

INDEX

	PAGE
Notice of Application for Writ of Mandamus	1
Affidavit of Nathan Kastovisky	3
Affidavit of Louis P. Greenberg.....	10
Affidavit of Daniel L. Strauss.....	12
Stipulation	14
Rule to Show Cause.....	15
Stipulation	17
Motion to Strike Out Testimony.....	94

TESTIMONY.

For Relator.

Nathan Kastovisky,	
direct examination	19
cross "	20
further direct examination	22
cross "	28
(recalled)	
further direct "	60
cross "	62
re-direct "	66
re-cross "	66
Frank Gargan,	
direct examination	39
cross "	42
John D. Castles,	
direct examination	45
cross "	52
re-direct "	57-59
re-cross "	58-59
(recalled) direct "	88

For Respondents.

John D. Castles,	
direct examination	67
cross "	69

	PAGE
Louis P. Greenberg, direct examination	74
Frank Gargan, direct examination	76
cross "	78
Bella Anderson, direct examination	83
cross "	85
Gerhardt Joa, direct examination	96
cross "	97
re-direct "	97
Certificate of Commissioner.....	99

EXHIBITS.

	Off'd	P't'd
P. 1. Deed	19	
P. 2. Permit No. 1723.....	21	21
P. 3. Building Ordinance	51	
D. 1. Certificate No. 1723	30, 75	75
D. 2. Application of Harry Citret.	31, 76	
D. 4. Application of Nathan Kas- tovisky	65, 76	
D. 5. Building Zone Ordinance ...	82	
D. 6. Subpoena to Lawrence Me- Grath	97	98

Note: Copies of Exhibits D. 2, D. 4 and D. 5 are bound in back of Printed Book.

Opinion of Supreme Court.....	101
Rule to Mould Pleadings	104
Alternative Writ of Mandamus	106
Return to Writ	110
Demurrer to Return	114
Joinder in Demurrer	118
Stipulation	118
Rule for Judgment	121
Notice and Ground of Appeal	122

Notice.

NOTICE.

New Jersey Supreme Court

STATE OF NEW JERSEY, *ex rel.*
NATHAN KASTOVISKY,
Relator,

vs.

JOHN D. CASTLES, Inspector of
Buildings of the Town of
Kearny, Kearny Zoning
Board of Appeals and TOWN
OF KEARNY,
Respondents.

10

*On Application for
Mandamus.*

Notice.

20

To the above-named respondents:

TAKE NOTICE HEREBY that on Saturday, December 18, 1926, at 10 o'clock in the forenoon, or as soon thereafter as counsel may be heard, we shall apply to his Honor, James F. Minturn, Justice of our New Jersey Supreme Court at the Hudson County Court House in the City of Jersey City, New Jersey, for a peremptory or alternative writ of mandamus to forthwith issue out of New Jersey Supreme Court commanding John D. Castles, Inspector of Buildings in the Town of Kearny, in the County of Hudson, the Kearny Zoning Board of Appeals, and the Town of Kearny to forthwith issue a building permit to Nathan Kastovisky, above-named relator, for the erection and construction of a certain three-story brick building to contain twelve apartments and janitor apartment on certain lands on the northeast corner of Beech street and Laurel avenue, in the Town of Kearny, Hudson

30

40

Notice.

County, New Jersey, as described in the affidavits attached hereto, which will be read in support of this application, and the original schedules mentioned in said affidavits will be filed at said time.

WELANKO & STRAUSS,
Attorneys of Relator.

10

20

30

40

Affidavit of Nathan Kastovisky.

10 BEGINNING at the intersection of the North-
erly line of Laurel Avenue and the Easterly
line of Beech Street; thence Easterly along
the line of Laurel Avenue and at right angles
to Beech Street fifty feet; thence North-
easterly and parallel with Beech Street one
hundred feet; thence Westerly and parallel
with Laurel Avenue fifty feet; thence South-
erly along the line of Beech Street one hun-
dred feet to the point or place of BEGINNING.

BEING known as lots numbered 167 and
168 on Map of lots of Rural Homestead
Company at Arlington, Town of Kearny,
filed in the Office of the Clerk of Hudson
County on March 31, 1873.

20 Said premises are delineated in red on a cer-
tain map annexed hereto and made part hereof
and marked Schedule A; which said map is a
true copy of the building zone map of the said
Town of Kearny.

3. On January 8, 1926, the Building In-
spector of the Town of Kearny issued a build-
ing permit for the erection on said lands of a
one-story building to contain five stores. Said
permit has never been revoked and is still in
30 force and in good standing.

4. Thereafter I commenced to dig and remove
the soil from said premises in order to erect the
foundations and complete the cellar for said
building, and I made an excavation approxi-
mately fifty feet wide and eighty feet deep for
a distance of about seven feet below the street
level.

5. Thereupon I decided to erect a larger build-
ing to be two-stories in height and to contain in
40

Affidavit of Nathan Kastovisky.

addition to the said five stores, four living apartments of four rooms each. Accordingly I made application to John D. Castles, Building Inspector of the Town of Kearny for a building permit for said two-story building, and I filed written application therefor together with specifications and plans and tendered the sufficient fees at said time. Said Building Inspector refused to issue a new permit in accordance with my application or to revise the existing permit, and gave as his sole reason for so doing—that the building I proposed to erect would be in violation of that ordinance of the Town of Kearny commonly known as the Zoning Ordinance, and specifically stated that the said lands were located in what in said ordinance is designated as Residence B District, and that the ordinance restricts buildings to be erected in said district to dwellings not over two and one-half stories in height and to be occupied by not more than two families. A true copy of said ordinance is annexed hereto and made part hereof, and is designated as Schedule B.

6. Said Building Inspector referred me to the Kearny Zoning Board of Appeals, and I renewed my application with said specifications and plans and fees, and the said Zoning Board likewise refused to issue permit or revise the existing permit. The said Zoning Board of Appeals stated that the community would be better served and municipal development advanced by the erection upon said lands of a building to contain apartments only and no stores; and also that said building should not be built on the property lines, but should set back therefrom in order to keep uniform the line of the

Affidavit of Nathan Kastovisky.

buildings adjacent to and in the neighborhood of said lands.

10 7. In accordance with such recommendations, plans were prepared for a three-story building to contain twelve apartments and no stores; and the said plans having first been duly approved by the Board of Tenement House Supervision of New Jersey, were presented to the said Building Inspector with proper application and specifications and fees and a request was made for a building permit therefor. Said Building Inspector again refused to issue a permit or to revise the existing permit and gave as his sole reason for so doing the same reason previously advanced by him on the former application as set forth in paragraph 5.

20 8. Said Building Inspector again referred me to the said Zoning Board of Appeals and I renewed my application with the said specifications and plans and said fees, but the said Zoning Board again refused to issue a permit or revise the existing permit. This time the Zoning Board of Appeals recommended that the building, instead of frame be of brick construction, and also that the building be set back further from the property lines than as set forth on the
30 plans.

9. Following such advice, new plans were made for a three-story brick building to contain twelve apartments and janitor's apartment; said building to set back further from the property line than theretofore, and said plans were first approved by the Board of Tenement House Supervision of New Jersey. And once more I
40 tendered said new plans, specifications and application together with sufficient fees to the

Affidavit of Nathan Kastovisky.

said Building Inspector and requested a building permit, and as on previous occasions, the Building Inspector refused to issue a permit or to revise the existing permit, and gave as his sole reason the same reason as stated in detail in paragraph 5. A true copy of said plans is annexed hereto and made part hereof and designated as Schedule C. 10

10. Again the said Inspector referred me to the said Zoning Board of Appeals, where I renewed my application with said specifications and plans and fees, and the Zoning Board again refused to issue said permit, or revise the existing permit.

11. The Zoning Board informed me that my sole recourse as far as they were concerned, would be to get the consent of the majority of the owners of lands in the vicinity of the aforesaid premises, to the erection of the said building, and that thereupon they would grant the permit. 20

12. I have made an effort to comply with such recommendation, but without success.

13. The Building Inspector and Board of Appeals have orally stated that the building permit first issued had been revoked and that I would not be permitted to build anything on said premises unless I obtained a new permit. 30

14. All of the aforesaid plans and specifications comply with the Building Code and Regulations and Ordinances of the Town of Kearny, and in each instance where application was made for building permit, the proper fees and charges required by said Code and Ordinance were tendered to the proper official. 40

Affidavit of Nathan Kastovisky.

15. As a result of the repeated failures to issue to me a building permit and of the afore-said statements that the original permit was not in force, no foundation walls have been erected on said lands, and a physical inspection of said lands will show a large hole about seven feet
10 deep, about fifty feet wide and eighty feet long. The sidewalk and earth about this excavation have become depressed and have had to be repaired on at least three occasions. With the change of seasons and the resulting rains and snows the said lands will likely become filled with water, and in such case the side walls may collapse. This will become very burdensome and expensive to me and may also become a danger and nuisance to the neighborhood and community.

20 16. The location of said lands is expressly suitable for a three-story brick building to contain twelve apartments and janitor's apartment; and that is the type of building which I propose to erect, and for which I make application hereby, according to the plans submitted herewith and designated as Schedule C.

30 17. There are no restrictions, covenants or conditions of record that prohibit the erection on said lands of a three-story building of the character and size set forth in said plans, nor are there any restrictions, covenants or conditions of record that require such structure to be built inside of the boundary lines of said lands.

40 18. I contend that the Building Inspector of the Town of Kearny has no legal justification for refusing to issue building permit to me for the erection of said three-story brick building to contain twelve apartments and janitor's apart-

Affidavit of Nathan Kastovisky.

ment in accordance with the plan herein designated as Schedule C, because the ordinance upon which he bases his decision is invalid for the following reasons:

1. It deprives me of the lawful use and enjoyment of my property without due process of law.

2. It is unreasonable in that it does not take into consideration all the attendant circumstances and conditions.

3. It deprives me of my property without compensation.

4. It is contrary to law.

I therefore pray that a writ of peremptory mandamus may forthwith issue out of and under seal of this Honorable Court, directed to the said John D. Castles, Inspector of Buildings of the Town of Kearny, commanding and enjoining him to forthwith issue a building permit to me for the erection and construction of said three-story brick building to contain twelve apartments and janitor's apartment on the lands now belonging to me at the northeast corner of Beech street and Laurel avenue in the Town of Kearny, Hudson County, New Jersey, according to the plans annexed hereto, which are the same plans which were submitted with the specifications to the said Building Inspector.

NATHAN KASTOVISKY.

Sworn and subscribed to before me
this 26th day of November, 1926.

M. A. BRODERICK,
(SEAL) Notary Public in New Jersey.
My commission expires July 14, 1931.

10

20

30

40

Affidavit of Louis P. Greenberg.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

10	STATE OF NEW JERSEY, <i>ex rel.</i> NATHAN KASTOVISKY, <div style="text-align: right;"><i>Relator,</i></div>	}	<i>On Application for Writ of Peremptory Mandamus.</i> <i>Affidavit.</i>
20	<div style="text-align: center;"><i>vs.</i></div> JOHN D. CASTLES, Inspector of Buildings of the Town of Kearny, Kearny Zoning Board of Appeals and TOWN OF KEARNY, <div style="text-align: right;"><i>Respondents.</i></div>		

20 STATE OF NEW JERSEY, }
 COUNTY OF ESSEX. } *ss.*

LOUIS P. GREENBERG, of full age, being duly sworn according to law on his oath deposes and says:

30 I am by vocation a practicing architect, duly licensed under the laws of the State of New Jersey to practice as such, and have my office at 156 Market street, in the City of Newark, New Jersey. At the request of Nathan Kastovisky, I drew plans and specifications for the erection and construction of certain buildings to be erected by him at the northeast corner of Beech street and Laurel avenue in the Town of Kearny, New Jersey.

40 Particularly did I prepare the plans and specifications for the three-story brick apartment building to contain twelve apartments and janitor's apartment, and which is annexed hereto and made part hereof, and is designated as Schedule C.

Affidavit of Louis P. Greenberg.

The said plans and the specifications are in accordance with the Building Ordinance and Building Code of the Town of Kearny.

