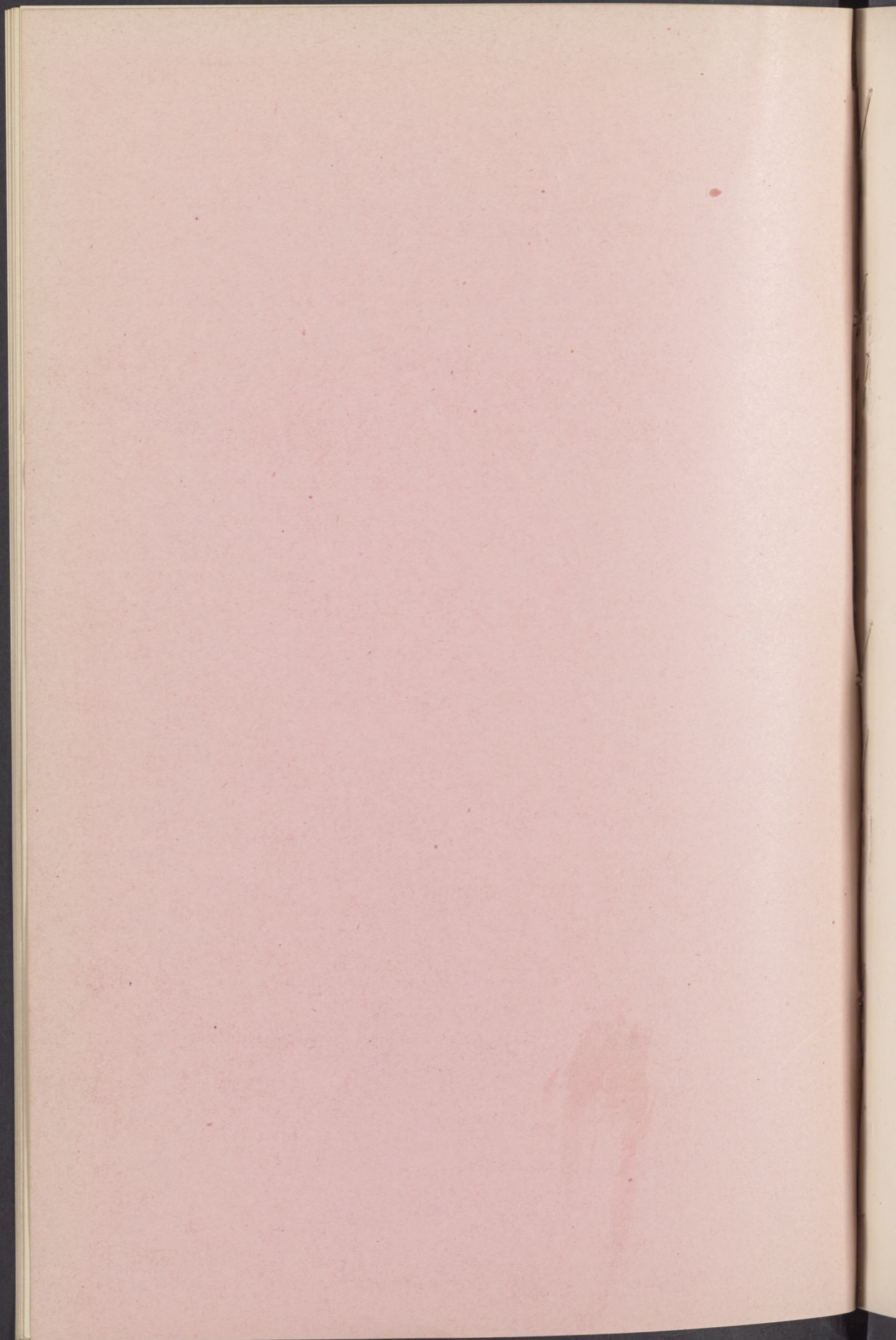




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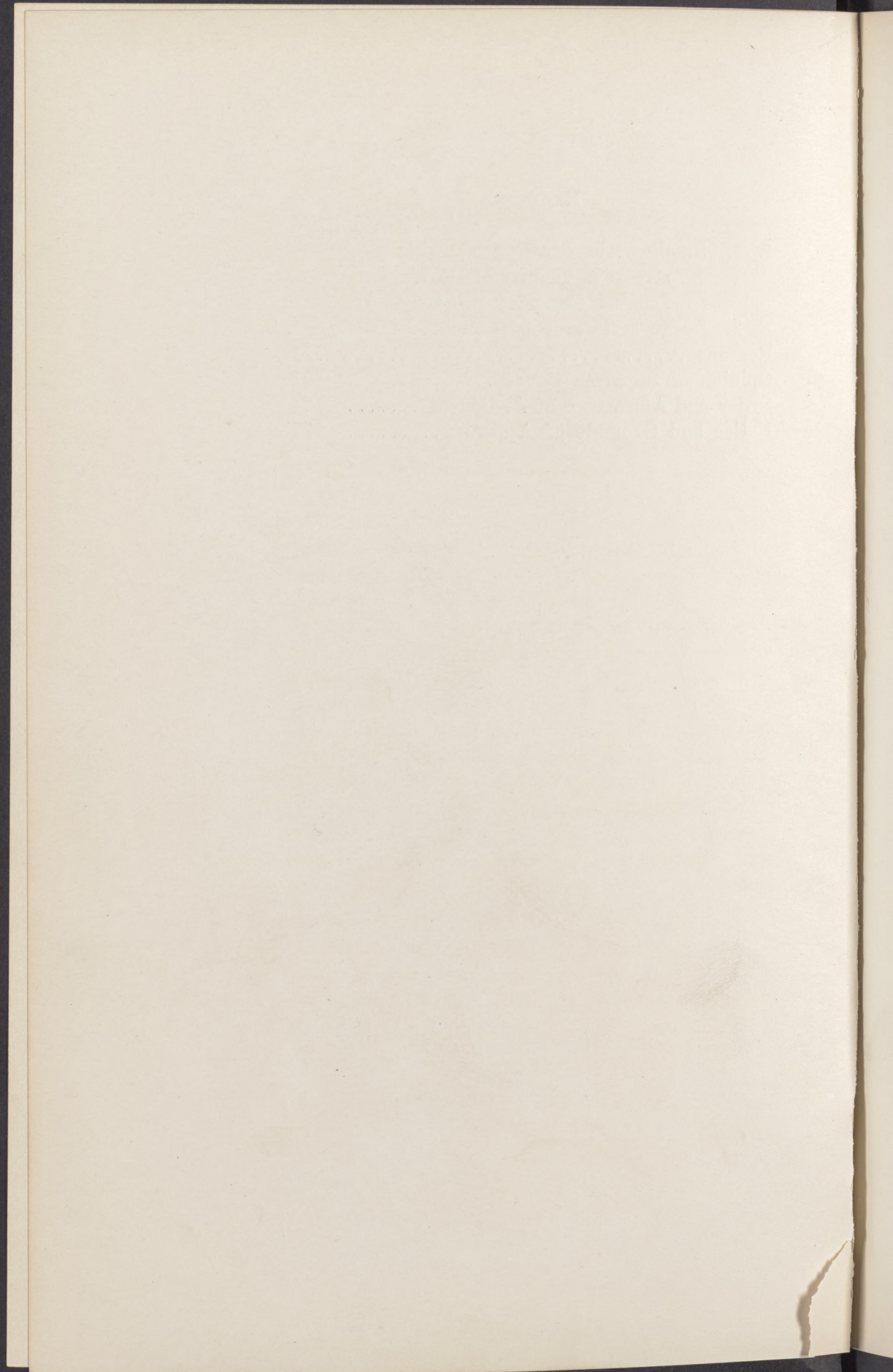
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WRIT OF CERTIORARI.

NEW JERSEY, ss.

The State of New Jersey to George
Fitzsimmons, Esquire, Recorder of
(SEAL) the Town of Belleville, and the Town
of Belleville: We, being willing, for 10
certain reasons to be certified of and
concerning a certain accusation, in writing, and
the proceedings at the trial and judgment of
conviction before you and by you against Frank
J. Durkin Lumber Company, for violation of
certain provisions of an ordinance of the Town
of Belleville known as the "Zoning Ordinance,"
which proceedings were brought against the said
Frank J. Durkin Lumber Company by the Town
of Belleville, as is said, do command you and 20
each of you that the said accusation, in writing,
proceedings at the trial, including the testimony
taken, judgment of conviction, with all things
touching and concerning the same together with
this writ, you distinctly and openly send, under
your hand and seal, to our justices of our Su-
preme Court of Judicature, at Trenton, on the
first Tuesday of May, next, that our justices
may cause thereon to be done what of right, and
according to the laws of this State, should be 30
done.

Witness, Honorable William S. Gummere,
Chief Justice of our Supreme Court of Judi-
cature, at Trenton, this 19th day of April, 1928.

FRED L. BLOODGOOD,
Clerk.

Return to Writ.

Endorsed—We allow this writ. Let it be sealed. Depositions may be taken by either party upon 4 days notice to the other. By the Court in open court.

THOMAS W. TRENCHARD,
P. J. S. C.

10

MERRITT LANE,
Attorney Prosecutor.

RETURN.

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

20 In obedience to the command of the within writ, I, George Fitzsimmons, Recorder of the Town of Belleville, do send under my seal to you, the Honorable Justices of the Supreme Court of Judicature of New Jersey, the accusation in writing and the proceedings at the trial, including the testimony taken, and judgment of conviction, with all things touching and concerning the same, in the matter pending before me wherein the Town of Belleville was complainant and the Frank J. Durkin Lumber Company was
30 defendant, as fully and as entirely as they remain before me, as appears in the schedule hereto annexed, as I am commanded.

In witness whereof I have hereunto set my hand and seal this first day of May, A. D. nineteen hundred and twenty-eight.

GEORGE A. FITZSIMMONS,
Recorder.

40

Return to Writ.

SCHEDULE.

1. Accusation in writing.
2. Proceedings at the trial and testimony.
3. Judgment of conviction.

COUNTY OF _____.

STATE OF NEW JERSEY, ss.

10

ROBERT H. WILLIAMS of the Town of Belleville, in the County of Essex and State of New Jersey, upon his oath complains that on the 1, 3, 5, 6, 7, 8, 9, 10, 12, 13 days of March A. D. 1928, at the Town of Belleville in the county aforesaid: F. J. Durkin Lumber Co. did violate Section 11 of "An Ordinance regulating and limiting the height and bulk of buildings hereafter erected and regulating and determining the area of yards, court and other open spaces, and restricting congestion and regulating and restricting the location of trades and industries and the location of buildings designed for specified uses and establishing the boundaries of zones for the said purposes and providing penalties for the violation of its provisions," in that the said F. J. Durkin Lumber Co., did unlawfully use for a purpose prohibited under said ordinance, certain premises in the Town of Belleville on the southerly side of John street, adjoining the easterly boundary line of the Town of Bloomfield, to wit, did use said premises as a building material storage yard, said use being prohibited in "A," residence zone under said ordinance, said premises lying within an "A" residence zone.

20

30

And said F. J. Durkin Lumber Company did further violate Section 14 of said Ordinance in that the said lumber company did occupy and

40

Return to Writ.

use aforesaid premises as a building material storage yard, without first having secured a certificate of occupancy from the superintendent of building therefor.

10 AND THEREFORE, he prays that the said F. J. Durkin Lumber Co., may be apprehended and held to answer to said complaint, and dealt with as law and justice may require.

ROBERT H. WILLIAMS,

Sworn and subscribed before me
this 19th day of March 19 .

GEORGE A. FITZSIMMONS,
Recorder.

20

30

40

*Testimony.*BEFORE THE RECORDER'S COURT OF
THE TOWN OF BELLEVILLE.

TOWN OF BELLEVILLE

*vs.*FRANK J. DURKIN LUMBER
COMPANY.

10

Transcript of testimony taken in the above-stated cause, before George Fitzsimmons, Esquire, Recorder of the Town of Belleville, in the Council Chambers, Town Hall, Belleville, New Jersey, on Monday, March 19th, 1928, at 9:30 o'clock in the forenoon.

20

Appearances:

John Brown, Esquire, town counsel, appearing for the Town of Belleville.

Merritt Lane, Esquire, and J. Larkin Hughes, of counsel, appearing for the Frank J. Durkin Lumber Co.

Florence I. Carman sworn as stenographer.

Mr. Lane: I don't know, has there been any pleading to this yet?

30

Mr. Brown: Not on this complaint.

Mr. Lane: Representing the Frank J. Durkin Lumber Company, the defendant is pleading to the complaint not guilty, and we further say that to apply the provision of the ordinance which is referred to in the complaint—or that section of the ordinance which is referred to in the complaint, to us, would be a violation of the rights secured to us by the 14th Amendment of the Constitution of the United States, in that

40

Testimony.

it would be a taking of our property without due process of law, within the meaning of the Constitution, and would also be depriving us of the equal protection of the law within the meaning of that Constitutional amendment; and we further say that it would likewise deprive us of the

10 right to own, possess, use and enjoy property within the meaning of the Constitution of the State of New Jersey; and we also say that that provision of the ordinance if applied to us is, or would be an exercise of power by a municipality beyond the authorization under the Statutes of New Jersey, because it would in no wise affect the public safety, health and general welfare.

Mr. Brown: If your Honor please, in response to the complaint that has been made,

20 the question of the constitutionality of the ordinance has been raised, and of course this court is not qualified to pass on that. There has been a violation of the ordinance, we contend and if so this court should not pass upon it. The constitutionality of the ordinance is something which can only be passed upon in the higher courts. So that the duties of this court are limited to the provisions of the ordinance.

30 Mr. Lane: In response to that, let me say that I am quite aware that that has become the practise in many police courts and other courts of similar jurisdiction, not to pass upon the constitutionality of ordinances and constitutional questions. If the Court declines to pass upon such questions, of course it is beyond the control of the parties, but this court is just as much bound by the Constitution of the United States and the Constitution of New

40 Jersey as is any higher court, and the Consti-

Robert H. Williams, direct.

tution is the law, and any ordinance or any statute which affects the law is just as valid in this court as it is in any other court, and under the rules of the Supreme Court of the United States, the constitutional question which we have here injected must be injected here; if it were not injected here, it would not be reviewable in the Supreme Court of the United States. Now what this court may do at the conclusion of this hearing is for this court to determine, but I have got to inject this here. 10

Mr. Brown: I concede part of what you say, Mr. Lane, but I think you will concede that the ordinance is presumed to be valid until ordered otherwise upon a judicial determination.

Mr. Lane: No, I will not concede that; I said as valid in this court as in any other court. But I don't think that under the laws of the State of New Jersey an ordinance is valid except under the determination of some court of competent jurisdiction, and I contend that this court is not a court of competent jurisdiction. 20

The Court: The Court will determine as to the complaint, and not pass upon the constitutionality of the ordinance.

ROBERT H. WILLIAMS, being duly sworn, according to law, on his oath testifies as follows: 30

Direct examination by Mr. Brown.

Q Mr. Williams, you are the acting building inspector of the Town of Belleville? A Yes.

Q In charge of the Building Department?

A Yes, sir.

Q And have you been acting in that capacity since January, 1928? A Yes. 40

Robert H. Williams, cross.

Q And for how long a time prior? A I have assisted Mr. Blank about two years.

Q Prior? A Before—prior.

Q Has the F. J. Durkin Lumber Company at any time since you have been acting for the department applied to you or to any one in your department, to your knowledge, for a certificate of occupancy to use the premises as a lumber storage yard, as a storage yard to be occupied by the F. J. Durkin Lumber Company on Belleville avenue in the Town of Belleville, near the Bloomfield line? A Never did.

Cross examination by Mr. Lane.

Q Is there such a thing as a permit to place lumber on this property in Belleville? A Such a thing as an occupancy permit to do any kind of business.

Q Under what section of the ordinance do you say that there is such a provision?

Mr. Brown: Shall we introduce this? I offer this in evidence.

Received in evidence and marked Exhibit P. 1.

Mr. Lane: The ordinance will speak for itself.

Mr. Brown: Now, Mr. Lane, that is section 14 of the ordinance. The ordinance will speak for itself.

Mr. Lane: I specifically raise the same objection that I raised at the outset of this proceeding, as to section 14 of the ordinance, for there is nothing there to be construed as a rule prohibiting the placing of lumber on one's own property.

George W. Lindsay, direct.

Objection overruled.

Mr. Lane: May I have an exception?

The Court: Exception granted.

By Mr. Brown.

Q Do you know, Mr. Williams, whether this property is in use as a lumber yard? A I do. 10

Q And do you know how long it has been in use for that purpose? A As far as I can tell, about July, '26.

Q And what year? A '26. 1926.

Q Oh, July, 1926? A Somewhere along there.

By Mr. Lane.

Q There are no structures on this property in Belleville, are there? A Not that I know of, no, sir. 20

GEORGE W. LINDSAY, being duly sworn, according to law, on his oath testifies as follows:

Direct examination by Mr. Brown.

Q Mr. Lindsay, are you employed by the Town of Belleville? A I am. 30

Q And in what capacity? A Assistant town engineer.

Q Are you familiar with the location of the property in question? A I am.

Q Have you been up to that property since January 1, 1928, for the purpose of making an examination of the property to determine whether that portion in the Town of Belleville 40

Albert S. Blank, direct.

was being occupied as a lumber yard? A I have.

Q And what did you find? A Lumber is stored on that portion of their property which is in the Town of Belleville.

10 Q Can you tell us on what dates you were there and made this inspection? A On February 17th. I went again on the 23rd. On March 1st, March 7th, March 12th, March 16th, and on the 19th.

Q And did the same condition that you have just stated exist upon each of these dates? A With minor changes, yes.

Q You are familiar with the location of the town line between Belleville and Bloomfield at that point? A I am.

20 Q And you did determine as a result of your survey, that that portion of the Durkin property lying in Belleville was occupied as a lumber yard on these various dates? A I did.

Cross examination by Mr. Lane.

Q There are no structures on that property, are there? A No, sir.

Q "No, sir" should be "Yes, sir," shouldn't it? A There are none.

30

ALBERT S. BLANK, being duly sworn, according to law, on his oath testifies as follows:

Direct examination by Mr. Brown.

Q Mr. Blank, you are employed by the Town of Belleville? A I am.

40 Q In what capacity? A Town engineer.

Frank J. Durkin, direct.

Q Have you had occasion since January 1, 1928, to make an inspection of the premises in question to determine whether any portion of them is occupied as a lumber yard? A I have.

Q Can you tell us on what dates you visited the property in question? A February 23rd, March 1st and March 9th.

10

Q And do you know whether these premises were occupied as a lumber yard on these respective dates? A I do.

Q You are the head of the Bureau of Engineering, are you not? A I am.

Q Do you know whether any application was ever made for a certificate of occupancy? A There was none to my knowledge.

No cross examination.

20

PLAINTIFF RESTS.

FRANK J. DURKIN, being duly sworn, according to law, on his oath testifies as follows:

Direct examination by Mr. Lane.

Q Mr. Durkin, where do you live? A 125 Essex avenue, Bloomfield. 30

Q And what office do you occupy with the defendant concern? A President and treasurer.

Q How long have you been president and treasurer? A Since July, 1926.

Q Are you familiar with the property owned by the company in Bloomfield and in Belleville?

A Yes, sir.

Q I show you a plan which is entitled "Scheme Yard Layout, F. J. Durkin Lumber

40

Frank J. Durkin, direct.

Company," and ask you whether by reference to the plan you can identify your property both in Belleville and in Bloomfield? A There is the Bloomfield location (indicating).

10 (By consent plot of Durkin property Exhibit D. 1 substituted)

Q What? A The Bloomfield location.

Q What I want is to—of course, this shows other property also, does it not? A Yes, sir. Nothing down here (indicating).

Q This is all yours (indicating)? A Yes, sir.

Q And up to here, too? A Yes, sir, where that line is.

20 Q So that on this scheme, all of the property which I am now going over with a black pencil (stop me if I am wrong) belongs to you? A Yes, sir.

Q And your home is over there (indicating)—that is your home? A Yes, sir.

Q What is the frontage on Belleville avenue—no, that is—yes, Belleville avenue? A 181 feet.

30 Mr. Brown: We are not offering any serious objection to this, if you want to introduce it in evidence.

Mr. Lane: Yes, I do want to introduce it.

Mr. Brown: We will consent to that. "Scheme" is offered in evidence and marked Exhibit D. 1.

40 Q And what is the frontage in the rear of the property—I assume it is the rear there, at the

Frank J. Durkin, direct.

railroad track? A It adjoins the railroad tracks 216 feet along the railroad.

Q Along what railroad? A Erie Railroad.

Q And how deep is it? A 560 feet there, I think. Yes.

Q The black line which runs through the property—is that the line dividing Belleville and Bloomfield? A Yes, sir. 10

Q Now, on the property which is located in Bloomfield, what is there erected? A Office building, and one shed.

Q And what is that shed used for? A Storage of lumber.

Q Is the property as a whole, used for one purpose? A Yes, sir.

Q Would it be possible for you to operate that portion of the property lying in the Town of Bloomfield without—as a lumber yard for the purpose for which it is used, without using the portion of the property which is in the Town of Belleville? A No, sir. 20

Q How long have you had experience in the lumber business? A Twenty-nine years.

Q Is there lumber piled on the portion of the property in Belleville? A Part of the property in Belleville.

Q And how far back from Belleville avenue —the frontage on Belleville avenue—is the lumber piled? A The entire length of the property. 30

Q What do you mean by that? How near to Belleville avenue is the first pile of lumber? A In Bloomfield or Belleville?

Q In Belleville? A About 180 feet.

The Court: What is that?

The Witness: About 180 feet from the street line.

Frank J. Durkin, direct.

Q And how much lumber has been piled there? A Will you be more specific as to the place? There is more than one pile there.

Q On that portion of the property in Belleville, anywhere on that property—that portion of the property in Belleville. A About forty
10 per cent I think, sir. About forty per cent of our stock.

Q That doesn't mean anything to me. A What do you mean, dollars and cents, or feet?

Q I don't know that feet would be much help to me, either. I mean how big it looks.

Mr. Brown: You mean area, as to space?

Q Maybe you can tell us that, Mr. Durkin.
20 What proportion of the area does the lumber occupy in Belleville on this property? A About three hundred feet.

Q Along the length of about three hundred feet; how wide a pile would that be? A About forty feet.

Q I suppose that varies from time to time as you have a large stock or a small stock? A Yes, sir.

Q And you say it is about forty per cent of
30 the stock of lumber which you carry at that particular place? A Yes, sir.

Q Now, I notice that there is made out on this scheme, and as laid out, a driveway. Is that driveway actually laid out on the ground? A Yes.

Q And that enters the property from where? A From Belleville avenue.

Q From the Belleville side or the Bloomfield side? A From both sides; one is in Bloomfield
40 and one in Belleville.

Frank J. Durkin, direct.

Q What kind of property is there adjacent to this property?

Mr. Lane: I would like to have that marked in evidence (indicating photograph).

Mr. Brown: May I make this interjection. We have no objection to the introduction of a photograph showing this property in Belleville, but we do object to an introduction in evidence of a photograph showing the property in Bloomfield. 10

Mr. Lane: Inasmuch as it is offered upon the strict question of permit, the Court will have to take it, and the Supreme Court will deal with that upon certiorari. I have to get my record.

Mr. Brown: My objection is based upon the ground that we are considering now only the ordinance of the Town of Belleville, and what the ordinances are in the Town of Bloomfield, we are not concerned with in this case. We can only deal with this case; that is my contention, that this particular ordinance of the Town of Belleville is what we are concerned with, and therefore I must object to putting that in evidence unless it is a photograph of property in the Town of Belleville, and not of the Town of Bloomfield. 20 30

Mr. Lane: Whether the application of this ordinance in this particular case is reasonable or not, does not depend entirely upon the situation in connection with Belleville; it effects the situation in that vicinity, whether in Belleville or Bloomfield. You cannot cut a person's property in two un-

Frank J. Durkin, direct.

reasonably, even if it is in two municipalities.

10 The Court: I overrule the objection. As to the introduction of the ordinance, as to the constitutionality of it, of course at this time I would not deny or admit anything pertaining to the question as to whether or not the ordinance was unconstitutional.

20 Mr. Lane: I except because I must make my record clear, and if I apply for a writ of certiorari, I am entitled to offer the evidence here; whether your Honor is going to pass upon the constitutionality of this ordinance is one thing, but I am entitled to offer evidence so it can be reviewed, so that the upper court can determine on the whole case whether the application of this ordinance to this particular case is a constitutional exercise of power. I have not said this ordinance was unconstitutional; Mr. Brown seems to think that I contend that this ordinance is unconstitutional. I have not said that. I say to apply this ordinance to this particular case is depriving us of our constitutional rights. It is the question of depriving us of our rights, and we have the right to have that passed upon by the upper court.

30 Mr. Brown: I concede you have that right, and you have the right to offer your testimony, and I have the right to object, and the Court has the right to rule on it, and neither one of us may be prevented from taking exception to the Court's ruling.

The Court: Objection sustained.

40 Exception allowed Mr. Lane.

Frank J. Durkin, direct.

Q Now, Mr. Durkin, I show you a photograph and ask you what that photograph shows.

A It shows a view of the office and lumber shed and lumber piles—office and shed being in the Town of Bloomfield, lumber piles in the Town of Belleville, taken from the Belleville side.

Q That is, looking at your yard from the opposite side of Belleville avenue? A Yes, sir. 10

Q And it shows the F. J. Durkin Lumber Company office building and structures that appear there in the Town of Bloomfield? A Yes.

Q And the lumber piles that appear there are in the Town of Belleville? A Yes, sir.

Q Can you tell me about where the town line lies? A Right here (indicating).

By Mr. Lane.

20

Q About as the black line that I have drawn goes, is that right—or something like that? A Yes, sir. Something like that.

Mr. Brown: For the purpose of clarifying the record, will you concede that the line that you have drawn is approximately at right angles to Belleville avenue?

Mr. Lane: Yes.

I offer that photograph in evidence.

30

Received in evidence and marked Exhibit D. 2.

Q Now, I show you another photograph and ask you what that represents? A The rear of my property looking from the Bloomfield side of the property east along the railroad.

Q Toward— A —the Town of Belleville.

Q Toward the Town of Belleville. This lumber pile which appears upon the extreme left of 40

Frank J. Durkin, direct.

the picture—is that one of your lumber piles?

A Yes, sir.

Q On the property in Belleville? A Yes, sir.

Q And this is looking from that point down toward the Town of Belleville? A Yes, sir.

10

Mr. Lane: I offer it in evidence.

Received in evidence and marked Exhibit D. 3.

Q Now, I show you another photograph and ask you what that represents? A Looking at our property from the opposite side of the railroad tracks toward Belleville avenue.

Q That's from the side of the railroad tracks shown in Exhibit D. 1, opposite your property in the Town of Belleville? A Yes, sir.

20

Q And it is looking right toward Belleville avenue? A Yes, sir.

Mr. Lane: I offer that in evidence.

Received in evidence and marked Exhibit D. 4.

Q I show you another photograph and ask you what that represents? A This is looking at the property opposite our property on Belleville avenue, looking on the Bloomfield side toward the Town of Belleville.

30

Q And can you tell me about where the Belleville-Bloomfield line comes here? A Right here (indicating).

Q It goes this way? A Yes.

Q That is, between these two houses? A It goes this way (indicating).

Q That fire hydrant— A —is in the Town of Bloomfield.

40

Frank J. Durkin, direct.

Q And does it go on the other side of that fire hydrant? A Yes, sir.

Q About like that (indicating)? A Yes, sir.

Q About like the black mark that I have drawn on that photograph? A Yes, sir.

Q And these green houses are in the Town of Belleville? A Yes, sir. 10

Q How far, do you know, are these residences which appear on the right of the photograph, from your property? A About six hundred feet.

Q Is there another street that comes in there upon which they are located? A There is a street in there where they are located. There is an empty acreage in there which at the present time is being used for a fill. 20

Mr. Lane: I offer that photograph in evidence.

Received in evidence and marked Exhibit D. 5.

Q I show you another photograph and ask you what that represents? A That represents a house and garage that is being built from the rear of our property looking from our property here to the Town of Belleville. 30

Q That garage is where? A That is in the Town of Belleville and the house is partly in Belleville and partly in Bloomfield.

Q And this is taken from— A From my yard.

Q From your yard looking toward the railroad tracks? A Yes, sir.

Q And is on the other side of the railroad track from your property? A Yes. 40

Frank J. Durkin, direct.

Q And this three-car—is that a public or a private garage? A A garage built for trucks; the man is in the trucking business there.

Q And it is used to store trucks? A Used to store trucks used in the trucking business. The storage of commercial trucks.

10 Q Now, this residence that appears there, partly in Belleville and partly in Bloomfield? A That's the office and home of the man doing the trucking business.

Q Does he have his office there also? A Yes.

Q What kind of trucking business is he doing?

A All kinds of commercial trucking; uses five and seven-ton trucks.

Q And the houses to the right; are they in Belleville or Bloomfield? A In Bloomfield.

20 Q Then Belleville is to the left of this picture and Bloomfield to the right? A Yes, sir.

Mr. Lane: I offer this photograph in evidence.

Received in evidence and marked Exhibit D. 6.

Q Now, I show you another photograph and ask you where it was taken from? A Taken from Belleville avenue on the Belleville side, looking at the property adjoining my property in the Town of Belleville.

Q Now, let me get located. Where is your property as you look at this photograph? A On the right-hand side.

Q This is looking at your property? A Yes, sir.

Q From across Belleville avenue? A Yes.

40 Q Across the street? A Yes.

Frank J. Durkin, direct.

Q And your property is the property to the right of this telegraph pole that appears here?

A Just about twenty feet below the pole.

Q What do you mean? A To the left of the pole.

Q And the property on the left shows the property in Belleville? A Yes, sir. 10

Q —adjoining yours. And what is this here? A Real estate office.

Q Is there a street that comes in here (indicating)? A Yes, sir.

Q To the right of the photograph upon which houses seem to face? A What do you mean?

Q To the left of the telegraph pole? A Yes, sir.

Q What street is that? A Pleasant avenue. 20

Q How far is this house from your property—or these houses? A The house to the right?

Q The house which is next nearest to the telegraph pole to the left, as it appears on the photograph? A As it appears on the photograph, from the left of the telegraph pole to down here is about six hundred feet.

Q How far is that house from your property line? A About sixty feet. That house was built after the lumber yard was there. 30

Mr. Brown: I move that last be stricken out, as not responsive.

Mr. Lane: That is my privilege to strike out on that ground, and examining counsel has the right to object on the ground that it is not responsive. I don't object to it.

Mr. Brown: I object on the ground it is immaterial.

Objection overruled and exception granted. 40

Frank J. Durkin, direct.

Mr. Lane: I offer this photograph in evidence.

Received in evidence and marked Exhibit D. 7.

10 Q Now, I show you another photograph and ask you what that represents? A That shows a piece of property adjoining ours on Belleville avenue, and looking from the opposite side of the street, and shows the houses the very nearest to our property.

Q Let me see; your line is about here? A Right here; the Town of Belleville is over here; this is to your right.

20 Q Your property line, as I understand it, is twenty feet to the left of the telegraph pole which appears here; is that right? A Yes, sir.

Q And this street which appears here, is that Pleasant avenue? A Yes.

Q And that is about how far from your property line? A 110 feet.

Mr. Lane: I offer this photograph in evidence.

Received in evidence and marked Exhibit D. 8.

30 Q Now, I show you another photograph and ask you what that represents? A That's part of my property and the property adjoining on the Bloomfield side.

Q Where is your property on this? A The extreme left-hand corner of the photograph.

Q Where the lumber is? A Where the lumber is piled.

40 Q And what is this, looking from the other side of the street? A The Town of Belleville.

Frank J. Durkin, direct.

Q The camera is in the Town of Belleville?
A Yes.

Q On the other side of the street? A Yes, sir.

Q And this portion of your lumber which is shown here to be on the extreme left of the photograph is in—what town is that in? A The Town of Bloomfield. 10

Q And the property to the right on the other side of the street is in the Town of Bloomfield?
A Yes, sir.

Q Is that a public garage which you see here next to the lumber yard? A Yes, sir.

Q It is a public garage? A Yes, sir.

Mr. Lane: I offer that photograph in evidence. 20

Received in evidence and marked Exhibit D. 9.

Q I show you another photograph and ask you what that represents? A That represents a view of our office, sheds and lumber piles, standing at Pleasant avenue and looking towards Belleville avenue.

Q The photograph was taken from a point on Pleasant avenue? A Yes, sir. 30

Q About where, as shown on Exhibit D. 1? A At the junction of Pleasant avenue and Smallwood avenue.

Q Where does the line run—somewhere over here? A Yes, sir; this way (indicating).

Q The lumber pile here shows as being in the Town of Belleville? A Yes, sir.

Q And the structures are in the Town of Bloomfield? A Yes, sir. 40

Frank J. Durkin, direct.

Q What is this big house appearing here?

A That is located in the Town of Bloomfield.

Q What is it? A The home of Mr. Hayes; Hayes' residence; the man that runs the greenhouses.

10 Q And the greenhouses are in the Town of Belleville? A Yes, sir.

Q How far is that from Belleville avenue?

A Sets back about 200 feet.

Mr. Lane: I offer that photograph in evidence.

Received in evidence and marked Exhibit D. 10.

20 Q I show you now—here is another photograph. What does that represent? A That is looking from the railroad tracks in the Town of Belleville to a factory known as the National Grain and Yeast Company.

Q Is it looking toward the Town of Belleville or the Town of Bloomfield? A Town of Belleville.

30 Q And this was taken at a point at the railroad tracks? A On the opposite side of the railroad tracks in the Town of Belleville.

Q About where, as shown on Exhibit D. 1? A Right about here (indicating).

Q That's about the middle of your property? A If extended across the railroad track, yes, sir.

Q And looking toward the Town of Belleville? A Yes.

Q Into the Town of Belleville? A Yes.

40 Q What is that factory? A The National Grain and Yeast Company.

Frank J. Durkin, direct.

Q How near is it to the point at which this photograph was taken, approximately? A Six hundred feet, about.

Q And what is this—is this a factory six hundred feet away? A That is a group of factories in there.

Q About six hundred feet— A Yes. 10

Q What are their plants—this one that you have referred to? A Some of them are frame structures, and others are brick buildings.

Q Are they all the one concern? A They are all one concern, yes, sir.

Q And this, I suppose, is their line—this fence line that you see here? A Yes, sir.

Q And beyond that are buildings? A Yes.

Q These same buildings? A National Grain and Yeast, and here they manufacture alcohol. 20

Q That property to the right of the railroad track as we look at this property from your side—what is that? A Vacant acreage.

Q And the property to the left of it? A Vacant acreage.

Mr. Lane: I offer this photograph in evidence.

