on the value of any individual piece of property has any relative bearing whatever on the issue of constitutionality when the plan is attacked by this prosecutor. The onus of his attack, I assume, is that the ordinance is confiscatory; that its effect is a confiscation of property. That pecuniary injury from an exercise of the police power does not demonstrate or indicate violation of constitutional limitations is too well settled to require argument or citations. The case of *Hadacheck v. Sebas-*

*tian*, 239 U. S. 394, where the regulation detracted from the value of the prosecutor's land \$704,000, and yet was upheld by the Supreme Court of the United States is a sufficiently striking illustration of the fact. Surely, the individual cannot be permitted to speculate upon the community's failing to exercise its constitutional powers, and then claim that the community is barred from interfering with the speculation.

The reasonableness of any zoning plan results from the fact that it represents a careful attempt to apply sound zoning principles, including a recognition of the appropriateness of the various regulations to the different sections of the Town by reason of location, topography, past development, trends and other features. The zoning power is entitled to equality of scope with other legislative powers, and therefore is entitled to the application of the general principle that the constitution requires only such equality as is reasonably appropriate to the nature of the power exercised, to wit, absence of arbitrary classification.

It will not be denied that every zone must have a termination. In the particular case the business zone terminates in the only logical place for its termination, far enough away from the railroad station to provide adequate business facilities; and far enough away from North Fullerton avenue to prevent congestion on a school street. The study of the school plans of Montclair will disclose that it is the settled and determined policy of the Board of Education to keep school buildings, by every means possible, away from regions of highly congested traffic.

In view of the finding of fact of the Board of Adjustment and in view of what must be ap-

parent, that there is legal evidence to support such finding of fact, we respectfully submit, therefore, that the ordinance of the Town of Montclair, pursuant to the enabling act of the Legislature passed in 1924, is a valid exercise of police power and that the decision of the Board of Adjustment being in strict compliance both with the forms and with the spirit of such statutes and such ordinance should be upheld by this Honorable Court, and that the ruling made by the Supreme Court reversing the action of the Board of Adjustment of the Town of Montclair should be determined as erroneous in point of law and justice, and that the same should be overruled by this Honorable Court.

Respectfully submitted,

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