I have made a physical examination of the premises within the past few months, and have observed a large excavation about fifty feet wide and eighty feet long and about seven feet deep. No foundation walls have been built. From my experience in the building and construction of buildings, I am of the opinion that the condition of this land is such that it will become very burdensome and expensive to maintain in its present condition, and will in all likelihood become a nuisance and a danger to the community, not merely from a sanitary standpoint, but also from the danger of the settling and caving in of the earth of the walls about the excavation.

LOUIS P. GREENBERG.

Sworn and subscribed to before me
this 27th day of November, 1926.

HAROLD M. BLANCHARD,
(SEAL) Notary Public of N. J.

30

40

Affidavit of Daniel L. Strauss.

NEW JERSEY SUPREME COURT.

STATE OF NEW JERSEY, *ex rel.*
NATHAN KASTOVISKY,

Relator,

vs.

JOHN D. CASTLES, Inspector of
Buildings of the Town of
Kearny, Kearny Zoning
Board of Appeals and TOWN
OF KEARNY,

Respondents.

*On Applica-
tion for
Mandamus.
Proof of
Service.*

10

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

20

DANIEL L. STRAUSS, of full age, being duly sworn according to law on his oath deposes and says:

1. On December 8, 1926, I served a true copy of the annexed notice and affidavits (without schedules) upon the respondent, John D. Castles, in person, and briefly explained the contents thereof to him.

30

2. On December 8, 1926, I served a true copy of the annexed notice and affidavits (without schedules) upon William B. Ross, the Town Clerk of the Town of Kearny, in person, and briefly explained the contents thereof to him.

3. On December 8, 1926, I served a true copy of the annexed notice and affidavits (without schedules) upon Edmund Skold, chairman and member of the Kearny Zoning Board of Ap-

Affidavit of Daniel L. Strauss.

peals, in person, and briefly explained the contents thereof to him.

DANIEL L. STRAUSS.

Sworn and subscribed to before me
this 14th day of December, 1926.

M. A. BRODERICK,

Notary Public in New Jersey.

My commission expires July 14, 1931.

10

20

30

40

Stipulation.

STIPULATION

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

10	STATE OF NEW JERSEY, <i>ex rel.</i> NATHAN KASTOVISKY, <div style="text-align: right;"><i>Relator,</i></div>	}	<i>On Application for Mandamus. Stipulation.</i>
	<i>vs.</i>		
	JOHN D. CASTLES, Inspector of Buildings of the Town of Kearny, K e a r n y Zoning Board of Appeals and TOWN OF KEARNY, <div style="text-align: right;"><i>Respondents.</i></div>		

20

It is hereby stipulated and agreed by and between McCarter & English, Attorneys for all the respondents above named, and Welanko and Strauss, attorneys for the relator, that the application for peremptory or alternative writ of mandamus be heard before his Honor James F. Minturn, Justice of our New Jersey Supreme Court, at 630 Hudson street, in the City of Hoboken, Hudson County, New Jersey, on Wednesday, December 15, 1926, at ten o'clock in the forenoon.

30

McCARTER & ENGLISH,
 Attorneys of Respondents.

WELANKO & STRAUSS,
 Attorneys of Relator.

40

Rule to Show Cause.

RULE TO SHOW CAUSE.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

STATE OF NEW JERSEY, <i>ex rel.</i> NATHAN KASTOVISKY,	}	10
<i>Relator,</i>		
<i>vs.</i>		
JOHN D. CASTLES, Inspector of Buildings of the Town of Kearny, Kearny Zoning Board of Appeals and TOWN OF KEARNY,	}	20
<i>Respondents.</i>		

*On
Application
for
Mandamus.

Rule to
Show Cause.*

Upon reading the affidavits filed in the above cause in the presence of McCarter & English, attorneys for all the respondents,

It is ordered by the Court on this 16th day of December, 1926, that the said respondents, John D. Castles, Inspector of Buildings of the Town of Kearny, Kearny Zoning Board of Appeals and Town of Kearny, do show cause before this Honorable Court on the 18th day of January, 1927, at ten o'clock in the afternoon of said day or as soon thereafter as counsel can be heard, at the State House, in the City of Trenton, why an alternative or peremptory writ of mandamus should not issue out of and under the seal of this Honorable Court commanding and enjoining the said John D. Castles, Inspector of Buildings of the Town of Kearny, Kearny Zoning Board of Appeals and Town of Kearny to forthwith issue a permit to the said Nathan Kastovisky for the erection and construction of a

Rule to Show Cause.

three-story brick building to contain twelve apartments and janitor apartment on the premises known as lots 167 and 168 on Map of Lots of Rural Homestead Company at Arlington, N. J., Town of Kearny, filed in the office of the Clerk of Hudson County, March 31, 1893, said
10 lots being located on the northeast corner of Beech street and Laurel avenue in the Town of Kearny, County of Hudson, New Jersey, in accordance with the plans and specifications submitted to and filed with the said John D. Castles, Inspector of Buildings, as set forth in said affidavits,

And it is further ordered that both parties have leave to take testimony upon due notice, to be used upon the hearing of this rule,

20 And it is further ordered that a copy of this order which may be certified by the attorneys of the relator be served upon the defendants within three days from the date hereof.

On motion of Welanko & Strauss, attorneys of the relator,

Let this rule be entered in the minutes.

JAMES F. MINTURN,
Justice.

30

40

Stipulation.

STIPULATION.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

STATE OF NEW JERSEY, <i>ex rel.</i> NATHAN KASTOVISKY, <i>Relator,</i>	}	10
<i>vs.</i>		
JOHN D. CASTLES, Inspector of Buildings of the Town of Kearny, K e a r n y Zoning Board of Appeals and TOWN OF KEARNY, <i>Respondents.</i>	}	20
		<i>On Application for Mandamus. Stipulation.</i>

It is hereby stipulated and agreed by Messrs. McCarter & English, attorneys of the respondents, and Welanko & Strauss, attorneys of the relator, that

1. The rule to show cause in the above matter is hereby continued without day.

2. That deposition and testimony be taken by the relator and respondents before Nicholas W. Bindseil, Esq., Supreme Court Commissioner, at the Town Hall in the Town of Kearny, New Jersey, on Monday, January 24, 1927, at 10:30 o'clock in the forenoon, and continued from time to time, to be used in the above entitled cause. 30

3. That thereafter application for a day to be fixed for the argument herein may be made upon five days' notice.

McCARTER & ENGLISH,
 Attorneys of Respondents.

WELANKO & STRAUSS,
 Attorneys of Relator. 40

Testimony.

TESTIMONY.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

10	STATE OF NEW JERSEY, <i>ex rel.</i> NATHAN KASTOVISKY, <div style="text-align: right;"><i>Relator,</i></div>	}	<i>On Application for Mandamus. Testimony.</i>
	<i>vs.</i>		
20	JOHN D. CASTLES, Inspector of Buildings of the Town of Kearny, Kearny Zoning Board of Appeals and TOWN OF KEARNY, <div style="text-align: right;"><i>Respondents.</i></div>		

Transcript of testimony taken pursuant to Rule to Show Cause in the above entitled suit, dated December 16, 1926, before Nicholas W. Bindseil, as Supreme Court Commissioner, at the Town Hall, Kearny, New Jersey, on Monday, January 24, 1927, at 10:30 A. M.

Appearances:

30 Messrs. Welanko & Strauss for Relator.
 Mr. Conover English for Respondents.

It is stipulated and agreed by and between the attorneys for the respective parties, that the testimony may be taken stenographically by the commissioner and afterwards reduced to type-writing, the signing of the same being waived.

Mr. Strauss: I offer in evidence deed dated April 1, 1926, between Isidor Sperber and Yetta

40

Nathan Kastovisky, direct.

Sperber, his wife, to Nathan Kastovisky, recorded on April 8, 1926, in Book 1602 of Deeds for Hudson County, on pages 155 &c., conveying the following described premises:

“All those certain tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the Town of Kearny in the County of Hudson and State of New Jersey 10

Beginning at the intersection of the Northerly line of Laurel Avenue and the Easterly line of Beech Street; thence Easterly along the line of Laurel Avenue and at right angles to Beech Street fifty (50) feet; thence northeasterly and parallel with Beech Street one hundred feet (100); thence Westerly and parallel with Laurel Avenue fifty (50) feet; thence Southerly along the line of Beech Street one hundred (100) feet to the point or place of BEGINNING. 20

BEING known as lots numbered 167 and 168 on Map of lots of Rural Homestead Company at Arlington, Town of Kearny filed in the office of the Clerk of Hudson County on March 31st, 1873.”

(Marked Exhibit P. 1.)

It is stipulated that there are no restrictions of record in the office of the Register of Hudson County, affecting the use of the land in question. 30

NATHAN KASTOVISKY, being duly sworn according to law, on his oath testifies as follows:

Direct examination by Mr. Strauss:

Q Mr. Kastovisky, you are the relator in this case? A Yes. 40

Nathan Kastovisky, cross.

Q Where do you live A 20 Schuyler Avenue, Newark, New Jersey.

Q And what is your business? A Builder.

Q And you are the owner of a plot of vacant land on the northeast corner of Beech street and Laurel avenue, in the Town of Kearny, Hudson County, New Jersey? A Yes.

Q Have you a building permit for the erection of a building on that land? A Yes.

Q And what is the nature of that building? A Five stores, one story building.

Mr. English: I think the permit, if you have one, should be produced.

Mr. Strauss: I am not proceeding on that permit.

20 Mr. English: Then why do you refer to it?

Mr. Strauss: Because it is part of the case.

Mr. English: Then I think it should be produced.

Mr. Strauss: We will produce it.

30 Q I show you a paper; is that the permit? A Yes.

Mr. Strauss: I offer in evidence the permit.

Mr. English: I would like to ask him some questions.

Cross-examination by Mr. English:

40 Q If you have this permit, why are you now proceeding in court?

Nathan Kastovisky, cross.

Mr. Strauss: I object to that; that will come out in the case.

Mr. English: You say that you waive this permit, then?

Mr. Strauss: Are you asking me the question?

Mr. English: Yes. 10

Mr. Strauss: No, we don't waive that permit.

Mr. English: I don't quite see how you can apply for a permit on one, and prove a permit on the other.

Mr. Strauss: You want it in evidence?

Mr. English: I think it is immaterial, but you brought out the fact that you have a permit.

Mr. Strauss: I will offer this Permit No. 1723 in evidence, approved January 8, 1926, and signed John D. Castles, Building Inspector. (Marked Exhibit P. 2.) 20

“Building Dept. Town of Kearny
Phone 1700 Kearny

THIS PERMIT NOTICE

To be Fastened on a Part of Building for which it is issued, where it can be Seen Plainly by all Persons. 30

PERMIT NO. 1723 has been
issued for this building.

This building has to be Erected or Altered According to the Building Ordinances of the Town of Kearny.

Approved

Date Jan 8 1926 John D. Castles
Town of Kearny, N. J. Building Inspector.” 40

Nathan Kastovisky, further direct.

Further direct examination by Mr. Strauss.

Q Did you proceed with any work on this land under this permit? What did you do?

10 Mr. English: I object to that because this permit is dated January 8, 1926, and the deed in evidence shows that he got his property by deed dated April 1, 1926; so anything he did under that permit, if he did anything, is immaterial; and on the other hand, he had no right to do anything under that permit, because he wasn't the owner of the property.

Q What did you do? A I excavated the cellar.

20 Mr. English: Was this permit issued to you?

Mr. Strauss: I think that should come under cross-examination.

Mr. English: All right.

Q And did you complete the excavation? A Yes, sir.

30 Q And what is the present condition of affairs, as far as the excavation is concerned?

Mr. English: I object to any evidence as to what he did.

A Under this permit now in evidence, Exhibit P. 2, it is excavated; it is a big hole; there is a fence around it.

40 Q What is the size of the excavation? A 50x80.

Nathan Kastovisky, further direct.

Q You mean 50 feet wide and 80 feet deep?

A Yes. Seven feet deep in the ground.

Q That is, below the surface of the ground seven feet? A Yes.

Mr. English: Same objection all the way through on this testimony.

10

Q What do you do next with respect to a building on that ground?

Mr. English: Are you speaking now of a time prior to April 1, 1926?

Mr. Strauss: I am speaking what he did after the excavation.

Mr. English: Tell us when he did it then.

20

Q When did you make your excavation? A In April.