Received in evidence and marked Exhibit D. 11. 30

Q I show you another photograph and ask you what that is? A That is a photograph of the factory adjoining my property on the Bloomfield side, looking from the railroad tracks; our property here (indicating).

Q Looking from the railroad tracks situated about where? A The extreme left of our property line looking from the railroad.

Q As it appears on Exhibit D. 1? A Yes. 40

Frank J. Durkin, direct.

Q And looking toward Belleville avenue? A Yes.

Q What kind of a factory is that? A Diamond Color Company.

Q What is that? A Manufacturer of chemicals.

10 Q What kind of chemicals? A Colors, principally.

Q Do you know how long that factory has been there? A About twenty years.

Q It was there before you were there? A Yes, sir.

Mr. Brown: I object to this photograph. That is property found in Bloomfield—

20 Mr. Lane: It shows property partly in Belleville and partly in Bloomfield, isn't that so?

The Witness: The lumber pile is in Belleville.

Q The lumber pile shown here is your lumber pile in Belleville? A Yes, sir.

Q The factory that you are now referring to is in the Town of Belleville? A Bloomfield.

30 Q Immediately adjoining your property at a point about where it corresponds here with Exhibit D. 1? A Yes.

Mr. Brown: I object to this testimony.

By the Court.

Q Is this in reference to a plant located in the Town of Bloomfield? A Yes, partly.

40 Mr. Lane: This man's property is also in Belleville. The Chemical Company's

Frank J. Durkin, direct.

structures are erected in the Town of Bloomfield; the property runs over into the Town of Belleville; is that right?

The Court: Do you consent as to the chemical plant?

Mr. Brown: I will consent to it.

Mr. Lane: I offer the photograph in evidence.

10

Received in evidence and marked Exhibit D. 12.

By Mr. Lane.

Q Now, does this photograph which I have referred to generally show the type of buildings and class of buildings surrounding your property? A May I have that again?

20

Q (Last question read as follows:) Now, does this photograph which I have referred to generally show the type of buildings and class of buildings surrounding your property? A Yes, sir.

Q I show you Exhibit P. 1, which is the Zoning Ordinance and a map that is on there; will you tell me where your property is located on this map? A Here is my property, right over here (indicating).

30

Q Here is the railroad? A Yes.

Q It adjoins the railroad? A Yes, sir.

Q That is right where that large mark on it is? A Yes, sir.

Q So that it immediately adjoins the industrial zone, does it not? A Yes, sir.

Q Now, what kind of property is there in that industrial zone—what kind of business? A Vacant acreage, National Grain and Yeast Company, manufacturers of chemicals, commercial trucking business.

40

Frank J. Durkin, cross.

Q Are there any others that you recollect at this time? A That's all the factories.

Q When did you purchase this property, Mr. Durkin? A The early part of 1926, March, 1926.

10 Q What was the property used for at the time of the purchase? A Vacant land.

Q When did you first establish your lumber yard there? A July, 1926.

Q And have you been continuing it since that time to the present time? A Yes, sir.

Q Did you ever speak with any of the officials of the Town of Belleville with respect to a permit? A Yes, sir.

Q When? A August, 1926.

20 Q Before or after you established the lumber yard? A Right after we established the lumber yard.

Q Who did you see? A Mr. Carrigher, chairman of the Building Department.

Q And what happened? A He said he could not issue a permit for the reason that the ordinance did not call for a permit for a lumber yard.

30 Mr. Lane: You will concede, will you not, that these photographs accurately portray what it has been testified they do portray during this proceeding, without our producing the photographer that took them?

Mr. Brown: Absolutely.

Cross examination by Mr. Brown.

Q Referring to Exhibit D. 6, this photograph of a house with a three-car garage in the back—

40 A Yes, sir.

Frank J. Durkin, cross.

Q Do you know what zone that building is in at the present time? A No, sir, I do not. I understand it is supposed to be in the residential section.

Q In the residence zone? A In the residence zone.

Q A change has been made in the zoning, so that it now is in the residence zone? A Yes. 10

Mr. Lane: I didn't get that.

Mr. Brown: He admits that a change has been made in the zoning, so that this building with the garage is now in the residence zone, and inasmuch as the ordinance speaks for itself, I desire to call the Court's attention to section 2, paragraph 11—first, paragraph 10, in which greenhouses are permitted in a residence zone, which refers to one of the former exhibits here in regard to this Exhibit D. 6; and I desire to call the Court's attention to paragraph 11, which permits a three-car garage, but specifically *limits* ~~permits~~ the garages in that zone to three-car garages. 20

Mr. Lane: Do I understand that the property which appears in Exhibit D. 6 was originally zoned as something other than residence? 30

Mr. Brown: Industrial.

Mr. Lane: It was zoned industrial?

Mr. Brown: Yes.

Mr. Lane: May we stipulate when that was changed?

Mr. Brown: We will have to have the town clerk as to that.

Mr. Lane: Can't it be stipulated— 40

Frank J. Durkin, cross.

Mr. Brown: Not to be perfectly accurate, Mr. Lane. I prefer to be accurate with that.

(See page for this information.)

Cross examination by Mr. Brown.

10

Q Mr. Durkin, you said that you established your lumber yard in 1926, and that after you established the lumber yard, you then spoke to Commissioner Carrigher about the permit? A Yes, sir.

Q Why didn't you speak to him before you established your lumber yard? A At the time we spoke to Mr. Carrigher, we didn't have any lumber in the Town of Belleville.

20

Q That was— A We were not storing lumber in the Town of Belleville.

Q That was in the year 1926? A Yes, sir.

Q Did you know there was such a thing as a zoning ordinance of the Town of Belleville? A I knew there was a zoning ordinance, yes, sir.

Q Didn't you think it might have been usual to have inquired whether you were getting into the right type of zone for your particular business?

30

Mr. Lane: Objected to as immaterial.

The Court: Objection overruled.

Mr. Lane: I object on the further ground, it is not proper cross examination.

Q How long after you established your lumber yard did you wait before you saw Commissioner Carrigher? A He sent for me.

40 Q Tell us what happened then, after he sent for you. A Mr. Carrigher sent Mr. Williams

Frank J. Durkin, cross.

with word for me to come down and see him. I arrived at the Town Hall and called upon Mr. Carrigher at his office. I went in and he asked me what I was doing. I told him I was going to build an office. He said, "You haven't got a permit." I said, "I don't need one; I am building it in the Town of Bloomfield." He said, 10
"All right."

Q Is that all? A Yes.

Q You didn't tell him at that time that you intended to locate a lumber yard in that portion of your premises in the Town of Belleville? A I didn't tell him in the Town of Belleville; I said I was going to operate a lumber yard.

Q In Belleville or Bloomfield? A On that property there.

Q You didn't tell him you were going to operate that lumber yard in Belleville? A At that time, no. 20

Q Then he didn't know at the time he told you a permit was not necessary, that a portion of the yard was to extend into Belleville, did he? A That was not the time. That was the time I came down there, and he told me he didn't know I was going there—

Q Didn't this conversation with Commissioner Carrigher take place the first time you came down? A No. 30

Q What was the first conversation? A As I told you, he sent for me, and wanted to know what we were doing there. I told him that we were going to open a lumber yard. He said, "You haven't got a permit." I said, "I don't need a permit, or to get a permit. I got a permit from the Town of Bloomfield." He said, "All right." 40

Frank J. Durkin, cross.

Q What was the rest of the conversation that took place at that time? Did you simply tell him you were going to build an office there, and operate your business in Belleville? A I told him I was going to operate on that property. I did not say Belleville or Bloomfield, or any other
10 place.

Q Did you tell him that part of your lumber yard was going to extend into Belleville? A No, sir.

Q You didn't mention it? A No, sir. He didn't ask me.

Q When was the next time you saw him? A Sometime later, I don't remember the date.

Q What was the occasion of your seeing him then? A He sent for me and said I would have to get a permit.
20

Q For what? A To conduct a lumber yard up there.

Q At the time you first mentioned a permit, you were constructing an office building? A Yes, sir.

Q Then what happened? A He said, "All right." I said, "What kind of a permit will I have to get?" He said, "I don't know, but you have got to have a permit," he said, "You
30 have to go before the Board of Adjustment and get a permit."

Q Did you go before the Board of Adjustment? A Yes, sir.

Mr. Lane: I object on the ground it is not cross examination; the proper way to prove that is by the records of the Board of Adjustment.

Objection sustained.

The Court: He has already answered.
40

Arthur R. Carr, direct.

Mr. Lane: I move to strike it out.

The Court: It will be stricken out.

Q Did you ever get a permit? A No, sir.

Q Did you ever apply to anybody else besides Commissioner Carrigher? A No, sir.

10

By Mr. Lane.

Q One more question, Mr. Durkin. This plan, Exhibit D. 1 which has been offered in evidence, showing the scheme, would seem to show some structures on the property in the Town of Belleville. No structures have been erected in the Town of Belleville, have they? A No, sir.

20

ARTHUR R. CARR, being duly sworn, according to law, on his oath testifies as follows:

Direct examination by Mr. Lane.

Q What is your business? A Insurance—fire insurance—general insurance.

Q Where do you live? A Nutley.

Q How long have you been in that business?

A About twenty-four years.

30

Q Doing what? A Insuring investment on residential property.

Q During your experience, have you acquired a familiarity with fire hazards? A I have.

Q And that includes fire hazards and so forth? A Yes, sir.

Mr. Brown: I don't think this line of testimony that is being mentioned here, or furnished here is material to the issue before

40

Arthur R. Carr, direct.

us; the reasonableness of the ordinance is not at issue here before this court. The hazards are not before this court; this court cannot pass upon that; I object to this as being immaterial.

10 The Court: Objection sustained. I cannot see the materiality in this witness coming here and testifying that he found a hazard in a lumber yard.

Mr. Lane: I ask for an exception.

20 Mr. Lane: There is no question, if the Court please, but that under the cases, this testimony is relative and material for the purpose of determining whether this ordinance is reasonable or not. This court says it won't determine the reasonableness of this ordinance but some court must determine on the record I am trying to make here. Of course, if you sustain the objection and the testimony is excluded, I don't believe I could get the testimony in here, unless I apply for a rule to take testimony. I don't think that is proper; I think the record should be made here, and that is what I am trying to make.

30 The Court: I will allow you an exception, Mr. Lane.

40 Mr. Lane: Then do I understand your Honor overrules any further testimony which may be offered for the purpose of showing either unreasonableness of the application of this ordinance to the particular facts of this case, or as to the deprivation of the rights—the constitutional rights of the defendant by applying the ordinance to the facts of this particular case?

Robert Williams, direct.

The Court: You do, and I will grant you an exception.

Mr. Lane: I will except to that.

Mr. Brown: Why, we have agreed just as announced. I consent to that.

10

REBUTTAL.

ROBERT WILLIAMS, recalled.

By Mr. Brown.

Q I show you, Mr. Williams, Exhibit D. 6, which shows the easterly portion of the Durkin Lumber Company property and the neighborhood adjacent to the south. Can you tell me under what kind of permit the real estate office located in the center of the picture was granted, a temporary or a permanent? A The Zoning Board granted the right to put up for one year and maintain that building. 20

Mr. Brown: And again, under the Zoning Ordinance, I call the Court's attention to paragraph 4, section 12, which permits the granting in undeveloped sections of the city temporary and conditional permits for not more than two years under which this permit was granted. 30

The tract indicated in Exhibit D. 6 was originally by the ordinance of September 3, 1923, industrial. On April 22, 1924, it was changed to residential. On November 25, 1924, it was changed to industrial. On April 5, 1927, it was changed to residence B, and 40

Robert Williams, direct.

April 22, 1924, it was changed to residence
A.

The property shown on Exhibit D. 6 is
part of that zone.

CASE CLOSED.

10

Mr. Brown: We submit our case to the Court.

Mr. Lane: I submit, also, with the objections I have already made at the outset of the hearing and also the objections I have made throughout the taking of the testimony, and with the further objection that there is nothing under the ordinance that requires a permit for the storage of lumber on your own property.

20

Mr. Brown: If your Honor please, I take exception to the last remark, and think it should be qualified. It depends upon whether your property is in a residential zone or in an industrial zone; the ordinance speaks for itself, and section 2 and section 14 distinctly say that no such property shall be used for such purpose without first having secured a permit, and also without having made application and having secured a certificate of occupancy.

30

Mr. Lane: My answer to that is that that is entirely beyond the power of the municipality, both on constitutional grounds and also upon the power conferred upon it by the statute.

40

The Court: This court concludes this ordinance to be legal until found otherwise by the higher courts. The testimony of the complaining witness of the Town of Belleville, the building inspector, is that the dates of the 1st, 3rd, 5th, 6th, 7th, 8th, 9th, 10th, 12th, 13th, 14th, 16th and 19th of March, 1928, that this ordinance was violated.

Judgment of Conviction.

There has been no testimony from the complaining witness or other witnesses for the town, of such violations on these days, except on the 1st, 7th, 12th, 16th and 19th, that testimony having been given by George W. Lindsay, assistant town engineer, and admitted by the defendant, Frank J. Durkin, that the ordinance was being violated by the storage of lumber in and on the premises herein mentioned; therefore the Court finds him guilty of violating the said ordinance on the said mentioned dates, and imposes a fine of twenty-five dollars for each day herein mentioned. The 1st, 7th, 12th, 16th and 19th days of March. 10

Mr. Lane: I except to that, of course, and want to ask the Court to suspend the payment of the fine at this time until we have had an opportunity to apply to the Supreme Court for certiorari. I shall do that the moment this testimony is written out. 20

The Court: I fine him twenty-five dollars for each of these dates, and I further order that the violation must be discontinued within a period of sixty days.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss. 30

Be it remembered that on the nineteenth day of March, 1928, Frank J. Durkin Lumber Co., Frank J. Durkin, president, brought before me George A. Fitzsimmons, Recorder of the Town of Belleville, county aforesaid, charged with violation of the Town Ordinance known as "An Ordinance regulating and limiting the height and bulk of buildings, hereafter erected and regulating and determining the area of yards, courts and other 40

Judgment of Conviction.

open spaces, and restricting the location of trades and industries and location of buildings designed for specified uses and establishing the boundaries of zones for the said purposes and providing penalties for the violation of its provisions."

10 The said Frank J. Durkin, having been charged with violation of Section XIV of said ordinance, and that the said lumber company did occupy and use premises on the southerly side of John street adjoining the easterly boundary line of the Town of Bloomfield in violation of the said Section XIV said premises being located in as described in said ordinance, Zone "A" of the above-named ordinance, and as prohibited under same.

20 And it appearing from the testimony of Robert H. Williams, building inspector, and Albert S. Blank, town engineer, and by the admission of the defendant, Frank J. Durkin, president of the F. J. Durkin Lumber Co., that the said ordinance was being violated, specifically on the 1st, 7th, 12th, 14th, 16th and 19th days of March, 1928, in that the said defendant did use said premises for the storage of lumber, as prohibited in Section XIV of the above-named ordinance.

30 Therefore, I, George A. Fitzsimmons, Recorder, adjudge Frank J. Durkin Lumber Co. guilty of violating said ordinance and order that F. J. Durkin Lumber Co. pay a fine of one hundred fifty dollars (\$150.00) and that the violation be moved within sixty days. The fine is hereby ordered suspended for a period of sixty days.

GEORGE A. FITZSIMMONS,
Recorder.

Testimony.

NEW JERSEY SUPREME COURT.

FRANK J. DURKIN LUMBER COM-
PANY,

*Prosecutor,**vs.*

GEORGE FITZSIMMONS, ESQ., Re-
corder of the Town of Belle-
ville, and the TOWN OF BELLE-
VILLE,

*Respondents.**Book No. 1.*

10

Transcript of testimony taken in the above-en-
titled cause, by consent, before Milton M. Unger,
Esq., a Supreme Court Commissioner of New
Jersey, 908 Prudential Building, Newark, N. J.,
on Thursday, September 13th, 1928, at 2 P. M.

20

Appearances:

Merritt Lane, Esq., for prosecutor.

John B. Brown, Esq., for respondents.

It is stipulated and agreed by and between the
attorneys for the respective parties, that the tes-
timony of the witnesses may be taken steno-
graphically and afterwards reduced to typewrit-
ing, the signatures of the witnesses to their said
testimony being waived.

30

.....
Supreme Court Commissioner.

40

Albert M. Robinson, direct.

ALBERT M. ROBINSON, produced as a witness on behalf of prosecutor, being duly sworn by the Commissioner, testified as follows:

Direct examination by Mr. Lane.

10 Q Mr. Robinson, where do you reside? A 54
Sunset avenue, Bloomfield, New Jersey.

Q What is your business? A A real estate broker.

Q How long have you been in that business?
A Fourteen years.

Q Dealing in property in what locality? A
Bloomfield, Glen Ridge, Belleville and Montclair.

Q Are you familiar with the Durkin property
on Belleville avenue, Belleville, and Bloomfield?
A Yes.

20 Q How long have you known that property?
A I judge about ten years.

Q Are you familiar with the property in the
immediate vicinity? A Yes.

Q And for the same length of time? A Yes.

Q Have you acted as broker in the buying and
selling of property in that vicinity? A Yes.

Q For the same period of time? A Yes.

30 Q Are you familiar with the values of prop-
erty in that vicinity and the suitability of prop-
erty for various uses? A Yes, sir.

Mr. Lane: I will ask to have this map or
schedule marked in evidence.

(Map or schedule received in evidence and
marked Exhibit P. 1.)

By Mr. Lane.

40 Q I show you a map or schedule. Is that the
property that is referred to as the Durkin prop-
erty? A Yes, sir.

Albert M. Robinson, direct.

Q Mr. Robinson, what would you say as to the availability of that property for the purpose of erecting residences of one family each? A I would say that the general layout of the property does not lend itself very well to cutting it up in an advantageous manner for private homes.

Q Why do you say that? A The frontage is so small. The frontage on Belleville avenue is about 170 feet or 175 feet, which would mean that just the front could be used for private homes, making the rear ground about 400 feet in depth, practically useless. 10

Q How many residences could be erected, having regard to the building zone ordinance of the Town of Belleville on 175 feet frontage? A The frontage of all this property is not all in Belleville. 20

Q How many could be erected on the Belleville frontage under the Zoning Ordinance of Belleville? A One.

Q And that Ordinance, I believe, requires 40 feet frontage? A About.

Q How many residences could be erected on the Bloomfield avenue site? A Three.

Q What would you say as to the development of that property for residential purposes in view of the locality? A The locality there especially on the Bloomfield side, would not be very good for residential purposes on account of the nearness of stores and a gasoline service station. 30

Q Have you attempted to arrive at some value of that tract of ground as a whole? Did you consider it wholly for the purpose of development for residential purposes?

Mr. Brown: Have you qualified Mr. Robinson? 40

Albert M. Robinson, direct.

By Mr. Lane.

10 Q Are you familiar with the value of lands in that vicinity? A I think I am; yes, sir. I have sold some property on Willet street, which is around the corner, within the last year, and within the last two years I have sold property off of Belleville avenue about one-quarter of a mile away from this particular plot.

Q And have you acted as a broker both for residential and factory purposes? A Not for factory purposes.

Q For industrial purposes of any kind? A No, sir.

Q In your business do you keep in touch with the value of properties in that vicinity? A Yes, sir.

20 Q I will ask what you consider the value of that property would be solely for the use of residential purposes? A About nine thousand dollars.

Q That is the whole price? A Yes.

Q Take that portion of the property which lies in Belleville, aside from the property lying in Bloomfield. What would you consider to be the value of that property for residential purposes? A Four thousand dollars.

30 Q If you developed the property for residential purposes, would you say the back land would be practically worthless? A The back land, yes.

Q How far from the street? A Anywhere from 150 to 200 feet back.

Q Is there any exit or ingress to those lands except by the Greenwood Lake Division of the railroad? A No, sir.

40 Q The back lands, I am talking about. A No, sir.

Albert M. Robinson, cross.

Cross examination by Mr. Brown.

Q Mr. Robinson, you mentioned the fact that you had been the broker for the sale that had taken place on Willet street. How far from Belleville avenue was that property located? A About two hundred feet. 10

Q Was it in the same block in which the Durkin property is located? A It was backed on to the Durkin property, with the exception of about fifty feet in the rear.

Q And how large was the lot or tract? A About 45 by 150 feet. I don't recall the exact dimensions.

Q Was it improved? A Yes.

Q Can you tell us the sale price? A Yes, sir, \$8,500. 20

Q Do you know to what use it was put subsequent to the sale by you? A I sold it as a new house. Before that it was vacant ground, and they built a new house on it.

Q How long ago was that? A Within the last year and a half, something like that.

Q I presume you are familiar with the zones both in Belleville and Bloomfield at this particular point? A Yes, sir.

Q Do you know what zone Belleville places that portion of the Durkin property in? A Yes, sir. 30

Q What zone is it? A Residential.

Q What zone does Bloomfield place the Durkin property in? A Well, the Durkin property fronts on business property.

Q Do you know whether there is anything in the Zoning Ordinance of Bloomfield to prohibit or restrict the erection of residences in business property? A There is not. 40

Whitney H. Roddy, direct.

Q When and where were the other sales that you made in that immediate vicinity? I think you named some off of Belleville avenue. A Yes, to the east of the Durkin property on the right-hand side of Belleville avenue, known as—
10 well, it is vacant property on the east of the Durkin property in Belleville. That is, on the right-hand side of Belleville avenue, going into Belleville—Arthur avenue.

Q It fronts on Belleville avenue? A Not fronting on Belleville avenue, just a block in from Belleville avenue, on Arthur avenue.

Q Can you tell us the approximate distance of those premises from the Durkin property? A Between one-eighth and a quarter of a mile away.

Q Do you know the character or type of zone
20 in which the property is located to which you have just referred? A Residential.

Q How large a tract was that? A Small, practically two plots 50 by 125.

Q Improved? A No, sir.

Q Unimproved? A Unimproved.

Q What would you say was the value of each, or the sales price? A Twenty dollars a foot.

30

WHITNEY H. RODDY, produced as a witness on behalf of the prosecutor, being duly sworn by the Commissioner, testified as follows:

Direct examination by Mr. Lane.

Q Where do you reside? A 33 Oak street, Bloomfield, N. J.

Q What is your business? A Real estate
40 and general insurance.

Whitney H. Roddy, direct.

Q How long have you been in that business?

A Ten years.

Q Are you familiar with this Durkin property? A I am, very well.

Q How long have you been familiar with it?

A I have been familiar with that certain tract, I should say, for a period of about seven or eight years. 10

Q Are you familiar with the property in the immediate vicinity? A Very much so. I manage property just up at the corner; I am the managing agent.

Q Have you bought and sold property or acted as agent in the buying and selling of property in the immediate vicinity? A I have. I sold the Durkin property to the Durkin Lumber Company. 20

Q When was that sale made? A In March, 1926.

Q Do you remember the sale price? A I don't recall the sale price.

Q What have you to say as to the availability of that piece of property for residential purposes? A That it is utterly impossible to use that tract for residential purposes for several reasons. One, it is being used on the north for business—a greenhouse there in which they not only grow flowers to sell directly from those greenhouses to the retail trade. I have purchased flowers there myself. 30

Q (By Mr. Brown.) At retail or wholesale? A Retail, not wholesale. On the west, adjacent to this property, there is a gasoline station which is in Bloomfield, which, I would say, is about one hundred feet from this tract. There is an apartment house with stores on the first floor. The Bloomfield property adjacent to this tract is 40

Whitney H. Roddy, direct.

10 zoned for manufacturing. As a matter of fact, there is a chemical factory adjoining this property. On the rear of the property, which is the south, it is used for commercial purposes. The Erie Railroad runs through, and at the rear they use it to take off freight and deliver. Belleville
avenue is a very noisy corner at that section, heavy traffic, and so forth. The tract is not large enough—200 feet front—to use it as a whole, so it would pay to use it for the development of residential property.

Q Is it large enough, or is it available to run any street through it, or anything of that kind?

A It is impossible to run a street through that ground to advantage.

20 Q As a result of that, how much could be made available for residential purposes in any event? A About 175 feet frontage by 150 feet in depth, that is the Belleville and Bloomfield frontage combined.

Q And if the Belleville and Bloomfield frontage combined were used for residential purposes back to 150 feet, what would happen to the back land? What would be done about that? A The back land would have no value whatsoever. It would be an utter loss.

30 Q Is there any way by which you could have ingress and egress to that back land? A There is absolutely no outlet to it. Belleville and John street is the only outlet.

Q Are you familiar with the Zoning Ordinances of Bloomfield and Belleville? A I am.

Q Under those Zoning Ordinances, how many residences could be put on that Belleville avenue frontage? A Belleville or Bloomfield?

40 Q Belleville first. A You could put one house on John street, Belleville, and three houses on Belleville avenue, Bloomfield.

Whitney H. Roddy, direct.

Q Can you tell me what the value of that tract would be if you were confined in its use to residential purposes? A Say approximately forty dollars a front foot. For the Bloomfield portion it would be about \$4,500 and the Belleville part \$2,700. That is taking the Bloomfield plot depth and taking the Belleville depth of say about 175 feet, and that back land there would only have a valuation of \$1,300 if you could get the people who bought the Belleville piece to utilize it. That would make a total of about \$9,000 altogether. 10

Q Is that property available for use for industrial purposes? A It is.

Q Has it any particular advantages for use for industrial purposes? A It has.

Q What are they? A You have the Greenwood Lake Division of the Erie Railroad at the rear of the property for a railroad siding to which they can deliver merchandise, and haul right from the trains right into your property. There are about four bus lines there at Belleville and John streets, and the commutation, to and fro, going back and forth all the time to this tract, making it ideal for an industrial center. 20

Q What have you to say as to the size of the plot for industrial purposes? Has it a plottage value for industrial purposes? A Yes, it has. It is ideal, having a frontage on the street and a frontage on the railroad large enough so you can use it for industrial purposes. 30

Q What would you consider its value for industrial purposes? A I consider the value of this tract at about \$21,000.

Q Assuming that you may use for industrial purposes the gore which appears to be in Bloomfield, has the land in Belleville in conjunction 40

Whitney H. Roddy, cross.

with the land in Bloomfield a particular value?

A The Bloomfield portion has no value alone as an industrial site.

10 Q Why do you say that? A For the simple reason that you have no railroad siding, any access to the railroad, and that the rear of this property, which has the greatest value as an industrial site, is in Belleville.

Q What do you say as to the size of the Bloomfield plot considered alone for industrial purposes? Has it size enough? A The Bloomfield portion has no value as an industrial site whatsoever alone.

Q For industrial purposes is it possible to place a value upon the tracts separately? A For industrial purposes?

20 Q Yes. A I would say the Belleville portion about \$16,000, and Bloomfield about \$4,000 for industrial purposes.

30 Q Will you tell me what the distance is, if you know, from the easterly side of this property on Belleville avenue and John street? What is the distance to the nearest street? A On the John street side I would say approximately about 110 feet. The property runs back to an angle. Say we come down about 250 to 300 feet of the Durkin property, and then there is a width there of about three feet. She runs on an angle.

Cross examination by Mr. Brown.

Q Just one item of information I would like to ask you, Mr. Roddy. You were agent of this property? A Yes.

40 Q At the time it was sold to Durkin? A That is, with my father. We are associated in business.

Frank J. Durkin, direct.

Q I would like to know the purchase price at that time, if you can recall exactly, or approximately?

Mr. Lane: I will give that to you in a minute.

10

FRANK J. DURKIN, produced as a witness on behalf of the prosecutor, being duly sworn by the Commissioner, testified as follows:

Direct examination by Mr. Lane.

Q Mr. Durkin, you are President of the Durkin Lumber Company, the owner of this property? A Yes, sir.

20

Q Have you personal information as to how long that railroad siding has been there? A Twelve years.

Q At the time you purchased the property, how much did you pay for it? A \$22,500.

Q You have been here and listened to the testimony of the real estate men? A Yes, sir.

Q Do you know of any other reason why it would be difficult to use this property for residential purposes? A About the only reason that was not explained is the sewage condition in that neighborhood. Our property is right in line of two towns and the both sewers, and about seven to ten feet from the dividing line, and the sewers are only about three feet in the ground at that point. The sewers terminate right there, and our property, when you get back to the railroad, is between seven and eleven feet—I am not sure—below the street level of Belleville avenue, so, if the property could possibly be cut so you could

30

40

John L. Hughes, direct.

put a street in there, there would be no outlet for the sewage if you get back fifty to sixty feet from the street.

Cross examination by Mr. Brown.

10 Q Mr. Durkin, I presume you still have your receipt or check for which you paid for the property at that time? A I don't believe we got a receipt. I believe we have checks.

Q Can you produce them? A Yes, we can produce them. I believe we got them.

Q That figure you named was for the entire plot? A Yes, the entire plot. We bought as one parcel.

20

JOHN L. HUGHES, produced as a witness on behalf of the prosecutor, being duly sworn by the Commissioner, testified as follows:

Direct examination by Mr. Lane.

Q Mr. Hughes, you are an attorney and counsellor at law? A Yes.

30 Q You represent the Frank J. Durkin Lumber Company? A Yes.

Q Have you made, or caused to be made an examination of the record showing how long this tract of land had been in one tract and one ownership? A Yes, I made the search, or caused it to be made in my office at the time of the purchase of the property by Frank J. Durkin Lumber Company.

40 Q How far back does the record show it has been one tract and one owner? A The record shows that the Eck Dynamo and Motor Company,

John L. Hughes, direct.

from which the Frank J. Durkin Lumber Company purchased the property, got title to this tract in two parcels, one from Lombert Brown and wife, and the other parcel from Joseph Garlock and wife. The deeds to both parcels are dated March 23, 1910, and recorded March 24, 1910, in the Register's office of Essex County. 10

Q And that purchaser was whom? A The purchaser at that time was the Ecks Dynamo and Motor Company, and they retained ownership until they conveyed to Frank J. Durkin Lumber Company by deed dated June 19, 1926.

Mr. Brown: No cross examination.

(Adjourned to Monday, September 24, 1928, at 3 P. M.) 20

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*Portion of Exhibit P. 1.*PORTION OF EXHIBIT P. 1 RESUMING
ORDINANCE OF BELLEVILLE PRINTED
AT FIRST STIPULATION, THE REST
BEING OMITTED.

10 "AN ORDINANCE regulating and limiting the
height and bulk of buildings hereafter erected
and regulating and determining the area of
yards, courts and other open spaces, and re-
stricting congestion and regulating and restrict-
ing the location of trades and industries and
the location of buildings designed for specified
uses and establishing the boundaries of zones
for the said purposes and providing penalties
for the violation of its provision.

20 The Board of Commissioners of the Town of
Belleville do ordain and enact as follows:

Section I. Kinds of Zones:

For the purpose of regulating and restricting
the location of trades and industries and the lo-
cation of buildings designed for specified uses,
for the purpose of restricting and limiting the
height and bulk of buildings hereafter erected,
and for the purpose of regulating and determin-
ing the area of yards, the Town of Belleville is
hereby divided into five classes of zones:

- 30 1. "A" Residence Zones,
2. "B" Residence Zones,
3. "C" Residence Zones,
4. Business Zones; and
5. Industrial Zones

as shown on the building zone map which accom-
panies this ordinance and is hereby declared to
be a part hereof. The zones designated on said
map are hereby established. The zone designa-
40 tions which accompany said building zone map

Portion of Exhibit P. 1.

are hereby declared to be a part hereof. No buildings or premises shall be erected, altered or used for any other than a purpose permitted in the zone in which such building shall be erected except in conformity with the regulations herein prescribed for the zone in which such building is located.

10

Section II. Use Regulations Controlling Residence Zones:

In a residence zone, no building or premises shall be used and no building shall be erected or altered which is arranged, intended or designed to be used, except for one or more of the following uses:

1. Dwellings or tenements, including the office of a physician, surgeon, dentist, lawyer, dressmaker, artist or musician, when situated in the same dwelling or apartment used by such physician, surgeon, dentist, lawyer, dressmaker, artist or musician as his private dwelling.

20

2. Boarding houses.

3. Hotels.

4. Churches.

5. Schools, public libraries or public museums.

6. Clubs, except clubs the chief activity of which is a service carried on as a business.

30

7. Philanthropic or eleemosynary uses or institutions, other than correctional institutions, or asylums for the insane.

8. Railroad passenger stations.

9. Parks and playgrounds.

10. Farming, truck gardening, nurseries of greenhouses.

11. Accessory uses customarily incident to the above uses, the term accessory use, however, not

40

Portion of Exhibit P. 1.

including a business or any building or use not located on the same lot with the building to which it is accessory, or a sign more than four square feet in superficial area. A garage or a group of garages for more than three motor vehicles shall not be permitted as an accessory use; but such
 10 garage or garages need not be occupied by the motor vehicles owned by the occupant of the premises to come within the definition of an accessory garage. Such garage may not, however, be occupied by any commercial truck except as permitted in Section XII.

A billboard, signboard, or advertising sign shall in no case be permitted as an accessory use. The placing of a "for sale" or "for rent" sign not exceeding four square feet in area shall,
 20 however, be permitted as an accessory use. A fence or other structure deemed by the superintendent of buildings to be designated primarily to cause annoyance or damage to an adjoining owner shall in no case be permitted as an accessory use.

A driveway or walk, used for access to a business or industrial use shall in no case be permitted as an accessory use.

30 Section III. Use Regulations Controlling Business Zones:

In a business zone, no building or premises shall be used, and no building shall be erected or altered which is arranged, intended or designed to be used for any of the following specified trades, industries or uses:

1. Building material storage yard.
2. Bottling works.

Portion of Exhibit P. 1.

3. Carousel, roller coaster, whirligigs, merry-go-rounds, ferris wheel or similar amusement devices.

4. Carpet, rug or bag cleaning establishment.

5. Carting, express, hauling or storage yard.

6. Contractor's plant or storage yard.

10

7. Coal, coke, lumber or wood yard.

8. Dry cleaning or dyeing establishment employing more than four persons.

9. Garage or group of garages for more than five motor vehicles, except as permitted in Section XII.

10. Ice plant or storage.

11. Laundry employing more than four employees.

12. Livery or boarding stables.

20

13. Metal or wood working shop employing more than four employees.

14. Milk distributing station.

15. Motor vehicles service station except as permitted in Section XII.

16. Stone yard or monument works.

17. Storage or bailing of scrap paper, iron, bottles, rags or junk.

18. Any trade, industry or use prohibited in an industrial zone.

30

19. Any kind of manufacture or treatment other than the manufacture or treatment of products clearly incidental to the conduct of a retail business conducted on the premises.

No use permitted in a residence zone shall be excluded from a business zone. Nothing in this section shall be deemed to exclude a newspaper establishment or an electric sub-station from a business zone.

40

Portion of Exhibit P. 1.

Section XIV. Certificates of Occupancy.