Q What next did you do with respect to building on that land? A They told me if I should build this—

Mr. English: I object to what they told you. You were asked what you did.

Q What did you do? A I left it as it is. I made plans for a twelve-family apartment in frame; when I brought it up to Mr. Castles, he refused to give me the permit and said it has got to go before the zoning; I go before the zoning—

30

Q Is that the next thing that you did with respect to this property after you made the excavation? A Yes.

Q Did you file any plans for any building with stores and apartments? A Yes, I filed

40

Nathan Kastovisky, further direct.

plan for stores and apartments; that was the first one.

10 Mr. English: If there is any application on file, I think it should be produced, if you are going to give testimony about it. It speaks for itself.

Q And with whom did you file those? A With the building inspector, Mr. Castles.

Q And what was the nature of that building?

20 Mr. English: I object on the ground that the application is the best evidence of what the nature of the building was, and if it was filed, it should be produced. We will produce it on behalf of the Town, if you ask for it.

Mr. Strauss: All right, I call upon you to produce all the plans and specifications.

Mr. English: The building inspector tells me that he took them away himself.

30 Q Was this plan and the specifications for the five stores and four apartments left with the building inspector? A Yes, it was left.

Q Together with a proper fee? A Yes.

Q Were those plans and specifications returned to you? A Yes, returned to me.

Q Are they here? A No, they are not here.

Q Why were they returned to you? A The zoning people refused to grant it.

Q Did the inspector give you a permit? A No.

40 Q What, if anything, did he do after you made your application? A We went before

Nathan Kastovisky, further direct.

the zoning board—I went before the zoning board and the zoning board refused to give it.

Q What did the inspector do with your plans and specifications at that time? A After the meeting they returned me the plans.

Q We are now with the inspector; what did the inspector do after you gave him the plans and specifications and the fee in this matter with the application for the five stores and four apartments? A He took the application, but he said it has got to go before the zoning board, and we went before the zoning board, and they refused to give. 10

Q What, if anything, did you do after that? A After that, of course, the way that stands, they told me that if I should go from the stores and I should make an apartment, they will give me a permit. 20

Q Who told you that? A By the meeting.

Q Who? A From the board.

Q Do you mean members of the zoning board? A Members of the zoning board.

Q What did you do after that? A I made plans for a twelve-family apartment, and I went to Mr. Castles and I asked him if that is within the fire limit; he told me no, it can be built frame. I then turned around and made plans for a frame building, and I go over there and made an application to him again, and he accepted the application with a fee, but he said it will have to go before the zoning board again. The zoning board met for action, and they refused to give me. There wasn't so much objection about the building, but there was objection about the frame. They told me if I should make it brick instead of frame, then it will be all right, and they will give me the permit. 30 40

Nathan Kastovisky, further direct.

Q What did you do next? A Then I made plans for a brick building, for twelve-family apartment, and janitor apartment, and brought in the application with the plans and paid the fee, and they accepted the application, of course, but it has to go before the zoning board again.

10 Q What happened then? A The zoning board refused me again.

Q What was the exact character of the building for which you made this last application?

A It was a brick building, twelve families and janitor apartment.

Q Were your plans and application for this three story brick building with twelve apartments and janitor's apartment returned to you?

A Yes.

20 Mr. Strauss: The original plan has been filed with the application for the rule to show cause in this case, and I will produce a copy at the next hearing.

Q You are now applying for a building permit for the three-story brick building to contain twelve apartments and janitor's apartment? A Yes.

30 Q Do you know whether those plans which you submitted were approved by the Board of Tenement House Supervision? A Yes.

Q And were they so approved? A Yes, they were approved.

Mr. English: I object to that. I think there should be better proof than that.

Witness: I got the plans.

Mr. English: I move to strike out the testimony that they were approved by the

Nathan Kastovisky, further direct.

Tenement House Commission, on the ground that the certificate of the Commission, or whatever was issued, is the best evidence.

Mr. Strauss: Will you agree that the plans which were submitted with the application in this case to the court are the plans in question and may be offered in evidence? They bear the stamp of approval of the Tenement House Commission on the back. 10

Mr. English: Mr. Castle is not sure about it, so I cannot make the admission.

Mr. Strauss: We will produce a copy of the plans.

Q Were you told by the building inspector at any time that you submitted any of those plans, why he would not grant you a building permit? 20

Mr. English: Yes or No.

A Yes.

Q What did he tell you? A He told me he couldn't do that; he had no power to do that.

Q Did he assign any further reason? A No. 30

Q And were you told by the zoning commission why a permit was not granted you?

Mr. English: Yes or No.

A They didn't give me no reason. Yes, they told me it is a two-family zone.

Q Who told you that? A Castles told me at the time he didn't give me the application— 40

Nathan Kastovisky, cross.

he didn't give me the permit. I asked for a permit.

Q That was a two-family zone? A On the lot.

Q Did he give you any other reason? A No.

10 Q Were you ever told by Mr. Castles that you could not erect the five stores with a one-story building on this property?

Mr. English: I object to that; the application is for a permit; he either got or didn't get a permit, and what Mr. Castles told him is immaterial and incompetent.

A Yes, he told me I cannot go ahead with the work. He told me I cannot.

20 Q Did you ever receive any notice that this permit for the one-story building to contain five stores had been revoked? A No.

Mr. Strauss: I will produce the plans at the next hearing.

Cross examination by Mr. English:

30 Q Your application to the court now is for a permit to erect a three-story brick building with twelve apartments and a janitor's apartment; is that right? A Yes.

Q Located where? A Corner of Beech and Laurel street.

Q Do you know what number on Laurel avenue? A I don't remember the number.

Q Do you know Harry Citret? A No.

40 Q I show you Exhibit P. 2, which is the Permit No. 1723; that was not issued to you? A No.

Nathan Kastovisky, cross.

Q Whom was it issued to? A To one Warner, I think, if I don't make no mistake.

Q Who is Warner? He is not you? A He is the man what had the property; I think he is party that bought it from the first owner.

Q You think Warner was the owner of the property? A Yes, he was the owner of the property. 10

Q On what theory did you undertake to go in and dig on a property that you didn't own and on a permit issued to Warner?

Mr. Strauss: I object; the question is wholly immaterial, and calls for a conclusion.

Q Have you got the permit that was issued in connection with this Exhibit P. 2? A I don't— 20

Q Is the paper you produce, Exhibit P. 2, a sort of a placard to be fastened on a part of the building? A Yes.

Q Don't you know that in connection with a sort of a placard a little certificate of some kind by the building inspector? A Yes.

Q Where is that certificate? 30

Mr. Strauss: We have it. (Producing paper.)

Mr. English: Counsel produces a certificate bearing the same number, 1723, dated January 8, 1926, which is the same date as Exhibit P. 2, of a permit granted to Harry Citret to erect a brick building at 189-191 Laurel avenue, for the proposed use of five stores. 40

Nathan Kastovisky, cross.

Q Is that the permit that you operated under when you went in and dug the cellar? A Yes.

Mr. English: I will have that marked for identification.

(Marked Exhibit D. 1 for identification.)

10

Q Did you know of the application of Harry Citret for this permit before he made it?

Mr. Strauss: I object as immaterial.

A What?

Q Did you know that Harry Citret was going to make this application before he made it?

A No, I didn't know it.

20

Q When did you find out that he had made the application for the permit and did have the permit? A I bought the property with it; I bought the property with the permit; otherwise, I wouldn't have bought the property.

Q You didn't buy the property from Harry Citret? A No, I didn't buy it from him, but I bought it from another man.

30

Q You bought it from Isidor Sperber and wife? A Yes.

Q You don't know who sold it to Sperber?

A No, I do not.

Q Did Sperber exhibit to you this permit before you bought the property? A Yes.

Q Did you see the application that Harry Citret filed?

Mr. Strauss: I object as immaterial.

40

A I didn't see no application, no.

Nathan Kastovisky, cross.

Q I produce from the files of the building inspector, the application of Harry Citret for a permit to erect a building for stores on this property, and show it to you, and ask you whether you have ever seen it before?

Mr. Strauss: I object to it as immaterial. 10

A I don't see it.

Mr. English: I offer it in evidence for identification.

(Marked Exhibit D. 2 for identification.)

Q When did you first see certificate, D. 1 for identification, which has been produced by your counsel at my request? A At the time I took the title. 20

Q When did you first go on the the premises and make any excavation? A A couple of days after I got the title.

Q After you got the property you didn't want to build the stores that are mentioned in this permit and application for permit, did you?

A Yes, I do want to build stores, and I want to build another story on top of it. 30

Q You wanted to change the plans, in other words, that Harry Citret had filed when he got his permit? A I want to change the plans for two-story building.

Q His plan called for just five stores, one story high building? A Yes.

Q You wanted stores and apartments above? A Yes.

Q So you didn't accept this permit, then, as it was; you went to the building inspector for another permit, didn't you? 40

Nathan Kastovisky, cross.

Mr. Strauss: I object to the first part of that question on the ground that it calls for a conclusion.

Mr. English: He knows whether he accepted it or not, or made a further application. What do you say?

10

A We want to build stores, and we make application to build another story on top of it; just like an alteration, I say.

Q You wanted to alter the plans by enlarging the building to have apartments above the stores? A Yes.

Q So that you didn't accept the permit which was granted just for stores alone?

20

Mr. Strauss: I object on the ground that it calls for a conclusion.

A I did accept it, because it is stores anyway; I cannot see in that time there should be any objection to the building, but I accept the stores, certainly.

Q But you didn't accept the complete plans as they were in the application of Harry Citret and his permit?

30

Mr. Strauss: I object to the question, again, on the ground that it calls for a conclusion.

A I did accept.

Q Then why didn't you build just one story building with stores, for which Harry Citret had a permit?

40

Mr. Strauss: I object as wholly immaterial.

Nathan Kastovisky, cross.

A I want to make it a better kind of building.

Q So, then, you did not accept the application as filed, which called for simply a one-story building with five stores?

Mr. Strauss: I again make objection on the ground that it calls for a conclusion, and the question has been completely answered with the preceding questions and answers. I also object on the ground that it is wholly immaterial. 10

A I accept that, but in case—because I said, if I cannot build it, I will have to build stores alone.

Q If you accepted the application of Harry Citret in the permit to build five stores, why didn't you go ahead and build them, without any further fuss or feathers? 20

Mr. Strauss: I object.

A I did.

Q How far had you gotten with your excavation before you went to Mr. Castles with an application to alter the plans? A It was pretty near complete. 30

Q The excavation was pretty near complete?

A Yes, because there was a steam shovel there.

Q Then you went to Mr. Castles with an application to alter the plans by building apartments and stores on that property? A Yes.

Q Was that the first application you made?

A That was the first application I made, yes.

Q He refused you a permit for that, didn't he? A He didn't refuse me, but told me I wouldn't get it. 40

Nathan Kastovisky, cross.

Q That is the same thing. A But he accepted the application.

Q Then when Mr. Castles turned you down, you went to the zoning board? A Yes.

Q And the zoning board refused the permit, too, didn't they? A Yes.

10 Q Or did they? A They refused.

Q Then did you file a second application? A Yes, at the time they told me that I should change it.

Q I want to know whether you filed a second application. A Yes, I made another application.

Q In the meanwhile you hadn't been doing any more work? A No.

Q What was your second application for? A That was calling for a frame building, 20 twelve-family and janitor apartment, in frame.

Q Frame building? A Yes.

Q Mr. Castles refused a permit for that? A Yes.

Q Did you go to the zoning board with that?

A Yes.

Q They refused a permit? A Yes.

Q Then did you file a third application?

A Yes.

30 Q What was that for? A Third application, that was for a brick building, twelve-family apartment, with janitor apartment.

Q Is that the application which you are now trying to get through the court? A Yes.

Q When you made your various applications, did you fill out printed forms similar to Exhibit D. 2 for identification? A I don't understand.

Q You said you made application to the building inspector? A Yes.

40 Q How did you make it? A We write it. I didn't write it; I had someone write it.

Nathan Kastovisky, cross.

Q Someone did it for you? A Yes.

Q Was it on a form similar to the paper, Exhibit D. 2 for identification, I showed you?

A Yes.

Q Where is that now? A I don't know; I left it with Mr. Castles.

Q You came and got it afterwards? A No, 10
I didn't get it; maybe someone else got it, but not me.

Q You got these plans that accompanied the application, didn't you? Your lawyer says they have now been filed with the clerk of the court?

A The plans I got.

Q You got the application at the same time?

A The application I didn't get, not that I remember.

Q Don't you remember that you came to the 20
office of Mr. Castles and took away the plans and application and all the papers? A I was here with another man.

Q Who was the other man? A I think it is McCormack.

Q What was he, an architect or builder or what? A He is a builder.

Q And he was with you? A Yes.

Q Don't you know his name? A Mc- 30
Cormack; I don't remember the name.

Q Where is his place of business? A He lives in Kearny; I don't know exactly.

Q Has he got a place of business here; was his name McGrath? A Oh, McGrath; that is the man.

Q McGrath is a local builder here in Kearny? A Yes.

Q He came in with you to see the inspector of buildings, Mr. Castles? A Yes. 40

Nathan Kastovisky, cross.

Q And at that time did either you or he ask to have the papers back? A No, I didn't ask for the papers back. I don't know what he asked for. He wants to see it; he wants to make application and he will get it, he said.

10 Q When you got through you walked out of the place with the plans under your arm?

A No, maybe that man has got the plan.

Q Who has got the plans? A McGrath.

Q Your counsel says that those same plans were filed at Trenton? A There were two sets of plans here; one set McGrath got and one set I give to Mr. Strauss, my lawyer.

Q Up to that time had you consulted Mr. Strauss, your lawyer? A Yes.

20 Q So you came out of the office, you and McGrath, with the two plans, you had one and gave it to Mr. Strauss, and McGrath kept the other plan; is that it? A I had the plans before.

Q I know you did, and you filed them with the building inspector? A Yes, but I got it from the building inspector before McGrath.

Q You got one copy from the building inspector? A Yes.

30 Q And you gave that to Mr. Strauss? A Yes.

Q Then afterwards you came in with Mr. McGrath and he got the other copy away from the building inspector? A Yes.

Q When you got your set of plans, you got the application or printed form that you had filed with the papers? A I didn't see it; I didn't hold it.

40 Mr. English: Have you got the printed application?

Nathan Kastovisky, cross.

Mr. Strauss: I don't think we have; we have one that may be a copy of it, and for that reason I am not certain whether these are the ones that were filed.

Q Have you got an architect? A Yes.

Q Who is your architect? A Greenberg. 10

Q What is his full name? A Louis Greenberg.

Q Where is his office? A 156 Market street, Newark.

Q Did he make the application or did you make that yourself? A The last one?

Q The one you are trying to get through the court now; that is the one I am talking about now. A No, he didn't get it.

Q Who wrote it out for you? A I think 20
Mr. Castles made it for me.

Q He wrote it out for you? A Yes.

Q You came to the office and he did the writing for you? A Yes.

Q You don't write yourself, do you? A No, I don't write myself like that.

Q When was it you made this last application which you are now trying to get through the court; when did you make it to Mr. Castle? 30

A I don't remember.

Q You remember that you made an affidavit to be submitted to the Court on your application?

A Yes.

Q You swore to the affidavit in November last; you remember that? A Yes.

Q In your affidavit, paragraph 9, you say that you tendered to the superintendent of buildings the new plans and specifications and the application, referring to the application which you are now seeking for a three-story, twelve-apartment, 40

Nathan Kastovisky, cross.

brick building. Who made out the application which you swore there you tendered to the inspector of buildings; who wrote it out for you?

A I believe Mr. Greenberg.

10 Q Now, where is that application which Mr. Greenberg made out for you? A I brought it in here to Mr. Castles.

Q I understand that, but you also left with Mr. Castles the plans, didn't you? A Yes.

Q You took away the plans and the application? A I took away the plans.

Q Did you file more than one copy of the application; you said you filed two copies of the plans? A Two plans there should be and one application.

20 Q One copy of the application and two copies of the plans? A Yes.

Q One copy of the plans you took away, and one copy of the plans McGrath took away? A McGrath took away the plans; he has got one set of plans.

Q And you got one set, which you gave to your lawyer? A I believe—I couldn't be sure—I think he has got the application, too.

30 Mr. English: Then I will ask you to produce at the next hearing the application which Mr. McGrath has.

Mr. Strauss: I will try to get it.

Q You don't live in Kearny, do you? A No.

Q You live in Newark? A Yes.

Q You bought this property for the purpose of building a building on it? A Yes.

40 Q And after you build on it, I suppose you want to sell it to someone else?

Frank Gargan, direct.

Mr. Strauss: I object as wholly immaterial.

Witness: Must I answer that?

Mr. English: Yes.

A I am a builder.

Q It is just a business proposition? A Yes, 10
it is a business proposition.

Mr. Strauss: I would like to reserve the right to recall this witness.

FRANK GARGAN, being duly sworn according to law, on his oath testifies as follows:

Direct examination by Mr. Strauss. 20

Q You are the secretary of the Kearny Zoning Board of Appeals? A I am.

Q Have you been secretary of that board since its organization? A Yes.

Q And when was that board organized? A February 11, 1926.

Q And was there a board in existence immediately prior to February 11, 1926? A I don't know; I understand there was; I am not sure. 30

Q Was there a board in existence on January 8, 1926, to your knowledge? A Not to my knowledge.

Q Do your records disclose some proceedings relative to property at the northeast corner of Laurel avenue and Beech street, in the Town of Kearny? A Yes.

Q Have you those records with you? A The minutes. 40

Frank Gargan, direct.

Q The records of the minute books, whatever records you have, of the Zoning Board of Appeals of the Town of Kearny? A Yes.

Q They are here? A Yes.

10 Q Will you read into the record anything you find in the minutes relative to this property—proceedings relative to this property?

Mr. English: I object to that for the reason that the rule to show cause refers to a specific application for a specific building, namely, a three-story brick building, to contain twelve apartments and janitor apartment, and I think any other applications to the zoning board are immaterial and irrelevant and incompetent.

20

Q Will you read into the record whatever the records of the Kearny Zoning Board of Appeals disclose relative to an application for a building permit for a two-story building to contain five stores and four apartments on the premises at the northeast corner of Laurel avenue and Beech street?

30

Mr. English: Same objection as before.

A (Reading) (Page 4 of the Minute Book.)

“Kearny, N. J., May 11, 1926.

40

“Mr. Nathan Kastovisky made application for the erection of a building of five stores and four apartments on the N. E. corner of Laurel avenue and Beech street, late of Mr. Herbert Purcell. A delegation living in this vicinity made protest. Upon motion by Mr. Portz, seconded by F. Gargan,

Frank Gargan, direct.

the application was immediately rejected.
Five votes in the affirmative.”

Q What do your records next show with relation to any building permits for this property? A Record of July 13, 1926, page 47 (reading):

10

“Nathan Kastovisky, 12-family apartment northeast corner of Laurel avenue and Beech street.”

Q What does that refer to? A It refers to application of Mr. Nathan Kastovisky made to the board.

Q What is next disclosed as far as this property is concerned? A Minutes of July 27, 1926, page 49 of the minute book, reading as follows:

20

“Upon a motion by Mr. Gardener, seconded by Mr. Benson, the application of Nathan Kastovisky to erect a twelve-family apartment of brick construction on the northeast corner of Laurel avenue and Beech street was order published for a public hearing, if plans were approved by Building Supt. John Castles. Carried—4 votes in the affirmative. Mr. Portz voting in the negative.”

30

Q What is the next reference to this property? A September 14, 1926, page 55. (Reading)

“The following applications for permits
* * * Nathan Kastovisky three story
twelve-family brick apartment house on the

40

Frank Gargan, cross.

N. E. corner of Laurel avenue and Beech street.

The above were laid over until next regular business meeting, to advertise for objections.

Four votes in the affirmative.”

10

Q What is the next reference in the minutes? A Page 57, September 28, 1926. (Reading).

20

“After hearing objections to the erection of a twelve-family apartment on the N. E. corner of Laurel avenue and Beech street (Nathan Kastovisky owner), upon a motion by Commissioner Gardener, seconded by Commissioner Portz, application was re-

jected. Five votes in the affirmative.”

That is all there is.

Cross examination by Mr. English.

Q The first application of which you have any record is under date of May 11, 1926, is that right? A Yes.

30 Q And that was rejected as a result of protests of the application made by Mr. Purcell? A That is right.

Q What objections did those people voice?

Mr. Strauss: I object; the record speaks for itself; and not proper cross examination.

A People stated that it would depreciate the value of their property.

40 Q Anything else? A I cannot recall anything else—and injurious to the health.

Frank Gargan, cross.

Q Can you recall anything else? A That is all.

Mr. Strauss: I object on the ground that it is hearsay.

Witness: I cannot recall anything else.

Q How many members are there on the Zoning Board of Appeals? A Five.

Q Another application was made on July 13, 1926? A Yes.

Q And what action was taken on that?

Mr. Strauss: I object; the record speaks for itself.

Mr. English: We didn't read it into the record; that should be done.

A The record reads: "The above applications were ordered published for a public hearing in the Municipal Building on July 27, 1926."

Q That included the Kastovisky application, I suppose? A Yes.

Q Was the application published? A It was.

Q Was there a hearing held on July 27? A Yes.

Q It already appears from the record read in evidence, that the application for a twelve-family apartment of brick construction was ordered published if the plans were approved by the superintendent, Mr. Castles.

Q Is that all that took place on the twenty-seventh? A That is all.

Q Was a publication made for a public hearing? A Yes.

Q And when was that held? A On August 10, 1926.

10

20

30

40

Frank Gargan, cross.

Q It appears from the record that on that date there were objections again? A Yes.

Q Who appeared and objected at that time?

A I don't know personally the names of the people, but there were a number of people there objecting.

10 Q Was there a large delegation? A I don't remember this particular night.

Q Do you remember any objections that were pressed on that particular night, August 10?

Mr. Strauss: I object on the ground that this is hearsay.

Mr. English: Just whether he remembers.

20 A I don't remember just what was said at that time.

Q Your record next shows that on September 14 Kastovisky made another application; is that right? A Yes.

Q For a three-story, twelve-family apartment of brick construction? A Yes.

30 Q And that was laid over for hearing of objections at the next regular meeting; is that right? A That is right, to advertise for objections.

Q And it appears from the next meeting, which was September 28, 1926, that objections were heard? A Yes.

Q And the application rejected by unanimous vote? A That is right.

Q Do you remember what objections were expressed on September 28?

Mr. Strauss: I object as immaterial.

40 A I don't remember just what was said.

John D. Castles, direct.

Q So many objections it is pretty hard to remember? A Yes.

Q Was there a delegation down again objecting on the ground that it affected health and matters of that character?

Mr. Strauss: I object, and also not 10
proper cross examination.

A I don't remember hearing anything of that nature.

Q You don't remember what was said? A No.

Q What is the procedure—after this disposition of the matter by the Board of Appeals on September 28, then what happened; did it go back to Mr. Castles, or what happened? A We 20
rejected the application. He is notified by the president that it has been rejected, and that is as far as I know.

Q That is the end of it, so far as you know? A Yes.

Q Is any record of this sent down by you to Mr. Castles as Inspector of Buildings? A No, sir, he is present at the meeting.

Q He sits in the meeting and has first-hand 30
information? A Yes.

JOHN D. CASTLES, being duly sworn according to law, on his oath testifies as follows:

Direct examination by Mr. Strauss.

Q Mr. Castles, you are the Inspector of Buildings of the Town of Kearny? A I am. 40

John D. Castles, direct.

Q You are one of the respondents in this case? A Yes.

Q Your records show a building permit was issued for the erection of a one-story building to contain five stores, on the northeast corner of Laurel avenue and Beech street, in the Town of Kearny? A It does.

10

Q Was that permit ever revoked? A Yes.

Q Do your records show that it has been revoked? A No, sir.

Q It is therefore uncanceled on your records?

Mr. English: I object to that as calling for a conclusion and therefore obviously—

20

A Yes, it is uncanceled.

Q Why do you then say that it was revoked?

A Because I notified him verbally.

Q Whom do you mean by "him"? A Mr. Kastovisky.

Q When? A When he came into my office.