10 *No land shall be occupied or used and no building hereafter erected or altered shall be occupied or used in whole or in part for any purpose whatsoever until a certificate of occupancy shall have been issued by the superintendent of buildings stating that the premises or building complies with all the provisions of this ordinance.*

No change or extension of use and no alteration shall be made in a non-conforming use or premises without a certificate of occupancy having first been issued by the superintendent of buildings that such change, extension or alteration is in conformity with the provisions of this ordinance.

20 Certificate of occupancy shall be applied for at the same time that the building permit is applied for and shall be issued within ten days after the erection or alteration of the building shall have been completed. A record of all certificates shall be kept on file in the office of the superintendent of buildings and copies shall be furnished upon request to any person having a proprietary or tenancy interest in the building affected. A fee of two dollars shall be charged for each original certificate and one dollar for each copy thereof.

30 No permit for excavation for, or the erection of any building shall be issued before application has been made for a certificate of occupancy. No building or premises may be occupied until such certificate shall have been issued.

Arthur R. Carr, direct.

NEW JERSEY SUPREME COURT.

FRANK J. DURKIN LUMBER
COMPANY,

Prosecutor,

vs.

GEORGE FITZSIMMONS, ESQ., Re-
corder of the Town of Belle-
ville, and the TOWN OF
BELLEVILLE,

Respondents.

10

Transcript of testimony taken in the above-
entitled cause, by consent, before Milton M. Un-
ger, Esq., a Supreme Court Commissioner of
New Jersey, 908 Prudential Building, Newark,
N. J., on Monday, September 24, 1928, at 3 P. M.

20

Appearances:

Merritt Lane, Esq., for prosecutor.

John B. Brown, Esq., for respondents.

ARTHUR R. CARR, produced as a witness on
behalf of the prosecutor, being duly sworn by
the Commissioner, testified as follows:

30

Direct examination by Mr. Lane.

Q Mr. Carr, where do you live? A Nutley,
New Jersey.

Q What is your business? A Lumber In-
surance.

Q How long have you been in that business?
A Twenty-three years.

Q Are you familiar with the Durkin Lum-
ber yard? A I am.

40

Arthur R. Carr, cross.

Q Are you familiar with the location? A I am.

10 Q What have you to say with respect to the increase of fire hazard or the increase of rates due to the increase of fire hazard by reason of the location in that particular neighborhood of the lumber yard? A My experience has been in connection with lumber yards in residential communities, which are quite numerous, that the dwelling rates are not affected where the intervening space between the lumber yard and the residences is 100 feet or more.

Q Do you know of lumber yards in this vicinity located in residential districts? A I do.

Q Can you tell me a few of them? A The Essex Lumber Company, located in Belleville.

20 Q In a residential district? A I am not familiar with the zoning.

Q I do not care whether you are familiar with the zoning or not. I am talking about the district itself. A Daniel Mellis, Belleville; Channel Lumber Company, Belleville; and numerous other ones in northern New Jersey suburbs.

Cross-examination by Mr. Brown.

30

Q Have you had occasion to place any insurance in the immediate vicinity of the Channel Lumber Company? A I have not.

Q In the immediate vicinity of the Daniel Mellis Lumber yard? A I have not.

Q In the immediate vicinity of the Essex Lumber and Coal Company yard? A I have not.

40 Q According to your testimony then, insurance companies do recognize a danger zone of

Arthur R. Carr, re-direct.

at least one hundred feet around lumber yards, do they not? A Depending upon the character of the lumber operations.

Q That is, anything within one hundred feet will be affected within that radius? A Within a hundred feet.

Q Within one hundred feet of a lumber yard? 10
A They will have to be.

Q You are an insurance man and an insurance expert, are you not? A Yes.

Q I ask you whether any structures, particularly residential structures within one hundred feet of a lumber yard are affected adversely by a lumber yard in their insurance rates? A Not any more so than in connection with other exposures.

Mr. Brown: I move to strike out the answer as not responsive. 20

By Mr. Brown.

Q Won't you answer the question? It must be either one or the other? A Within one hundred feet?

Q Yes. A Yes.

Q Have you placed any insurance within that zone around the Durkin Lumber Company yard? 30
A I have not.

Re-direct examination by Mr. Lane.

Q Are residences within one hundred feet bound to be affected by the presence of a lumber yard, Mr. Carr? A Not unless the matter was specifically taken up with the Rating Bureau.

Q Are there other businesses which affect the rates to the same extent as lumber yards? 40
A Many of them.

Frank J. Durkin, direct.

Mr. Brown: I object as immaterial.

By Mr. Lane.

10 Q As, for instance, what? A A garage, store, and dwellings. Anything of a business nature.

Mr. Brown: This, of course, is subject to my objections.

Re-cross examination by Mr. Brown.

20 Q Did you state that the residences that might be within one hundred feet of the Essex Lumber and Coal Company, or Daniel Mellis Lumber Company, or Channel Lumber yard were not affected in their insurance rates? A I did not.

Q Do you know whether they are or not? A I do not.

FRANK J. DURKIN, recalled on behalf of prosecutor.

30 *Direct examination by Mr. Lane.*

Q Mr. Durkin, do you know for what purpose your predecessor in title bought the property you subsequently bought? A To build a factory on.

Q What kind of business was that? A The Eck Dynamo and Motor Company, manufacturing motors.

40 Q Where did they have their factory? A In the Town of Belleville on Main street.

Albert S. Blank, direct.

Q Do you know why they did not build the factory there? A The only reason he told me was there was no sewer available for that property, which is the condition now.

Mr. Brown: No cross examination.

10

ALBERT S. BLANK, produced as a witness on behalf of respondents, being duly sworn by the Commissioner, testified as follows:

Direct examination by Mr. Brown.

Q Mr. Blank, you are the Town Engineer of Belleville? A That is right.

Q Are you familiar with the location of the premises in question? A I am.

20

Q Have you had occasion to make sketches and layouts of that property? A Several times.

Q And surveys of the property? A Yes, sir.

Q And these are some of the sketches in accordance therewith (indicating)? A That is right.

30

Mr. Brown: For the purpose of getting these indented, if it is acceptable to you, Mr. Lane, we will offer them in evidence right away.

Mr. Lane: No objection.

(Small scale drawing showing streets in vicinity of Durkin Lumber Company, Belleville, New Jersey, received in evidence and marked Exhibit R. 1.)

40

Albert S. Blank, direct.

(Large scale drawing showing streets and residential buildings in the vicinity of the Durkin Lumber Company, Belleville, New Jersey, received in evidence and marked Exhibit R. 2.)

10 *By Mr. Brown.*

Q These maps are laid out on a scale, Mr. Blank? A They are.

Q Referring to Exhibit R. 1, what is the scale of that map? A One inch equals 300 feet, except the width of the streets is enlarged in order to show them more plainly.

Q Can you tell us from Exhibit R. 1 what the distance would be from the Durkin property to the National Grain and Yeast Company, formerly Hafla and Stickel Yeast Company factory?
20 A Approximately one thousand feet.

Q And the distance from the Durkin property to the Copper Mills? A Approximately 2,100 feet.

Q Can you tell us, Mr. Blank, based upon your experience in laying out of various sections in municipalities, whether this property occupied by the Durkin Lumber Company on this exhibit would be susceptible to a residential development from the standpoint of streets, sewers and other improvements? A It could be, yes.
30

Q If there were to be developed by the improvement with streets, how would you suggest that be done advantageously? A Smallwood avenue could be extended westerly so as to allow a street frontage on the railroad side of the property and also facing the northerly side of Smallwood avenue.

Q Did I understand you that you would extend it directly west? A Yes, its present
40

Albert S. Blank, cross.

course, so that some lots would have their rear yards on the railroad property, and facing the south side of Smallwood avenue, lots on the opposite side of the street could also be made to face on Smallwood avenue, and lots could also face on Belleville avenue, with adjustments.

Q Are you familiar with the sewer conditions in that neighborhood? A I am. 10

Q Can you tell us whether it would be possible to give sewage facilities to the rear section of that Durkin property if it were so developed? A It is possible.

Q Under what manner would that be done or could that be done? A Around Stevens street and Smallwood avenue the sewer could be extended in a westerly direction so as to give this property sewer service. 20

Q Would it be possible to give sewer facilities to any residences or buildings which might be erected on the Belleville avenue section of the Durkin property? A It is possible.

Q And in either case would you as an engineer say you could get the proper drainage? A Absolutely.

Cross-examination by Mr. Lane.

Q Have you laid out any map showing the division of this Durkin property for residential purposes? A No, not as yet. 30

Q If you extended Smallwood avenue right across the line, do you know how many feet there would be from the southerly line of the new Smallwood avenue to the Erie Railroad? A How it that?

Q Can you tell me how many feet you would have from the new southerly line of Smallwood 40

Albert S. Blank, cross.

avenue to the Erie Railroad? A Approximately one hundred fifty feet.

Q Do you know how many houses you could put on that plot? A I should say there would be room enough for four or five houses.

10 Q Do you know what there is adjoining the Durkin plot over the Bloomfield line? A Yes.

Q At the point where it touches the Erie Railroad between what would be the new Smallwood avenue and Erie Railroad? A Four or five plots.

Q What is over there? A At this particular section now?

Q Yes. A There is only lumber encroachment at the present time.

Q What do you mean by "lumber encroachment"? A Lumber piles.

20 Q I don't mean that side. I mean what is over the line? A There is a chemical plant and some one-family houses.

Q There is a chemical plant immediately adjacent? A Yes.

Q The property of the Chemical plant goes right over and adjoins the line of the Durkin property, does it not? A That is right.

30 Q You think the best use that can be made of that property is to put a residence up against that Chemical plant? You would consider that is the best use that can be made of that plot of ground to put a residence up against the chemical factory? A I see no reason why it could not be. The chemical plant would not be there a great many years.

Q It is used now? A It is.

Q And you think the best use that can be made of that is to put a residence up against that chemical plant, is that right? I don't care

Albert S. Blank, cross.

whether you answer that question yes or no. A No, it is not probably the best use at that particular line.

Q Nor is it the best use that can be made of that property if you put a residence 40 feet removed either, is it? A No, it is not.

Q Nor to put a residence at any point from your new proposed Smallwood avenue across that line towards that chemical plant, a distance of two hundred feet, is it? A Well, the further away you get the more—

Q Two hundred feet is not very far away from a chemical plant, is it? A No, it is not.

Q It is no far enough away to avoid the influence of that chemical plant if used as a residential property, is it? A No.

Q Nor is it generally considered to be the best available use of land abutting on a railroad to use it for residential property? A No, it is not.

Q Now we have got you 216.4 by 150 feet. What are you going to do with the rest of that land? A Well, that could be changed into a residential zone.

Q There is room for one house. What are you going to do with the rest of it? A That means an exchange could be used for residential purposes.

Q I know if you bought land you can do a lot of things, but I am talking about that plot as it stands? A A residential building on Belleville avenue.

Q One building? A Possibly.

Q Is there room for any more? A No, not facing Belleville avenue.

Q Anywhere? A Facing on Smallwood avenue.

Albert S. Blank, cross.

Q How many feet have you got there? A About 175 feet crossing Smallwood avenue.

Q How many houses can you put on there? A About four.

10 Q Could you put four houses there with the way that land slants? A Not the way the land slants.

Q You have got to take the land as is. How many are you putting there with the way that land slants? A Possibly three.

Q Can you put three there? A Yes, I should say you could put three there, but you would have an irregular lot on one of them, though.

20 Q You would have an irregular shaped lot with a forty foot frontage, and ten feet in back. From a forty foot frontage how much of a width would you have in back? A Ten feet in back.

Q Twenty foot back? A How about going back one hundred feet and getting a street line?

Q Going back how far in the rear? A About 125 feet in the rear.

Q You have a forty foot front on that end lot? A I see. Taking the entire property?

30 Q Yes. A Well, you could put in about 25 feet on the rear.

Q Would you have 25 feet on the rear? A You ought to be able to get that.

Q Let us see whether you would or not. How deep would you make your lot? A One hundred feet. I am talking now of slanting the lot at the same time.

40 Q Slanting your lots this way (indicating). Ultimately you will have one lot that is going to be triangular, isn't that so? A That's right.

Albert S. Blank, cross.

Q I am going to get away from that triangular lot. A If you want to carry it back perpendicularly to Smallwood avenue it wouldn't be triangular.

Q Have you estimated what it would cost to put Smallwood avenue through there? A No, I have not.

10

Q It would cost something? A Absolutely.

Q And that cost would have to be assessed against the property even if the improvements were carried out by the municipality, wouldn't it? A Right.

Q You haven't any idea what it would cost? A No, I would not offhand.

Q How far were you going to bring that sewer? A To Pleasant avenue.

Q How far in distance? A Four hundred feet.

20

Q Then you would have to carry it into the property? A That's right.

Q Do you know what that would cost? A Possibly three dollars a foot.

Q I show you Exhibit D. 3. Those are the kind of buildings and the class of property that is indicated on this map to the south of Smallwood avenue, aren't they? A That is right; the rear.

30

Q You haven't shown on your Exhibit R. 2 the green houses right opposite the houses, have you? A Yes, they are on there.

Q What appears right opposite this property without coloring outline are green houses? A That's right.

Q Have you shown the real estate office? A No, that is not on there.

Q Where is that? A Right on this corner (indicating). On the southwest corner of Pleasant avenue and Belleville avenue.

4C

Albert S. Blank, re-direct.

Q Right adjoining this property? A Correct.

Q The property to the south of the railroad track, between the railroad track and the factory is vacant land, is it not? A Correct.

10 Q Has this factory that appears here, the National Grain and Yeast Company, any railroad connection? A Yes, I believe they have a spur back in there.

Q Then crossing the property from the Erie Railroad down to the National Grain and Yeast Company there is a spur which is not shown upon this map? A Right.

Q Has the Belleville Copper Rolling Mills a railroad connection? A Yes, they had.

20 Q Where did that connect? A It connects way down in Mill street.

Q There is a spur running from the Erie Railroad south into the Copper Rolling Mills which is not shown on this map? A Right.

Re-direct examination by Mr. Brown.

30 Q Do you know, Mr. Blank, whether Exhibit D. 3 shows the development laid out on your Exhibit R. 2 lying between Smallwood avenue and the Erie Railroad? A It does.

Q Showing residential properties backing up to the railroad? A Right; the rear of the properties.

Q Do you know whether the railroad was there before these houses were constructed? A It was.

40 Q Do you know also the type of structures to the west of the Durkin property, and to the west of the chemical factories referred to? A I do.

Albert S. Blank, re-cross.

Q What type is that? A They are residences.

Q How far would you say they were away from the chemical factory? A Practically adjoining them.

Q Would they be any greater distance from the chemical factory, residences which might be constructed on the Durkin property? A About the same. 10

Q Does the chemical factory appear to be objectionable to them?

Mr. Lane: I object to that. How can he tell whether it appears to be objectionable to them?

A I can't say. 20

Q Now, the sewer that you were questioned about which you would extend from Stephen street for the purpose of serving other localities, and the rear of the Durkin property if it were developed, would the entire cost of that sewer fall upon the development of the Durkin property? A No, the properties benefitted.

Q Each would bear its proportionate share? A Each would have to bear its proportionate expense. 30

Re-cross examination by Mr. Lane.

Q You just landed the sewer on Smallwood avenue and Pleasant avenue at the Durkin property. All the expense of carrying that sewer along into Smallwood avenue would fall on the Durkin property, wouldn't it? A That's correct.

Albert S. Blank, re-cross.

Q And also any additional sewer which would be needed to relieve the property at Belleville avenue? A Right.

Q And there would be a sewer needed there? A Yes.

10 Q How would you get that? A Continue it along Belleville avenue.

Q How many more feet of that would there be? A Possibly about four hundred feet to sewer that.

Q You told us to the west of the Durkin property there are residences, is that right? A There are, yes.

Q There are also stores or business places, aren't there? A That's right.

20 Q I show you Exhibit D. 9. That is a view of Belleville avenue from the Durkin property and shows a garage right next door? A Correct.

Q And shows two or three residences and shows a brick building that has stores at least underneath? A Yes.

30 Q You know as a matter of fact, don't you, for one hundred feet in from Belleville avenue that property is zoned for business use as permitted to be made by Bloomfield? A I presume so. I don't know the Zoning Ordinance. I see it there.

Q You also knew that Willet street, which is the next street to the west of Belleville avenue, is zoned industrial, though there are residences on the street? A I couldn't say it is zoned industrial. I haven't seen the zoning map.

Q You know there are business places along that street? A Yes, there are business places now.

Harold B. Hayward, direct.

HAROLD B. HAYWARD, produced as a witness on behalf of respondents, being duly sworn by the Commissioner, testified as follows:

Direct examination by Mr. Brown.

Q Mr. Hayward, where do you live? A Belleville, New Jersey.

Q What is your occupation or profession? A Insurance rating and inspections.

Q And by whom employed? A The Royal Exchange Assurance Corporation.

Q Are you familiar with the premises in question? A I am.

Q And the location concerning them? A I am.

Q And the character of the property concerning them? A I am.

Q Can you tell us, Mr. Hayward, whether your Schedule Rating Bureau makes any distinction in its rates between lumber yard property and residential property? A It does.

Q What is the greater distinction in the rates? A Why, a dwelling exposed by a lumber yard is rated approximately three times as much as if the lumber yard were not there.

Q Do you agree then with Mr. Carr, who testified here some time ago, there is a danger zone around a lumber yard established by the Schedule Rating Bureau? A There is.

Q And you say the rates run as high as three times the ordinary rate for residences in the immediate vicinity of a lumber yard? A They do.

Q Are you acquainted with the location of the Essex Lumber and Coal Company in Belleville? A I am.

Harold B. Hayward, cross.

Q And the Daniel Mellis Lumber yard? A I have been through the plant.

Q And the Channel Lumber yard? A The Channel? No, I am not.

Q Do you know whether those increased rates apply in any of these instances? A They do.

10 Q You know that of your own personal knowledge? A I do, absolutely.

Cross examination by Mr. Lane.

Q Which properties have been affected by the presence of the Essex Lumber Company? A Certain dwellings on Cortland street.

Q How close are they to the lumber yard? A That I couldn't say.

20 Q Well, about? A Oh, I should say fifty to seventy-five feet.

Q Do you know of any particular dwellings that have been affected by the Daniel Mills Lumber yard? A I don't know of any, but they must be affected.

Q I didn't ask you that. You say they were affected. I am asking you whether you know of any? A Why, I couldn't give you the street locations.

30 Q Do you know of any, of your own knowledge? A They must be.

Q I don't want "they must be." A Why dwellings adjacent or adjoining that property are higher in rates.

Q How do you know? A By having the insurance thereon.

Q Which ones do you know, of your own knowledge? A I know the house.

40 Q How close is it to the lumber yard? A I should say between fifty and seventy-five feet.

Harold B. Hayward, cross.

Q Do you know whether there has been any increase of rates upon any of the property in the neighborhood of the Durkin Lumber Company— A I do not.

Q —because of the influence of that lumber yard? A I do not.

Q You made no inquiry as to that? A No. 10

Q There are other businesses which increase the rates? A There are other businesses which increase rates.

Q To the same extent as the lumber yard? A Not to the same extent.

Q There is no business that increases it to the same extent as a lumber yard? A Oh, yes, but not all businesses.

Q All businesses increase the rates? A All industrial businesses increase the rates. 20

Q Even stores increase the rates, don't they? Just ordinary mercantile stores increase the rates, do they not? A Yes, and no.

Q I don't see how it can be both. A It depends on the circumstances.

Q What does that mean? A A building with a twelve inch blank brick wall parapeted through the roof would not cause any exposure to a dwelling. It would depend, if open windows and occupancy and a lot of things of that nature. 30

Q Chemical factories increase the rates, don't they? A They do.

Q They increase the rates to the same or a greater extent than lumber yards, do they not? A Not necessarily.

Q Well, usually? A It would depend on the rate of the chemical factory.

Q What do you mean by that? A Why, if it was fire resistance construction equipped with automatic sprinklers it might be also dwelling 40

Harold B. Hayward, re-direct.

rates and therefore would not take in exposure danger.

Q It depends more or less upon the manner in which business is carried on? A It does, and the nature and occupancy.

10 Q And the question of the structure that houses it? A It does.

Re-direct examination by Mr. Brown.

Q Was it merely because you could not remember the name of the persons that you were unable to give specific instances in connection with the Mellis Lumber yard? A The Essex Lumber, I think it was.

Q Yes, the Essex Lumber and Coal Company. A I can't just think of his name. I know him.

20 Q Well, Insurance Companies placing insurance increase the rates if they know that the premises are within that danger zone. A They can't, because the rates are established by the Schedule Rating Bureau of New Jersey which all companies must conform to.

By Mr. Lane.

30 Q Automobile stations increase the rates, do they not? A What do you mean?

Q Automobile filing stations? Garages with automobile filing stations in front of them? A Yes.

By Mr. Brown.

Q Is a danger zone around a filing station as great as the danger zone around a lumber yard?

40 A There is some distinction but the rate of a filing station is lower, as a rule, than a lumber yard.

Harvey B. Thompson, direct.

Q That depends on circumstances? A Yes, filing stations. I don't say public garages.

Q But the garages increase the rates too, don't they? A Yes, I admitted that before, but the filing station rate is considerably lower, therefore, the percentage is less.

10

HARVEY B. THOMPSON, produced as a witness on behalf of respondent, being duly sworn by the Commissioner, testified as follows:

Direct examination by Mr. Brown.

Q Where do you live, Mr. Thompson? A 185 Hornblower avenue, Belleville, New Jersey.

20

Q What is your occupation or profession? A Real Estate and Insurance.

Q Are you familiar with the locality of the premises in question? A I am.

Q What would you say, Mr. Thompson, as to the availability of these premises for residential purposes? A The availability of the plot of the Durkin Lumber Company for residential purposes is very good, being on a through street, four bus lines and a railroad station just south of the property; has all public utilities in the way of gas and electric light.

30

Q Is this property susceptible of development as a residential neighborhood? A The property is susceptible of development as a residential neighborhood.

Q How could this be done advantageously? A Taking the entire plot it could be done by a continuation of Smallwood avenue through to a dead-end street, having two street frontages on

40

Harvey B. Thompson, direct.

Smallwood avenue, that is the north and south side, and the south side of Belleville avenue.

Q And if that development were followed out, can you give us an estimate of the value of the property, or can you give us your valuation of the property as it stands for residential purposes with that possible development in view? A In my opinion the value of the property to be developed for residential purposes, that is the land value, would be between forty and fifty dollars per front foot on the proposed continuation of Smallwood avenue and approximately eighty dollars per front foot on Belleville avenue.

Q Referring to Exhibit D. 1 and applying the valuations that you have just stated, can you tell us what value this property would be for residential purposes? A May I ask a question in order to set myself straight on it? In speaking of this plot, the land we are speaking of is the entire plot of the Durkin Lumber Company?

Q Yes. A You are not speaking of only that portion just in Belleville, which is the larger portion, excluding from any calculation the portion of Bloomfield?

Q It takes in the entire tract.

30 The Witness: May I have that question again?

Q (Question repeated by stenographer as follows): Referring to Exhibit D. 1 and applying the valuations that you have just stated, can you tell us what value this property would be for residential purposes? A Approximately \$29,000.

40 Q Mr. Thompson, do you know whether the rear of this property is accessible by the street

Harvey B. Thompson, direct.

or highway? A The rear is accessible. By rear, you mean that portion facing the railroad on the southerly end?

Q Yes. A It is accessible by a continuation of the roadway running north and parallel with the railroad tracks.

Q Does that run directly into the property? 10
A That runs directly into the property.

Q Do you know whether it is accessible from Smallwood avenue? A It is accessible to Smallwood avenue, because the property touches on Smallwood avenue.

Q There are two means of access from public highways to the rear portion of this property?
A There are.

Q Which would lend to favorable residential development? A Yes. 20

Q I show you Exhibit R. 1. Are you familiar with the location of the yeast factory? A I am.

Q And the rolling mills? A I am.

Q What would you say as to either or both of those factories affecting the development of the Durkin property for residential purposes? A I would say there would be no effect on the Durkin property for residential purposes for this reason; they are south of the railroad track and there is no means of access from these properties across the railroad track other than Willet street which lies west of the factory property. In other words, the railroad is a natural barrier. 30

Q Referring to Exhibit D. 3. Are you familiar with the buildings and land included in that exhibit? A I am.

Q Do you know whether they are nearer to the yeast factory than the Durkin Lumber Com- 40

Harvey B. Thompson, direct.

pany property would be? A They are relatively nearer the yeast factory.

Q Wouldn't the yeast factory be directly opposite them and diagonally away from the Durkin Lumber Yard? A It would.

10 Q Do you know whether this residential development shown in Exhibit D. 3 existed prior to the existence of this yeast factory? A The yeast factory was in existence before those residences were built.

Q Would you say that the presence of the yeast factory has been detrimental to that development? A I would say it had not.

20 Q What would you say, Mr. Thompson, to a comparison between the value of this property for lumber yard uses and its use for residential purposes? A While I would not want to compare its uses, that is the value—that is in difference in value between it as a lumber yard property or residential property, it is essentially, that is from one angle, residential property. Mr. Durkin may think otherwise. There would be a difference of opinion right there.

30 Q We are not now considering the value which the business may mean to Mr. Durkin. From a cold blooded real estate man's standpoint, we are speaking for a comparison of the value of that land for a business of that nature, with its value, if used, for residential purposes. Would the value of a business of that nature be greater or less than that which could be obtained for use of the land for residential purposes? A That is going to require a little thought. The property I would look at as having a higher value for residential purposes than for industrial purposes, but your question is one there would be a wide difference of opinion on.

40

Harvey B. Thompson, direct.

The value of property is established by sales in the immediate vicinity, therefore, whether the property was used for a lumber yard or used for residential purposes, if it was being bought through condemnation, a comparison of values of adjacent property would be taken into consideration.

10

Q Do you know whether this property and the adjoining property would be desirable from a residential standpoint for the purpose of constructing apartments?

Mr. Lane: I object to that question so far as the adjoining property is taken into consideration.

Q Considering the character of the neighborhood, would you say that this might be desirable for apartment house sites, particularly along Belleville avenue? A I do know there have been two applications made for permits for apartment houses, both of which have been turned down by the Zoning Board in Belleville.

20

Q How close were those premises? A One was on the northeast corner of Pleasant avenue and Belleville avenue, and the other on the southwest corner of Pleasant avenue and Belleville avenue.

30

Q Can you give us an idea how recently those applications were made? Within what time? A I should say approximately—

Q Prior to the establishment of the lumber yard? A No, approximately two years ago. That would bring it in 1926, just about the time the lumber yard was established, I should say, without having definite dates in hand.

40

Harvey B. Thompson, direct.

Q What have you to say now as to the availability of those same premises for apartment house sites in view of the establishment of this lumber yard? A With the lumber yard that is already established there, in my opinion it is questionable as to the advisability of considering residential facilities on the southwest corner of Pleasant avenue and Belleville avenue.

10 Q Why do you say that? A Well, if I might be permitted to enlarge there. We have here what I call a border line case. In other words, it is the boundary line of two municipalities with different zoning ordinances in each one. The property is divided by two town boundary lines, and one is industrial, and the encroachment of the industrial feature over on
20 to the residential feature of the other town. Instead of your higher grade development, that is, your residential development working westward in this case, the industrial development is working eastward, and encroaching upon your residential section. I think that completes my reference there.

Q Well, does the encroachment of an industrial section or zone act as a deterrent to the development of property for residential purposes? A As a general rule it does.

30 Q Would you say that the establishment of this lumber yard would act as a deterrent to the building of residences and apartment houses in the immediate vicinity? A In my opinion it would.

Q If this property were used along Belleville avenue for apartment house sites, would it bring a higher price than if used for solely one-family or two-family residential houses? A That question is problematical and hard to answer. I
40

Harvey B. Thompson, cross.

should say the value of the land there for either purposes would be about the same, except that a person desiring a plot for apartment development would take into consideration the plottage feature which would make a higher value than a single forty or fifty foot front lot.

Q One more question, Mr. Thompson. Do you know whether the yeast factory was established prior to the enactment of the Zoning Ordinance in Belleville or subsequent? A The buildings were there before the zoning ordinance went into effect. 10

Cross examination by Mr. Lane.

Q Mr. Thompson, where did you get your value of fifty dollars a front foot on new Smallwood avenue? A That is the value of that property in my opinion. 20

Q What do you base it on? A I base it upon the values of other properties of similar lands.

Q Which properties? A Properties south on Fairway avenue. Fairway avenue is one block east of Hewitt avenue, which is a development put through there by Hefla and Stickel.

Q When has that been put through? A Within the past two years. 30

Q How does that property compare with this? A That property compares very favorably with this property.

Q Are there any factories in the immediate vicinity? A There are no factories in the immediate vicinity, but it is within reasonable distance of the Isolation Hospital.

Q How far? A I should estimate that the buildings of the Isolation Hospital are between 40

Harvey B. Thompson, cross.

200 and 250 feet away from the property line of Fairway avenue.

Q Are there any railroad spurs, a railroad freight line running along its boundary? A There are none.

10 Q Is there a chemical factory abutting it? A There are none.

Q Then why does it compare with this property which has both of those elements? A It compares favorably with it because this property here has along its easterly line what I consider a high class residential section. It does have along the westerly line a chemical factory you speak of.

20 Q And in an industrial zone generally? A Well, I agree it is an industrial zone, but I wouldn't say generally.

Q But so far as the Zoning Ordinances of the Town of Bloomfield are concerned, it is zoned industrial. That means any industrial factory can be put there on the property abutting east and have a chemical factory, opening up the railroad with a freight yard and spurs going along the industrial property to the south. How does that compare with a locality that has absolutely none of those characteristics? A Of course, I disagree it has a freight yard.

30 Q I said a freight line with spurs running over it with factories to the south? A With spurs going to the south, and spurs are several, is what I consider a natural barrier in the form of the main line of your railroad tracks.

Q It is a two-track road used for freight purposes? A It is not used for freight purposes, it is the main line of the Greenwood Lake Railroad.

40

Harvey B. Thompson, cross.

Q The Greenwood Lake Railroad of the Erie Railroad? A Yes.

Q Running freight over the same line? A They do.

Q And serve a great many interests? A They do.

Q They run to Passaic Valley? A No, they don't run to Passaic Valley, they run up to what I call the Wanaque Midvale Valley. 10

Q They serve industries all the way up? A They serve industries all the way up and also have passenger stations all the way up, and those passenger stations are through residential sections of Montclair, Glen Ridge and Upper Montclair.

Q At this particular point along this line of the Erie Railroad to the south are industries and industrial lands, is there not? A There is, with two spurs. 20

Q With at least two spurs at this time going off there? A To two factories.

Q No one can tell how many freight stations and factories will be located there? A They cannot.

Q It is an industrial section? A It is.

Q Abutting this property to the west is an industrial zone and there is actually located there a chemical factory? A There is actually located there a small chemical factory, and also a number of residences. 30

Q And business places? A There are no business places that I know of on Willet street between Belleville avenue and the railroad.

Q You know Willet street is owned by Bloomfield business? A I do from hearsay.

Q Then, if there are no industries except this chemical factory now abutting this property on 40

Harvey B. Thompson, cross.

the west, and no business houses along that block of Willet street, there is no assurance that within the next year or the year after there might not be any industry in this locality or other kinds of business? A You say the next year?

10 Q Or any future time? A We can't foretell the future.

Q It is so zoned to permit that kind of improvement? A It is so zoned.

Q Certainly when you are zoned that way by a municipality it is not an incentive to the building of residences? A Not when you are zoned industrial.

Q So that this property, aside from the line of the Erie Railroad, is zoned on two sides industrial? A On the west side and south side.
20 South of the railroad track a natural barrier.

Q Yet you are comparing prices for residential purposes with property which is not anywhere near an industrial zone or factory? A With due consideration of the adjoining vicinity, because your Fairway avenue property is apportioned from fifty dollars to sixty dollars up, and the figure which I used on that property there in arriving at my estimate of the approximate value was forty dollars to fifty dollars on
30 the inside.

Q The net result of that is, if this lumber yard is affected it will not affect the value of this surrounding property at all? A Yes, it will.

Q How can it if the surrounding property does not affect the value of this property? You have indicated it is a fact this property bounded on the south and west for industrial purposes, does not affect the value of property for residential purposes at all. If this is so, how does
40

Harvey B. Thompson, cross.

the presence of this lumber yard affect the surrounding properties for residential purposes?

A In the first place, the property set down as industrial is south of the railroad which acts as a natural barrier. This property of the lumber yard will affect your property values as it is a continuation of encroachment. It is a barrier line. 10

Q The encroachment does not affect, you say, the value of our property for residential purposes. If that is so, how does the use of our property for industrial purposes affect the value of surrounding property? One of the two, I think, must be incorrect? A To part of your statement, Mr. Lane, that is the answer, that the industrial zone on the Bloomfield side of the property does affect the Durkin Lumber Company property value. 20

Q All right, to what extent? A But the larger portion of the Durkin Lumber Company property is in the A Residential Zone of Belleville, and immediately adjoining it is a high-class residential section. The industries on Willet street, the chemical plant in particular first, has been there for a great many years. That is the buildings have. I don't know about the plant itself. They have a certain effect and would have a certain effect on the development of the Durkin Lumber Company property for residential purposes. 30

Q What effect? A Oh, I should say it would not lower the value of that property below forty dollars a foot.

Q Well, now, you told us fifty dollars a foot. A I told you between forty dollars and fifty dollars a foot. 40

Harvey B. Thompson, cross.

Q I thought you said fifty dollars a foot? That is why you reached a valuation of \$29,000. Now you reduce it to forty dollars a front foot, is that right? A If you will refer to the record you will find my valuation was on an average or value of forty to fifty dollars a foot, and my
10 answer to the entire valuation, the entire tract, was approximately \$29,000.

Q All right, if that chemical factory was not there, what would be its value, and if the zones on each side were residential instead of industrial? A There is no question what it would be more.

Q Well, how much more? A That is a matter of opinion.

Q All that you have given is opinion? A
20 The answer to that question is, if the industrial zone and if the chemical plant was not there, and if the Bloomfield side of the line was zoned for residential purposes, it would, in my opinion, bring the value of that property up to around sixty dollars per foot.

Q What do you base that on? A That is my opinion.

Q What do you base it on? A You can't base
30 an opinion on anything other than what you yourself may gain from experience, when you are taking certain things, such as if the chemical factory was not there, and if not zoned industrially.

Q What do you base your figure on of sixty dollars a front foot? A That is my opinion of what this property is worth.

Q You said that several times. What is your opinion based on? It is useless unless based on something. A It is based on my knowledge
40 of the sale of other property.

Harvey B. Thompson, cross.

Q Where? A Belleville, New Jersey, Hornblower avenue and similar houses to that property.

Q Get somewhere nearer to the *locus in quo*, somewhere near this property. Do you know what properties brought on Smallwood avenue to the south? A Those houses bring between \$9,500 and \$11,500. 10

Q That is the house, lot and everything? A That is the house and lot—the Fuller Development. In other words, you want my opinion of the value of the land per front foot?

Q I don't want your opinion on that at all, I want to know what you know about it? A I have no knowledge of any sales made on Smallwood avenue of plain land.

Q Have you any knowledge of sales on Smallwood avenue of land where the price was separate from the building? A I have none. 20

Q So you haven't any knowledge at all, based on sales, as to the value per front foot of land to the south of Smallwood avenue? A Nothing definite, no, of land separate from the buildings.

Q Then you say those lots and buildings, both, were \$9,500 to \$10,000? A \$10,500.

Q One-family houses? A One-family and two-story houses. 30

Q On land how wide? A Forty foot front by 150 feet in depth. They vary.

Q Do you say they run to the railroad? A They run to the street which is parallel to the railroad tracks.

Q Is that a street, or railroad property? A A street. Town property to my understanding.

Q Don't you know anything about it? A It appears on the town maps, and has always been 40

Harvey B. Thompson, cross.

regarded as such, and always been used by anyone.

Q An unimproved road, is it not? A It has been filled. I wouldn't call it improved.

10 Q Do you know anything about the value of the land to the north of Smallwood avenue between Pleasant and Stephens street? A Not with the land separately.

Q Do you know anything about the land on the southerly side of Belleville avenue between those two streets? A No, I do not.

Q Or to the north of Belleville avenue? A No, I can't quote any values in there.

20 Q What is the nearest point to which we are discussing that you do have any knowledge of the value of land as land? A Fairway avenue. That is the nearest I can come to it.

Q That is a development commenced within the last year? A Within the last two years.

Q And sold off as lots? A Yes.

Q Who built the buildings? A DeNoia and Stickel owned the property. The buildings are being built by individual builders.

30 Q Individuals buy the lots and build buildings? A Not the individuals that occupy them. A large number of lots was sold off to the builders.

Q And sold to the builders? A Yes.

Q How? A A builder would come along, that is in the building game, and would buy a lot and erect a house on it for sale.

Q No connection between the construction of the building and the purchaser of the lot? A By the original owner?

40 Q Yes. A I should say there was no connection between the builder of the house and

Harvey B. Thompson, cross.

the original owner of the land, DeNoia and Stickel's office.

Q What kind of buildings are being built on that land? A Two and a half story frame dwellings of one family.

Q At what price? A The prices run from \$9,500 to \$10,000—\$10,750.

10

Q Those are cheap houses, are they not? A I wouldn't call them cheap houses. They are reasonably priced houses.

Q You can't get very much of a building in these times, including the land, for \$9,500 or \$10,000, can you? A You can get a reasonable house. You can't get anything elaborate. You can't expect to have the bathroom tiled right up to the ceiling.

Q Does \$9,500 to \$10,000 include the cost of the land also? A That includes the cost of the land.

20

Q On your basis of fifty dollars per front foot the houses would only cost \$7,500 to erect? A That's it.

Q You can't get much of a house for \$7,500? A I know you can get a very desirable house for a little more. When I say a little more, I mean in hundreds of dollars. I have built a house which I call very desirable, and the actual cost of the house was \$8,600.

30

Q How many rooms are in these houses to the south of Smallwood avenue, do you know?

A Six rooms. Living room, dining room, kitchen, three bedrooms, a bath, and no attic.

Q You have made no difference in your fixation of price per front foot on the Smallwood avenue frontage as it nears the chemical factory or industrial zone, have you? A Up to the present time the distance there is two hundred

40

Harvey B. Thompson, cross.

feet, and I don't know of any plants against the chemical factory.

Q I am not asking you about the plants. You know a chemical factory is a chemical factory?

A That is true, and it depends a whole lot on what they make in the chemical factory.

10 Q You know that is an industrial zone upon which any industry may be located? A That is true.

Q A lumber yard, chemical factory, or anything else. Why haven't you made some gradation in your prices, depending on the proximity to this industrial zone? A I am not setting any prices on Smallwood avenue. I am quoting of my knowledge what property sold for there.

20 Q But you are if your testimony is of any avail at all. You are basing value upon Smallwood avenue frontage which you intend to create across this land? A Yes.

Q You put a value of from forty to fifty dollars a front foot. I am asking you if you gave any consideration to the influence as you approached west of the industrial zone? A I would say I have.

Q Well, what consideration? A Depreciating the property.

30 Q How have you depreciated it? A That is near the westerly line. From ten to twenty per cent.

Q So you do not think all the property along that two hundred foot frontage is worth forty to fifty dollars per front foot? A I do think it is worth forty to fifty dollars per front foot.

Q Even that portion of it which abuts the chemical factory? A The further you get away from the chemical factory the more valuable it becomes.

Harvey B. Thompson, cross.

Q Even that portion of it that abuts the chemical factory you think is worth forty to fifty dollars per front foot for residential purposes? A I do.

Q Well, then, what do you think that portion of it which is 200 feet away is worth per front foot? A I think it is worth fifty dollars, in my opinion. 10

Q So that you think that ten dollars a front foot would account for the difference between the easterly line of the property and the westerly line of the property which abuts the chemical factory? A I do, having in mind your property is controlled with a residential zone restriction.

Q Now, what has a residential zone to do with the fact that a residence on one side, at least, abuts the chemical factory? Does it make any difference if it abuts a chemical factory on one side or the other side? A On that particular point there is a difference in the value of the property, but farther east on that same proposed continuation of Smallwood avenue no other property is a residential zone. 20

Q Does a residential zone on a map with the fact on the south we have an industrial zone, and on the west an industrial zone, the fact it is zoned on the map a residential zone, undo the fact of the existence of an industrial zone on two sides? A It would. 30

Q You think so? A Yes.

Q So that maps can undo facts, is that right? A It is not so that maps can undo the facts.

Q You have a fact. You have an industrial zone to the south and west. You say that the tial zone, in some way or another affects the situation that you are zoned to the east as a residen- 40

Harvey B. Thompson, cross.

10 ation? A It brings us right back to the point, Mr. Lane, where you have your border line situation with your industrial zone or industrial liability, the residential area encroaching upon a high class residential area. There must be a division of the line somewhere, and if we continue the division line, that is, we do away with our division line, then you encroach upon a residential section and continue it on.

20 Q Is there any reason why the line of Pleasant avenue should not be made? A Yes, in my opinion we have here a plot of land, the larger portion of which is in a residential zone. The smaller portion is in the industrial zone in another township. There is no reason why the Town of Belleville, in my opinion, should change their zoning of that territory laying in that portion of this plot of the Durkin Lumber Company in an industrial section.

Q I am not interested in your opinion whether Belleville should change it or whether it should not be changed. Again I ask you whether as a physical fact the controlling line along Pleasant avenue would make any difference to the property to the east? A It would further extend the industrial zone to Bloomfield.

30 Q What difference would it make to the property to the east? A It would encroach upon property to the east.

Q What difference would it make? A It would depreciate from its residential feature.

Q But you have told me that the fact the industrial zone is to the south of houses along Smallwood avenue, the Erie Railroad being a natural barrier, has no effect upon the property on Smallwood avenue for residential purposes? A It has none.

40

Harvey B. Thompson, cross.

Q If you stop on the line of Pleasant avenue to the west, Pleasant avenue being as much a natural barrier as the railroad track, and forms just as much a natural barrier, why is it that would affect property to the east? A I don't agree with you it is a natural barrier similar to that of the railroad track. 10

Q You can look across the street and the railroad track you can look across? A You can go across the street, look across; you can look across a railroad track, but cannot go across the railroad track.

Q You have no railroad trains or freight cars traveling along the street? A You have not.

Q And you have no line of railroad? A You have freight cars and passenger cars. 20

Q You have the handling of freight? A Yes.

Q And you think that the railroad is more of a natural barrier than a street? A I think it is more of a natural barrier than a street.

Q The fact of the existence of a railroad track then has all to do with the value of property for residential purposes, the near existence of it? A The availability of it.

Q Any deleterious influence on property, such as a railroad track running along the rear of the property has a depreciating effect on the value of that property for residential purposes? A I don't agree with you there. 30

Q You think not? A I think not.

Q So that you think, although the existence of an industrial zone to the south of Smallwood avenue does not affect the availability or value of property to the north of the railroad track for residential purposes, the extension of the 40

Harvey B. Thompson, cross.

industrial zone to Pleasant avenue would have a deleterious effect on property to the east of Pleasant avenue, is that right? A My answer to the first part is that is evident as established by residences north of the railroad track, that the industrial zone south of the railroad track
 10 has not affected it from a residential standpoint. The extension of the industrial zone to Pleasant avenue would, in my opinion, affect the property as a residential section.

Q Can you tell me why it is that one does not affect the value for residential purposes, and the other does? A The one south of the railroad track is separated from the residential section by the railroad tracks themselves which act as a natural barrier, there being not means
 20 of ingress or egress across those tracks.

Q What do you mean by "a natural barrier"? A A right of way in this particular instance by which it is unlawful to trespass or cross the railroad tracks.

Q Do you think the mere fact a person might or might not cross over the railroad tracks has anything to do with the question whether land south of it can be used for industrial purposes? A In this case we are speaking of industrial
 30 property. We think of crossing the railroad tracks, not the individual going across the tracks, but vehicles in the transporting of materials and supplies and the delivery of merchandise and things of that character.

Q That, you think, has an influence upon the value of property rather than the existence for industrial use? A I do not get that, Mr. Lane.

Q It is the passage of persons, particularly vehicles, which has an influence on the value of the property, or a depreciating influence on the
 40

Harvey B. Thompson, cross.

value of property rather than the existence of it for industrial use? A They both affect it.

Q You said the industrial zone to the south did not affect the value to the north at all because of this natural barrier? A Now, I don't recall having said that.

Q Well, does it, or doesn't it? A The use 10
to which the land is put would reflect on it.

Q Does the use of this land to the south affect the value of the land to the north of the railroad tracks? A It would not, because the value of this property as residential property has already been established, in as much as every lot is built upon.

Q It can be ruined? A It can be ruined, yes.

Q Doesn't the influence of an industry have 20
any effect upon it? A Depending on the industry, it would.

Q Doesn't any industry have an effect upon it? A I wouldn't say any industry, no.

Q The industries located south of the land? A At the present it does not affect the property.

Q And the fact there may be other industries there? A Depending on the industry that came in or that was permitted to come in would have its reflection in whether it killed the property or did not. 30

Q So that anybody that builds residences on the Durkin property takes a chance of industries coming in to the south of it which may absolutely kill it for residential purposes, is that right?

A Yes, I would say to your question.

Q Well, first I want to know why the value of the Durkin property is not now killed for residential purposes by an actual chemical factory? A Depending on the industry. 40

Harvey B. Thompson, cross.

Q Can there be anything worse imagined than a chemical factory? A Yes, I can name a few things that would be worse.

Q Could it be located in a business zone? Chemical factories have wide industries not permitted in business zones— A I know that.

10 Q —one degree below a business zone where lumber yards are permitted? A Yes.

Q So a chemical factory is one of the industries that is very apt to affect residential properties, isn't it? A Depending entirely on the type of chemical made.

Q A chemical factory using one type of chemical in an industrial zone, it may be changed overnight to another type of chemical? A Yes.

20 Q Hasn't that some influence on the value of property in the future? A That is what we are talking about.

Q Here you have an industrial zone to the west where any industry may be put. Here we have a high class residential section zone to the east of the same business property. You have now told me there may be industries which would come to the south that would kill land to the north for residential purposes. Doesn't it follow there may be industries in there which would kill the value of the Durkin property for residential purposes?

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Mr. Brown: I object to that; it is all speculative.

By Mr. Lane.

Q You have told me that industries might come to the south which would kill the value of land to the north for residential purposes. To the west of the Durkin property we have a zone

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Harvey B. Thompson, cross.

for industrial purposes where any industry may come. May not industries be established there which would kill the value of the Durkin property for residential purposes? A If such a concern was established in this industrial zone to the west of the Durkin property, it would not only affect the Durkin property, but all the other property.

10

Q So that all the property there now lies subject to that, including that to the east of Pleasant avenue? A It does.

Q Still you think with that staring a man in the face, the property to the west, zoned for industrial purposes, into which such industries may come, he is going to put up money to put into a residence? A I do at the present time, Mr. Lane.

20

Q Dealers look to the future, don't they? A Some of them do.

Q They should, if they don't, shouldn't they? A Yes.

Q A careful developer would, wouldn't he? A I would say yes to that question.

Q Here you have a piece of land being zoned in which an industry may come which you say might kill and affect not only it but also property to the east of Pleasant avenue, and yet you say a reasonable sale of that land would be to put money in there and develop it for residential purposes. A I do. It is residentially zoned now.

30

Q How about the future? A The future is something no one can tell about, in my opinion.

Q Do you think a man would put money in it now with the knowledge that in the future he might be wiped out? A The Durkin property residentially zoned has been already established.

40

Harvey B. Thompson, cross.

Q You are putting new money in at this time when land to the west is zoned industrially? Do you think that is a reasonable thing to do?

10 A Let us clear up a point, Mr. Lane. The chemical plant as far back as I can remember has been in this particular location and has not affected the business or residences along Willet street, Bloomfield. It has not affected the building of residences east of the Durkin property.

Q You know as a fact, do you not, the mere fact a residence is built in an industrial zone or near an industrial zone does not indicate at all that the land value for residential purposes has been affected, don't you? A Yes.

20 Q So that the fact that these buildings have been built—\$9,500 including land and building—south of Smallwood avenue, does not indicate that the value of that land for residential purposes has been affected by the proximity of industrial zones, does it? A The particular house we are referring to is bound by the Durkin property on the east, beginning practically at the Durkin Company line, and the Durkin property is zoned for a residence. In other words, a high-class residential section, that portion of it lying in Belleville.

30 Q I didn't ask you that. I asked you whether the mere fact that residences had been built on the south side of Smallwood avenue was proof that the proximity of the industrial zone had not affected the values for residential purposes. A It had not.

Q I didn't ask you that. I asked you whether the mere fact that residences had been built on industrial zone indicated that the value of the land had been affected for residential purposes?

40 A To answer that question I should say it did not, sir.

Harvey B. Thompson, cross.

Q Well, then, I follow it up by saying the mere fact of the building of residences to the south, on the southerly side of Smallwood avenue, does not indicate the value of that land has not been affected for residential purposes. I should think one would follow the other. A One would follow the other. 10

Q You will find some people, under the same circumstances, building some types of residences right in an industrial zone. A Yes.

Q To house people that work in the industries. A Sometimes to house people working in the industries.

Q Other times to house people who work in businesses in the immediate vicinity? A Right.

Q So the mere erection of residences in an industrial zone does not indicate anything about the value of property for industrial purposes, does it? A It does not. 20

Q How much would you say it would cost to extend Smallwood avenue? Have you any knowledge on it at all? A Well, I have no definite knowledge. I am not an engineer.

Q You haven't figured that out, is that right? A I haven't figured that out, no.

Q How much would it cost to extend this sewer that has got to be extended? A That I can't definitely say; I don't know. 30

Q How much is it going to cost, and what kind of buildings would you put on this land? We are discussing the future of the Durkin property if transferred into a residential section. A I should say buildings put on there would grade from \$9,500 to \$10,500.

Q How much would it cost to put them up? A Depending entirely upon your contract, your finish and your trim. It could range from \$7,500. 40

Harvey B. Thompson, cross.

Q From \$7,500 up to what? A Well, I personally would not build any house that would cost beyond \$9,000.

Q Why not? A Because the general type of the property does not call for it. The type of the entire section does not call for a higher grade building.

Q Why not? A Because all of your adjoining property, that is, property immediately east of the Durkin property, is made up of small one-family dwellings.

Q I thought this was a high-grade property to the east you were talking about? A I don't recall saying anything about high-grade property, but residence "A" zone.

Q Just what is residence "A" zone? A Medium priced houses.

Q They are not medium priced, they are low priced. A Now, that all depends whether we are talking about the \$35,000 house.

Q Can you get a house for much less than \$7,500 or \$9,000, of any kind, nature or description? A I can sell you some for \$8,800.

Q I said less than that. That is \$9,000. A You can get them, yes.

Q All right. You will put houses there that will cost from \$7,500 to \$9,900. How many are you going to put there? A On the proposed continuation of Smallwood avenue?

Q Yes. A You can place in there five houses on each side of the proposed street.

Q How can you? A With lots of forty feet front by approximately 152 feet in the rear on the southerly side, and, I would say, between 125 and 140 feet in depth on the northerly side.

Q You are not permitted under the Zoning Ordinance to put houses on less than a forty-foot front, are you? A No, you are not.

Harvey B. Thompson, cross.

Q You haven't two hundred feet at that point so you can't very well put five houses on it. Your Zoning Ordinance, as I recall it, calls for a number of square feet in a person's yard and the distance between the houses. A I have information of some houses being built on 35 and some on 32 foot frontages, and still comply with the Zoning Ordinance. 10

Q That land as you see, runs on an angle. A Yes.

Q You see it tapers over to 215 up here (indicating)? A Yes.

Q On that angle of Smallwood avenue, how can you put five houses? A That can be set out by tapering off a little bit at the rear of the rear lot.

Q You would have to take off quite a little. Do you see the degree of that angle? A Yes. Here is a larger map. I should say this is the same width across here, 217 feet. That is merely my opinion. 20

Q That is your opinion based on looking at this survey. A Looking at that survey, yes. You differ up here (indicating). I take the increase here in your angle and you come back of Belleville avenue to another angle.

Q You also go off here on an obtuse angle? A Yes, it goes off here on an angle (indicating). 30

Q Do you think those lines are parallel? A Up to this point. I think those two lines are parallel.

Q You would put five houses on what? A In my opinion you can put five houses on there (indicating).

Q How many houses would you put on in front? A You have 181 feet all told. You could put four houses across that plot. 40

Harvey B. Thompson, cross.

Q What kind of houses would be there? A Why, put up residences following the same type in the neighborhood to the south of it.

Q To cost how much? A Valued around \$10,000.

10 Q You would put one up against the gasoline station? A Yes.

Q You would put a \$10,000 residence there? A It is possible.

Q I am not asking you possibilities. You said this property is available for residential purposes. I am trying to find out how much you know about it. A You are asking my opinion about putting a \$10,000 house up against the gasoline station.

20 Q I am trying to find out how you figure it is worth anything for residential purposes A I would like to get your question straight in my mind.

Q What kind of houses? There are at least three elements you have got to know, both the cost of the land and the building. A That is right.

Q Second, what return you are going to have. A That is right.

30 Q I am trying to figure out how you figure the availability of this for residential purposes? How much do you think the houses are going to cost, and how many are you going to put there? A In answer to how many you should put there, it would be four.

Q Are you figuring this out on the stand, or had you already figured it out? A I am giving you my opinion.

Q Did you figure it up before you went on the stand? A I have not.

40 Q You just figured the matter while I am interrogating you? A That's it.

Harvey B. Thompson, cross.

Q Yet you told us that that property was available for residential purposes when you didn't know the cost of the land and building and how many houses you were going to put on, the cost of the improving of the street, and the cost of bringing in the sewer, or anything of that kind, but you must know about what return you were to get. You didn't know or ought to know any of those things, did you? A I figured that property out on a lot basis before I came in here. 10

Q We are talking about the development for residential purposes. First you have to know the cost of the development and secondly, a reasonable return. You knew neither, did you? A I don't consider that.

Q Do you think you can arrive at a value of property for residential purposes without knowing the nature of the development, cost of the development, or the return you would receive and expect to get? 20

Mr. Brown: I object to that question. The witness stated he based his value on the character of the surrounding neighborhood, and that is all the act requires.

By Mr. Lane.

Q (Last question repeated by stenographer as follows): Do you think you can arrive at a value of the property for residential purposes without knowing the nature of the development, cost of the development, or the return you would receive and expect to get? A I am taking into consideration the adjacent property to the east of which this plot of land is at the present time; the type of development would follow in a corresponding manner. 30 40

Harvey B. Thompson, cross.

Q Now, will you answer my question?

Mr. Lane: Repeat the question.

Q (Last question repeated by stenographer.)

10 A All those facts have to be taken into consideration.

Q I am asking you now to tell me how many houses you figured can be built upon this tract, and what the cost of those houses would be, what the cost of making the improvement was, including the cost of the sewer in Smallwood avenue, and what you could get for the houses if you had erected them. Also what you consider to be the cost of the land, so I can determine whether you can get a reasonable return on your investment.

20 A My answer to that question is that I have not figured out the detailed cost of each one of the items you have enumerated.

Q Yet you have already told me those items had to be taken into consideration in arriving at the value of the property for residential purposes. A The figures and values which I have quoted you have been based upon my knowledge of general values of property similar to the one-family residence dwellings built in the tract just east of the Durkin Lumber Company property.

30 Q Then your knowledge of those ground values is confined to the Fairway Development, which is one street still to the east of Hewitt avenue as appears on Exhibit R. 2, is that right? A That's right.

Q You think that is a fair comparison with this property, is that right? A Yes, I do.

Q So far as the physical characteristics go now, can you very well imagine two pieces of property more dissimilarly situated than the two

Harvey B. Thompson, cross.

pieces you compare, one without any factory or industry zone in the immediate vicinity, and the other one with an industrial zone right abutting to it and factories around it? A In quoting to you the figures I have, I have given consideration of the depreciation between the property on Fairway avenue.

10

Q On what experience do you base you depreciation and consideration to? A I don't think I got that.

Q I mean, on what experience do you base the depreciation that you have given credit to? A Depreciation is a matter of opinion, and the amount of depreciation which I have heretofore quoted is from ten to twenty per cent.

Q What experience have you had in figuring that depreciation of difference? Does it just come out of your head? A No, it comes from other transactions.

20

Q That is what I want to know. Where have you made similar comparison where you knew the actual values of both tracts so as to get at this depreciation? A Well, I bought or had something to do with the purchase of the property now occupied by the new Essex County Golf Links.

Q How far is that from here? A That I should say is two block below Fairway avenue.

30

Q You mean two blocks east? A Two blocks east of Fairway avenue.

Q How did that compare with Fairway avenue? A That property compares with it in general conditions; general circumstances of the type of land.

Q Did it have any factories around it? A There were no factories around it.

Q Any railroads around it? A No.

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Harvey B. Thompson, cross.

Q Any industrial zones around it? A No.

Q Then how does that help us in finding out what difference you should make between the Fairway property and this property? A That is the amount of depreciation, in my opinion.

10 Q You have said that a great many times. I want to know whether or not that statement of yours, it is your opinion, is a mere guess? It must be a guess unless based on something. I have been trying to find out what it is based on. A Well, I admit your question has got me stumped.

Q Then it is a mere guess? A No.

Q Then why isn't it? A It is not a mere guess, because your opinion as to the amount of depreciation on any particular tract is a matter
20 of opinion.

Q What is it based on? If it is not based on something it is a guess. A It is based on your ideas in connection with pieces of property.

Q I want to know in your experience where you have had property to compare with this? A I haven't had any similar property to compare with this.

30 Q I want to know where you have had an opportunity to know the value of property, as the Fairway avenue property is and the actual value of property, such as this, so you can arrive at the amount of difference in percentages between the two, if you have had such experience. A I have had no experience on property similar to the Durkin Lumber Company property where it is affected by a railroad, but I have had on other pieces of property in Belleville experience where the various factors have tended to depreciate values.

Harvey B. Thompson, re-direct—re-cross.

Q I am talking about this particular kind of factor. A If you are talking about this particular kind of factor I have had no experience.

Q Yet you venture to express an opinion based upon no experience, is that right? A I venture to express an opinion.

Q Based on no experience, is that right? A Based on no experience in connection with a chemical factory.

Q Or an industrial zone next door? Don't confine it to a chemical factory. I am confining it to the immediate proximity of an industrial zone into which any industry may go. A The answer has already been given.

Q And yet you do not call that a guess? A No, I do not call that a guess.

Re-direct examination by Mr. Brown.

Q Would you say that the establishment of a zone adjacent to the Bloomfield line in Belleville had any effect in stabilizing property values in that zone or to the immediate east? A It did have an effect of stabilizing property values immediately east of the Durkin property, because it was in a residential zone.

Re-cross examination by Mr. Lane.

Q Do you mean by the words "stabilizing values," keeping the values at the same amount? A Keeping the property valued as residential property.

Q If it were thrown open for industrial purposes the value might be a great deal higher than for residential purposes, might it not? A Not without killing the residential property.

Harvey B. Thompson, re-cross.

Q I understand that, but the value as value might be higher for industrial purposes, might it not? A They might, but I don't know.

Q You know generally this land is adapted for industrial purposes, don't you? A No, I do not.

10 Q You don't think that the proximity to a railroad and to public streets and the plottage value gives an adaptability for industrial purposes? A Any plot of ground that is laid out as this property is is adaptable for industrial and also residential purposes.

Q It has a peculiar adaptability for industrial purposes when it has a sufficient plottage, plus railroad connections, plus public streets within a reasonable distance of the center of things, has it not? Also plus bus lines running along the street which can bring employees to the property? A And which can also take residents out.

20 Q I understand that, but that kind of property has a peculiar adaptability for industrial purposes, hasn't it? A I don't consider that conclusively.

Q You think a piece of property of that kind, or property located two and a half miles from a railroad would have more of an adaptability, and away from a public street would have more of an adaptability for industrial purposes? A No, I do not.

30 Q What would you require for the adaptability for industrial purposes? Is there anything else the property lacks for industrial purposes now? A There is nothing it lacks for industrial purposes, nothing it lacks for now.

Q Except the presence of an industrial zone on one side? A In Bloomfield.

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Harvey B. Thompson, re-cross.

Q I don't care where it is. This is next door to it, isn't it? A Yes.

Q All of this property around the railroad has an adaptability for industrial purposes, hasn't it? A It has if you destroy the residential purposes for which it is already established.

Q Belleville avenue is a main highway? A It is. 10

Q Business in parts at least? A Business in parts, but not in that section.

Q It runs through the center of the town? It is a main through highway? A Yes.

Q And bus lines run along it? A Yes.

Q And it is the kind of street upon which business is bound to locate, isn't it? A Business may locate in certain sections of it. 20

Q It is the kind of street, a main highway adaptable which business will seek out? A Business will not take cross streets.

Q Well, ordinarily. A Business will not take cross streets ordinarily.

Q This is a main highway passing through what towns? A Belleville and Bloomfield.

Q Any other towns? A I believe it continues into Glen Ridge.

Q Any other towns to the south or east? A No towns to the east. 30

Q Does it run through Nutley? A It does not.

Q Where does it run into? Newark? A It runs into Belleville and ends at Main street, Belleville. In other words, it is a dead end at the westerly line.

Q Then it is continued on as what? A Main street. It is not continued on. Main street is another main street. 40

Harvey B. Thompson, re-cross.

Q How does it run in? A Main street runs north and south and Belleville avenue runs east and west.

10 It is stipulated that the following sections or portions of the Zoning Ordinance may be printed in lieu of the entire ordinance. The entire ordinance may be referred to by the Court and counsel, if desired, but if counsel do refer to any portions of it, they shall print that portion referred to in the brief.

From the beginning of the Ordinance down to and including Section 3. Section 14.

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REASONS.

NEW JERSEY SUPREME COURT.

FRANK J. DURKIN LUMBER COM- PANY,	<i>Prosecutor,</i>	10
<i>vs.</i>	<i>On Certiorari.</i>	
GEORGE FITZSIMMONS, ESQUIRE, Recorder of the Town of Belleville, and THE TOWN OF BELLEVILLE,	<i>Respondents.</i>	<i>Reasons.</i>

The prosecutor writes down the following reasons for a reversal of the judgment of conviction brought to this court by the writ of certiorari herein: 20

1. The application of the provisions of the ordinance referred to in the complaint, which resulted in a conviction, to the Frank J. Durkin Lumber Company, under the circumstances of this case is a violation of the rights secured to the Frank J. Durkin Lumber Company by the 14th amendment to the Constitution of the United States, in that it is a taking of the property of the Frank J. Durkin Lumber Company without due process of law, the property of the Frank J. Durkin Lumber Company lying partly in Bloomfield and partly in Belleville. The said Frank J. Durkin Lumber Company operates a lumber business on that portion of the land lying in Bloomfield in strict accordance with the zoning ordinances of the Town of Bloomfield. It uses the property lying in Belleville for the maintenance 30 40

Reasons.

of lumber piles in connection with its business located in Bloomfield. The land is peculiarly adapted for business or industrial use and not for residential use and to compel its use for residential purposes would be to materially decrease its value and in fact destroy its value. The effect of preventing it from so using the land is to prevent its use of the land for legitimate purposes and compel its use for purposes for which it is not adapted is a taking of its property and there is no sufficient public purpose to be accomplished which would warrant the taking of the property under the police power without compensation, and there is therefore a taking of property of the Frank J. Durkin Lumber Company without due process of law.

20 2. The application of the provisions of the ordinance referred to in the complaint, which resulted in a conviction, to the Frank J. Durkin Lumber Company, under the circumstances of this case, is a violation of the rights secured to the Frank J. Durkin Lumber Company by the 14th amendment to the Constitution of the United States in that it is a denial of the equal protection of the law. The Frank J. Durkin Lumber Company is using said property, as stated in Reason 1. Other property, similarly situated belonging to other owners, may be used for similar purposes. There is no reason, arising from the situation of the land or otherwise which makes a distinction between the property owned by complainant and other similar property, which would warrant a classification of the property of the said Frank J. Durkin Lumber Company into a class in which such use should not be permitted and there is, therefore, a denial of the equal protection of the law to the Frank J. Durkin Lumber Company.

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Reasons.

3. The application of the provisions of the ordinance referred to in the complaint, which resulted in a conviction, to the Frank J. Durkin Lumber Company, under the circumstances of this case, is a violation of the rights secured to the Frank J. Durkin Lumber Company by the Constitution of the State of New Jersey in that it deprives the Frank J. Durkin Lumber Company of the right to own, possess, use and enjoy property. 30

4. The application of the provisions of the ordinance referred to in the complaint, which resulted in a conviction, to the Frank J. Durkin Lumber Company, under the circumstances of this case, is a taking of the private property of the Frank J. Durkin Lumber Company for public purposes without compensation, in violation of the rights secured to the Frank J. Durkin Lumber Company under the Constitution of the State of New Jersey. 40

5. The application of the provisions of the ordinance referred to in the complaint, which resulted in a conviction, to the Frank J. Durkin Lumber Company, under the conditions existing in this case results in the exercise of power by the municipality beyond the authorization of any statute of the State of New Jersey in that the maintenance of the pile of lumber upon the property of the Frank J. Durkin Lumber Company referred to in the testimony in no wise affects the public safety, health or general welfare within the meaning of the statutes, and it is beyond the power of the municipality to prevent the storing of such lumber upon such property. 10

6. If the amendment to the Constitution of the State of New Jersey permitting zoning, adopted 20

Reasons.

on or about the 18th day of October, 1927, is to be interpreted as permitting the application of the Zoning Ordinance of the Town of Belleville to the Frank J. Durkin Lumber Company, under the circumstances of this case, and to sustain the conviction or to authorize the adoption by the

10 Legislature of legislation which will permit the application of said Zoning Ordinance to the Frank J. Durkin Lumber Company, under the circumstances of this case, and to sustain the conviction, said amendment to the Constitution of the State of New Jersey is in conflict with the provisions of the 14th amendment to the Constitution of the United States in that it permits the taking of the property of the Frank J. Durkin Lumber Company without due process of law and

20 in that it permits a denial of the equal protection of the law to the Frank J. Durkin Lumber Company and in that it permits the adoption of an *ex post facto* law. The said Frank J. Durkin Lumber Company repeats here what it said under Reasons 1 and 2, and further says that it was established in business and was using the property in the manner that it was using it at the time of the complaints against it and its conviction, prior to the adoption of the said amendment to

30 the Constitution of the State of New Jersey and the adoption of the statute in pursuance thereof.

7. The statutes of the State of New Jersey adopted by the Legislature and approved by the Governor on or about the 3rd day of April, 1928, in pursuance of the zoning amendment to the Constitution of the State of New Jersey, if interpreted to permit the application of the Zoning Ordinance of the Town of Belleville to the Frank J. Durkin Lumber Company, under the circumstances of this case, is in conflict with the pro-

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Reasons.

visions of the 14th amendment to the Constitution of the United States in that it permits a denial of the equal protection of the law and in that it permits the taking of the property of the Frank J. Durkin Lumber Company without due process of law and in that it is an *ex post facto* law. The said prosecutor repeats here the statements which it made under Reasons 1 and 2, and further says that it was using the said property in the manner in which it was using it at the time the complaint was made against it and the conviction had against it, prior to the adoption by the Legislature of the statute in this reason set forth and that it was convicted prior to the adoption of said statute. 10

8. The provisions of the statute of the State of New Jersey, approved by the Governor on or about the 3rd day of April, 1928, adopted by the Legislature in pursuance of the zoning amendment to the Constitution of the State of New Jersey, if it be interpreted to permit the application of the Zoning Ordinance of the Town of Belleville to the Frank J. Durkin Lumber Company, under the circumstances of this case, is void because it is an *ex post facto* law. And said prosecutor says that it had used the said property in the manner in which it was using it at the time of the complaint made against it and in the manner in which it was using it at the time of the conviction prior to the adoption of the statute in this Reason set forth, and was convicted before the adoption of such statute. 20 30

9. The provisions of the statute of the State of New Jersey, approved by the Governor on or about the 3rd day of April, 1928, adopted by the Legislature in pursuance of the zoning amend- 40

Reasons.

ment to the Constitution of the State of New Jersey, if it be interpreted to permit the application of the Zoning Ordinance of the Town of Belleville to the Frank J. Durkin Lumber Company, under the circumstances of this case, is void because the purpose is not expressed in the title
 10 to the act.

10. The provisions of the ordinance, if applied to the Frank J. Durkin Lumber Company, under the facts in this case are unreasonable.

11. The proofs did not show a violation by the Frank J. Durkin Lumber Company of any provisions of the ordinance referred to in the complaint which resulted in a conviction—

a—The provisions of the ordinance do not forbid the storing of lumber upon the property of the Frank J. Durkin Lumber Company, as the
 20 proofs show such lumber was stored.

b—The ordinance does not require a certificate of occupancy for the storage of lumber as such lumber was stored upon the property of the Frank J. Durkin Lumber Company.

12. The trial court erred upon the objection of the municipality in overruling the offer of a photograph showing the property in the vicinity
 30 of the property of the Frank J. Durkin Lumber Company involved in this case in Belleville and in Bloomfield.

13. The trial court erred in overruling the testimony of Arthur R. Carr offered for the purpose of showing that the storing of lumber upon the property of the Frank J. Durkin Lumber Company involved in this case had nothing to do with public safety.

Reasons.

14. The trial court erred in overruling the offer of testimony by the prosecutor for the purpose of showing the unreasonableness of the application of the ordinance to the particular facts of the case.