Q What was that? A I have no record of the date. I suppose it was—when he started to work up there; maybe it was in March or April, I don't know.

30

Q Did you see the excavation while in course of work? A Yes, sir.

Q And did you know that Mr. Kastovisky was doing the work? A No, sir, I didn't know. I have been up on the job several times, trying to get the owner, and couldn't, to stop the work.

30

Q Was the application for the two-story building and five stores and apartments made to you after you notified Mr. Kastovisky that he would not be permitted to go on with the work? A After, yes, sir.

40

John D. Castles, direct.

Q Were those plans and specifications in accordance with the ordinances of the Town of Kearny? A Yes.

Q And you refused to give Mr. Kastovisky a permit? A I did.

Q Why? A Contrary to the zoning laws of the town. 10

Q In what respect? A Stores.

Q It is not contrary to the zoning ordinance to erect stores anywhere in Kearny, is it? A No.

Q And was that the only reason that you refused to give him his permit? A Yes.

Q And after that an application with plans and specifications were made to you for a building on the same land, to be a three-story building and containing twelve apartments? A Yes. 20

Q Of frame construction? A Yes.

Q You again refused to issue a permit? A I did.

Q Why? A Contrary to the zoning law.

Q The plans and specifications complied with all other ordinances? A Yes.

Q And subsequent to that an application was made to you for the erection on this land of a three-story building of brick construction to contain twelve apartments and janitor's apartment and no stores, is that so? A Right. 30

Q And you again refused to issue a permit? A We did.

Q And for what reason? A The same as the other,—contrary to the law.

Q Contrary to law? A To the zoning law.

Q The specifications and plans complied with all other ordinances? A Yes.

Q You issued a permit to erect stores on this land in January, 1926? A I did. 40

John D. Castles, direct.

Q And that permit calls for the erection of a one-story building to contain five stores? A Yes.

10 Q And on each occasion that Mr. Kastovisky tendered you plans and specifications and made application for his building permit, did he tender you the proper fees? A He did.

Q Has a building permit been issued for the erection and construction of a building to contain stores and apartments on Laurel avenue and Stewart avenue? A No such connection.

Mr. English: I object to that.

Q Or is it on Beech street and Stewart avenue? A Yes.

20 Q How far is that away from the property with which we are now concerned in this case?

Mr. English: I object to that as incompetent, irrelevant and immaterial. Any action with relation to any other property has nothing to do with the property in question. Each case has to stand on its own merits.

30 A I suppose 2,000 or 2,500 feet.

Q Isn't that property on the opposite side of Beech street, two block from the corner in this case?

Mr. English: I object for the same reason as already stated; it relates to another property, another application and another owner.

40 A Yes, but two very long blocks.

John D. Castles, direct.

Q And isn't the property situated in what is known as a residential district, restricted to one-family buildings?

Mr. English: Same objection as before.

A No, it is a two-family zone, I think. 10

Q And it is the same zone as the property in question is situated in? A Yes.

Q And that building contains stores and apartments, which has been erected?

Mr. English: Same objection as before.

A Yes.

Q Have you issued a permit for an apartment building to house more than two families at Chestnut street and Oakwood avenue, in the Town of Kearny? 20

Mr. English: I object on the ground that it is incompetent, irrelevant and immaterial, and relates to a different property, different locality, and different application, and different owner, and it has no relevancy to this action.

Q Have you granted such a permit? Do you say there has been such a permit granted? 30

A Yes.

Q Isn't Chestnut street and Oakwood avenue within the zones limited to properties not to house over two families?

Mr. English: Same objection.

A Yes.

Q And were both of those permits granted during the year 1926? 40

John D. Castles, direct.

Mr. English: Same objection as before.

A No.

Q When was the first permit granted?

Mr. English: Same objection.

10 A In 1925.

Q And the Chestnut street and Oakwood avenue?

Mr. English: Same objection.

A 1920.

Q And were either of those permits granted as a result of litigation?

20 Mr. English: Same objection.

A What do you mean, in the court or before the zoning board?

Q Did the parties have to go to court to get these permits?

Mr. English: Same objection.

A No.

30 Q Do you examine all plans for buildings to contain three families or more for the purpose of determining whether approval has been given by the New Jersey Board of Tenement House Commission? A I do.

Q And do you pass such plans on to the zoning board with such approval being stamped on the plans? A Yes.

40 Q Do you recall whether in this case such approval was stamped on the plans for the three-story brick building to contain twelve

John D. Castles, direct.

apartments and janitor's apartment? A It hadn't had my approval.

Q I am speaking of the tenement house approval? A I cannot say, now, whether the tenement house approval was on it or not, but before the permit would have been issued for it, it would have to be O. K.'d by the Tenement House Board. 10

Q You are familiar with the building ordinance of the Town of Kearny? A I am.

Q And does that building ordinance require a hearing on revocation of permits?

Mr. English: I object; the building ordinance speaks for itself. You have a copy of it; put it in evidence.

Q Is this a true copy of the building ordinance of the Town of Kearny? (Witness shown book.) A Yes. 20

Mr. Strauss: I offer it in evidence, and I offer particularly section 4, page 7, of the Building Ordinance, reading as follows:

"Every permit issued by the said Building Inspector shall be subject to revocation, should he become convinced that the work done under such permit is proceeding in violation of law. Revocation of a permit shall be in writing, and shall be served on owner, superintendent or contractor in charge of the work, or posted on the property; and from and after such revocation of permit all contractors performing any work in or about said structure, building or premises, shall be subject to a fine as herein provided." 30

(Marked Exhibit P. 3.)

John D. Castles, cross.

Q Are you familiar with section 4 of the Building Ordinance relative to revocation of permits? A Yes.

Q Wherein it is provided that revocation of a permit shall be in writing? A Yes.

10 Q "And served on the owner, superintendent or contractor in charge of the work, or posted on the property"? A Yes.

Q Was there any revocation in writing in this case? A No.

Q Was there any hearing held? A No, it wasn't necessary; the man wanted to change the plans; if he had gone ahead, he would have been notified in writing.

20 Mr. Strauss: I ask that that last part of the answer be stricken out as not responsive.

Mr. English: I object to it.

Cross examination by Mr. English.

Q Mr. Castles, I show you Exhibit D. 1 for identification, which was a permit issued to Harry Citret; is that correct; that was issued by you? A Yes.

30 Q That was before Kastovisky owned the property? A Yes.

Q Was it represented to you that Harry Citret owned the property? A Yes.

Q Isn't that how you came to issue the permit to him? A Yes.

Q Did Harry Citret do any work under that permit that you ever heard of? A No, sir.

Q Who did the first work, if any, under that permit? A Mr. Kastovisky.

40 Q And then he began to excavate for the cellar? A Yes.

John D. Castles, cross.

Q Did he come into your office at any time about that time when he was excavating? A No, sir.

Q When did you learn that he was excavating, if ever; how did you find it out? A By going in my tour of duty around there.

Q You investigate these things throughout the town? A Yes. 10

Q And you found this excavation was being made by Kastovisky? A Yes.

Q Then what happened? A I wanted to get hold of him to notify him to quit.

Q When did he make application to you for an alteration in the plans? A I think it was about March or April; I have no record of it, because I didn't put anything down in the book.

Q Did you get hold of him to notify him to quit before he wanted to change the plans? A No. 20

Q Before you connected up with him, he came in and wanted to change his plans? A Yes, that is it exactly.

Q Did he file a formal application for an alteration of plans? A Not with me.

Q How did you find out he wanted to change his plans? A He brought the plans in here and asked me to give them a permit on it. 30

Q To do what? A To make that change, put a story up above; I said I couldn't do it, and he had no permit to do anything there.

Q He had no permit to do anything at all, did he? A No.

Q Kastovisky himself didn't? A No.

Q Is that why you wanted to revoke it, because he had no permit to work? A Yes, that is why he got no written notice of it. 40

John D. Castles, cross.

Q Then he came in with a new set of plans which was a substantial alteration in the building? A Yes.

Q Did he file any formal application on that?
A I think he did file a formal—a regular application. At that time he only had the plans,
10 and he took it over to his architect and had an application made out; I told him that would have to come before the board.

Q This Exhibit P. 2 in evidence was the placard to be posted on the building showing the permit had been issued to Harry Citret; is that right? A Yes.

Q And that and Exhibit D. 1 for identification both are numbered 1723? A Yes.

Q And applies to Harry Citret only? A Yes.

20 Q It appears that Kastovisky made three separate applications; of course, every time he made another one, he withdrew the first one, did he not?

Mr. Strauss: I object.

Q That was the effect of it?

30 Mr. Strauss: I object as calling for a conclusion.

A Yes.

Q Did he or not withdraw it himself?

Mr. Strauss: I object on the same ground.

Witness: Give me the question again.

40 Q After he had filed the first application and when he made the second application, did that

John D. Castles, cross.

effectually withdraw the first one, or did he come in and withdraw it?

Mr. Strauss: I object as calling for a conclusion.

A That automatically dropped the other one. 10

Q When he filed the next one? A Yes.

Q Going back, it started off with a permit to Harry Citret, then Kastovisky undertook to excavate under that permit, which he had no right to do.

Mr. Strauss: I object to that as it calls for a conclusion.

A Yes, he had no right to do that.

Q Then before you could get to him, he came in to you with a set of plans indicating that he wanted to change the character of the building? 20

A That is right.

Q And at your suggestion a formal application was filed on his behalf, which was rejected and taken up to the board of appeals? A Yes.

Q And that called for a two-story building with stores below and apartments above? A Yes. 30

Q Did he pay any money on that? A Yes, he paid the fee.

Q Did he afterwards come and get the money back? A Yes.

Q Did he get that money back before he filed the next application? A He did.

Q Then the next application was for a frame building with stores and apartments, is that right, or a frame building with just apartments?

A A frame building without stores. 40

John D. Castles, cross.

Q Do you remember how many families? A I don't remember.

Q Did he pay a deposit on that application?

A He did.

Q That, I think, was rejected both by you and the zoning board? A Yes.

10 Q Did he come and withdraw his money on that? A He did.

Q Before he made the third application? A Yes.

Q Then the third application was the one which is now in the application to the court, namely, for a brick building with twelve apartments and a janitor's apartment; is that correct? A Yes.

Q He paid the fee on that? A He did.

Q Was it rejected by you? A It was.

20 Q And by the zoning board? A Yes.

Q Then did he come and take away his papers? A He did.

Q When did he do that? After the zoning board was through or before? A Oh, yes, after everything was through and finished up.

Q Did he take away the deposit? A Yes.

Q Did you give him back his money? A Yes.

30 Q So the whole thing was withdrawn by him taking away the application of plans and securing the return of his deposit?

Mr. Strauss: I object to the question on the ground that it calls for a conclusion and counsel's characterization of a series of acts are of a legal significance.

A He did.

40 Q He did in fact take away his plans, did he not? A He did.

John D. Castles, re-direct.

Q And he did in fact take away his application which he made? A Yes.

Q And he did in fact apply to you for a return of the deposit? A He did.

Q And you gave him the plans, the application and the money? A Yes.

Q That was all before he made this application to the Court? A It was. He didn't know what he was going to do when he went out. 10

Q Was Kastovisky the owner of these other properties that Mr. Strauss asked you about where permits had been issued? A No.

Q Were they in the same zones or other zones? A In the same zones, two-family zones.

Re-direct examination by Mr. Strauss.

20

Q Was the fee that was given to you for the permit to erect a one-story building containing five stores ever returned? A No, sir.

Q And at the time when you say Mr. Kastovisky took away the plans and specifications for the three-story building of brick construction, to contain twelve apartments and janitor's apartment, did you return the fee to him, or did he demand it from you? A He asked for the money. That was paid in cash, and he asked for it. 30

Q How many copies of the plans did you have? A One copy.

Q How many copies of the specifications? A No, I don't take specifications.

Q There are specifications in the application, aren't there? A No, sir.

Q How many papers did you have beside the plans? A Application the same as that (indicating D. 2 for identification). 40

John D. Castles, re-cross.

Re-cross examination by Mr. English.

Q The permit for the five stores, Exhibit P. 2, and D. 1 for identification, was accompanied by a deposit? A Yes.

10 Q That money was paid by Harry Citret, was it not? A Yes.

Q It had nothing to do with Kastovisky at all?

Mr. Strauss: I object as calling for a conclusion.

A No.

Q That was before Kastovisky appeared on the scene? A Yes.

20 Q Some months before he owned the property? A Yes.

Q The Building Ordinance in evidence as Exhibit P. 3, by section 4, provides that "Blank forms for the detailed statement as herein required may be obtained at the office of the Building Inspector, which the applicant shall fill out, and the owner or owners, his or their agents, shall sign the agreement contained in the statement"; that is what you refer to as the application, is it not? A Yes.

30 Q And that is the same as Exhibit D. 2 for identification? A Yes.

Q Which was made by Harry Citret? A Yes.

Q Kastovisky made an application on a similar blank from time to time, did he not? A Yes.

40 Q And those applications are always made on behalf of or in the name of the owner, are they not? A Yes, sir.

John D. Castles, re-direct—re-cross.

Q This Exhibit D. 2 for identification is produced out of your files, is it not? A Yes.

Q By Harry Citret? A Yes.

Q He has never withdrawn that or taken his money? A No, sir. On anything that is entered up in my book, they would have to go before the Town Council to get the money, because it is turned in every month. 10

Q But Citret now having no further interest in the property, that falls of its own weight?

Mr. Strauss: I object as immaterial to the issue in this case.

Q And he can get his money back by proper application to the council? A Yes.

Re-direct examination by Mr. Strauss. 20

Q Did you ever notify Mr. Citret of your action on the permit that was issued? A No.

Q Neither in writing nor orally? A No.

Q Under your Building Ordinance, an application for a permit may be made by the owner, lessee or agent of either, or architect or builder employed by the owner? A Right.

Re-cross examination by Mr. English. 30

Q Did Harry Citret ever do anything under his permit? A No, sir, he did not.

Q Do you know who he is or where he is, or anything about him? A I do not.

Q Was there any occasion to give Kastovisky a written notice of the revocation of the permit to Harry Citret?

Mr. Strauss: I object. 40

Nathan Kastovisky, recalled, further direct.

A No.

Q That is not within the requirements of the Building Ordinance? A No, sir. How could I? I had nothing to recognize him as an owner.

10 The further taking of testimony in this matter is adjourned to a day to be agreed upon between counsel.

Continuation of testimony in the above entitled cause, before Nicholas W. Bindseil, as Supreme Court Commissioner of New Jersey, at the Town Hall, Kearny, New Jersey, on Friday, March 11, 1927.

20 Appearances:

Messrs. Daniel L. Strauss and Benjamin M. Weinberg, for relator.

Mr. Conover English for respondents.

NATHAN KASTOVISKY, recalled for further

Direct examination by Mr. Strauss.

30 Q I want to clear up this business of these plans and this application. How many plans and how many applications did you file for the erection of a twelve-apartment brick building?

A Two plans and one application.

Q How many plans did you receive back? A I received one.

Q How many applications were returned? A I didn't get any.

40 Q Who gave you that plan back? A Mr. Castles.

Nathan Kastovisky, recalled, further direct.

Q How did he come to give you that back?

A After that hearing I went in here and I see what we can do; I ask what we can do.

Q What hearing? A From the Board of Adjustment, the last hearing, where they turned me down. Then I asked him, to see maybe he can do anything for me. He said, "Mr. Kastovisky, we decide we cannot do anything for you. Here is your plan and your money." 10

Q Did he ask you what you were going to do? A Yes, he asked me what I am going to do. I said, "I am going in Court right away."

Mr. English: I object. I asked you to produce the plan and application, and counsel said, "I will produce the plans at the next hearing". That is on page 12. 20

Q What did you do with that plan that you say was returned to you after this last hearing by the Zoning Board? A That plan I give to you.

Q Did you receive it back from me? A No.

Mr. English: Page 24:

"Mr. English: Then I will ask you to produce at the next hearing the application which Mr. McGrath has. 30

"Mr. Strauss: I will try to get it."

Mr. Kastovisky says:

"I believe—I couldn't be sure—I think he has got the application, too."

"Mr. English: Then I will ask you to produce at the next hearing the application which Mr. McGrath has.

"Mr. Strauss: I will try to get it." 40

Nathan Kastovisky, cross.

Q Do you know who has the other plan and the application? A I don't know. I know he had a plan; I seen it.

Mr. English: Who is "he"?

Witness: Mr. McGrath.

10

Q Where is the application? A I don't know.

Q Have you it? A If I have it?

Q Yes. A No.

Q Was it ever returned to you? A No.

Q Was the other plan and the application ever returned to anyone else at your request?

A No.

20

Mr. Strauss: I will now say for the record that the plans referred to as being returned to the witness and delivered by him to me is the same plan that was filed in the office of the Supreme Court Clerk with the original application.

Mr. English: I assume that was annexed to your affidavits?

Mr. Strauss: That is annexed to the affidavits.

30

Cross examination by Mr. English.

Q Who is Mr. McGrath, Mr. Kastovisky?

A He is a Kearny man.

Q He is a builder? A He is a builder.

Q He was going to build this apartment for you if you got your permit, wasn't he?

Mr. Strauss: I object.

A No, he wants to get me the permit.

40

Q Was he going to build the building for you? A No.

Nathan Kastovisky, cross.

Q Who was going to? A I built it myself.

Q Are you a builder? A Yes.

Q You got Mr. McGrath to help you get the permit? A Yes.

Q Because he was a local builder in Kearny?

A Yes, he is a local builder in Kearny.

Q And he was acting for you in the matter of filing these plans and getting this permit? 10

A He was trying—he said he will do it, yes.

Q And he was trying to help you do it? A Yes.

Q Is that right? A That is right.

Q You and he came together to see Mr. Castles in this office, didn't you? A I suppose we did.

Q You know that you came with Mr. McGrath? A Yes, he was here.

Q How many times did you and Mr. McGrath come together to see Mr. Castles? A Once. 20

Q When was that? A I don't remember exactly, but it was after the Zoning Board turned me down.

Q Then you and Mr. McGrath came together to see Mr. Castles? A Yes.

Q And that is the time you took away your plan? A Yes.

Q And Mr. McGrath took the other set of plans and application with him? A I don't know if he took it or not. 30

Q You and Mr. McGrath came here together after the Zoning Board turned you down and you took away one set of plans? A Yes.

Q And Mr. McGrath said that he would try and get the application in his own name, didn't he, for you? A I don't know how he is to get it.

Q You know he was going to make another effort to get the application through? A I 40

Nathan Kastovisky, cross.

don't know; he said he was going to get it in a few days, not long; otherwise, I didn't want to have anything to do with him.

Q And whatever he was going to do was really for you, wasn't it? A Yes.

10 Q And at that time when he said that, you and he both being here, he got from Mr. Castles and took away with him the plans and the application, didn't he, one set of the plans and the application? A I don't know if he took it away or not.

Q Yes, you know that much. A I know he has had a plan and I don't know if he took it away, because I left them here. I went away myself.

20 Q You know that he took a plan which was a duplicate of the set of plans which you took away; both were alike? A Yes.

Q You know that, don't you? A Yes.

Q You know Mr. McGrath took one set of these plans with him? A Yes; I didn't tell him to take away the plans.

Q But you were both here talking together with Mr. Castles? A Yes.

30 Q You took one set of plans and he took the other; you know that? A I don't know if he did or not.

Q You know he also took away the application? A I don't know. Why should he take it away when he got to make his application? That don't mean to say he took away my plan.

Q You know he took away a copy of the application that you filed with Mr. Castles? A I don't know if he took it away.

40 Q You didn't take it away? A No, but I don't know if he took it away. How do I know?

Nathan Kastovisky, cross.

Q You know that it is not here now, don't you? A I don't know. What do I know?

Q And Mr. McGrath said he would try and get a new application through in his name, and you said it had to be done in two or three days or you didn't want it? A Yes.

Q That is true, isn't it? A Yes. 10

Q And the application that you are talking about and the plans you are talking about are for this three-story brick building that you are now trying to get through the Court? A What?

Q You know you are making an application to the Court through your lawyers? A Yes.

Q To compel the city officials here to give you this permit? A Yes.

Q And the permit you are after is a permit to build the three-story brick building? A Yes. 20

Q And that was the building that was called for in these plans? A Yes.

Q And it is the kind of building that is mentioned in the application? A Yes.

Q And that was the building that was called for in these plans? A Yes.

Q It is the kind of building that is mentioned in the application? A Yes. 30

Q I show you a paper which I have obtained from the Clerk of the Zoning Board of Appeals; that is the application that you filed with the Zoning Board on this same brick building, is it not? A I think it is.

Q There is your name, Nathan Kastovisky? A Yes, I signed it.

Mr. English: I offer it in evidence, for identification.

(Marked Exhibit D. 4, for identification.) 40

Nathan Kastovisky, re-direct—re-cross.

Q At the time you were in with Mr. McGrath, you took away one set of plans and also got your money from Mr. Castles, didn't you? A Not exactly that day, no.

Q How long after? A I don't remember; a couple of days after.

10 Q You came in and got the cash; he gave you the cash; that is right? A Yes.

Q Do you remember when that all was? A I don't remember exactly when it was.

Re-direct examination by Mr. Strauss.

Q How did you come to get the money? A I didn't come for the money.

20 Q How did you come to get it? A Mr. Castles said he could not do anything for me; he said, "Here is the plans; I cannot do anything." They couldn't do anything, but I said, "I will go in court." He said, "Here is your plans and here is the money."

Q The application that Mr. McGrath was so interested in getting, was that for the same kind of a building, a three-story brick apartment building? A For the same building, yes.

30 *Re-cross examination by Mr. English.*

Q How long after the Zoning Board turned you down did you come in here with Mr. McGrath? A I don't know exactly.

Q A day or two? A No, a couple of days after.

Mr. Strauss: We rest.

40 Mr. English: It is stipulated that the Relator, Nathan Kastovisky, obtained title

John D. Castles, direct.

to the property by deed of Isidor Sperber and wife, dated April 1, 1926; recorded April 8, 1926, in Book 1602 of Deeds for Hudson County, page 155; that Isidor Sperber, his grantor, obtained title to the same property by deed of Gandolfo P. DiMartino and wife, dated March 5, 1926, recorded March 9, 1926, in the Register's Office of Hudson County; that DiMartino obtained title to the property by deed from John W. Carlson and wife to Gandolfo P. DiMartino by deed dated May 11, 1925, recorded May 18, 1925. Is that agreed to? 10

Mr. Weinberg: Sure.

JOHN D. CASTLES, heretofore sworn, called on behalf of the respondents. 20

Direct examination by Mr. English.

Q You are the Inspector of Buildings; is that your title? A Municipal superintendent.

Q Do you remember the fact that Mr. Kastovisky filed with you, in your office, an application for a license to build a three-story brick building at the corner of Laurel and Beech street? A Yes. 30

Q Do you remember that after you denied the permit he took the matter to the Zoning Board of Appeals? A Yes, sir.

Q It appears from the minutes of that Board already in evidence, that the application was rejected by the Zoning Board on September 28, 1926. Do you remember that after that time Kastovisky came back to your office? A Yes. 40

John D. Castles, direct.

Q Was he accompanied by anybody? A He had been back himself and he had been back when someone was with him.

Q A man named McGrath, a local builder here in Kearny? A Yes.

10 Q What is his first name, Lawrence? A I think it is Thomas, I am not positive; I could verify it by the books. He has built in town here.

Q Suppose you look it up. A L. J. McGrath, I have here.

Q On any of those occasions when Kastovisky came in with McGrath did he take the plans away? A Yes, the last time they were both here—they had been here a couple of times—the last time they were here the plans were handed
20 to Mr. McGrath.

Q How many sets of plans were filed with you? A Two sets.

Q How many copies of the application? A One set of application.

Q One application and two sets of plans? A Yes.

Q When they both came in, the day you speak of, were both sets of plans and the application handed back? A Yes, they were all
30 rolled up together.

Q To whom were they handed? A McGrath took them.

Q Took both sets of plans and the application? A Yes.

Q And Kastovisky, was he there? A Yes.

Q And they were together in the matter? A Yes.

Q And they walked out together? A Yes.

40 Q McGrath carrying the plans and the application? A Yes.

John D. Castles, cross.