15. The trial court erred in overruling the offer of testimony by the prosecutor to show that the storing of lumber upon the property of the Frank J. Durkin Lumber Company involved in this case does not in any wise affect public health, safety or public welfare. 10

16. The facts proven did not warrant a judgment of conviction for the offense charged in the complaint.

17. The statute, Chapter 274 of the Laws of 1928, does not authorize the municipality to regulate the use of property except with respect to the limiting and restricting to specified districts and regulating therein buildings and structures according to the nature of their construction and the nature and extent of their use, and said prosecutor does not maintain upon his said land any building or structure within the purview of the said statute, nor would a regulation of such use of prosecutor's property have any reasonable relation to any of the purposes for which such regulations may be adopted under the provisions of Section VII of said statute. 20 30

18. By virtue of the provisions of the statute, Chapter 274 of the Laws of 1928, all acts giving authority to the municipality to adopt zoning ordinances and the ordinance under which prosecutor was convinced, were repealed. And, further by virtue of the provisions of said statute, only such portions of such ordinances were 40

Reasons.

- continued in effect as had been adopted for any of the purposes set forth in the act; and prosecutor says that if the said ordinances be so interpreted as to prevent the prosecutor from using his property in the manner complained of, said purpose is not within the provisions of the said statute. The Legislature having, by the provisions of said statute, repealed all legislation authorizing the municipality to adopt the ordinance for the violation of which prosecutor was convicted, the ordinance in its entirety fell and it was beyond the power of the Legislature to continue the ordinance in effect, because to so do would read into the statute terms and conditions of said ordinance contrary to the provisions of the Constitution of the State of New Jersey and would likewise result in *ex post facto* and retro-active legislation, and would deprive the prosecutor of the right secured to it by the Constitution of the State of New Jersey to own, possess, use and enjoy property, and would result in the taking of its property without due process of law within the meaning of the 14th amendment to the Constitution of the United States and a denial of the equal protection of the law within the meaning of the same amendment.
19. The statute, Section 274 of the Laws of 1928, provides that non-conforming use or structure, existing at the time of the passage of an ordinance, may be continued upon the lot or in the building so occupied, and the prosecutor says that the effect of said statute is that the ordinances continued in effect by it must be considered, for the purpose of the act, to have been adopted at the time of the passage of the act, and that at such time prosecutor was using the land in the manner complained of and if such use was

Reasons.

a non-conforming use, it has the right to continue such use.

MERRITT LANE,
Attorney for Prosecutor.

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OPINION OF SUPREME COURT.

Filed November 30, 1928.

NEW JERSEY SUPREME COURT.

No. 229. October Term, 1928.

FRANK J. DURKIN LUMBER COMPANY, <i>Prosecutor,</i> <i>vs.</i> GEORGE FITZSIMMONS, Recorder &c., et als., <i>Defendants.</i>	}	<i>On</i> <i>Certiorari.</i>
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Submitted October Term, 1928: Decided November 30, 1928.

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Before Justices Minturn, Black and Campbell.

For the prosecutor: Messrs. James Larkin Hughes and Merritt Lane.

For the defendants: Mr. John B. Brown.

PER CURIAM:

The writ of certiorari was allowed in this case, to review the judgment of conviction of the prosecutor, for the violation of certain provisions of an ordinance of the Town of Belleville; known as the "Zoning Ordinance;" adopted September 3, 1923. The prosecutor files nineteen reasons for setting aside the judgment of conviction. The reasons are argued under five heads in the prosecutor's brief.

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The complaint charged the prosecutor with maintaining on the premises on the southerly

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Opinion of Supreme Court.

side of John street in the Town of Belleville a lumber pile or building material storage yard, which it used in connection with its lumber business carried on in another part of the premises, located in the Town of Bloomfield, and, that the maintenance of such a lumber pile and use there-
 10 of was the use of the premises as "a building material storage yard," within the meaning of section 14 of the ordinance.

That section required a "certificate of occupancy." It provides; "no land shall be occupied or used and no building &c., occupied or used in whole or in part for any purpose whatsoever until a certificate of occupancy shall have been issued by the Superintendent of Buildings stating that the premises or building complies
 20 with all the provisions of the ordinance." No building or premises may be occupied until such certificate shall have been issued. The prosecutor was convicted by the Recorder of Belleville of violating the ordinance on the 1st, 7th, 12th, 16th and 19th days of March, 1928 for not obtaining a certificate of occupancy, as required by the ordinance.

Eight reasons filed by the prosecutor for setting aside the conviction under the ordinance are, the ordinance or the conviction thereunder is in
 30 violation of the Constitution of the United States or the Constitution of New Jersey or both. Not so. We have read the argument made on behalf of the prosecutor on this point with interest and care. It fails to satisfy us that is so. We cannot find any argument to support or sustain the contention. The constitution, P. L. 1928, p. 820, and the legislation passed in pursuance thereunder, P. L. 1928, p. 696, are applicable, *Koplin*

Opinion of Supreme Court.

v. *Village of South Orange*, 142 Atl. 235; 6 N. J. Misc. 489.

We find no merit in the other reasons filed for setting aside the conviction. They call for no extended discussion. It may be possible, that with so many reasons urged we have overlooked a good one. Let that be as it may. Piling lumber, as it may affect injuries to children, for an illustrative case see *Vanderbeck v. Hendry*, 34 N. J. L. 467. The zoning ordinance of the Town of Belleville is not unreasonable in its application to the prosecutor's lands. The ordinance is presumed to be reasonable, and the burden is on the prosecutor to show its unreasonableness. 10

The conviction of the prosecutor by the Recorder of the Town of Belleville brought up by the writ of certiorari is affirmed, with costs. 20

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ORDER OF AFFIRMANCE OF JUDGMENT.

NEW JERSEY SUPREME COURT.

10	FRANK J. DURKIN LUMBER COMPANY,	<i>Prosecutor,</i> <i>vs.</i>	<i>On</i> <i>Certiorari.</i> <i>Order of</i> <i>Affirmance</i> <i>of Judgment.</i>
	GEORGE FITZSIMMONS, Recorder of the Town of Belleville, and THE TOWN OF BELLEVILLE,	<i>Respondents.</i>	

20 This cause having been duly submitted on brief at the October term of this court by Merritt Lane and John L. Hughes, of counsel for the prosecutor, and John B. Brown, of counsel for the respondents, and the Court having considered the same and finding no error in the record or the conviction of the prosecutor by the Recorder of the Town of Belleville:

30 It is, thereupon, ORDERED and ADJUDGED that the conviction of the prosecutor by the Recorder of the Town of Belleville, removed by Writ of Certiorari in this cause, be affirmed with costs and the record be remitted to the court below to be proceeded with according to law and the practice of said court.

Entered December 11, 1928, on motion of

JOHN B. BROWN,
Of Counsel for Respondents.

NOTICE AND GROUNDS OF APPEAL.

Filed December 20, 1928.

NEW JERSEY SUPREME COURT.

FRANK J. DURKIN LUMBER
COMPANY,

Prosecutor,

vs.

GEORGE FITZSIMMONS, Recorder
of the Town of Belleville, and
THE TOWN OF BELLEVILLE,
Respondents.

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*On
Certiorari.*

*Notice of
Appeal and
Grounds of
Appeal.*

To John B. Brown, attorney for respondents.

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PLEASE TAKE NOTICE, that the prosecutor in the above-entitled cause appeals to the Court of Errors and Appeals, the last resort in all causes, from the whole of the judgment entered in this cause upon the ground that the New Jersey Supreme Court erred in affirming the conviction of the prosecutor by the Recorder of the Town of Belleville and in giving judgment for the respondents and against the prosecutor whereas, in fact, it should have reversed and set aside the judgment brought up by the writ of certiorari for one or more of the reasons filed in the New Jersey Supreme Court.

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Dated: December 17, 1928.

MERRITT LANE,
Attorney for and of counsel
with the Prosecutor-Appel-
lant.

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Notice and Grounds of Appeal.

Service of a copy of the within Notice of Appeal and Grounds of Appeal is hereby acknowledged this 18th day of December, 1928.

JOHN B. BROWN,
Attorney for Respondents.

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E g H

Notes and Queries of Japan.

Journal of a visit to the island of Japan, in the
 Annual and Biennial of America, 1857.
 Published this 18th day of December, 1857.

JOHN E. BROWN,

Author of *Japan*.

New Jersey Court of Errors and Appeals

No. 81, February Term, 1929.

FRANK J. DURKIN LUMBER COM- PANY, <i>Prosecutor-Appellant,</i> <i>vs.</i> GEORGE FITZSIMMONS, Recorder of the Town of Belleville, and THE TOWN OF BELLEVILLE, <i>Respondents.</i>	<i>On Appeal from Judgment Supreme Court on Certiorari. Sat Below: MINTURN, BLACK AND CAMPBELL, JJ.</i>
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REPLY BRIEF OF APPELLANT.

(Italics, etc. ours, except where otherwise noted.)

I.

Respondents say (p. 2) that there is no proof in the case that the prior use of the land by appellant was legal.

The contention of appellant, made under Points 2, 4 and 5 of our original brief, is that, under the law as settled in this State by *Ignacius v. Risley*, 98 N. J. L. 712, 121 Atl. 783, affirmed *sub nom. State v. Nutley*, 99 N. J. L. 389; *Karke Realty & Associates v. Mayor and Aldermen*, 5 N. J. Advance Reports 1512; *Rudensey v. Board of Adjustment of Town of Montclair*, 131 Atl. 906, 4 Misc. 103; *Eaton v. Village of South Orange*, 130 Atl. 362, 3 Misc. 956; *Williams v. Gaige*, 130 Atl. 721, 3 Misc. 1095; *Morgan v. Board of Commissioners*, 139 Atl. 718, 6 Advance Reports 84; *Robert Realty Co. v. City of Orange*, 139 Atl. 54, 5 Adv. Reports 1514, prior to the

adoption of the constitutional amendment appellant could not be prevented from using the land in the manner in which it did, in fact, use it, and its use, therefore, *was* legal.

It is immaterial whether the Town of Belleville recognized the use as legal.

II.

On p. 2 of their brief respondents refer to a "public highway paralleling the Erie Railroad and lying between said railroad and the block of residences facing on Smallwood avenue." There *may* be a "public highway" *on paper*. What that public highway actually looks like is indicated by the photograph, Exhibit D. 3.

On p. 3 respondents refer to the Greenwood Lake Division of the Erie Railroad as "a passenger line carrying *some* freight," and they refer to p. 82, l. 38 to l. 18, p. 83 of the State of the Case. The witness who testified at p. 82 was Thompson, who is referred to in our original brief, pp. 11 and 21. The testimony of Thompson as to the Erie Railroad is:

"Q I said a freight line with spurs running over it with factories to the south? A With spurs going to the south, and spurs are several, is what I consider a natural barrier in the form of the main line of your railroad tracks.

Q It is a two-track road used for freight purposes? A It is not used for freight purposes, it is the main line of the Greenwood Lake Railroad.

Q The Greenwood Lake Railroad of the Erie Railroad? A Yes.

Q Running freight over the same line? A They do.

Q And serve a great many interests? A They do.

Q They run to Passaic Valley? A No, they don't run to Passaic Valley, they run up to what I call the Wanaque Midvale Valley.

Q They serve industries all the way up?

A They serve industries all the way up and also have passenger stations all the way up, and those passenger stations are through residential sections of Montclair, Glen Ridge and Upper Montclair.

Q At this particular point along this line of the Erie Railroad to the south are industries and industrial lands, is there not?

A There is, with two spurs.

Q With at least two spurs at this time going off there? A To two factories.

Q No one can tell how many freight stations and factories will be located there? A They cannot.

Q *It is an industrial section?* A *It is.*"

III.

On p. 6 respondents speak of the land to the south as being residential for "approximately 1,000 feet." This is the land shown on Exhibits D. 6, D. 11, D. 3, and it is the land which has had the vicissitudes in zoning pointed out on p. 6 of our original brief. It is the land which Thompson, respondents' own witness, calls an "*industrial section.*" However it may now be zoned, it is, *in fact*, industrial and useless for any other purpose. (See the testimony of respondents' witness *Blank*, p. 68, and respondents' witness Thompson, pp. 82, 83.)

It may be that the yeast factory, referred to on p. 10, is 1,000 feet away from appellant's property in *Belleville*, but all the land across the railroad tracks, although zoned for residential purposes, *is useless except for industrial purposes.*

IV.

The statement of respondents that appellant's property is worth \$29,000 for residential purposes rests on the testimony of the witness Thompson which cannot be relied upon and which we have considered on p. 11 of our original brief. *He did not properly qualify as an expert upon the value of the property.*

Blank, the Town Engineer, tells us what must be done to develop the property for residential purposes, p. 62, and then concedes that *its value for residential purposes may, at any time, be destroyed*, and yet he thinks that the owner should expend the moneys required to extend the street, lay the sewer, etc., necessary to develop it for residential purposes, although he concedes *that the best use of the property is not for industrial purposes* (bottom of p. 64, and top of p. 65).

V.

Respondents seem to contend (p. 13) that municipalities may segregate residential from other districts *as such* and that the *mere fact* that there is a difference between a residence and a business house indicates a difference bearing a substantial relation to the public health, safety, morals and general welfare.

No decision ever so held. On the contrary, prior to the constitutional amendment, the decisions were all the other way.

The Supreme Court of the United States in *Nectow v. the City of Cambridge*, 72 L. Ed. 520, referred to in our original brief, p. 15, repudiated any such theory and it repeated that repudiation in *State of Washington, ex rel. Seattle*

Title Trust Co. v. Roberge, decided November 19, 1928, No. 3 United States Supreme Court Advance Opinions, 73 L. Ed. 39, referred to on p. 22 of our original brief.

Again, on p. 16, respondents insist that a municipality may regulate the zoning of property *because of the effect of that zoning upon the development of other property* or, in other words, that one man's property may be, by governmental agency, restricted for the resulting benefit of another man's property, and respondents go so far, on p. 17, as to assert that a man may be restricted in the use of his property because of the increase of fire hazard to another man's property, although that increase of fire hazard is not, in and of itself, such a danger to public safety as that it is a matter of *public concern*.

The Supreme Court of the United States, in the cases just referred to, repudiated any such theory.

VI.

Respondents, on p. 16, refer to the fact that there is no guaranty that the piles of lumber will not eventually cover every foot of appellant's ground. If the extent of the piling of lumber on appellant's land affects in anywise the public safety, health, morals or welfare, the remedy of the municipality is to regulate the extent of the use, not to forbid it.

VII.

Respondents seem to contend, p. 19, that appellant is not entitled to be heard here because, instead of appealing to the Adjustment Board, created by the ordinance, it violated the ordinance and now is appealing from its conviction.

In the first place, there is no proof that there is a Board of Adjustment.

In the second place, the contention of appellant is that no permit is required under the ordinance and that the application of the ordinance to the situation here present violates rights secured to it both under the Constitution of this State and of the United States, and even if there were a Board of Adjustment, appellant was not obliged to go to that board.

Losick v. Binda, 102 N. J. L. 157.

It may be that a zoning ordinance is presumed to be valid, but that does not mean that an attack upon its application in a particular case, on constitutional grounds, must be by direct attack upon the ordinance.

The Supreme Court of the United States will, even on habeas corpus, after conviction for violation of an ordinance requiring a permit, discharge the person convicted if it finds that, in the particular case, the application of the ordinance to the person convicted has violated his constitutional rights.

Yick Wo v. Hopkins, 118 U. S. 220, 30 L. Ed. 221, a permit case.

VIII.

On p. 23 respondents put appellant in the position of claiming that the amendment and act in pursuance thereof are "*ex post facto*" laws. Appellant did not use or intend to use the term "*ex post facto*."

IX.

Respondents, under Point V, p. 28, etc., argue that the constitutional amendment and the statute adopted in pursuance thereof *must* refer to the *use of land as such*, and they sum up their argument, on p. 23, by saying: "The whole purpose of zoning *must* fail if the zoning amendment and the 1928 act could, by any stretch of the imagination, be so construed as to permit the prohibition of stores, apartments, garages and buildings housing any and all types of industries, but to permit the unrestricted intrusion of any and all industries upon the land *merely because the use of the land for such industries did not necessitate the erection of a building or structure.*"

The difficulty with the argument, we submit, is that respondents, basing their view upon what they believe the people *should have done*, by the constitutional amendment, and the legislature, by the act adopted in pursuance thereof, contend that the people and the legislature have, *in fact*, done that which *they have not done* and that which, from a consideration of the legislation existing at the time of the adoption of the constitutional amendment and of the acts in pursuance thereof, it appears that *they did not intend to do*.

The argument advanced by respondents defeats itself.

They refer to the legislation existing at the time of the adoption of the constitutional amendment and to the agitation with respect to zoning and they point out, as is the fact, that, prior to the adoption of the constitutional amendment, legislation had been adopted which permitted municipalities to regulate the use of land *as such*.

They assume that, because there were those who favored the extension of power with respect to zoning, there were none who opposed it. But the fact is otherwise, as reference to the cases and to the debates on the zoning amendment will indicate.

When the legislature framed the constitutional amendment it had before it these *conflicting* views. It also had before it, in previous legislation, *appropriate language which it might have adopted had it been intended to regulate the use of land as such.*

With all of this information and with the conflicting views before it, it framed the constitutional amendment and confined the power authorized by it to the adoption of a zoning ordinance limiting and restricting to specified districts and regulating therein *buildings and structures* according to *their* construction and the nature and extent of *their* use. It is quite clear that the intent was to grant certain rights with respect to zoning to municipalities but to *strictly confine those rights.* The constitutional amendment is a *compromise* between two conflicting views. Neither view was adopted in totality. Had it been the intent of the amendment to permit regulation with respect to the *use of land as such,* it would have been perfectly simple to have framed it so as to have said so.

Respondents say that the amendment is to be read as if it authorized a municipality *to regulate the use or uses to which the land within any specified district may be put* (p. 31 of their brief). If that was the intent why was not the amendment so framed? It cannot be said that it was framed in the manner in which it was for purposes of shortness or conciseness because the broader language is shorter and more concise.

In construing the constitutional amendment respondents ignore the rule that *every word must be given effect*. Indeed, respondents desire to change the entire wording.

It is immaterial to the rule whether the words are words of enlargement or of restriction. *In either event, effect must be given to each word.*

In expounding the Constitution of the United States, every word must have due force and appropriate meaning, for it is evident from the whole instrument that no word was unnecessarily used or needlessly added.

Holmes v. Jennison, 14 Pet. 540, 10 L. Ed. 579;

Cohen v. Virginia, 6 Wheat. 264, 5 L. Ed. 257;

Trimble, J., in *Ogden v. Saunders*, 12 Wheat. 213, 6 L. Ed. 606;

Knowlton v. Moore, 178 U. S. 41, 44 L. Ed. 969.

In the construction of the Constitution *real effect* must be given to the words it uses. *Myers v. United States*, 272 U. S. 52, 71 L. Ed. 160.

In *Blake v. McClung*, 172 U. S. 239, 43 L. Ed. 432, the Supreme Court of the United States held that the court could not assume that the words "within its jurisdiction" in the constitutional provision prohibiting any state from denying to any person within its jurisdiction the equal protection of the laws, were inserted without any object, nor was it at liberty to eliminate them from the Constitution and interpret the clause in question as if they were not to be found in that instrument.

Yet respondents desire to interpret the zoning amendment as if the words "buildings and struc-

tures according to *their* construction and the nature and extent of of *their* use" were omitted.

The amendment is one authorizing the restriction of an owner of property in the use of that property, and neither its language nor the language of the statute adopted in pursuance thereof can be extended.

The rule is that authorization to restrict the use of one's property is to be strictly construed.

This is the effect of what this court said in *State v. Nutley*, 99 N. J. L. 389 at 391, and what the Supreme Court said in the same case, 98 N. J. L. 712.

The restriction is in derogation of common right and the rule of strict construction applies.

25 R. C. L., title Statutes, Sec. 299 at page 1078.

X.

The answer to the contention made by respondents under Point VI (p. 38) is that, if, under legislation existing at the time appellant commenced the use of this land for the purpose of storing lumber there was no power by which the municipality could *legally* prevent its use, then, notwithstanding the existence of the ordinance, which purported to forbid the use (if it did), the use of the land by appellant *was legal* and the intent of Section 11 of the Act of 1928 is to permit the continuance of any *non-conforming use or structure which was legal*, whether because of the non-existence of any ordinance forbidding it or because the prohibition of any such ordinance (as applied to the particular case) deprived the user of constitutional rights then existing.

If this is not the construction to be put upon section 11, then the use of any structure erected as an apartment house in contravention of the terms of an existing ordinance, although under permission granted by the municipality in obedience to a writ of mandamus of the Supreme Court (in certain instances affirmed by this court) must be stopped for, notwithstanding that such apartment house was built under permission of the Supreme Court, the use was *non-conforming*, but, according to the contention of respondents, it was *not* a conforming use "*at the time of the passage of an ordinance*," and therefore *not* within the protection of section 11.

Although the Supreme Court had held that, notwithstanding the express terms of the ordinance, the use could *not be prevented*, according to the contention of respondents, if the Act of 1928 *continued in effect the ordinance* with the provisions which, by virtue of the constitutional amendment and the legislation adopted in pursuance thereof, might be contained in such an ordinance, the ordinance is given life as of a time anterior to the passage of the constitutional amendment and the legislation in pursuance thereof, and the *non-conforming* use, not existing at the time of the passage of the ordinance, may now be prevented.

The general rule is that constitutional amendments are to be construed as speaking *prospectively*.

Shreveport v. Cole, 129 U. S. 36, 32 L. Ed. 589;

Moultrie County v. Rockingham Ten Cent Sav. Bank, 92 U. S. 631, 23 L. Ed. 631;

Ray County v. Vansycle, 96 U. S. 675, 24 L. Ed. 800.

The language of the zoning amendment *is* prospective. Nevertheless, it is contended by respondents, in effect, that, by virtue of this amendment adopted in 1928, the legislature has power to adopt a statute to legalize the application of an ordinance of Belleville, adopted in 1923, to appellant's lands in 1926 and 1927, when at those times *such application could not constitutionally be effected*.

It is by *this* means that respondents argue that the use of appellant's lands, prior to the adoption of the constitutional amendment and the legislation in pursuance thereof, was not legal.

It is also by *this* means that respondents argue that appellant is not within the provisions of section 11 of the Act of 1928.

It is quite immaterial that appellant knew of the zoning ordinance if, in fact, its provisions could not be constitutionally applied, at the time, to prevent it from using the land in a manner it contemplated.

Ignaciunas v. Risley, 98 N. J. L. 712 at 719.

XI.

Under Point VII respondents argue (p. 40, etc.) that the zoning ordinance is not unreasonable in its application to appellant's lands.

The argument is a repetition of what had already been said and we have considered the facts under Point VI, p. 4 of our original brief, and again herein.

While respondents cite cases, p. 42, to the effect that the prevention or increase of a fire hazard is recognized as a valid exercise of the

police power, those cases were all determined *after* the constitutional amendment and the legislation adopted in pursuance thereof, and without regard to the opinion of the Supreme Court of the United States in *Nectow v. City of Cambridge*, decided May 28, 1928, 72 L. Ed. 520.

If a *mere* increase in fire hazard is sufficient to warrant interference by a municipality with the use of land, then there is no limit to which such interference can be carried, for almost every industry has a different fire hazard from any other industry and almost every building used for residential purposes has, in fact, a fire hazard different from other buildings used for the same purpose.

The *real purpose* of restricting the land of appellant to residential use is indicated by respondents on p. 43 when they say "and with a view of *conserving the value of property and encouraging the most appropriate use of land throughout such municipality.*" This is but another way of saying that *private property can be taken for private purposes without compensation.*

Respondents at p. 43 of their brief reiterate that "The Town of Belleville, under a *valid* ordinance imposed reasonable restrictions upon the use of the land of the appellant." There are but two grounds upon which it can be contended that the application of the ordinance to the lands of appellant could be sustained, prior to the adoption of the constitutional amendment and the legislation in pursuance thereof, (1) Fire hazard; (2) To conserve the value of surrounding property.

But neither of these grounds were sufficient.

Ingersoll v. Village of South Orange, 3 Misc. 334, 128 Atl. 393;

Eaton v. Village of South Orange, 130 Atl. 362, 3 Misc. 956.

And other cases referred to on p. 25 of our original brief.

The ordinance, therefore, at the time of its adoption and at the time appellant commenced the use, so far as its application to it was concerned, was *not* legal and appellant had a legal status in its use of the land.

Respectfully submitted,

JAMES LARKIN HUGHES,

MERRITT LANE,

Of Counsel with Appellant.

New Jersey Court of Errors and Appeals

FRANK J. DURKIN LUMBER
COMPANY,

Prosecutor-Appellant,

vs.

GEORGE FITZSIMMONS, Recorder
of the Town of Belleville, and
THE TOWN OF BELLEVILLE,

Respondents.

*On Appeal
from Judgment of
Supreme
Court in
Certiorari.*

*Sat Below:
MINTURN,
BLACK and
CAMPBELL,
JJ.*

BRIEF OF APPELLANT.

(Italics, etc., mine, except where otherwise noted.)

The Case.

This is an appeal to review a judgment of the Supreme Court (p. 124), entered on the opinion of the Court (p. 121) affirming a conviction, upon review ^{by} ~~of~~ certiorari, of appellant by the Recorder of the Town of Belleville for violation of Section 14 of the Zoning Ordinance of that town, adopted September 3, 1923, the complaint being that appellant maintained on its premises a lumber pile which it used in connection with its lumber business carried on in another part of the premises, located in the Town of Bloomfield and that the maintenance of such lumber pile and use thereof was the use of the premises as "a building material storage yard," which use was prohibited in "A" residence zone established by the ordinance, the premises in Belleville lying within that zone (Complaint, p. 2) (Ordinance, p. 52).

Testimony was taken before the Recorder. Attempts were made by appellant to prove facts which would indicate that to apply the terms of the ordinance to appellant under the circumstances would be to deprive it of its property without due process of law within the meaning both of the Federal and State Constitutions and to take its property for public purposes without compensation within the meaning of the State constitution. The Court overruled most of the testimony upon the ground that it could not determine any question arising under either constitution. The result was a determination that appellant had violated the ordinance on the 1st, 7th, 12th, 14th, 16th and 19th days of March, 1928, in that "it had used said premises for the storage of lumber as prohibited in Section 14 of the above-named ordinance." Appellant was fined \$150.00 and directed to remove the violation within sixty days (p. 37).

Application was made to the Chief Justice for a Writ of Certiorari and denied. The application was renewed to the Supreme Court and granted with leave to take depositions. Depositions bearing upon the constitutional questions involved were taken.

In the Supreme Court nineteen reasons for reversal were filed, but the argument was, as stated in the opinion of that court (p. 122) confined to five heads and will be so confined here.

The purpose of filing the numerous reasons was to satisfy the rule of the federal courts that the application of the Constitution of the United States, to be reviewable, must be clearly set forth in its various aspects. Eight of the reasons filed have to do with the application of the Constitution of the United States and of the

State of New Jersey and all are argued under Point I.

THE POINTS INVOLVED.

POINT I.

If the Ordinance is given an effect to prevent the use of appellant's land now made by it, appellant will be deprived of its property without due process of law in violation of the rights secured to it both by the Constitution of the United States and of the State of New Jersey and the property of appellant will be also taken for public purposes without compensation within the meaning of the State Constitution.

POINT II.

If the Ordinance is to be construed as prohibiting appellant from making use of the land in the manner complained of there was no justification under any statute existing at the time of the passage of the Ordinance, nor at the time of the commencement of the use and neither the amendment to the Constitution nor any legislation adopted in pursuance thereof can retroactively affect the situation.

POINT III.

No permit was required under the terms of the Ordinance for storing lumber upon appellant's land.

POINT IV.

The municipality was without power under the law to require a permit for the use of appellant's land for the piling of lumber. The Ordinance cannot be sustained under Section VI of the Zoning Act of 1924 continuing ordinances theretofore adopted in full force and effect.

POINT V.

If the Ordinance is designed to prevent the use of appellant's land for the purpose of piling lumber, it cannot be sustained under either the Zoning Amendment or the act adopted in pursuance thereof, Chapter 274 of the Laws of 1928, page 696.

POINT VI.

If the piling of lumber upon appellant's land is to be considered within the terms of the Zoning Act of 1928 and within the terms of the ordinance of Belleville, then it was a non-conforming use or structure within the meaning of Section 11 of the Act of 1928.

The Facts.

The plot of ground owned by appellant lies partly in Belleville and partly in Bloomfield. It is shown on the blue print (Exhibit D. 1). The property has no street frontage except on Belleville avenue along which it runs (It touches on its easterly side Pleasant avenue at Smallwood, but that touching cannot be considered a frontage) 113.23 feet in Bloomfield and 69.02 feet in Belleville. It runs on an angle from Bloomfield avenue. It has a depth on its easterly side, which is in Belleville, of 556.08 feet and runs to

the Greenwood Lake Division of the Erie Railroad and thence westerly along that railroad 217.04 feet, all in Belleville. It then runs northerly, still in Belleville, for a distance which we should approximate at 60 feet, more or less, and then crosses the line dividing Belleville from Boomfield on an angle, and continues for approximately 250 feet on different angles to Belleville avenue in Bloomfield. The result is that, if the property be divided between that portion lying in Belleville and that portion lying in Bloomfield, a gored-shaped piece is left in Bloomfield with a street frontage of 113.23 feet, with a depth of approximately 250 feet, tapering to a point, with no access to the railroad and there is left in Belleville another peculiarly shaped piece with a street frontage of only 69.02 feet and a depth of 556.08 feet and a rear along the Greenwood Lake Division of the Erie Railroad of 217 feet.

The property as a whole constitutes a single tract and has been in the same ownership *as a single tract* since 1910 (p. 51).

The Greenwood Lake Division of the Erie Railroad has been in existence for many years and the property *has had railroad facilities for many years*. The property was purchased by the predecessor in title of appellant, the Ecks Dynamo and Motor Company in 1910 *for industrial use* (p. 60). This was long before any zoning ordinance. Appellant purchased the property on June 29th, 1926 (pp. 28, 49, 51) as a single tract and paid \$22,500 for it. At the time of the purchase it was vacant.

The portion of the property in Bloomfield upon which appellant conducts its lumber business is zoned *in an industrial district*. The part

of the property which lies in Belleville, by the Zoning Ordinance of Belleville of September 3, 1923, is zoned in "A" residential district. The property appears on the building zone map of Belleville, part of the ordinance (Exhibit P. 1) at the place marked "X," lying next to Bloomfield and just north of the railroad. The land immediately opposite, across the railroad track in Belleville, has had some vicissitudes as to zoning. By the ordinance of September 3, 1923, it was zoned *industrial*; on April 22, 1924, it was zoned *residence*; on November 25, 1924, it was changed to *industrial*; on April 5, 1927, it was changed to *residential*. In the meantime, even after it has been zoned residential, *industrial use was permitted* (Exhibit D. 6, testimony, pp. 29, 35, 20). It is clear from an inspection of the plottings, Exhibits R. 1 and R. 2 and the testimony of the town's witnesses (Blank, p. 68) and (Thompson, p. 83), that *it is useless save for industrial purposes*. Thompson says, referring to this land to the south of the Erie Railroad Q *It is an industrial section?* A *It is*.

We note here that under the term "Industrial Zone" as used in the Belleville ordinance, there is included heavy industrial uses, there being no zone provided for in the ordinance permitting any uses of a more obnoxious nature than those permitted in the industrial zone. Lumber yards are permitted in a *business zone* (Sections 3 and 4 of the ordinance, Exhibit P. 1).

The surroundings of the property of appellant are indicated by the photograph, Exhibit D. 2, shows the office of appellant located at Belleville avenue in Bloomfield. The line of Belleville is to the left of all of the structures shown upon this photograph. Some of the uncovered piles of lumber are in Belleville (p. 17).

Exhibit D. 3 is a photograph taken from a point at the rear of appellant's property along the railroad looking east. The property shown is in Belleville and the lumber pile on the extreme left of the photograph is on appellant's property in Belleville (p. 18).

Exhibit D. 4 is a photograph taken from the side of the railroad track opposite appellant's property and shows the property partly in Belleville and partly in Bloomfield. A part of the lumber piles are on the property in Belleville (p. 18).

Exhibit D. 5 is a photograph taken from appellant's property, of the land opposite on Belleville avenue. The Belleville line runs about at the point where the fire hydrant appears. The greenhouses are in Belleville and the residences which are shown on the photograph to the right are more than 600 feet from appellant's property (p. 19).

Exhibit D. 7 was taken from a point on Belleville avenue opposite the property of appellant. The property of appellant is to the right of a telegraph pole and extends about 20 feet to the left of the pole. The street shown intersecting Belleville avenue is Pleasant avenue. The structure on the property adjoining appellant's is a real estate office. The nearest residence to the line of appellant's property is approximately 600 feet. The house which is shown on the corner of Belleville and Pleasant avenues was erected after the lumber yard was established (p. 21).

Exhibit D. 8 is a photograph taken from approximately the same point except that it shows a part of the lumber pile of appellant to the right of the photograph (p. 22).

Exhibit D. 9 is a photograph taken from the opposite side of the street from appellant's property, the camera being in Belleville and shows the property adjoining appellant's property in Bloomfield. The lumber on the extreme left of the photograph is that of appellant and is in Bloomfield. A public garage adjoins the property of appellant in Bloomfield (p. 23).

Exhibit D. 10 is a photograph taken from a point on Pleasant avenue in Belleville to the east of appellant's property looking toward appellant's property and Belleville avenue, and shows the office of appellant located in Bloomfield on Belleville avenue. The lumber pile on the extreme left, or part of it, is in Belleville. All of the structures are in Bloomfield (p. 23).

Exhibit D. 11 is a photograph taken at a point on the railroad track opposite about the middle of appellant's property. All of the property shown in the photograph is in Belleville. The factory is that of the National Grain and Yeast Company which is located about 600 feet from the middle of appellant's property. There are a group of factories, as indicated by the photograph. Alcohol is manufactured (p. 24). The property adjoining that of appellant is clearly indicated by this photograph as devoted *either to industrial use or vacant acreage available only for industrial use.*

Exhibit D. 12 is a photograph taken from the railroad track showing a factory adjoining the property of appellant to the west located in Bloomfield. *It belongs to a chemical company manufacturing colors and has been in existence over twenty years.* The lumber pile which appears on the extreme right, over the top of the structure of the chemical company, belongs to

appellant and is located in Belleville. *A part of the chemical company's property extends over into Belleville at the point on the blue print (Exhibit D. 1) where the gore is shown formed by the intersection of appellant's property line and the line dividing Bloomfield and Belleville and adjoining the Greenwood Lake Division of the Erie Railroad (p. 26).*

Appellant maintains no structures in Belleville (testimony of the Acting Building Inspector of Belleville, Williams (p. 9), and of the Assistant Town Engineer, Lindsley (p. 10). It has not, and has not had, any lumber piled on that portion of its property in Belleville nearer than 180 feet of the street (p. 13). The piles are about 330 feet long and 40 feet wide (p. 14). The amount piled on the Belleville part of the property is about forty per cent. of the stock carried by appellant (p. 14).

Appellant could not carry on its lumber business upon any part of the property without using a part of the property in Belleville for the purpose of storing lumber.

The property is available *only for business purposes* and its use for business purposes is confined to lumber yards, factories or some industrial purpose requiring small street frontage and large storage facilities, and this applies to the property whether considered as separated into that located in Bloomfield and that located in Belleville, or whether considered as one plot (p. 13).

Appellant took depositions and produced two real estate experts as witnesses, who testified, Robinson (p. 40) and Roddy (p. 44) that: the property was available for *industrial purposes only*; there was no way by which it could be ad-

vantageously developed for residential purposes; its value for residential purposes, considering both tracts in Bloomfield and Belleville as one, was not in excess of \$9,000; *it was peculiarly adaptable for industrial purposes*; its value for industrial purposes was approximately \$21,000.

The fact is that the property was purchased by the predecessor in title of appellant, long before any zoning ordinance, *for industrial use* (p. 60).

The witnesses go into details as to the reasons for their judgment and it is quite apparent, from an inspection of the map, which shows the location of this property, and an inspection of the photographs, which show its surroundings, that its use is *industrial*.

In an effort to offset this testimony the Town produced the Town Engineer, Blank (p. 61), and a real estate man, Thompson (p. 75). We do not intend to consider their testimony in detail. The Town Engineer's testimony is of no value whatever for he shows no familiarity with the subject and is forced to admit that the highest use of this property is *not* residential.

He says:

"Q There is a chemical plant immediately adjacent? A Yes.

Q The property of the chemical plant goes right over and adjoins the line of the Durkin property, does it not? A That is right.

Q You think the best use that can be made of that property is to put a residence up against that chemical plant? You would consider that is the best use that can be made of that plot of ground to put a residence up against the chemical factory? A I see no reason why it could not be. The chemical plant would not be there a great many years.

Q It is used now? A It is.

Q And you think the best use that can be made of that is to put a residence up against that chemical plant, is that right? I don't care whether you answer that question yes or no. A *No, it is not probably the best use at that particular line.*

Q Nor is it the best use that can be made of that property if you put a residence 40 feet removed either, is it? A *No, it is not.*

Q Nor to put a residence at any point from your new proposed Smallwood avenue across that line towards that chemical plant, a distance of two hundred feet, is it? A Well, the further away you get the more—

Q Two hundred feet is not very far away from a chemical plant, is it? A *No, it is not.*

Q *It is not far enough away to avoid the influence of that chemical plant if used as a residential property, is it?* A *No.*

Q *Nor is it generally considered to be the best available use of land abutting on a railroad to use it for residential property?* A *No, it is not."*

The real estate expert produced by the Town, while he says that the property may be developed for residential purposes (p. 75) indicates clearly that he has not made a sufficient study of the subject to make his testimony of any value (pp. 87, 99). He admits that whether this property can be advantageously developed for residential purposes depends upon the return which one may obtain upon his investment and that rate of return depends upon the cost of the improvement, the cost to make the land available for residential purposes, to wit, the cost of extending Smallwood avenue and the cost of bringing in a new sewer, and also the cost of constructing the buildings and what one would expect to receive for the buildings when constructed, but he says that he has *no knowledge of any of these elements*, and

yet he pretends to say that the land can be developed for residential purposes (pp. 103, 104).

It is this kind of testimony upon which the town relied when it make its statement in the brief in the Supreme Court: "The prosecutor's lands are, therefore, pre-eminently fitted for residential development."

The witness says, in effect, that this land may be developed advantageously for residential purposes notwithstanding the fact that there is a chemical factory and an industrial zone abutting the property immediately to the west, and that there are industries to the south and that any kind of industry may come in, and yet he says that *the extension of the industrial zone in Belleville to Pleasant avenue would depreciate the value of the property to the east of Pleasant avenue for residential purposes* (pp. 93, 94). It is quite apparent that both statements of the witness *cannot be true*. He is finally forced to admit (p. 97) that industries may come in, both to the south and to the west of this property, in view of the present use to which that property is put and its zoning, which *would kill the Durkin property for residential use* and he adds that it would not only kill that property for residential use but would also affect the value of the property to the east of Pleasant avenue, now devoted to residential use, for such use. But he insists, without knowledge as to any of the elements involved, that the Durkin property, with this prospective use of the property to the south and west of it for industrial purposes so that its value for residential use may be completely killed, should be devoted to use for residential purposes, and he insists that the use of that property for industrial purposes will depreciate the value of the property to the east of Pleasant avenue for

residential use, although he concedes that, at *any* time, the property to the west and south of the Durkin property may be used for such industrial purposes as will kill the value of the property to the east of Pleasant avenue for residential use (pp. 96, 97).

He says:

“Q You have told me that industries might come to the south which would kill the value of land to the north for residential purposes. To the west of the Durkin property we have a zone for industrial purposes where any industry may come. May not industries be established there which would kill the value of the Durkin property for residential purposes? A *If such a concern was established in this industrial zone to the west of the Durkin property, it would not only affect the Durkin property, but all the other property.*

Q *So that all the property there now lies subject to that, including that to the east of Pleasant avenue?* A *It does.*

Q Still you think with that staring a man in the face, the property to the west, zoned for industrial purposes, into which such industries may come, he is going to put up money to put into a residence? A I do at the present time, Mr. Lane.

Q Dealers look to the future, don't they?

A Some of them do.

Q They should, if they don't, shouldn't they? A Yes.

Q A careful developer would, wouldn't he? A I would say yes to that question.

Q Here you have a piece of land being zoned in which an industry may come which you say might kill and affect not only it but also property to the east of Pleasant avenue, and yet you say a reasonable ~~sale~~ *use* of that land would be to put money in there and develop it for residential purposes? A I do. It is residentially zoned now.

Q How about the future? A The future is something no one can tell about, in my opinion."

The net effect of his testimony is that the use of the Durkin property for industrial purposes will no more affect the value of the property to the east of Pleasant avenue for residential use than the establishment of such industries as may now be established to the south and west of the Durkin property will affect the value of the property to the east of Pleasant avenue for residential use.

We ask the Court to read the testimony of these two experts.

A sufficient answer is found to the testimony of these experts for the town in the physical layout of the property and its surroundings, and the application of common sense to these physical facts.

ARGUMENT.

POINT I.

If the Ordinance is given an effect to prevent the use of appellant's land now made by it, appellant will be deprived of its property without due process of law in violation of the rights secured to it both by the Constitution of the United States and of the State of New Jersey and the property of appellant will also be taken for public purposes without compensation within the meaning of the State constitution.

The application of the Constitution of the United States and of the State of New Jersey are separate matters but will be argued together.

The rights secured to appellant under the due process clause of the Constitution of the

United States cannot be affected by the* provisions of the zoning amendment to the Constitution of New Jersey. A provision of the Constitution of the State, the effect of which is to deprive a person of property without due process, is as obnoxious to the Federal Constitution as is a State law or a municipal ordinance.

Miss. & M. R. Co. v. McClur, 10 Wall. 511, 19 L. Ed. 997.

White v. Hart, 13 Wall. 646, 20 L. Ed. 685.

Houston v. S. C. R. Co., 170 U. S. 243; 42 L. Ed. 1023.

This case is within the principle of *Nectow v. the City of Cambridge*, decided May, 1928, by the Supreme Court of the United States, 72 L. Ed. 520, U. S. Supreme Court Adv. Opinions No. 13, June 1, 1928, p. 520.

The Supreme Court in this latter opinion has indicated the restriction to be placed upon what was said by the same court in *Euclid v. Ambler Realty Co.*, 272 U. S. 365; 71 L. Ed. 303, and has indicated that the construction put upon the Euclid case by this Court in *Oxford Construction Co. v. Orange*, 5 N. J. Adv. Rep. 729, 137 Atl. 545, is correct.

The Nectow case involved a zoning ordinance of Cambridge, which was of the usual kind, dividing the city into three districts, residential, business and unrestricted. The land of the plaintiff-in-error in the Supreme Court of the United States was in residence district R-3, in which was permitted *only* dwellings, hotels, clubs, churches, schools, philanthropic institutions, greenhouses and gardening, with customary incidental accessories. The suit was instituted in the State Court for a mandatory injunction, commanding the city to grant a permit for the plaintiff-in-

error to erect any lawful buildings upon a tract of land *without regard for the provisions of the ordinance including such tract within a residential district*. The State Court denied the application, whereupon a writ of error was taken to the Supreme Court of the United States. The basis of the ground of relief was that the plaintiff-in-error was deprived of his property without due process of law. The Supreme Court, in a unanimous opinion by Mr. Justice Sutherland, reversed the State Court. It stated the facts, which indicated that the territory lying east and south of plaintiff's land was unrestricted and that there were factories in the neighborhood. The Master in the State Court found as a fact "that no practical use can be made of the land in question for residential purposes, because among other reasons herein related, *there would not be adequate return on the amount of any investment for the development of the property.*" The Master further said:

"I am satisfied that the districting of the plaintiff's land in a residence district would not promote the health, safety, convenience and general welfare of the inhabitants of that part of the defendant city, taking into account the natural development thereof and the character of the district and the resulting benefit to accrue to the whole city and I so find."

The Supreme Court said:

"It is made pretty clear that *because of the industrial and railroad purposes to which the immediately adjoining lands to the south and east have been devoted and for which they are zoned, the locus is of comparatively little value for the limited uses permitted by the ordinance.*"

Stating the law, the Supreme Court said:

"The governmental power to interfere by zoning regulations with the general rights

of the land owner by restricting the character of his use, is *not unlimited* and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare."

The Court concluded:

"That the invasion of the property of plaintiff-in-error was serious and highly injurious is clearly established; and, since a necessary basis for the support of that invasion is wanting, the action of the zoning authorities comes within the ban of the 14th Amendment and cannot be sustained."

This decision of the Supreme Court of the United States indicates that the construction put by this court in the case of *Oxford Construction Co. v. Orange*, 5 N. J. Adv. Rep., p. 729, 137 Atl. 545, upon the Euclid case is precisely correct, and indicates further that the constitutional amendment with respect to zoning *has added nothing whatever to the power of the Legislature and that the decisions of this court and of the Supreme Court of this State delivered prior to the adoption of the constitutional amendment, Oxford Construction Co. v. Orange*, 5 N. J. Adv. Rep. 729; 137 Atl. 545; *Ignaciunas v. Risley*, 98 N. J. L. 712, 121 Atl. 783, affirmed *sub nom State v. Nutley*, 99 N. J. L. 389; 125 Atl. 121; and many others; are still controlling, the only difference being that their application is now to the "due process" clause of the Constitution of the United States and not to the Constitution of New Jersey or the terms of the statute upon which the power to zone is based.

The testimony in this case shows that it is strikingly similar in its facts to the Nectow case. We have already considered the testimony in the statement of facts. The land of appel-

lant is comparatively useless except for industrial purposes and it has industrial uses so near to it on two sides (as in the Nectow case) as that its development for residential purposes is not to be thought of as a business proposition. The effect of the enforcement of the ordinance would be to split the property of appellant, consisting of one tract, into two parts, leaving one part within Bloomfield zoned in an industrial district and *now used for industrial purposes and useless for residential purposes because of the zoning*, and another tract in Belleville, with a frontage of but 69 feet on a street and with a depth of in excess of 500 feet, with a frontage on a railroad of 217 feet in the rear, *useless for anything except industrial purposes*.

It would deprive appellant of access to the railroad for that portion of the land left in Bloomfield zoned to industrial uses. Appellant paid for the land, as a whole, \$22,500 in 1926. The evidence shows that it is worth about that sum as a whole for industrial purposes (p. 47) without taking into consideration the improvements put upon the Bloomfield portion. If appellant is to be prevented from using that portion in Belleville for industrial purposes, the value of the tract left in Belleville will be reduced from approximately \$16,000 (its value as used in conjunction with the tract in Bloomfield) to \$4,000 or \$5,000; the Bloomfield part could not be used for industrial purposes and the value of the improvements upon the Bloomfield tract would be destroyed.

The Supreme Court of the United States in the Nectow case approved the statement of the Master that no *practical* use of the land in question for residential purposes could be made, based upon the fact "there would not be adequate

return on the amount of any investment for the development of the property.”

The Town, in its brief in the court below, attempted to distinguish the facts in the Nectow case from those in the case at bar. It said that, in the Nectow case, the property restricted was an isolated plot, cut off from the rest of the residential district, and having factories and railroads “immediately adjoining.” The fact is that the location in the Nectow case was *not* isolated and cut off from the rest of the residential district. The Supreme Court said. (72 L. Ed. 522):

“The boundary line of the residential district before reaching the locus runs for some distance along the streets, and to exclude the locus from the residential district requires only that such line shall be continued 100 feet further along Henry street and thence south along Brookline street.”

The locus in the Nectow case (72 L. Ed. 521) had, as the locus in the case at bar, on one of its sides, a residential district and on two of its sides either an industrial district or an unrestricted district.

In the case at bar not only does the line of the residential district cut the property of appellant in two but it also cuts the block in two, as in the Nectow case.

Respondent in its brief below contended that there was a distinction because, in the Nectow case, the lands of prosecutor were subject to one jurisdiction, whereas, the land in the case at bar is subject to two jurisdictions.

What difference that can make in the application of the 14th Amendment of the Federal Constitution or of the Constitution of New Jersey we do not see. What we are dealing with are physi-

cal facts, and if, as a physical fact, the land of appellant is cut in two and, as a physical fact is partly in an industrial zone in one municipality, a physical situation is created which makes zoning of that portion of it in the other municipality for residential purposes a taking of property without due process of law.

(*Buell v. Ball*, 20 Iowa 282;
(*Covington v. Southgate*, 15 B. Mar. 492.)

The Constitution of the United States recognizes *state* but *not municipal* lines.

The respondent insisted in its brief in the court below that it was not the enforcement of the ordinance which would affect a severance of the property but that appellant accepted such severance when it purchased a piece of property extending into two municipalities "which property had been cut into two very irregularly shaped plots by the dividing line between the two municipalities, prosecutor being chargeable with the knowledge of said fact and also of the knowledge of the varying regulations in each municipality."

The answer is that the State cannot, by laying out municipalities, cut lands into parcels and authorize the municipalities to adopt such regulations as will destroy the value of the land dependent upon the physical fact.

The State cannot, by extending the boundary of a city to include farm lands, subject such lands to taxation for city purposes.

Desty on Taxation, Vol. 1, p. 287.

Again, respondent in the court below in its brief, distinguishes the *Nectow* case by pointing to the fact that, in that case, prior to the adoption of the zoning ordinance, the owner of the prem-

ises had entered into a contract for the sale of the plot, whereas, in the case at bar, the zoning ordinance of the Town of Belleville had been in effect two years and four months *prior to the purchase of the premises in question by the Durkin Lumber Company.*

The answer to this is that the right to contract is as valuable as is an actual contract and is equally protected by the fourteenth amendment. It is property.

Allgeyer v. Louisiana, 179 U. S. 578; 41 L. Ed. 832

A further answer to this contention is, as well as to the contention that appellant purchased with knowledge that the property was divided into parcels by the dividing line between the municipalities, that it is immaterial, under the fourteenth amendment, whether appellant purchased before the passage of the zoning ordinance, or before or after the lines of the municipalities were laid out. *Ignacionas v. Risley*, 98 N.J.L. 7.

The principle of these cases is applicable to the effect of the fourteenth amendment.

Respondent also urged in the court below, in its brief, that—"the premises in question were a part of and entirely surrounded (in Belleville) by a residential district in which a high-class development was going on * * * and the value of prosecutor's premises for residential purposes exceed its value for industrial purposes."

The fact is that appellant's property on one side, true in Bloomfield, is entirely industrial, and so zoned, and that on one side, in Belleville, across the railroad track, while the land is now zoned residential, receiving that zoning only on

April 5, 1927, having been zoned industrial on November 25, 1924, and remaining so until April 5, 1927, industries have been established, and, according to the testimony of respondent's own witness, Thompson, the section is industrial. Zoning can have no effect upon a physical situation now existent.

It is *not* the fact that the property is more valuable for residential purposes than for industrial use nor is it the fact that that portion of the residential district adjoining appellant's land is a high class development.

The only evidence of any probative value in the case is that the value of the land for industrial purposes is \$21,000 and that its value for residential purposes is not in excess of \$9,000. See the discussion of the evidence p. 10 of this brief.

It will be observed that the application of the property owner in the Nectow case, which was sustained by the Supreme Court of the United States, was an application

"for a permit to erect *any* lawful buildings upon a tract of land *without regard to the provisions of the ordinance including such tract within a residential district.*"

The Supreme Court of the United States in *State of Washington, ex rel. Seattle Title Trust Company v. Roberge*, decided November 19, 1928, No. 3 United States Supreme Court Advance Opinions, 73 L. Ed. 39, reaffirmed what it had said in the Nectow case, repeating almost exactly what this court had said prior to the adoption of our constitutional amendment:

"The governmental power to interfere by zoning regulations with the general rights of the landowner by restricting the character of his use, is not unlimited and, other ques-

tions aside, *such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals or general welfare.* * * * "Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities."

After all, the remarks of the Supreme Court of the United States in rendering this opinion in *Euclid v. Ambler Realty Co.*, 272 U. S. 380; 71 L. Ed. 303, makes that opinion of little weight as a precedent in a particular case. The Supreme Court said:

"It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable."

And again:

"What would be the effect of a restraint imposed by one or more of the innumerable provisions of the ordinance, considered apart, upon the value or marketability of the lands is neither disclosed by the bill nor by the evidence, and we are afforded no basis, apart from mere speculation, upon which to rest a conclusion that it or they would have any appreciable effect upon those matters. Under these circumstances, therefore, it is enough for us to determine, as we do, that the ordinance in its general scope and dominant features, so far as its provisions are here involved, is a valid exercise of authority, leaving other provisions to be dealt with as cases arise directly involving them."

Under the ordinance of Belleville, Section 3, the zone next in order to a residence zone is a

business zone, and, in a business zone, there are permitted coal, coke, *lumber* or wood yards. Unless, therefore, there is a reason why *all* business or industrial use should be excluded from the property of appellant having a *substantial* relation to the public health, safety, morals or general welfare, there is no reason why the particular use made by Prosecutor of the land in Belleville should be prohibited for *not only is the piling of lumber permitted in the next zone, i. e., a business zone, but the conduct of a lumber yard, as such, is permitted.*

There is no proof in the case at bar that the fire hazard is at all increased by the presence of appellant's *lumber pile* upon that portion of the land in Belleville. *It could not be increased.* The land in Bloomfield is zoned to industrial uses and lumber is piled upon it and must continue to be piled upon it. Factories adjoin appellant's land, which factories create a high fire hazard, such as the chemical plant adjoining appellant's property at its rear located in Bloomfield, the land of the chemical company, however, extending over the line into Belleville. There are no residences close enough to appellant's lumber pile on the Belleville tract to be affected by any increase of fire hazard (see testimony of Carr, p. 57).

The expert produced by the town (Haywood, p. 71) to testify as to fire hazards says that the rate is raised upon buildings within 50 and 75 feet of a lumber yard, but he concedes that almost *any* business or industrial use causes an increased rate within that radius. A gasoline station increases the rate. There is one adjoining appellant's property in Bloomfield.

The municipality has itself, however, answered any argument as to increase of fire hazard by

placing a lumber yard in the very next zone to an exclusive residence zone, *making no distinction, in matter of fire hazard, between a lumber yard and any other business permitted in the very next zone.* And the proof shows that at least three lumber yards are now located in Belleville in the midst of residences (pp. 58, 71, 72). In its brief in the court below respondent's answer to this statement was that "Said lumber yards, however, are all within an industrial zone." What difference does that make? They are permitted in an industrial zone *in the midst of residences.* A fire hazard, if any to the residences, is not any different whether the residence be in a residence zone or an industrial zone.

But the mere increase of a fire hazard is not sufficient to warrant a restriction in the use of land, *Ingersoll v. Village of South Orange*, 126 Atl. 213, 2 Misc. 882, alternative writ allowed, 128 Atl. 393, 3 Misc. 335, judgment for relator, 130 Atl. 721, 102 N. J. L. 218, affirmed by this court on opinion below, *Eaton v. Village of South Orange*, 130 Atl. 362, 3 Misc. 956. In *Williams v. Gaige*, 130 Atl. 721, 3 Misc. 1095, the Supreme Court, dealing with the matter of an increase of fire hazard due to the erection of a gasoline station, said:

"The last ground urged by the respondent to sustain its refusal to issue a building permit is that the fire hazard would be increased by the erection of the gasoline station at the point proposed and the safety of the public thereby endangered. This argument was considered and held to be unsubstantial in the case of *Ingersoll v. South Orange* (N. J. Sup.), 128 A. 393, affirmed by the Court of Errors and Appeals (N. J. Sup.), 130 A. 721."

Rudensey v. Board of Adjustment of Town of Montclair, 131 Atl. 906, 4 Misc. 103.

In *Karke Realty & Associates v. the Mayor and Aldermen*, 139 Atlantic 55, 5 Adv. 1512, decided October 17, 1927, this Court said:

"The second ground upon which the refusal of the municipality to issue the permit is sought to be justified is that it would increase the fire hazard in that locality. The Supreme Court rightly considered that this contention was without merit, under the doctrine of *Ingersoll v. South Orange*, 128 A. 393; s. c. on appeal (Err. & App.), 130 A. 721 (not yet officially reported)."

The judgment in this case was rendered before the adoption of the zoning amendment to the State constitution. The Court pointed out, as it did in *Robert Realty Co. v. City of Orange*, 139 Atl. 54, 5 Adv. 1514 that the decision *was not affected by that amendment*.

And see *Morgan v. Board of Commissioners*, 139 Atl. 718; 6 Adv. 84 and cases cited.

Respondent disposed of these cases in the court below, some of the decisions being of this court, by the decisions of the Supreme Court since the adoption of the constitutional amendment.

Bouer v. Jersey City, 6 N. J. Misc. 519; 142 Atl. 240.

Fulton v. Mayor and Aldermen of Jersey City, 6 N. J. Misc. 505; 142 Atl. 238.

D'Elia v. Hague, 6 N. J. Misc. 509; 142 Atl. 238.

And the Supreme Court in its opinion, referred to *Koplin v. South Orange*, 6 N. J. Misc. Rep., p. 489; 142 Atl. 235. In each one of these cases the Supreme Court stated that it would permit a molding of the pleadings if it were desired to take the case to this court. So far as we know there has been no decision by this court in any

of these cases and no decision of the Supreme Court, except that in the case at bar, since the Supreme Court of the United States decided *Nectow v. the City of Cambridge* (U. S. Supreme Court, Adv. Opinions 13, June 1, 1928, p. 520); 72 L. Ed. 520.

Each one of the opinions of the Supreme Court referred to by respondent apparently rests upon the view that the constitutional amendment and the statute enacted pursuant to it permit zoning to *any* extent that the municipal authorities may determine. The 14th Amendment is not referred to but it is still in existence.

In the light of the decision of the Supreme Court of the United States in *Nectow v. City of Cambridge*, 72 L. Ed. 520, each one of the decisions preceding our constitutional amendment, notwithstanding our constitutional amendment, is applicable to the present situation for, although in those cases the Court was dealing with the provisions of *our statute* which required that the regulations should be for the purpose of promoting the *public safety, health or welfare*, the Supreme Court of the United States has said that, under the Federal Constitution *any ordinance must have a substantial relation to public health, safety, morals or welfare*.

Respondent also argued in the court below in its brief that Belleville could not permit appellant to use its Belleville property for the purposes of storing lumber "because it would be depriving property owners within the said danger zone of a property right to which they are constitutionally entitled," respondent apparently conceiving that property owners have some constitutional right to prevent the use of property adjoining which would create a greater fire hazard than a residence. No such constitu-

tional right exists. The refusal of the courts, upon application of property owners, to enjoin the use of property for garage purposes is a sufficient answer.

Bourgeois v. Miller, 89 N. J. Eq. 285.

The Supreme Court, in its opinion, seemed to think that, because piles of lumber might fall and thereby injure children (*Vanderbeck v. Hendry*, 34 N. J. L. 467), it was within the power of a municipality to prevent the piling of lumber on property because children, trespassing upon the land, might be injured. *Vanderbeck v. Hendry*, 34 N. J. L. 467 is authority, in effect, for the piling of lumber upon property is *not* a nuisance; it is perfectly legal to pile lumber on property, although that property is subject to being entered by children; there is no liability of the lumber company for an injury suffered by children. Now, lumber is not the only thing which may fall or which may cause injury to children. In a residential district there may be an exposed areaway. Is the use of such an areaway to be prohibited because children may come upon the premises and fall into it? There may be an exposed coal chute on residence property. Is it to be prohibited because children may come upon the property and fall into it? Children have no regard for the imaginary line which separates residential districts from industrial districts and, in a business district in this town, lumber yards may be conducted. For how long a distance away from a residential district must lumber yards be prohibited because children may stray? In the case at bar, immediately adjoining appellant's property it maintains, and rightfully, a lumber yard in Bloomfield *in the same block*. Children have no regard for the imaginary line separating municipalities. To

the south of appellant's property, and bordering it, is a railroad which extends along the rear of this *highly developed* residential district, if the statement of respondent in its brief in the court below is to be taken as correct. Children may play in back yards. This railroad is more dangerous than any pile of lumber can possibly be. The railroad is there as a physical fact.

It is quite clear that it was not because of the supposed fire hazard or because of the danger to children, injected by the Supreme Court, that this property was zoned as it was. It was so zoned because of the view of some one that to permit it to be used for industrial purposes might affect the value of the property to the east in Belleville for residential purposes.

Respondent complained in the court below that although appellant now has its lumber piled some distance back from any street there was no assurance it would not bring its piles nearer to the street. The answer is—let the municipality regulate the distance such piles must be from a street.

And respondent in its brief in the court below quoted, among other things, that portion of Section 5 of Chapter 274 of the Laws of 1928 which permits zoning regulations to be made, with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view of conserving the value of property, and encouraging the most appropriate use of land throughout such municipality, and respondent, at several points in its brief, referred to the effect that might be created upon the value of the lands adjoining. It must be remembered that a street separates the land of appellant from any

built-up residential district. But it has not been held that it is within the police power, under the guise of regulations which have a substantial relation to public health, safety, morals or welfare, to regulate the use of land because of the effect of that use upon the value of other lands for specific purposes.

Appellant's rights under the Constitution of this State are infringed. Appellant commenced to use the property in Belleville for the purpose of piling lumber thereon in 1926, more than a year prior to the adoption of the constitutional amendment. If ~~the~~ use was legal at that time, *it* ~~he~~ cannot be deprived of it without compensation in the public interest by virtue of any constitutional amendment. There has not been excised from our Constitution the provision, which has been held equivalent to the clause of the Constitution of the United States providing for due process, *i. e.*, that all men should have the right to enjoy and defend life and liberty and acquire, possess and protect property.

It is not to be assumed that the people intended, by the constitutional amendment permitting zoning, to authorize the Legislature to prevent a use of property to which the property was put at the time of the adoption of the amendment. *Such a construction of the amendment might permit the Legislature to authorize a municipality to adopt ordinances which would require the destruction of buildings over a wide territory without compensation.*

It would not only make wholly ineffective that provision of our State Constitution which gives every individual the right to acquire, possess and protect property but also that section which provides that private property should not be

taken for public use without just compensation, paragraph 8 of Section 7 of Article 4.

The amendment was intended to speak *prospectively*. It was intended to authorize the Legislature to regulate buildings and structures according to their construction and the nature and extent of their use, *erected subsequent to the passage of any act of the Legislature adopted in pursuance of the amendment*. It could not authorize the Legislature to interfere with existing legal uses without excising the two clauses of the Constitution of New Jersey, to which we have referred, and without offending the Federal Constitution with respect to due process and securing equality of the law.

The Legislature apparently thought there was a distinction, when it placed the constitutional amendment before the people, between the destruction of tangible physical property and a regulation upon the future use of vacant land. Whether there is such a distinction or not is questionable in view of the decision of the Supreme Court of the United States in *Nectow v. Cambridge*, 72 L. Ed. 520, but the question need not be determined here for it is clear that the taking a use of that property from the owner to which it had been legally put prior to the adoption of the constitutional amendment would undoubtedly be a violation of the two clauses of our Constitution to which we have referred and a violation of the Federal Constitution, and moreover a violation of the fundamental concept of our Government which goes deeper even than any express constitutional provision. *Pierce v. Society of Sisters*, 268 U. S. 510, 69 L. Ed. 1070.

Under the Constitution and the statutes as they existed at the time appellant commenced to use

the land in Belleville for the purpose of piling lumber, it had a legal right so to do. It is immaterial whether any ordinance of the Town of Belleville forbade it so to do *unless* that ordinance was a valid exercise of the power of the municipality. Its validity, so far as its effect upon appellant is concerned, *must be judged as of the time it commenced the use. No subsequent validation of the ordinance, either by constitutional amendment or by statute adopted in pursuance thereto, can deprive it of that use.*

Moreover, this land was joined in one ownership as a single plot, and was, in fact, purchased by the predecessor in title of appellant for *industrial use* in 1910, years before any zoning ordinance was thought of (pp. 50, 51, 60).

This case, we submit, therefore, is to be decided as if the constitutional amendment and the act passed in pursuance thereto were not in existence notwithstanding the fact that the offense charged against appellant took place after the adoption of the constitutional amendment.

This reasoning, also, we submit, has an important bearing upon the construction to be put upon both the constitutional amendment and the act adopted in pursuance thereof. We will hereafter indicate that it *may* be construed as prospective in intent, and Section 11 of the act *may* be construed as to permit uses, non-conforming at the time of the passage of the act, to continue. Such a construction is possible and reasonable and is in accord with the fundamental rights of property owners.

POINT II.

If the Ordinance of Belleville is to be construed as prohibiting appellant from making use of the land in the manner complained of there was no justification under any statute existing at the time of the passage of the ordinance, nor at the time of the commencement of the use and neither the Amendment to the Constitution nor any legislation adopted in pursuance thereof can retroactively affect the situation.

The argument under this point has already been made and it is stated here solely as a separate point to direct attention to it. That without the aid of the constitutional amendment and the statute adopted in pursuance thereof the use of the land by appellant in the manner in which it uses it could not be prohibited under any legislation then existing is demonstrated, we submit, by *Ignacinas v. Risley*, 98 N. J. L. 712, 121 Atl. 783, affirmed, *sub nom State v. Nutley*, 99 N. J. L. 389, 125 Atl. 121, and cases following it.

Indeed, from the testimony of the town's witness, Thompson (pp. 91, 92, 107, 108), it would appear that the *real* purpose of preventing appellant from using its land for industrial purposes is that *private* property to the east of Pleasant avenue *might not be reduced in value for residential purposes*. There is no *public* purpose involved. The restriction placed upon appellant in the use of this land is wholly for *private* purposes. The public's safety, health, morals and welfare plays no part. *While private property cannot be taken for public purposes without compensation, private property cannot be taken for private purposes either with or without compensation.*

The restriction upon the use of the land of appellant being illegal when that use was commenced, the use cannot now be prevented under any constitutional amendment, or legislation in pursuance thereof, adopted after the use was commenced without offending the 14th Amendment to the Constitution of the United States.

The Supreme Court of the United States in *Dobbins v. City of Los Angeles*, 195 U. S., p. 222, 49 L. Ed., p. 169, held that the right of the municipality or the Legislature to control the erection and maintenance of *gas works* was *not unlimited* and that an ordinance of a city circumscribing the limitations within which gas works might be erected and maintained, so as to include within the prohibited territory property purchased for that purpose within the district within which gas works were then permitted, without a showing that the public health, safety and welfare required such an act, was invalid, and the Supreme Court said:

“The supreme court of California, as may be gathered from its opinion in this case, based its decision upon the proposition that, as the exercise of the right to control the location and construction of gas works is within the power conferred by the legislature upon the city, the act of the municipality in question cannot be reviewed, because so to do would be a substitution of the judgment of the court for that of the council upon a matter left within the exclusive control of the legislative body. To support this conclusion a citation is made from the opinion of this court in the case of *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77, to the effect that the legislature is the exclusive judge of the propriety of police regulation when the matter is within the scope of its power. The observations of Mr. Chief Justice Waite in that connection had reference to the facts of the particular case and were certainly not

intended to declare the right of either the legislature or a city council to arbitrarily deprive the citizen of rights protected by the Constitution, under the guise of exercising the police powers reserved to the states. It may be admitted that every intendment is to be made in favor of the lawfulness of the exercise of municipal power, making regulations to promote the public health and safety, and that it is not the province of courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community. But notwithstanding this general rule of the law, it is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining *whether the law or ordinance is a lawful exercise of the police power, or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property.*"

And it further said:

"Complying with the terms of the ordinance which was in force when the plaintiff in error was about to begin the erection of the gas works in controversy, a tract of land was purchased within the district wherein the erection of such works was permitted, a contract was entered into for the construction of the works, a considerable sum of money was expended. It may be admitted as being a correct statement of the law as held by the California supreme court that, notwithstanding the grant of the permit, and even after the erection of the works, the city might still, for the protection of the public health and safety, prohibit the fur-

ther maintenance and continuance of such works, and the prosecution of the business, originally harmless, may become, by reason of the manner of its prosecution or a changed condition of the community, a menace to the public health and safety. In other words, the right to exercise the police power is a continuing one, and a business lawful today may, in the future, because of the changed situation, the growth of population, or other causes, become a menace to the public health and welfare, and be required to yield to the public good. *North Western Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.*, 115 U. S. 672, 29 L. Ed. 524, 6 Sup. Ct. Rep. 252. *But the exercise of the police power is subject to judicial review, and property rights cannot be wrongfully destroyed by arbitrary enactment."*

POINT III.

No permit was required under the terms of the Ordinance for storing lumber upon appellant's land.

The ordinance divides the town into five zones: 1. "A" residential zones; 2. "B" residence zones; 3. "C" residence zones; 4, business zones, and 5, industrial zones (section 1) (p. 52). It then provides, with respect to the residence zones, that:

"no building or premises shall be used and no building shall be erected or altered which is arranged, intended or designed to be used except for one or more of the following uses."

The uses include farms, truck gardens, nurseries and greenhouses.

Section 14 provides, that:

"No land shall be occupied or used and no building hereafter erected or altered shall be

occupied or used in a whole or in part for any purpose whatsoever until a certificate of occupancy shall have been issued by the superintendent of buildings, stating that the premises or building complies with all the provisions of this ordinance." * * *

"Certificate of occupancy shall be applied for *at the same time that the building permit* is applied for and shall be issued within ten days after the *erection or alteration of the building* shall have been completed."