Q When was that as near as you can now remember after September 28, 1926, when the Zoning Board denied their application? A I cannot tell you the date; I think it was early in October.

Q Of 1926? A Yes.

Q It already appears that the deposit which Mr. Kastovisky made in connection with this application was returned to him by you; was it returned? A I returned it to him. 10

Q Do you remember how much it was? A \$50.

Q How did you return it to him, check or cash? A Cash.

Q And when did you do that, if you remember, with reference to the time when you got his plans? A I asked him if he wanted his money then, and he said no. He come in again in a couple of days, and a couple of days after that he came in and got it. 20

Q Alone? A All alone.

Q Did you give him the money? A Yes.

Q That was a couple of days after he and McGrath got the plans and specifications? A Yes.

Q That was also early in October? A Yes. 30

Cross examination by Mr. Weinberg.

Q Have you any official record as to when you returned the plans and the application? A No, sir, nothing in writing.

Q Have you any official record as to when you returned the money? A No, sir.

Q Didn't you take a receipt from him? A No, sir.

Q Did you make a record of when you received the money? A No, sir. 40

John D. Castles, cross.

Q You have no record as to receipt of permit money? A No, sir.

Q Or return of the same? A No, sir. I hold the money until I give him the permit, and the permits are made out in duplicate.

10 Q So that there is no official record showing that you ever received any money from Mr. Kastovisky? A No, sir.

Q So that the Town doesn't know that you ever did take any money? A From Mr. Kastovisky?

Q Yes. A No, sir.

Q Or any other applicant for a permit? A Not in the same case.

Q Not on the same case? A I mean anything pertaining to the zoning laws.

20 Q That is your regular custom, is it? A Yes; it has been my custom, yes.

Q You held your position how long? A Sixteen years.

Q Do you recall the application that you say was returned to Mr. McGrath? A Yes.

Q Do you know what sort of an application you returned to him? A Yes; I can show you a duplicate that is made out.

30 Q All right. A An application the same as this.

Mr. English: You produce a blank permit?

Witness: Yes.

Q Have you a name for this particular form, which I have in my hand? A It is an application for a building permit.

40 Q That is the regular application which you use? A Yes, sir.

John D. Castles, cross.

Q Was it properly filled out by Mr. Kastovisky? A It was.

Q And it was an application for a twelve-apartment brick building? A I believe it was, yes.

Q Well, do you know? A Yes, I can say it was. 10

Q Let us be sure about it; you are sure that it was? A Twelve-apartment brick building.

Q And the application that you returned to Mr. McGrath, was that for a twelve-apartment brick building? A It is whatever application—the date you had—it was wrapped up right in with the plans; I hadn't taken it out; I returned it to him in the manner he brought it in.

Q It was the same application that he made? A Yes. 20

Q For a twelve-apartment brick building? A Yes.

Q At the location mentioned by Mr. English? A Yes, Laurel and Beech street.

Q Can you tell us just what steps you took after receiving the application and the plans from Mr. Kastovisky? A What steps I took?

Q Yes. A I told him it was contrary to the law, that I couldn't give him a permit, and he would have to go before the Zoning Board, and I gave him an application to fill out with the Zoning Board, one of the applications here. 30

Q Have you that application? A Yes.

Mr. English: You refer to Exhibit D. 4 for identification?

Witness: Yes.

Mr. Weinberg: Do you want to put that in? 40

John D. Castles, cross.

Mr. English: I will put it in later on.

Q After the application to the Zoning Board of Appeals of the Town of Kearny was made by Mr. Kastovisky, what was the next step taken in this matter? A It was rejected by the Zoning Board.

10 Q Before it got to the Zoning Board of Appeals? A Before it got to the Zoning Board?

Q Yes. A Before it got to it. I don't get what you mean.

Q Did you advertise the matter? A No. That isn't advertised until it goes to the Zoning Board; that is not up to me.

Q Was it advertised, to your knowledge, before the hearing before the Zoning Board? A No, sir.

20 Q And do I understand that Mr. Castles contradicts that statement, then? A No.

Q You don't mean to contradict any statement that was made by the Clerk of the Zoning Board? A No, sir.

Q Do you pass upon the question as to whether or not the proposed building conforms to the building code here? A Yes.

Q And did you pass upon the application of Mr. Kastovisky in this respect? A Yes.

30 Q I refer now to the application for the twelve-apartment brick building. A For the building, brick, yes.

Q And so far as building requirements were concerned, did the application and the plans and the specifications conform to the requirements of the Building Department? A Yes, they did.

Q So that so far as they show, the only reason for the rejection of the permit was be-

40

John D. Castles, cross.

cause the proposed building was in a so-called zoned district against everything but two-family houses? A Yes.

Q At the time that you say you returned the plans and the application, were Mr. Kastovisky and Mr. McGrath present? A Yes.

Q Is it not a fact that Mr. Kastovisky left first and left you with Mr. McGrath? A No, sir. 10

Q You remember that clearly? A Yes, sir.

Q Was not Mr. McGrath here alone with you at the time you returned the plans and application? A No, sir. Mr. Kastovisky said to turn the thing over to Mr. McGrath, that he was going to take the thing over.

Q Did he tell you to turn it over to him while he was here? A Yes, sir. 20

Q And you handed the plans and the application personally to Mr. McGrath? A Yes, sir, he took them.

Q Was there any further applications made either by Mr. McGrath or Mr. Kastovisky? A After that?

Q Do you recall how it came about that the plans, application and cash were returned? A How they were returned?

Q How it came about. A No, I think with some agreement between Mr. Kastovisky. 30

Q Not what you think; do you know how it came about that they were returned? A No, sir.

Q Well, you do remember that you told Mr. Kastovisky there was nothing more that could be done for him in the matter? A Yes, that I couldn't do anything more for him.

Q You didn't tell him that anybody else could or would do anything else? A No, sir. 40

Louis P. Greenberg, direct.

Q So you advised him to take the plans and the money, didn't you? A Yes.

10 It is stipulated and agreed that the proceedings now pending were first begun by a notice of a motion served on the respondent, John D. Castles, of an application to Justice Minturn for a writ of mandamus on December 8, 1926, and on the same day a true copy of the notice and affidavits without schedules was served upon William B. Ross, Town Clerk of the Town of Kearny, in person, to whom the contents were briefly explained, and on the same day, a true copy of the same notice and affidavits without schedules was served upon Edmund Skold, Chairman and member of the Kearny Zoning Board of Appeals, in person; all service upon Castles, Ross and Skold being made personally, and a rule to show cause, dated December 16, 1926, was issued by the said Justice.

20

LOUIS P. GREENBERG, sworn on behalf of respondents.

30

Direct examination by Mr. English.

Q You are an architect by profession? A Yes.

Q Did you draw the plans for Mr. Kastovisky for his proposed three-story brick building to be erected corner of Beech and Laurel avenue, in Kearny? A Yes, sir, I did.

40 Q I subpoenaed you to produce the plans, among other things; have you got them with

Louis P. Greenberg, direct.

you? A I have no copies of the plans; Mr. Kastovisky has all of them. I just have the originals at my office.

Q Mr. Kastovisky testified in this case that you wrote out for him the application for the permit, which application he filed with Mr. Castles; do you remember doing that? A Yes. 10

Q I subpoenaed you to produce the application. Have you got it? A No, Mr. Kastovisky had that; I never saw it after it left my hands.

Q The last you saw it was in Mr. Kastovisky's possession? A That is right.

Mr. Weinberg: No cross examination.

Mr. English: I offer in evidence Exhibit D. 1 for identification.

Mr. Weinberg: Objected to as not material. 20

(Marked Exhibit D. 1.)

"No. 1723 C

Office of Building Inspector,
Kearny, N. J., Jan. 8, 1926.

Permit is granted Harry Citret
to erect a brick Building
Location 189-190 Laurel Ave. Street 30
Block 150 Lot 20-21

Width 49 Depth 100 Height 15

Number of stories 1

Proposed Use 5 stores

Estimated Cost \$10,000.00

This Permit is subject to existing ordinances.

John D. Castles,
Building Inspector
Per B. S.

Fee \$20.00 40

Frank Gargan, direct.

Mr. English: I also offer in evidence Exhibit D. 2 for identification, which was the application of Harry Citret.

(Marked Exhibit D. 2.)

10 FRANK GARGAN, sworn for respondents.

Direct examination by Mr. English.

Q Mr. Gargan, it already appears that you are the clerk of the Zoning Board of Appeals? A Secretary.

Q I show you a paper which has been marked Exhibit D. 4 for identification, which you handed me before we began today. A Yes, sir.

20 Q What is that paper? A That is a regular form application Mr. Kastovisky made out.

Q That is Mr. Kastovisky's application to the Zoning Board? A Yes.

Q For the construction of this brick building that is the subject matter of this suit? A Yes.

Q And you produced that from the files of the Zoning Board? A Yes.

30

Mr. English: I offer Exhibit D. 4 for identification in evidence.

(Marked Exhibit D. 4.)

Q The application which you just produced, Exhibit D. 4, is not dated; it appears from the minute book of your Board, which is in evidence, page 55, that on September 14, 1926, Nathan Kastovisky made application for a permit for a three-story twelve-family brick apartment house;

40

Frank Gargan, direct.

is that the date that that application D. 4 was received and filed? A I cannot say.

Q Look at it and see. A There were two applications made.

Q For a brick house? A Yes.

Q Show me the record in the book where the other application was made for brick construction. A Page 48 there is a record of twelve-tenement apartment northeast corner of Laurel avenue and Beech street. 10

Q Does that show whether it is brick or not? A No.

Q What was the date of that? A July 13, 1926.

Q Look at page 49, the record of July 27, 1926; what is the record there? That was the rejection of the previous one of July 13, and that says "Frame," does it not? A Yes. 20

Q That means a frame construction? A Yes.

Q Am I not right, then, that the record of the application for the brick construction, which is the one we are concerned with, was that referred to on September 14, 1926, page 55? A There is one here on July 27.

Q "Application of Nathan Kastovisky to erect a twelve-tenement apartment of brick construction on the northeast corner of Laurel and Beech street." That is the minutes of July 27, 1926? A Yes. 30

Q Found on page 49-50 of that book? A Yes.

Q Is that the first reference in your book to brick construction—application for a brick constructed building? A Yes, of an apartment house. 40

Frank Gargan, cross.

Q Then this application, Exhibit D. 4, must have been received, at the earliest, July 27, 1926; is that right? A Yes.

Q Possibly at the latest, the date of the other minutes, September 14, 1926? A Yes.

10 Q And the two entries in your minutes refer to the same thing? A Yes.

Q On what date was the application finally turned down by the Zoning Board? A September 28, 1926.

Q You have produced from your files a couple of protests. I show you one of them, on white paper. Is that filed with respect to the application of Mr. Kastovisky? A Yes, sir.

20 Q I show you another one, with a blue back; is that also filed with respect to the same application? A I cannot say whether that is filed the same night.

Q Mr. Kastovisky's building proposition was filed with respect to the building corner of Laurel and Beech? A Yes.

Q Did you count the number of names on the one on white paper, first referred to? A Yes.

Q How many? A 51.

30 Q How many names on the one with the blue back? A 48.

Q Did any of the objectors appear at any of these hearings and press their protests? A Yes.

Cross examination by Mr. Weinberg.

Q Mr. Gargan, the minutes of the Zoning Board of Appeals are kept by you as secretary? A Yes.

40 Q And all these minutes that you have referred to are in your own handwriting? A Yes.

Frank Gargan, cross.

Q And the facts therein stated are from your own knowledge? A Yes.

Q You being present at the time of the various meetings? A Yes.

Q Do you recall whether or not at the time the application for the twelve-family frame apartment house was rejected that any advice was officially given by the members of the Zoning Board to Mr. Kastovisky? A No, I cannot say. I believe that someone said—which one, I don't know—said that at the time he was going to put in a frame building, and someone stated that they heard different ones in the hall state if it was brick, that they wouldn't object. 10

Q I don't know what someone in the hall said. Have you referred to the hall as being outside of the meeting room? But what I want to know, and the persons that I am referring to who said anything, would be the Commissioners. Do you recall that any of the members of the Zoning Board of Appeals advised Mr. Kastovisky to present a new application for a twelve-family brick apartment house? A Not officially at the meeting. 20

Q Was it said by the commissioners in the open meeting? 30

Mr. English: I object to what was said by the commissioners; the minutes are the best evidence.