No structure or building of any kind is erected upon the property of appellant in Belleville, nor is any business conducted on that property except in the sense that lumber is piled upon it and removed from it in the course of the lumber business conducted by appellant in *Bloomfield*.

The ordinance, considered as a whole, indicates that it was *not intended to apply to the case of a placing of personal property upon land*. The provision for the time that the certificate of occupancy provided for by Section 14 should be applied for indicates that the Town Council had in mind the *erection of a building* for the time fixed for the application is "the *same time that the building permit is applied for*."

The law in effect at the time of the passage of this ordinance was Chapter 162 of the Laws of 1922, P. L. 1922, p. 277, supplementing Chapter 240 of the Laws of 1920. The act gave the municipality power to regulate and restrict the location thereafter of trades, industries and residences and the subsequent location of business designed for a specified use in any designated area.

It is submitted that appellant by piling lumber upon the property in Belleville, to be used

in connection with the lumber business carried on by it in Bloomfield, was *not carrying on a trade or industry in Belleville within the meaning of this statute.*

By the Zoning Act of 1924, 2 Cum. Sup. to Comp. Stat. of N. J., p. 2404, Sec. 136-4200F, (Sec. L), a municipality was given the right:

“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 and other purposes.”

It may be that the language of the Zoning Act of 1924, Section 1, is broader than that of Section 1 of the Act of 1922. The language of Section 1 of the Act of 1924 referred to the use of land *for* trade, industry, residence or other purposes and the language of Section 1 of the Act of 1922 was restricted to the *location* of trades, industries and residences. But with respect to the construction to be put upon this ordinance the Act of 1924 is unimportant as it was adopted after the passage of the ordinance.

POINT IV.

The municipality was without power under the law to require a permit for the use of appellant's land for the piling of lumber. The Ordinance cannot be sustained under Section VI of the Zoning Act of 1924 continuing ordinances theretofore adopted in full force and effect.

By the zoning act of 1924 the municipality was given power to regulate and restrict the

location and use of land for trade, industry, residence or other purposes, 2 Cum. Sup. to Comp. Stat. of N. J., p. 2405, Sec. 136-4200F, and by Section 6 of that act it was 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 or such board of public works.”

We have already argued that under the language of Chapter 162 of the Laws of 1922, P. L. 1922, p. 277, which was in effect at the time of the adoption of the ordinance, granting to municipalities the right to regulate and restrict the *location* thereafter of trades, industries and residences, the municipality had no power to prevent appellant from piling lumber upon the land, and, if that is so, we submit that the ordinance, if construed to affect the situation here present, was void *ab initio* and that *Section 6 of the zoning Act of 1924 was not designed to validate any provision of an ordinance theretofore passed which did not have a basis in the law existing at the time of its passage.* Section 6 provides that:

“All such ordinances shall *remain* in full force and effect, except so far as they shall be inconsistent with the provisions of this act” * * *.

These words are prefaced by the following words:

“Wherever any municipality shall have adopted an ordinance or ordinances for any of the purposes covered by this act, such ordinance or ordinances 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 or such board

of public works to appoint said zoning commission as herein provided."

The words "shall *remain* in full force and effect" indicate that the legislature had in mind an ordinance or the provisions of an ordinance which, prior to the Act of 1924, *had a force and effect*.

The design of the legislature was merely to relieve the municipalities from re-enacting ordinances which had been passed, for any of the purposes referred to in the act, *which the municipality had been justified in passing under pre-existing legislation*.

So far as the Zoning Act of 1924 added to the power of the municipality, it was contemplated that new ordinances should be adopted if the municipality desired to exercise the additional power.

The "giving" of force and effect to ordinances previously adopted, which had no force and effect, is not within the language "*remain* in full force and effect" and not within the intent of the Legislature nor within its power.

POINT V.

If the Ordinance is designed to prevent the use of appellant's land for the purpose of piling lumber, it cannot be sustained under either the Zoning Amendment or the act adopted in pursuance thereto, Chapter 274 of the Laws of 1928, page 696.

The zoning amendment was declared a part of the constitution on October 18, 1927, P. L. 1928, p. 820. It provides:

"The Legislature may enact general laws under which municipalities, other than coun-

ties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, *buildings and structures, according to their construction, and the nature and extent of their use*, and the exercise of such authority shall be deemed to be within the police power of the State. Such laws shall be subject to repeal or alteration by the Legislature."

This amendment was in effect at the time of the commission of the acts complained of in the instant case, *but not at the time of the initial devotion of the land to the use complained of*. The Legislature having specifically provided by amendment to the Constitution for an express grant to the Legislature of power to regulate zoning, *it must be inferred that there is no power in the Legislature beyond the terms of the express grant*.

It has been considered that, after the adoption of the zoning amendment, zoning ordinances are to be considered in the light of that amendment and the validity of the ordinances governed by the terms of the amendment.

The amendment grants power to the Legislature *only* to regulate *buildings and structures, according to their construction* and the nature and extent of *their* use.

The language used indicates that it is confined to *buildings and structures which are in the nature of buildings*. It is only a structure, which is in the nature of a building, which has a "construction" and which has a use which may be regulated as to nature and extent.

The word "use," as applied to a structure, indicates some use exterior to the structure itself. We do not mean that a structure need necessarily be a building. A derrick erected

upon the property, used for the purpose of loading and unloading, might be a structure although not a building. And any number of like instances may be imagined.

In the case at bar we have *no such structure*. All that we have, upon the land in Belleville, is a pile of lumber, which pile of lumber has no "use" whatever. It is placed upon the land and thence removed, no use of it being made in the meantime and it is incapable of use in the meantime.

It is apparent that the restricted language of the constitutional amendment *was not inadvertent, but intentional*. At the time of the adoption of the amendment by the Legislature and its submission to the people, the Zoning Act of 1924 was in effect. It provided 2 Cum. Sup. to Comp. Stat. of N. J. 2405, Sec. 136-4200F, (Sec. 1), in broad language, that the municipality might "regulate the location and *use* of buildings, structures *and lands*." When the constitutional amendment came to be passed, this broad language was cut down to the "limitation and restriction to specified districts and regulating therein *buildings and structures* * * * and the nature and extent of *their* use." There was deliberately omitted the broad language which would give the right to limit the "use of * * * *land*."

If appellant is to be deprived of using its land for the purpose of piling lumber thereon, there is a limitation, not of any building or structure according to *its construction* and the *nature and extent* of *its* use, but a limitation of the *use of land* which is *not* included in the constitutional grant of power.

Chapter 274 of the Laws of 1928, P. L. 1928, p. 696, which was passed by the Legislature in pursuance of the constitutional grant, is *also* limited by its express terms to "*buildings and structures according to their construction and the nature and extent of their use.*"

The third section of the act provides for a grant of power to any municipality of the State to limit and restrict to specified districts *buildings and structures according to their construction and the nature and extent of their use*. Section 3 further provides:

"The authority conferred by this act shall include the right to regulate and restrict the height, number of stories, and sizes of buildings, and other structures, the percentage of lot that may be occupied, the sizes of yards, courts, and other open spaces, the density of population, and the location and use and extent of use of buildings and structures for trade, industry, residence, or other purposes."

Section 4 provides for districts in the language:

"* * * and within such districts it may regulate and restrict the erection, construction and re-construction, alteration, repair, or use of buildings, or other structures.
* * *"

Section 10, which has reference to the enforcement of the act, provides:

"In case any building or structure is erected, constructed, altered, repaired, converted, or maintained, or any building or structure is used in violation of this act, etc., etc."

The words of the act clearly refer to *buildings or structures in the nature thereof*.

The answer of respondent in the court below to this point was that it must be considered that,

notwithstanding the language of the constitutional amendment, the people intended to grant the power to the Legislature to restrict the *use* of land as such. The complete answer to this is—if the people intended it why did they not say so through the constitutional amendment? As already pointed out, at the time of the adoption of the amendment by the Legislature and its submission to the people, the zoning act of 1924 was in effect, which, in express language, provided that municipalities might “regulate the location and *use* of buildings, structures and *lands*.” With this before it, the Legislature submitted to the people the constitutional amendment, which was confined to the grant of power to the Legislature to adopt zoning ordinances to limit and restrict “to specified districts and regulating *therein buildings and structures* according to their construction and the nature and extent of *their use*.”

Under the circumstances, how can this court say that the people intended to grant to the Legislature the power to regulate the *use* of lands as such?

POINT VI.

If the piling of lumber upon appellant's land is to be considered within the terms of the Zoning Act of 1928 and within the terms of the Ordinance of Belleville, then it was a non-conforming use or structure within the meaning of Section 11 of the Act of 1928.

Section 11 of the Act of 1928, reads:

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

Section 7 of the Act of 1928, provides:

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

We have already argued that if the ordinance of Belleville is construed to apply in the instant case that the purpose is not among those set forth in the Act of 1928, for the reason that it is a restriction upon the use of *land* and *not* a restriction upon the construction or nature or extent of the use of a *building* or *structure*. But if it be considered, so far as it affects this case, to be for one of the purposes set forth in the Act of 1928, then, at the time of the adoption of the Act of 1928 and at the time of the adoption of the constitutional amendment, *the use by appellant was a non-conforming use*.

The effect of Section 7 is to give *new* life to the ordinance as of the date of the passage of the Act of 1928, for only by giving it such effect can the ordinance be considered to have been adopted under the provisions of the Act of 1928. Therefore, reading Sections 7 and 11 together, it was, we submit, the Legislature's intent to permit any use to be continued which was in existence at the time of the passage of the act, so far as any ordinance adopted previous to the

passage of the act, and continued in effect by the act, were concerned, and, so far as any subsequent ordinances were concerned, at the time of the passage of such subsequent ordinances.

Conclusion.

It is respectfully submitted that the judgment of the Supreme Court should be reversed and the record remitted to the Supreme Court with directions to set aside the conviction.

Respectfully submitted,

JAMES LARKIN HUGHES,
MERRITT LANE,

Of Counsel for Prosecutor.

New Jersey Court of Errors and Appeals

FRANK J. DURKIN LUMBER COM-
PANY,

Prosecutor-Appellant,

vs.

GEORGE FITZSIMMONS, Recorder
of the Town of Belleville, and
THE TOWN OF BELLEVILLE,
Respondents.

*On Appeal
from Judg-
ment of Su-
preme Court
in Certiorari.*

Sat Below:
MINTURN,
BLACK and
CAMPBELL,
JJ.

BRIEF FOR RESPONDENTS.

Statement of Facts.

(Italics ours except where otherwise noted.)

The Town of Belleville, on September 4, 1923, adopted a zoning ordinance (Exhibit P. 1). Under said ordinance the premises in question together with a large adjoining section, were included in an "A" Residence Zone. This classification still obtains.

In March, 1926, three years subsequent to the adoption of said ordinance, appellant purchased a plot of ground peculiarly situated, approximately one-third of said plot being in Bloomfield and two-thirds in Belleville. That portion of said plot lying in Bloomfield was zoned "Industrial" while that portion in Belleville was zoned "A" Residential. Appellant erected an office on the Bloomfield side of the border line, and commenced the operation of a lumber business, using both the Bloomfield and Belleville sections of this property for the storage of lumber.

Appellant, in its brief, makes numerous references to the alleged "legal" use of the premises in question as a lumber storage yard, by the appellant. Inasmuch as the case contains no proofs that the prior use of the land by appellant was legal, respondents find it incumbent to meet this implication by the brief statement that the legality of appellant's use of said land was never admitted nor recognized by the respondents and that the present conviction now under review is the third conviction of the appellant for the breach of said zoning ordinance, with respect to the use of said land, the two former convictions being of the same nature.

Appellant was charged with a violation of sections two and fourteen of said ordinance in that it did unlawfully use the said premises for a building material storage yard, and further, in that it did occupy and use the said premises for the aforesaid purpose without having first secured a certificate of occupancy therefor. At the conclusion of the trial, the Recorder of the Town of Belleville found the appellant guilty, convicted it of violating the zoning ordinance, and imposed a fine therefor. The conviction came up for review before the Supreme Court, and was affirmed by that court.

The general lay-out of appellant's property can best be seen by reference to Exhibit R. 2. It will be noted from this exhibit that the said property has a frontage on Belleville avenue in both of the said towns, the bulk of appellant's property, however, being in the Town of Belleville. On the easterly side, the premises in question have access to both Smallwood and Pleasant avenues, and also to the public highway paralleling the Erie Railroad and lying between said railroad and the block of residences facing on

Smallwood avenue. The following facts indicate the character of the neighborhood surrounding the appellant's property within the Town of Belleville. Appellant's property within the Town of Belleville is zoned "Residential" and is entirely surrounded by a "Residential" zone. On the northerly and easterly sides of the premises in question, there is a high-grade development of one-family houses. On the south, there is acreage zoned "Residential" (State of Case, p. 35, l. 37 to p. 36, l. 1) extending southerly and easterly from the appellant's land, to a depth of at least (1,000) one thousand feet. In the "Residential" district to the north, there is a greenhouse, which, under the ordinance, is permitted in an "A Residential" zone. To the east of said premises is a high type residential development, together with a small real estate office constructed under a temporary permit permitted by the zoning ordinance. Southeasterly from appellant's property and separated by said "Residential" acreage is a yeast factory one thousand (1,000) feet away, and still further to the southeast, are copper mills approximately two thousand one hundred (2,100) feet away (see Exhibit R. 1). Immediately adjoining the premises in question on the south are the tracks of the Greenwood Lake Division of the Erie Railroad, a passenger line carrying some freight (State of Case, p. 82, l. 38 to l. 18, p. 83).

THE POINTS INVOLVED.

POINT I.

The Belleville Zoning ordinance, as applied to said lands of the appellant, has not violated the "due process" provisions of the United States Constitution; neither has appellant's property

been taken for public purposes without compensation, within the meaning of the New Jersey Constitution.

POINT II.

The prohibition placed upon appellant's said use of its Belleville lands was authorized under the statute which existed at the time of the passage of the ordinance, said authority being subsequently supplemented and strengthened by the zoning amendment and incident legislation.

POINT III.

Appellant was required, under the terms of the zoning ordinance, to secure a permit for the occupation or use to which it has put the said premises.

POINT IV.

The municipality had power under the law to require a certificate of occupancy of the appellant.

POINT V.

The zoning ordinance of the Town of Belleville was valid prior to, and is sustained under, the zoning amendment and the act adopted in pursuance thereto. (Chapter 274 of the Laws of 1928, p. 696.)

POINT VI.

The said use of that portion of appellant's land within the Town of Belleville does not come within the "non-conforming use" authorized in Section II of the 1928 act.

POINT VII.

The zoning ordinance of the Town of Belleville is not unreasonable in its application to the appellant's lands.

ARGUMENT.

POINT ONE.

The Belleville zoning ordinance, as applied to said lands of the appellant, has not violated the "due process" provisions of the United States Constitution; neither has appellant's property been taken for public purposes without compensation, within the meaning of the New Jersey Constitution.

Appellant has dwelt at great length upon the contention that its property has been taken without due process of law and without just compensation, and the case of *Nectow v. The City of Cambridge*, (U. S. Supreme Court, Adv. Opinions 13, June 1, 1928, p. 520; 72 L. Ed. 520) is cited as the outstanding authority in support of this stand, and in appellant's opinion, the *Nectow* decision has so circumscribed the decision in *Euclid v. Ambler Realty Co.*, (272 U. S. 114; 71 L. Ed. 303) as to render ineffective any claim of support, on behalf of the respondents, from the *Euclid* case.

The facts in the *Euclid* case are quite similar to those in the case *sub judice*.

"It is said that the Village of *Euclid* is a mere suburb of the City of Cleveland; that the industrial development of that city has now reached and in some degree extended into the village, and in the obvious course of things will soon absorb the entire area for industrial enterprises; that the effect of the ordinance is to divert this natural de-

velopment elsewhere, with the consequent loss of increased values to the owners of the lands within the village borders. But the village, though physically a suburb of Cleveland, is politically a *separate municipality, with powers of its own and authority to govern itself as it sees fit, within the limits of the organic law of its creation and the state and federal Constitutions*. Its governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined, not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitely fixed lines. If it be a proper exercise of the police power to relegate industrial establishments to localities separated from residential sections, it is not easy to find a sufficient reason for denying the power because the effect of its exercise is to divert an industrial flow from the course which it would follow, to the injury of the residential public, if left alone, to another course where such injury will be obviated. It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way" (*Euclid v. Ambler Realty Co.*, Supreme Court Reporter, 272, page 119, sec. 6).

The dividing line between the Towns of Belleville and Bloomfield divides the premises in question. That portion of said premises within the Town of Belleville is surrounded by a residential zone, extending on the north for a distance of over a mile, on the east approximately one-half mile, and on the south approximately one thousand feet (Exhibit P. 1; State of Case, p. 62, ll. 17-24). The Bloomfield section of appellant's property lies in an industrial zone, and it is the development within this overcrowded in-

dustrial zone that now seeks to reach out and extend into the residential zone of another municipality on the south, namely, Belleville (State of Case, p. 80, ll. 17 to 35).

It is not an arbitrary, unlimited, restriction of industry that the zoning ordinance of Belleville seeks to lay down. Said Belleville zoning ordinance seeks to encourage the location of industries in surroundings that would be most advantageous to themselves, as evidenced by the industrial zones, but the obligation is just as binding upon the municipality to preserve residential zones under development, as this one is from the encroachment of industries which would ignore municipal boundary lines.

The reasoning employed by the Supreme Court in the Euclid case, is equally apropos of the Durkin case.

“The law of nuisances, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of the power. Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart but by considering it in connection with the circumstances and the locality.”

“Here, however, the exclusion is in general terms of all industrial establishments, and it may thereby happen that not only offensive or dangerous industries will be excluded but those which are neither offensive nor dangerous will share the same fate. But this is no more than happens in respect of many practice-forbidding laws which this court has upheld, although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves.

The inclusion of a reasonable margin, to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation. In the light of these considerations, we are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the prescribed class. It cannot be said that the ordinance in this respect 'passes the bounds of reason and assumes the character of a merely arbitrary fiat.' "

In the Euclid case the Court cites with approval, the decision of the Supreme Court of Louisiana, in *State v. City of New Orleans*, (97 So. 444), as follows:

"Aside from considerations of economic administration, in the matter of police and fire protection, street paving, etc., any business establishment is likely to be a genuine nuisance in a neighborhood of residences. Places of business are noisy; they are apt to be disturbing at night; some of them are malodorous; some are unsightly; some are apt to breed rats, mice, roaches, flies, ants, etc., * * * ."

"If the municipal council deemed any of the reasons which have been suggested, or any other substantial reason, a sufficient reason for adopting the ordinance in question, it is not the province of the courts to take issue with the council. We have nothing to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfying to a majority of the citizens, their recourse is to the ballot—not the courts."

Appellant urges that the Nectow case is strikingly similar in its facts to the Durkin case. On the contrary, even a cursory review of the evidence in the two cases will show a striking dissimilarity.

The appellant on page 19 of its brief states as follows:

"The locus in the Nectow case (72 L. Ed. 521) had, as the locus in the case at bar, on one of its sides, a residential district and on two of its sides either an industrial district or an unrestricted district.

In the case at bar not only does the line of the residential district cut the property of appellant in two but it also cuts the block in two, as in the Nectow case."

Both of these statements apply to the Durkin property in its entirety as it extends into both municipalities, and is therefore clearly inapplicable to the case at bar which can only consider such portion of said premises as lies within the confines of Belleville.

In the Nectow case, the plot of ground involved was a small irregular plot situated at the northwest corner of said block within which it was located. With the exception of this small plot, the entire block was in an unrestricted district occupied by factories and railroads. This irregular corner plot had an average width of eighty-eight feet and an average depth of two hundred eighty-four feet. It was proposed to narrow this plot from eighty-eight feet, to sixty-five feet by the widening of Brookline street. It becomes apparent, therefore, that this isolated plot cut off from the rest of the residential district, and having factories and railroads "immediately adjoining," would be of little value for residential purposes, but highly desirable for industrial purposes.

The reason for the Supreme Court's decision in the Nectow case is apparent from the following statement by the Court in rendering its opinion:

"It is made pretty clear that because of the industrial and railroad purposes to which *the immediately adjoining lands* to the south and east have been devoted and for which they are zoned, the locus is of comparatively little value for the limited uses permitted by the ordinance."

That the Nectow decision is therefore applicable, will be apparent from the following comparison of the Nectow case with the case at bar.

In the Durkin case, the premises in question are a part of and entirely surrounded by a residential zone, so far as Belleville is concerned, and the nearest approach of the industrial district to the appellant's land in the Town of Belleville is the yeast factory located one thousand feet away (State of Case, p. 62, ll. 17 to 24. Also see Exhibit R. 1).

In the Nectow case, *prior* to the adoption of the zoning ordinance, the owner of the premises in question had entered into a contract for the sale of said plot together with adjoining property owned by him in said unrestricted district.

In the Durkin case, the zoning ordinance of the Town of Belleville had been in effect two years and four months prior to the purchase of the premises in question by the Durkin Lumber Company.

In the Nectow case, the premises in question and the surrounding lands on all sides were entirely within the municipality concerned, and entirely subject to its jurisdiction.

In the Durkin case, the appellant's property lies partly in the Town of Bloomfield and partly in the Town of Belleville, the lumber office being on that portion within the Town of Bloomfield; the Durkin property being subject therefore to the conflicting jurisdictions of two adjoining municipalities.

In the Nectow case, the plot of ground, detached as it was, and all but surrounded by unrestricted property, was clearly of little value for residential purposes and highly valuable as an industrial site.

In the Durkin case, the premises in question were a part of and entirely surrounded (in Belleville) by a residential district in which a high-class development was going on (Exhibit P. 1; State of Case, p. 35, ll. 35-40; State of Case, p. 82, ll. 13 to 16; p. 85, ll. 22 to 26), and the value of appellant's premises for residential purposes exceeds its value for industrial purposes, namely, twenty-one thousand dollars (\$21,000) (appellant's brief, p. 10, l. 6) and also exceeds the price paid by appellant for said land. (Value of land for residential purposes \$29,000.) (State of Case, p. 75, l. 18, to p. 77, l. 21.)

The decision in the Nectow case, therefore, under the aforesaid conditions would obviously not be applicable to the conditions in the Durkin case.

The Euclid and Nectow cases are one in principle, though involving different sets of facts.

The case of *Oxford Construction Co. v. Orange*, (5 N. J. Adv. Rep. 729; 137 Atl. 545); cited by appellant, is now controlled by the case of *Koplin v. South Orange*, (6 N. J. Misc. Rep. p. 489), *supra*.

Appellant contends that the United States Constitution recognizes State but not Municipal lines, and infers that to permit two adjoining municipalities to exercise, independently, rules and regulation which may be beneficial to the internal welfare of each municipality, but which might, in an instance such as this, work a hardship on the owner of lands which extended over into an adjoining municipality, would be directly violative of the Fourteenth Amendment to the United States Constitution, as depriving one of his property without due process of law. This same principle was involved in both the *Euclid* and the *Nectow* cases. Both of these decisions recognize and uphold the right of municipalities to enact zoning ordinances under the police power, where the application of said ordinances bears a substantial relation to the public health, safety and welfare.

“But the village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit, within the limits of the organic law of its creation and the state and federal Constitutions.” (*Euclid v. Ambler Realty Co.*, 272 U. S. 365; 71 L. Ed. 303.)

Further, the right of a sovereign state to create municipalities and to endow them with the authority to govern themselves, was a right which existed in the sovereign states before the creation of this Union, and a right which was not delegated to the Federal government. It is an attribute of sovereignty.

“The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others, retained by the people.” (9th Amend. to U. S. Constitution.)

“The powers not delegated to the United States by the constitution, nor prohibited by

it to the States, are reserved to the States respectively, or to the people." (10th Amend. to U. S. Constitution.)

Appellant complains that the effect of the enforcement of the ordinance would be to split the property in question into two parts leaving one part within the Town of Bloomfield, zoned in an industrial district and the other part within the Town of Belleville. It is not the enforcement of the ordinance which would affect such a severance of the property. The appellant itself, accepted said severance when it purchased a piece of property extending into two municipalities, which property had been cut into two very irregularly shaped plots by the dividing line between the two municipalities, appellant being chargeable with the knowledge of said fact and also of the knowledge of the varying regulations in each municipality.

There is no merit to the contention of the appellant that because in the Nectow case the application was "for a permit to erect any lawful buildings upon a tract of land without regard to the provisions of an ordinance including such tract within a residential district," that therefore, the Belleville Zoning ordinance, in its application to appellant's land, must fall because the reason for said application does not show a substantial relation to the public health, safety, morals or general welfare. The courts in this state have recognized and upheld zoning ordinances which segregated residential from other districts, as showing a substantial relation to the public health, safety, morals, and general welfare, prior to the recent amendment and legislative enactment, as well as subsequent thereto. A review of the decisions to this effect, prior to said amendment, is unnecessary, and the recent

case of *Koplin v. South Orange*, (6 N. J. Misc. Rep., p. 489), is sufficient authority for the point urged.

Appellant on page 22 of its brief, alleges that the "vacant acreage" in Belleville to the south of the premises in question and separated therefrom by the railroad, is industrial. Such is not the case. This large extent of acreage is zoned residential and prior to its establishment as a residential zone, there were but two evidences of industry existent, namely the Yeast Company's plant which was 1,000 feet distant from the *locus in quo*, and the Copper Mills which were approximately 2,100 feet distant.

Appellant contends that the premises shown in Exhibit D. 6 are industrial. Such is not the case. It will readily be seen that the premises are used for residential purposes and that the three-car garage erected thereon, even though used to house trucks, is permitted under the zoning ordinance of the Town of Belleville.

"A garage or a group of garages for more than three motor vehicles shall not be permitted as an accessory use; but such garage or garages need not be occupied by the motor vehicles owned by the occupant of the premises to come within the definition of an accessory garage. Such garage may not, however, be occupied by any commercial truck except as permitted in Section XII." (Section II, par. 11 of the Zoning Ordinance.)

"Permit the storage of a commercial truck in an accessory garage located in a residence zone." (Section XII, par. 9 of Zoning Ordinance.)

Exhibit D. 9 portrays the conditions in Bloomfield immediately adjoining appellant's land showing the gasoline filling station with the usual accumulation of automobiles, old and new, as

near to the appellant's lumber piles as it would be possible to place them. Exhibit D. 12 portrays conditions in Bloomfield immediately adjacent to appellant's property, showing the chemical factory also immediately adjoining appellant's lumber shed filled with shingles.

Appellant concedes, that by reason of these conditions, there exists in Bloomfield, a high fire hazard along the western line of appellant's property, and that immediately adjoining piles of lumber. (Appellant's brief, p. 24, ll. 16-24.) This fire hazard originates in the Town of Bloomfield, and the Town of Belleville has an absolute right to safe-guard its own peculiar interests and to say that such a fire hazard shall be kept at arm's length and shall stop at the borders of the municipality; that it, the Town of Belleville, is not to be considered a tool nor a matter of convenience for the purpose of advancing the interests of a neighboring municipality by the extension of such a fire hazard over the boundaries into a residential district of Belleville. Under the zoning act of 1928 "*any municipality*" is given the power to regulate zoning within its own boundaries, without regard to the regulations imposed by a neighboring community.

Mention is made of the fact that the said chemical plant's property extends into Belleville, but there is no proof that the small triangular corner of said chemical plant's property lying within Belleville is used for industrial purposes and it will be noted from Exhibit D. 1 that said small triangular piece of land is inconsequential for the purposes of this case.

It has been argued that the extension of the appellant's lumber yard into the Town of Belleville, and the use of its said Belleville property

for the lumber industry, does not constitute a fire hazard, and that neither "are there any residences near enough to the appellant's lumber pile on the Belleville tract to be affected by any increase of fire hazard," and that neither are any of the piles of appellant's lumber near enough to residential districts to affect or to endanger any of the structures in the residential districts at the present time. There is, however, no guaranty that the piles of lumber will not eventually cover every foot of appellant's ground if it be permitted to make such use of the aforesaid land. Further, the said use of said land by appellant would not be the best use to which the said land could be put,

"Such regulation shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for *particular uses*, with a view of *conserving the value of property* and encouraging the *most appropriate use of land* throughout such municipality" (Zoning Act, p. 2, sec. 5).

because such use, instead of being favorable to, or encouraging the development to which the surrounding lands are adaptable, and to which they have been appropriated, would be a deterrent to said development (State of Case, p. 80, ll. 31 to 35). That is a very significant fact, and is borne out by the testimony of both respondents' and appellant's witnesses, to the effect that a lumber yard constitutes a fire hazard and that the "Schedule Rating Bureau of New Jersey which all companies must conform to" has placed a danger zone around a lumber yard, said danger zone being at least one hundred feet in depth and that the insurance rates within that zone increase rapidly in proportion to their proximity to the lumber yard (State of Case p. 58, ll. 16 to 28, p. 59; p. 71, ll. 22 to 38). The Town

of Belleville cannot, therefore, permit the appellant to make such use of its Belleville property for, by so doing, it would be depriving property owners within the said danger zone of a property right to which they are constitutionally entitled. It would unlawfully authorize the taking of private property for private purposes and without just compensation or due process of law.

Appellant would contend that the designation of a lumber yard in the next zone below a residential zone is an admission that no fire hazard is involved, since under said arrangement a lumber yard situated in a business zone might be adjacent to a residential district, and that, therefore, the extension of a lumber yard into a residential district at any other point would not constitute a fire hazard. But the deliberate segregation and classification of lumber yards in the business zone, which is next in order below the "C" residential zone (the lowest grade of residence zone), is sufficient evidence that said classification was made with a view to its substantial relation to the public safety, health, and general welfare, and is, therefore, sufficient to bar it and its influence from any other zone in which it may be prohibited. Such classification is in entire consonance with section 5 of Chapter 274 of the laws of 1928 in that the said regulation is a part of the comprehensive plan designed *inter alia* "to secure safety from fire," and such regulation was made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for residential purposes, and with a view of conserving the value of property and encouraging the most appropriate use of land."

However, the fact that the zoning ordinance may have segregated lumber yards in a zone

next to and below a "C" residence zone, is entirely beside the point, inasmuch as the premises in question are entirely surrounded in the Town of Bloomfield by a residential zone.

Appellant states in its brief that the "proof shows that at least three lumber yards are now located in Belleville, in the midst of residences" (State of Case, p. 72, ll. 1 to 10). Respondents answer this by saying that said lumber yards, however, are all within an industrial zone. To this appellant replies that said fire hazards are recognized and permitted under the zoning ordinance in industrial zones by allowing lumber yards therein. The answer to that is that under the proper exercise of the police power, a municipality is permitted to segregate industries and such fire hazards for the purpose of greater concentration in the regulation and control of traffic attendant upon industry, and for the more affective control of fire hazards with the consequent greater safety to human life by concentrating said hazards in zones or localities where they may be most effectively controlled.

The increase of fire hazard is one of the elements now permitted to be considered by a municipality in districting a municipality for the purpose of zoning, the cases cited by appellant to the contrary not now being in point since the adoption of the aforesaid amendment and legislation. (*Bower v. Jersey City*, Vol. 6, No. 24, N. J. Misc. Rep., page 519; *Fulton v. Mayor and Aldermen of Jersey City*, Vol. 6, No. 24, N. J. Misc. Rep. 505; *D'Elia v. Hague*, Vol. 6, No. 24, N. J. Misc. Rep. 509.) It is urged by the appellant that since the use by it of its Belleville land for said purpose in 1926, prior to the adoption of the constitutional amendment, was legal it cannot now be deprived of said use without com-

pensation. Respondents deny that the use of said land by the appellant was ever legal. Appellant purchased said land and established said use with full knowledge of the restrictions imposed upon said land under the zoning ordinance of the Town of Belleville. It admits that it was informed that it would have to appear before the Board of Adjustment in Belleville because said use was prohibited under the Belleville zoning ordinance. It admits that it never secured from said Board the permit required under said ordinance. (Case, p. 30, l. 22 to p. 31, l. 40; p. 32, ll. 27 to 33; p. 33, ll. 7 to 10).

The present Zoning Act requires, as did all the former acts, that before an applicant could appeal to the courts of New Jersey for relief from the restrictions of an alleged unreasonable zoning ordinance, said applicant must have followed the orderly procedure laid down in said statutes, namely, that of appearing before the Board of Adjustment and placing itself within the jurisdiction of said Board for the purpose of securing from said Board, if possible, a variance of the strict terms of said ordinance. If the present action had been an application for a writ of mandamus to compel the Building Inspector to grant a permit, or for a writ of certiorari, where the applicant had not prosecuted proceedings before the Board of Adjustment, the writs would have been denied and the applicant instructed to appear before said Board, before it could have any legal standing in this court. Appellant did not see fit to follow this procedure and ignored the zoning ordinance of the Town of Belleville and the duly constituted Board of Adjustment, and proceeded to violate said ordinance. After a series of convictions for the violation of said ordinance, it now appeals to this court for ex-

emption from the penalties imposed for the said violations, and for the purpose of having this court now declare unreasonable, the said ordinance, admitting that it deliberately and with full knowledge, refused to avail itself of the privileges and safeguards accorded to it in the "due process of law" aforementioned. Such an action on the part of the appellant cannot give it a standing as to entitle it to recognition before this court. The Belleville zoning ordinance is presumed to be valid. (*Partnoff v. Bigelow*, 133 Atl. 534; *Long v. Scott*, 133 Atl. 767.) The courts alone may determine its validity or unreasonableness. The appellant cannot be permitted to substitute its judgment for the judgment of the court as to the unreasonableness of said ordinance.

POINT TWO.

The prohibition placed upon appellant's said use of its Belleville lands was authorized under the statute which existed at the time of the passage of the ordinance, said authority being subsequently supplemented and strengthened by the zoning amendment and incident legislation.

This point is advanced merely for the purpose of answering appellant's point "two," inasmuch as the question here involved has been previously disposed of.

In support of its point "two," appellant cites the former authority, *Ignaciunas v. Risley*, (98 N. J. L. 712). The line of decisions for which this Nutley case is authority were all decided prior to the passage of the Amendment. Since the adoption of the Zoning Amendment, the case of *Koplin v. South Orange*, (6 N. J. Misc. Rep. p. 489), has superseded the Nutley case, as the outstanding authority.

In the Koplin case, the zoning ordinance had been adopted five years prior to the adoption of the said Amendment. The Court states (section 7):

“The effect of that provision of the statute, adopted pursuant to the constitutional amendment, would seem to be that the provisions of the ordinance of the Village of South Orange (now in question) *as to zoning for residential purposes*, and as to the height of buildings and set-backs, *are deemed to be within the police powers of the state*, if made with reasonable consideration ‘to the character of the *district* and its peculiar suitability for particular *uses*, with a view of conserving the value of property and encouraging the most appropriate *use of land* throughout such municipality,’ and not otherwise unreasonable.”

With reference to the retrospective effect of the 1928 act, the Court states:

“Admitting that the Ordinance does not have a retroactive effect, so far as buildings in the course of erection are concerned, it is clearly applicable where the process of construction has not yet been begun.”

This construction is applicable to the case at bar.

In the Koplin case, the applicant had not undertaken to apply the property in question to the particular use desired.

In the Durkin case, the appellant is in the same position by virtue of the fact that its use of said premises in the manner aforesaid, was illegal *ab initio*. It, therefore, had acquired no legal status which it alleges would have been adversely affected by the retroactive operation of the 1928 act. The Court says in the Koplin case:

“For we believe it to be immaterial whether the changed conditions arise from

an intervening valid municipal ordinance (as in that case) or from a statute enacted pursuant to an amendment of the constitution of the state, as in this case. Under the authority of the Zabriskie case, the writ of mandamus being discretionary, there can be no vested rights that control the exercise of that discretion, unless a permit is issued and work actually commenced thereunder."

Appellant urges that in preventing it from using its land for industrial purposes, that private, not public purposes are involved, namely, the maintenance of values for residential purposes of land to the east of Pleasant avenue; and the testimony of Thompson, a witness for the respondents, is cited (State of Case, pp. 91, 92, 107 and 108). An examination of said testimony shows the appellant to be in error in its interpretation thereof, and the purpose of said ordinance to be public and not private, and must force one of the conclusion that the ordinance in question, in its present application, was reasonable because it considered, among other things, "the character of the district, and its peculiar suitability for particular *uses* * * *" and sought to conserve "the value of adjoining properties and to encourage the most appropriate *use of land*." Thompson testified that the encroachment of the lumber yard on Belleville territory would depreciate the residential value of property to the east and that the preservation of appellant's Belleville property for residential purposes had the effect of stabilizing property values in that zone; that the development of appellant's said land for residential purposes would be a reasonable use of said property.

Appellant urges as one of its reasons, that if the conviction of the appellant under the aforesaid zoning ordinance is sustained by the

Amendment, and the 1928 act, then the said Amendment and act, in their application to this case, would be *ex post facto*. The answer to this is a very brief one. The authorities are all to the effect that "the phrase of '*ex post facto*' in the constitution, extends to criminal and not to civil cases." The present case is a civil and not a criminal case. The violation on which the conviction is based is not a crime within the purview of the statutes, but merely relates to the infringement of a municipal ordinance which provides a penalty therefor. Neither is the Act of 1928 an *ex post facto* law, by reason of the allegation of the appellant that the laws of 1922 and 1924, as they supported the said ordinance, were invalid. This has been sufficiently disproved above.

POINT THREE.

Appellant was required, under the terms of the zoning ordinance, to secure a permit for the occupation or use to which it has put the said premises.

The property in question is in an "A Residential" zone. The aforesaid zoning ordinance prohibits the use of land in an "A Residential" zone for the storage of building material. It is conceded that no structure or building has been erected by the appellant upon that portion of its land in the Town of Belleville, but appellant itself (appellant's brief, Point III), admits the violation of said ordinance in its aforesaid occupation and use of said premises when it states:

"Nor is any business conducted on that property except in the sense that lumber is piled upon it and removed from it in the course of the lumber business conducted by prosecutor in Bloomfield."

Respondents cannot agree that the construction of an office and other structures on appellant's Bloomfield property, and the piling of lumber upon appellant's Belleville property, is such a disassociation from the aforesaid lumber business as to exclude the storage of said lumber in Belleville from the operation of said ordinance. Such contention is mere subterfuge, the piling and storage of lumber being an indispensable integral element of the lumber industry and inseparable from it.

Appellant contends that the "certificate of occupancy required under Section XIV of the zoning ordinance applied only to the occupancy of buildings." Section XIV is very clear and specific in its differentiation between land and buildings (State of Case, p. 56):

"No land shall be occupied or used, and no building hereafter erected or altered shall be occupied or used,"

and again,

"until a certificate of occupancy shall have been issued by the Superintendent of Buildings stating that the premises, or building complies with all the provisions of this ordinance;"

further,

"No building or premises may be occupied until such certificate shall have been issued."

The second paragraph of said section, in its reference to the use of premises, makes no mention of buildings or structures;

"No change or extension of use and no alteration shall be made in a non-conforming use of premises without a certificate of occupancy having first been issued by the superintendent of buildings that such change, extension or alteration is in conformity with the provisions of this ordinance."

The fourth paragraph of said section distinguishes clearly between buildings and premises:

“No permit for excavation for, or the erection of any building shall be issued before application has been made for a certificate of occupancy. No building *or premises* may be occupied until such certificate shall have been issued.”

In view of the foregoing, a certificate of occupancy was required under said ordinance for the use or occupation of land for designated purposes as well as for the use or occupation of buildings.

The zoning ordinance of the Town of Belleville was adopted September 4, 1923, in pursuance of the powers granted under Chapter 162 of the Laws of 1922, at page 277, supplementing Chapter 240 of the Laws of 1920. The powers granted under the act of 1922 and embodied in said ordinance were ample to control the situation *sub judice*. The act gave municipalities power by ordinance to regulate and restrict the location thereafter of *trades, industries, and residences* and the subsequent location of buildings designed for a specified use in any designated area. The aforesaid act was not impaired by Chapter 146 of the Laws of 1924, page 324, which empowered municipalities to regulate and restrict *inter alia*, the location and use of buildings, structures and land, for trade, industry, residence, or other purposes. Section 9 of said latter act, at page 329, further states:

“Wherever the provisions of any other statute or local ordinance or regulation * * * imposed other higher standards than are required by the regulations made under the authority of this act, the provisions of said statute or local ordinance or regulation shall govern.”

It is submitted, therefore, that the validity of the aforementioned sections of said ordinance is fully sustained under the combined authorization of the aforesaid acts of 1922 and 1924. Appellant must have realized this when it was compelled to resort to the drawing of fine definitions of the words "trade" and "industry," as they applied to the present case, insisting that the piling of lumber on appellant's premises in the manner aforesaid did not come within the purview of either "trade" or "industry." Webster defines "industry" as:

"Any department of productive activity; particularly, a distinct established business or trade; as, the mining industry; the iron industry. Any kind of labor employed in production."

POINT FOUR.

The municipality had power under the law to require a certificate of occupancy of the appellant.

As stated above, the zoning ordinance in question, was drafted in accordance with the provisions of Chapter 162 of the Laws of 1922, page 277. Said act, in Section 1, permitted a municipality

*"to regulate and restrict the location thereafter of trades, industries, * * *."*

*"For each such district, regulations may be imposed designating the trades and industries that shall be excluded or subjected to special regulations * * *."*

Chapter 146 of the Laws of 1924, did not abridge the aforesaid powers in so far as they affected the case at bar. The latter act states in Section 1,—

*"the governing body * * * of any municipality of this state is hereby empowered*

*to regulate and restrict * * * the location and use of * * * land for trade, industry, residence, or other purposes."*

Even though the 1924 act may have superseded the 1922 act, the ordinance in question was fully maintained and established under the latter act. Section 6 of the 1924 act states as follows:

"Wherever any municipality shall have adopted an ordinance or ordinances for any of the purposes covered by this act, such ordinance or ordinances shall be deemed to have been adopted under the provisions of this act * * *."

"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 * * *."

Can there be any doubt that the ordinance in question, included among others, one "of the purposes covered by this act" namely, the regulation, restriction, and location of the use of land for trade or industry?

Again we meet the plea of appellant, that the mere "piling of lumber" upon the land in question did not come within the purview of "trade" or "industry," by the assertion that the use to which the appellant put that portion of its aforesaid land lying within the Town of Belleville, is so inseparably connected with the industry conducted by the appellant upon the entire premises, that it cannot be considered separate and apart from it. It would have been equally as illogical to have contended that the merchandise placed on the shelves in a grocery store, played no part in the transactions which took place over the counter, and was, therefore, not part of the grocery business. The appellant did not pile or store its lumber on its Belleville

property for pastime. It was stored there for the purpose of sale in the conduct of the aforesaid lumber industry, on the Bloomfield portion of appellant's land, so that the manner of occupation of the premises in question, by the appellant, comes clearly within the provisions of the act of 1924.

It is submitted that the ordinance in question was a valid ordinance "in full force and effect" under the aforesaid act of 1922, and that coming within the provisions of the 1924 act, as set forth above, it was continued in Section 6 of said latter statute, in full force and effect. In fact, the ordinance in question was strengthened under the provisions of the 1924 act, which held:

Section 10. "And in construing the provisions of this act, the courts shall construe the same most favorable to municipalities, it being the intention hereof, to grant to the municipalities of this state, in the fullest and most complete manner possible, the *police powers* of the state *for the regulation* within the boundaries of the respective municipalities, *of all matters related to the subject matter of this act.*"

The host of decisions of this court favorable to zoning, is evidence of the recognition of the right of municipalities to exercise such police power.

POINT FIVE.

The zoning ordinance of the Town of Belleville was valid prior to, and is sustained under, the zoning amendment and the act adopted in pursuance thereof. (Chapter 274 of the Laws of 1928, page 696.)

Appellant assumes that neither the zoning ordinance nor the aforesaid statutes of 1922 and

1924 could give the municipality jurisdiction over the matter at issue. The ordinance is presumed to be valid until declared to be invalid by a court of competent jurisdiction. (*Portnoff v. Bigelow*, 133 Atl. 534; *Long v. Scott*, 133 Atl. 767.) Appellant contends that the aforesaid statutes of 1922 and 1924 were powerless to validate said ordinance in so far as it comprehended the matter at issue, and it contends further that there having been no valid authority, prior to the constitutional zoning amendment, vested in a municipality to regulate the "use of land," that neither the said zoning amendment nor the legislation enacted thereunder gave that power to municipalities. The respondents again submit that prior to the said amendment, municipalities had ample authority to control such situations, and that even were it conceded that they had not had such authority, it is maintained that this situation was corrected by the adoption of the said zoning amendment and the subsequent legislation resulting therefrom.

The attention of the court is respectfully called to the following peculiar phraseology in the zoning amendment:

"buildings and structures, according to their construction, and the *nature and extent of their use.*"

The legislature draws a distinction between buildings and structures and the appellant illustrates this very aptly in referring to a derrick used for the purpose of loading and unloading. The illustration used serves the better to show the further distinction in the mind of the legislature between the regulation of buildings and structures "according to their construction," and the regulation of buildings and structures according to the nature and extent of their use. It was

not the right to regulate the size and strength alone of the derrick, which the legislature intended. It intended fundamentally to regulate the *use* to which said derrick will be put; a *use* to which said derrick will be put; a *use* not only co-extensive with the use of the surrounding land, but a use dependent upon and a *part of the use* of the surrounding land. A building or structure, therefore, only has *use* in its connection with the land. It is apparent, therefore that the legislature intended to and did vest in municipalities not only the power to regulate the types or kinds of construction, but to regulate also the *use* to which said buildings and structures should be put, and determine further, *the nature of the use* to be permitted in connection with said buildings and structures, and the *extent of that use*. The appellant, itself, aptly states "the word 'use' as applied to a structure indicates some *use exterior to the structure itself*." This bears out the contention of the respondents that the purpose of zoning legislation is not intended merely to permit municipalities to control the construction of buildings and other structures (building codes would be sufficient to accomplish that), but also to determine the *use* to which said buildings and structures may be put. Buildings and structures, themselves, are of no consequence unless they can be put to some use. The *use*, therefore, is of greater significance than the building or structure, and the whole scope of zoning legislation in this state has been to permit municipalities to *restrict to specified districts*, buildings and structures, which were to serve peculiar *uses*. Those buildings, for instance, which were to be used as chemical plants were permitted to be restricted to certain specified locations. Manufacturing buildings or structures were and are permitted to be segregated, and

buildings and structures which were designed to be used for the purpose of conducting certain kinds of business were permitted to be assigned to particular districts. It is evident, therefore, that the constitutional amendment and the subsequent legislation permitting the laying out of *land* in certain specified districts, and confining to certain *districts*, buildings or structures according to the *use* to which they were to be put, can be no other than an authorization to a municipality *to regulate the use or uses to which the land within any specified district may be put.*

The courts have also adopted this view. In the case of *A. G. Construction Company v. Scott* (6 N. J. Advanced Reports, No. 22, p. 1063), the Court says:

“We also find nothing in the *use to which the land is proposed to be put* which is detrimental to the public health, safety, or general welfare.”

No one will concede that the legislature ever intended that the regulation of buildings and structures alone would promote public morals or the general welfare. It was the regulation of the *use*, namely, the trade, the industry, the business, or the like, that the legislature intended, to secure public morals and the health and welfare, and it is inconceivable that the legislature should have intended to control only those uses affecting public morals, health and welfare which were confined to a building, and to ignore similar or equally objectionable uses established on land on which there may have been no buildings. The legislature never intended to exempt from such control piles of lumber without a roof or covering over them, exposed to the weather, in material storage yards, but to bring within the operation of said regulations the same piles of

lumber where a mere covering had been erected over them, no matter how flimsy or unsubstantial that structure might be.

The whole purpose of zoning must fail if the zoning amendment and the 1928 act could, by any stretch of the imagination, be so construed as to permit the prohibition of stores, apartments, garages, and buildings housing any and all types of industries, but to permit the unrestricted intrusion of any and all industries upon the land merely because the use of the land for such industries did not necessitate the erection of a building or structure. We would respectfully urge the Court to take judicial notice that the fundamental reason for the creation of, and the fundamental purpose in the adoption of zoning legislation is the preservation, primarily, of residential zones from the encroachment of undesirable business and industry.

It is again submitted and, as the appellant has well stated, "that the word 'use' as applied to a structure, indicates some use exterior of the structure itself." The use will not always necessarily be confined to the structure itself. Take, for instance, the *use* to which an office in connection with a lumber industry may be appropriated. There is nothing particularly harmful or injurious to public health, morals or general welfare that would require regulation in such an office in itself, but it is the *use* of that office for the purpose of conducting an industry that brings it within the jurisdiction of zoning regulation and makes it desirable and permissible to restrict industries of that type to particular districts, and *it is not the said office building, alone, that requires said regulation, but also the land occupied by piles of lumber and devoted to that use which emanates from said office building.* The said

zoning amendment and legislation authorize the regulation of the construction of a lumber office because of the *nature and extent of its use, said use* not being confined to the small two by four office, but *extending over the surrounding premises used in conjunction with the office*, and to be covered with piles of lumber available for sale. The use of said office and the said use of the surrounding premises are inseparable.

“Appellant could not carry on its lumber business upon any part of the property without using a part of the property in Belleville for the purpose of storing lumber.” (Appellant’s Brief, p. 9, ll. 20 to 24.)

“Q Is the property, as a whole, used for one purpose? A Yes, sir.

Q Would it be possible for you to operate that portion of the property lying in the Town of Bloomfield without—as a lumber yard for the purpose for which it is used, without using the portion of the property which is in the Town of Belleville? A No, sir.” (State of Case; testimony of F. J. Durkin, p. 13, ll. 17 to 24.)

The said uses are one and the same, and where the said amendment and legislation invest a municipality with the right to control said industry in its entirety where the premises used therefor are contained entirely within the said municipality, the said legislation will regard the industry in its entirety, for the purpose of giving jurisdiction to that municipality within whose boundaries only that portion of the land may lie, upon which there is no structure other than the piles of lumber, where the premises used for said purpose extend from one municipality into another.

The amendment distinguished between buildings and structures. The appellant states that on that portion of its land lying within the Town

of Belleville there are no structures. Respondents contend that the piles of lumber in question may, for the purposes of zoning, be held to be structures. Just what may be considered a structure will vary according to the circumstances. It is not necessary that the various parts of a structure be joined together by means of nails or bolts. No one can deny that a mere pile of earth when used for certain purposes constitutes a structure. Take, for instance, a dirt embankment consolidated for the purpose of laying thereon a railroad track. Such an embankment would come within the category of a structure by virtue of the fact that it has organization and has been erected with the definite aim in view of serving a particular function or use. Said piles of lumber are structures within the purview of zoning legislation, requiring regulation and control, because of the menace to life and property through the fire hazard. The piles are erected with organization and the lumber bound together at intervals by layers of plank or lumber placed at right angles to the general construction of the pile, and as such structure, their *use* is very apparent, namely, they are stock in trade kept in the vicinity of the lumber office for the purpose of ready availability to meet the demands of the trade.

Prior to the adoption of the zoning amendment and subsequent legislation, zoning in New Jersey had met with many reverses because of the alleged weaknesses in the then zoning legislation. This Honorable Court is asked to take judicial notice of the public demand for the strengthening and enlarging of the powers of zoning, which demand finally crystallized in the form of a constitutional amendment, adopted by two successive sessions of the legislature, and by an overwhelm-

ing vote of the people of New Jersey. The intention of the people of the State, and the intention of the legislature was to enlarge the zoning powers of municipalities—not to restrict them as prosecutor infers. That there was embodied in said amendment, *the intent and power to regulate the uses to be applied to land*, as well as the intent and power to regulate the uses applied to buildings and structures, is obvious from the numerous instances thereof in the zoning legislation of 1928 (Chapter 274) consequent to said amendment:

(a) In Section 3, a specific grant of the police power is made to municipalities which may, thereunder, “*limit and restrict to specified districts, and regulate therein*” not only buildings and structures according to their construction, but also to “the nature and extent of their use.” If said act had merely given the regulatory power over “buildings and structures according to their construction, and the nature and extent of their use,” there might be some merit in the appellant’s contention. But under the aforesaid section, the municipalities are given the right to parcel out the *land* in specific “*districts, and may regulate therein.*” The right given, therefore, is not the mere power to regulate buildings and structures according to their construction and the nature and extent of their use, without regard to their location. It will be observed that the parceling of the land into specified districts is the essential point, and the legislature so recognized this in placing it first in the aforesaid section. The fundamental purpose and effect, therefore, of said grant is the limiting and restricting to certain districts, and regulating therein, buildings, structures and uses. A grant for the aforesaid purpose must, of necessity, imply a grant of the

right to regulate the use of the land within any said specified district for the purposes set forth in the act; and that this is what the legislature intended is shown from the purpose of which said legislation was enacted:

“The *location and use* and extent of use of buildings and structures for *trade, industry, residence or other purpose.*”

(b) Section 4 emphasizes the grant of the right to “*divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this act*” * * *, but the regulations in one district may differ from those in other districts.”

(c) Again, in Section 5, we find that such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for *particular uses*, and with a view of *conserving the value of property*, and encouraging the most *appropriate use of land* throughout such municipality.

(d) Section 9, subsection 2, distinguishes clearly between the right to regulate the *use* and the right to regulate buildings or structures.

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

(e) Section 9, subsection 3, provides:

“that no such variance shall be made to grant or allow a structure *or use* in a *district* restricted against such structure *or use* unless the *lands* in respect of which the variance is made abut a district in which such structure *or use* is authorized by the zoning ordinance; and provided further, that no such structure *or use* shall be allowed more than one hundred fifty feet (150) beyond the boundary line of the district in which such structure *or use* is authorized by the zoning ordinance.”

(f) Section 9, subsection 4:

“To recommend in writing to the governing board or board of public works upon appeal, in specific cases, that a structure *or use* be allowed in a district restricted against such structure *or use* where the *lands* in respect of which such recommendation is made, do not abut a district in which such structure *or use* is authorized by the zoning ordinance or where such lands are more than one hundred fifty (150) feet beyond the *boundary line of the district* in which such structure *or use* is allowed * * *; and in case such recommendation shall be approved by the governing body or board of public works, then the administrative officer in charge of granting permits shall, forthwith, issue a permit for such structure *or use*” (a direct authorization for requiring of the prosecutor the permit in question).

(g) Section 10:

“In case any building or structure is erected, constructed, altered, repaired, converted or maintained, or any building or structure is used in violation of this act or of any ordinance or other regulation made under authority conferred hereby, the proper local authorities of the municipality, in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance *or use*, to restrain, correct or

abate such violation, *to prevent the occupancy of said buildings, structure or land, or to prevent any illegal act, conduct, business, or use in or about such premises.*”

(h) Section 11:

“Non-conforming Building and Uses. *Any non-conforming use or structure existing at the time of the passage of an ordinance may be continued upon the lot or in the building so occupied, * * **”

(i) Section 13:

“This act or any ordinance or regulation made under authority of this act, shall not apply to existing *property* or to buildings or structures used or to be used by public utilities, * * *.”

The foregoing, it is submitted, effectually disproves any claim that may be advanced by appellant to the effect, that if the 1928 Act be construed as valid in its application to the present case, then it is invalid by reason of the fact that the title of said Act does not express its true purpose.

POINT SIX. .

The said use of that portion of appellant's land within the Town of Belleville does not come within the “non-conforming use” authorized in Section 11 of the 1928 act.

“Section 11. Non-conforming Building and Uses. *Any non-conforming use or structure existing at the time of the passage of an ordinance may be continued upon the lot or in the building so occupied, and any such structure may be restored or repaired in the event of partial destruction thereof.*”

Appellant would take advantage of the benefits and rights conferred by the foregoing section 11. The right to such benefits, however, pre-

supposes the previous legal status of said non-conforming use. The said statute was not intended to legalize an illegal non-conforming use under a prior ordinance when the said statute preserves "in full force and effect" the aforesaid ordinance.

"Section 7. Existing Zoning Ordinances Saved. Wherever any municipality shall have adopted an ordinance, or ordinances, prior to the adoption of this act, for any of the purposes set forth in this act, such ordinance, or ordinances, shall continue in effect as if they had been adopted under the provisions of this act; and it shall not be necessary in such cases for the governing body or board of public works to appoint a zoning commission as provided by section 6 herein. All such ordinances shall remain in full force and effect, except insofar as they are inconsistent with the provisions of this act, until they shall have been amended, or repealed by the governing body or board of public works."

Appellant was not entitled to take advantage of the benefits of section 11, because it was never in possession of a legal right to use said premises for conducting a lumber business. Appellant at the time it purchased said property, was charged with notice of Belleville's zoning ordinance, and in fact, all of its ordinances which might affect said premises. Appellant, however, had actual knowledge of the existence of said zoning ordinance, but never secured the permit required thereby.

"Q Did you know there was such a thing as a zoning ordinance of the Town of Belleville? A I knew there was a zoning ordinance, yes sir" (State of Case, p. 30, ll. 23 to 25).

"A I said, 'What kind of a permit will I have to get?' He said, 'I don't know, but you have got to have a permit,' he said,

'You have to go before the Board of Adjustment and get a permit.'

Q Did you go before the Board of Adjustment? A Yes, sir'' (State of Case, p. 32, ll. 27 to 33).

Q Did you ever get a permit? A No, sir.

Q Did you ever apply to anybody else besides Commissioner Carragher? A No, sir'' (State of Case, p. 33, ll. 7 to 10).

Furthermore, the claim of appellant (Appellant's brief, Point 6, p. 45) that it is entitled to the benefits of section 11, is a frank admission that the zoning amendment and the 1928 act both authorize the municipal regulation of the use to be permitted on the land in any specified district.

POINT SEVEN.

The zoning ordinance of the Town of Belleville is not unreasonable in its application to the appellant's lands.

Every intendment is made in favor of the reasonableness of an ordinance, and to support it, a construction will be placed on it which will make it reasonable rather than unreasonable. (*McGonnell v. Board of Commissioners*, 98 N. J. L. 642; 121 Atl. Rep. 135; *Burg v. Ackerman*, 135 Atl. 672.)

The presumption is that the ordinance is reasonable. (*Biltwell Co. v. Scott*, Vol. 6, No. 28, N. J. Adv. Rep. page 621; *Portnoff v. Bigelow*, 133 Atl. 534; *Long v. Scott*, 133 Atl. page 767.) The ordinance is presumed to be reasonable and the burden is on the appellant to show its unreasonableness. (*Kitay v. Quigley*, Vol. 6, No. 28, N. J. Adv. Rep. pages 623, 624; *Neumann v. Hoboken*, 82 N. J. L. 275; 82 Atl. Rep. 511.) The

case of *Bellofatto v. Board of Adjustment of Montclair* (6 N. J. Misc. Rep. No. 24, page 513) holds:

“The presumption is that the requirements and regulations of the ordinance are reasonable unless the contrary is shown (*Burg v. Ackerman*, 5 N. J. Mis. R. 96), and there is a further presumption that the action of the board was right. *Silvester v. Princeton*, 5 N. J. Adv. R. 1801. It follows, therefore, that the action of the board in refusing to vary or modify the terms of the ordinance will not be disturbed unless its action is shown by lawful evidence to be wrong. *Oxford Construction Co. v. Orange*, *Ibid.* 729.”

The premises in question are zoned “residential” and are entirely surrounded in Belleville by the “residential” zone of which it is a part. As will be noted in Exhibit P. 1, all the property to the north and east is zoned “A Residence” zone. By ordinance adopted April 22, 1924, the property to the south of the premises in question was also made “residential” (State of Case, p. 35, l. 37 to l. 8 on p. 36). On the north and east and adjoining the premises in question is a high-grade residential development (see Exhibit D. 3, D. 7, D. 8; State of Case, p. 82, ll. 13 to 16; p. 85, ll. 22 to 26). The land in question, surrounded as it is by a “residential” zone, is susceptible of a high type of “residential” development, both the front and rear of said lands having access to public streets (State of Case, p. 77, ll. 7 to 21). The premises are also in demand as an apartment house site (State of Case, p. 79, ll. 22 to 27). By continuing Smallwood avenue westerly through the interior portion of said lands, lots for building purposes would then be available on either side of said Smallwood avenue, continued (State of Case, p. 75, l. 26 to l. 2 on p. 76). The drainage and sewage for the rear of said prop-

erty could be disposed of by way of Smallwood avenue (State of Case, p. 63, ll. 17 to 20).

To permit the maintenance of the lumber industry upon appellant's lands would be to permit the encroachment into a "residential" section of a fire hazard which is now proscribed under said ordinance (State of Case, p. 58, l. 39 to l. 13 on p. 59; p. 71, ll. 22 to 37). The prevention of, or any increase of, a fire hazard is recognized as a valid exercise of the police power. (*Bower v. Jersey City*, Vol. 6, No. 24, N. J. Misc. Rep. page 519; *Fulton v. Mayor and Aldermen of Jersey City*, Vol. 6, No. 24, N. J. Misc. Rep. 505; *D'Elia v. Hague*, Vol. 6, No. 24 N. J. Misc. Rep. 509.)

The establishment of said lumber industry on the appellant's lands would retard residential development and depreciate the values of surrounding properties. (State of Case, p. 80, ll. 31 to 35; p. 85, ll. 8 to 11), facts which this court will recognize. (*D'Elia v. Hague*, Vol. 6, No. 24, N. J. Misc. Rep. 509.)

The value of the land in question for residential purposes exceeds its value for industrial purposes (p. 76 of State of Case, ll. 36 and 37).

"Q Can you tell us what value this property would be for residential purposes? A Approximately \$29,000."

Depositions were taken in this matter and the witnesses for the town testified that because of the availability for development for residential purposes, of the rear portion of the appellant's said land, that the value of said land for residential purposes was far in excess of the value for such purposes as given by the appellant's witnesses who testified that for residential purposes, only the frontage of appellant's land along Belleville avenue could be considered, and

that the rear or interior of appellant's lands was absolutely useless, the value of said frontage being estimated by them to be \$9,000. (Prosecutor's brief, p. 10, ll 2 to 5.) The bias and decided interest of appellant's witnesses is apparent from the foregoing statements when it was conclusively shown by the town's witnesses that the interior of appellant's land was capable of a high development, having access to both Pleasant avenue and Smallwood avenue, as well as the public right of way adjacent to the Erie Railroad tracks. Appellant has failed to produce the preponderance of evidence necessary to overcome the presumption of reasonableness of said ordinance and the town's evidence. Even had the value for industrial purposes exceeded the value of the land for residential purposes, that fact would not have been conclusive under the Euclid case where it was found the value of the premises in question for industrial uses was greatly in excess of the residential value.

The appellant's lands are, therefore, preeminently fitted for residential development, giving due consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view of conserving the value of property and encouraging the most appropriate use of land throughout such municipality.

The Town of Belleville, under a valid ordinance imposed reasonable restrictions upon the use of the land of the appellant. Said ordinance was continued in full force and effect after the amendment and subsequent legislation.

Appellant never had a legal status in its said use of said land, so far as this case is concerned.

It is respectfully submitted, therefore, that the judgment of conviction should be affirmed.

Respectfully submitted,

JOHN B. BROWN,
Counsel for Respondents.

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Exhibit R-2

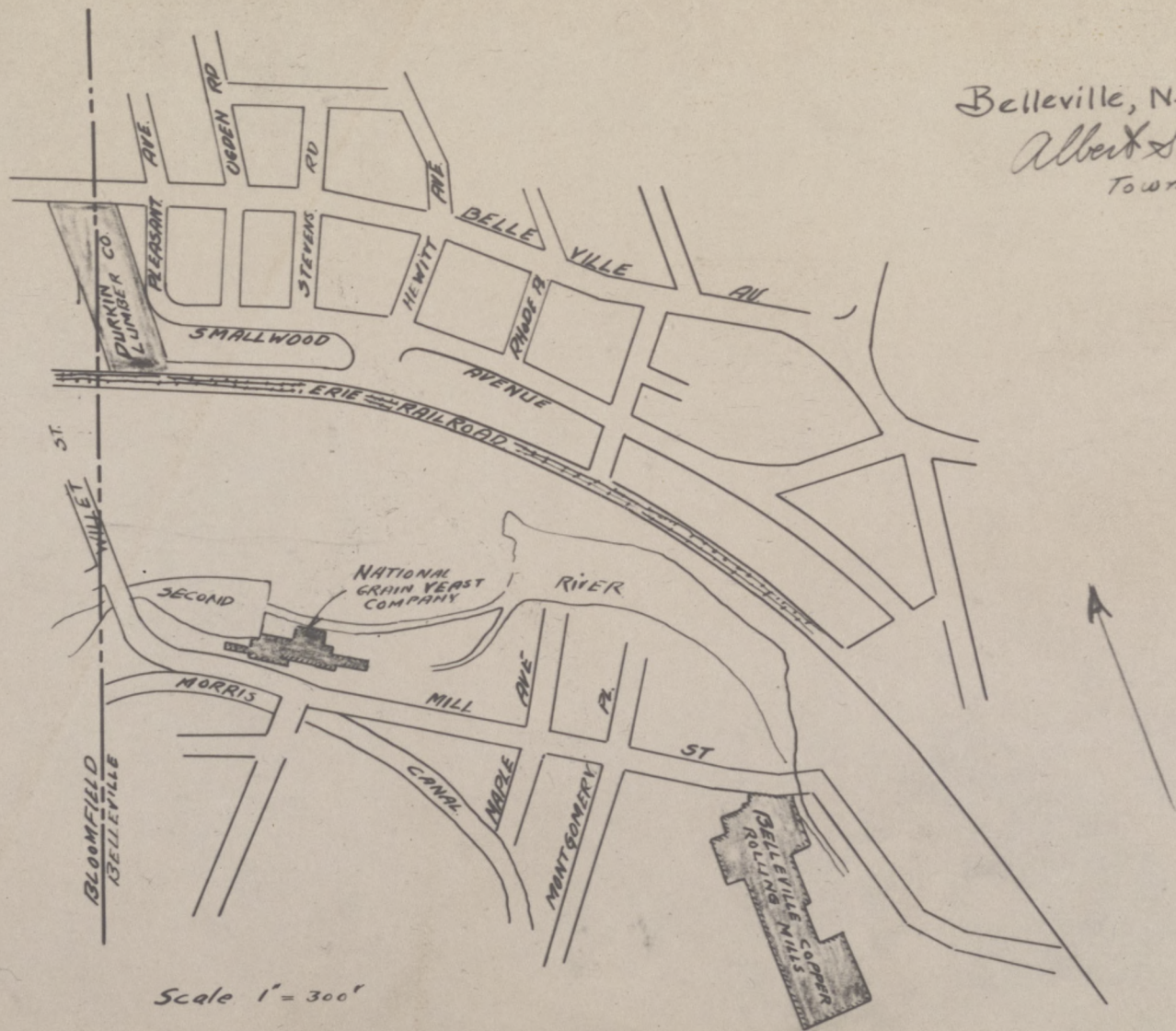
THE OLD RELIABLE
THE T-SQUARE AND TRIANGLE CO.
PHOTOSTATS & BLUE PRINTS
LARGEST BLUE PRINT HOUSE IN THE STATE
DRAWING MATERIALS
14 Beaver St. Newark, N. J.
Ground Floor Service, Tel. 5120 Mkt.

Noted

Exhibit R1

50 Disturbed
redwood 1/4

2471



Scale 1" = 300'

9/24/28

THE OLD BAY
THE T-SQUARE AND THE BEE
PHOTOSTATS & BLUE PRINTS
LARGEST BLUE PRINT HOUSE IN THE STATE
DRAWING MATERIALS
14 Beaver St. Newark, N. J.
Ground Floor Service, Tel. 6120 Mkt.



Exhibit D-12



Exhibit D-11



Exhibit D-10



Exhibit D - 9.



Exhibit D-8.



Exhibit D-6



Exhibit D-5



Exhibit D-4.



Exhibit D-3.

1110



Exhibit D-2.



Exhibit D-7.

Exhibit D-I

only 1 house
on 40 feet

45'

50'

BELLEVILLE AVE.

JOHN ST.

WILLET STREET

MELVIN L. TOWNSEND

NOW OR FORMERLY
ANNA K. E. RAMGE.

N. 11° 09' E.
86.50

N. 14° 35' W.
153.61

NOW OR FORMERLY
HERBERT LERSCH.

N. 3° 12' W.
315.08

TOWN OF BLOOMFIELD.
TOWN OF BELLEVILLE.

556.08
N. 7° 45' W.

NOW OR FORMERLY
SOHO PARK & LAND CO.

GREENWOOD LAKE
DIV.
ERIE R.R.

BLOOMFIELD AND BELLEVILLE, N.J.
JULY 28 - 1926.
WATKINS & LEACH.
SURVEYORS.
BLOOMFIELD, N.J.

SCALE - 1 INCH = 50 FT.

THE OLD RELIABLE
THE T-SQUARE AND TRIANGLE CO.
PHOTOSTATS & BLUE PRINTS
LARGEST BLUE PRINT HOUSE IN THE STATE
DRAWING MATERIALS
14 Beaver St. Newark, N. J.
Ground Floor Service, Tel. 6120 Mkt.

Map of Exhibit P-I

ZONE ORDINANCE

BUILDING ZONE MAP BELLEVILLE, NEW JERSEY

TOWN COMMISSION

JOHN H. WATERS, MAYOR

JOHN DE GRAY

L. F. VERMEULE

FRANK A. NEARY

GEORGE G. YARROW

HERBERT S. SWAN, CONSULTANT, 15 PARK ROW, NEW YORK



Where lot line in the passage authorized to extend to twenty-five feet from the zone line.

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