Q Do you know officially why, after the application for a twelve-family frame apartment was rejected, a new application for a twelve-family brick building was put in? A Do I know why it was?

Q Yes. A No, I do not. 40

Frank Gargan, cross.

Q Do you not recall that it was because of advice given at the meeting of the Zoning Board when the application for the frame building was rejected, that the advice was given to him to make the application for a brick building? A I do not recall it being said at the meeting.

10 Q But the next record you have is the application for a twelve-family brick building? A Yes.

Q Have you in any of the minutes referred to by Mr. English any notation that any petitions objecting to the building in question were presented to the meeting? A I have a petition, yes.

20 Q The question is do your minutes show that any petitions objecting to the erection of the particular building were presented to the Zoning Board? A I cannot say.

Q Look at them and see. A Yes, I have here, on page 57, "After hearing objections to the erection of a twelve-family apartment on the northeast corner of Laurel avenue and Beech street (Nathan Kastovisky owner), upon a motion by Commissioner Gardener, seconded by Commissioner Portz, application was rejected. Five votes in the affirmative."

30 Q Have you anything in your minutes to show of what those objections consisted? A No, sir.

Q Or in what form the objections were made? A No, sir.

Q The only thing your minutes do show that objections were made? A Yes.

Q Do you recall now what objections were made? Yes or No. A Yes, I do.

40 Q Do you recall who made the objections? A No, sir.

Frank Gargan, cross.

Q You are familiar with the ordinance of the Town of Kearny? A Hardly.

Q I refer now to the ordinance with relation to zoned area. A Yes.

Q What area do you designate this Beech and Laurel avenue locality as being located in? A I think it is in Zone B. 10

Q And to make it clear, Zone B provides for the erection of only two-family houses? A Yes.

Q Since the application to the Zoning Board, in September, 1926, to your knowledge has the zoning ordinance with respect to Zone B been changed? A Not to my knowledge.

Q Have you knowledge on the subject? A I don't understand you.

Q Would you know if the zoning regulations concerning Zone B or any other zone in Kearny were changed since September, 1926? A I would know if it were changed. 20

Q Do you know whether they were changed? A No, sir, I do not. They haven't been changed.

Q Then I understand you as saying that the same regulations with respect to the type of buildings which were in force in September, 1926, have continuously been in force to the present time? A Yes. 30

Q So that if an application for a twelve-family brick building was contrary to the requirements of the ordinance covering Zone B in September, 1926, it would have been contrary to the provisions of the zoning ordinance covering Zone B in December, 1926?

Mr. English: I object to that as argumentative and improper, and calls for a conclusion. 40

Frank Gargan, cross.

Mr. Weinberg: I admit that it calls for a conclusion, and think he is competent to state such a conclusion.

10 Q Have you any of the printed official regulations of the Zoning Board of the Town of Kearny covering Zone B, which regulations are in force or were in force in December, 1926? A Yes.

Q Will you produce a copy? (Witness produces same.)

Mr. English: Refer to the section.

Witness: Section 13 of the Building Zone Ordinance of the Town of Kearny, adopted July 12, 1922.

20 Q That was still in force and was in force in December 1926? A Yes.

Q In other words, the same ordinance covering Zone B which was in force in September, 1926, was in force in December, 1926, and is still in force? A Yes.

Q The territory limitation of those zones have not been changed, have they? A No.

30 Mr. English: I offer in evidence the Building Zone Ordinance referred to by the witness, and particularly call attention— with particular reference to Section 21, which creates a Board of Appeals.

(Marked Exhibit D. 5.)

Q Section 21 creates a Board of Appeals? A Yes.

Q Is that the Board of Appeals that you are the secretary of? A Yes.

40

Bella Anderson, direct.

Q From whose minutes you have been reading this afternoon? A Yes.

Q And when you were on the stand before?
A Yes.

BELLA ANDERSON, sworn for respondents. 10

Direct examination by Mr. English.

Q Are you employed in the office of John D. Castles, Inspector of Buildings of Kearny? A I am.

Q How long have you been so employed? A Three years next May.

Q Did you ever see Mr. Kastovisky who sits here? A Yes, I have. 20

Q You remember he was in and out about his application for a building permit? A Yes.

Q Do you know Mr. Lawrence McGrath of this town? A Yes.

Q He is a builder? A Yes.

Q Do you remember any occasion when Mr. Kastovisky and Mr. McGrath came in together to see Mr. Castles? A Yes.

Q Do you remember whether that was before or after the Zoning Board had turned down Mr. Kastovisky's application? A After. 30

Q Do you remember how long after? A A couple of weeks, I guess.

Q Do you remember what month it was they came in? A October.

Q Of 1926? A Yes.

Q Do you remember whether on that occasion they asked for and took away their plans and applications? A Yes, they took them away. 40

Bella Anderson, direct.

Q What was said, as you remember, about that? A Mr. Castles rolled up the plans and gave them to him, and I understood that Mr. McGrath—

10 Mr. English: Never mind what you understood.

Q Mr. Castles rolled up the plans and gave them to him? A Yes.

Q Was the application included with that? A Yes.

Q How many sets of plans were filed? A Two, I believe.

Q The two plans and application were handed back? A Yes, sir.

20 Q Do you know whether handed to Mr. Kastovisky or to Mr. McGrath? A I don't remember.

Q Were they both there together? A Yes.

Q Did they leave together? A Yes.

Q And the conversation took place in the presence of the two of them and Mr. Castles? A Yes.

30 Q Do you remember whether at any time Mr. Kastovisky got the money that he deposited with that application? A Yes, he got it a few days after.

Q Do you remember how much it was? A \$50.

Q How do you remember that? A I took it out of the safe.

Q This safe right here in this room? A Yes.

40 Q Did you hand it to him or give it to Mr. Castles? A I believe I handed it to Mr. Kastovisky.

Bella Anderson, cross.

Q Right in the presence of Mr. Castles? A Yes.

Q And he walked out? A Yes.

Q How long was that after he and McGrath had been in and gotten the plans and application? A About a week, I guess.

Q Within a short time? A Yes. 10

Q That was still in October? A Yes.

Cross examination by Mr. Weinberg.

Q Did you keep this money loose in the safe, this permit money? A What do you mean "loose"?

Q Just as you stated, the money was in the safe? A Yes.

Q Don't you bank it? A No, we don't bank it until the end of the month. 20

Q Don't you issue checks against that money? A No.

Q Never write out a check? A No.

Q Do you ever take checks? A Yes, we take checks.

Q Do you deposit the checks, if you take checks? A Yes, at the end of the month.

Q Do you know how long you held this money? A We had it quite a while, I guess. 30

Q Do you know how long? A I cannot tell you just how long.

Q Approximately how long? A I don't know just how long.

Q Have you any record showing when you received the money? A We received the money when he first went before the Zoning Board.

Q Have you any record to show when you received this money? A No, we haven't. 40

Bella Anderson, cross.

Q You have no record to show when you paid it out? A No.

Q You have no record to show if you paid it out? A No, we haven't.

10 Q What did this permit money amount to per month here in this town; what is the amount of the permit money? A It amounted last month to \$1,997, in the month of February.

Q You have no record of when that money was taken in? A Downstairs they have.

Q When I say record, I don't care whether it is upstairs or down. A We have no record of this gentleman's money, because we didn't issue any permit.

20 Q You didn't know when you received the money whether you were going to issue a permit, did you? A We didn't know; I knew that we couldn't unless he went before the Zoning Board.

Q You didn't know whether the Zoning Board was going to grant the permit, did you, or not? A No, I didn't.

30 Q Notwithstanding that, you made no record of this money at all? A No, not unless we take a stub out for the permit, and then we have a record of the money.

Q Are other people in the same boat as Mr. Kastovisky was in, that is to say, make applications where you are not sure whether they will be granted or not? A Yes.

Q And in none of those cases did you make a record of when you received the money? A No.

Q Or when you returned it? A No.

40 Q The application and plans that were returned, did you examine them? A No, Mr. Kastovisky did.

Bella Anderson, cross.

Q You don't know what papers were given back by Mr. Castles at all? A I understood everything was given back.

Q You don't know whether it was a blank piece of paper in the plans or whether it was the filled in application? A I saw the application.

Q Did you look at it? A Yes.

10

Q What was it for? A A building.

Q How did you come to see the application?
A It was in the plans.

Q Did Mr. Castles show it to you before he gave it back to Mr. McGrath? A No.

Q You didn't know what he gave Mr. McGrath, do you? A Yes.

Q What is your practice when money comes in? You put it in an envelope and label it with the name of the applicant? A Yes.

Q You hold it there—? A Until the permit is either granted or denied.

20

Q After it is denied you just hand back the money without making any record? A Yes.

Q If it is granted, then you make a record of it? A Yes.

Q You issue a permit out of the stub book just like D. 1 that I show you? A Yes.

Q And that is the kind of money that is referred to as downstairs where people paid over a thousand dollars last month? A Yes.

30

Q Money relating to permits that had been granted? A Yes.

Mr. English: I subpoenaed Mr. McGrath to be here this afternoon. For some reason he is not here, and therefore I am not able to finish today.

Mr. Weinberg: May I on the record ask Mr. English if he is insisting upon the pro-

40

John D. Castles, recalled, direct.

duction of the application for the twelve-family brick apartment building which was returned, as the town claims, to Mr. McGrath?

Mr. English: I subpoenaed Mr. McGrath to produce it.

10 Mr. Weinberg: Do you make a point of having that application in evidence?

Mr. English: I think it is quite important.

Mr. Weinberg: Will you state, if you care to, in what respect it is important?

Mr. English: (No answer).

20 JOHN D. CASTLES, heretofore sworn, recalled for

Direct examination by Mr. Weinberg.

Q Are you familiar with the zoning regulations covering Zone B in the Town of Kearny?

A Yes.

30 Q Will you state of your own knowledge whether any buildings have been erected by permission of the Zoning Board in Zone B since the passage of the ordinance in question, which buildings violate the provisions of that ordinance?

Mr. English: I object to that as immaterial and incompetent and irrelevant, and has no bearing whatever on the issues now before the Court with respect to this particular application.

40 Mr. Weinberg: So that the Court might be advised when it reads this testimony, of

John D. Castles, recalled, direct.

the purpose of this question, I state, that the purpose is to show an abandonment by the Town of the so-called regulations set up in the zoning ordinance.

Mr. English: There is no abandonment by the Town, because counsel knows they are fighting all these cases most vigorously, and retained me especially for that purpose, and I have been fighting them all winter. 10

Mr. Weinberg: I asked it for that purpose. As I read the testimony taken at the previous hearing, there was an admission by Mr. Castles as to the erection of one building which does violate the provisions of that zoning ordinance. That is found in his testimony on page 36, given on January 24, 1927. 20

Mr. English: Assuming that is true, that doesn't make your question relevant. It does not indicate an abandonment at all.

Mr. Weinberg: That is a question for the Court to determine.

A Yes, it has been broken, if you call it broken; consent has been granted to one. I know one case anyway. There might be more; I don't know. 30

Q Now, there is a great difference, as you know, Mr. Castles, between one and more than one. Will you say whether in your opinion this zoning ordinance was broken more than once?

A Yes, it has been.

Q More than once?

Mr. English: The same objection as before.

A Yes. 40

John D. Castles, recalled, direct.

Q How many times, approximately?

Mr. English: Same objection.

A I know of three cases.

10 Q Will you name those three instances—not the name, necessarily, but in what respects the zoning ordinance has been broken or violated?

Mr. English: Same objection as before.

A Stores, where it is contrary to the zoning law.

20 Q You permitted the erection of stores in Zone B, although such erection was contrary to the provisions of the zoning law covering Zone B, which is the same zone in which the property of Mr. Kastovisky is located? A Yes.

Q The three instances, were they all of stores?

Mr. English: Same objection.

A One was a gasolene station in Zone A.

Q What was the Zone A zoned for? A One family dwellings.

30 Q Zone B—you said there were three in Zone B?

Mr. English: Same objection.

A Apartment house.

Q How many family apartment house?

Mr. English: Same objection.

A I think thirty.

40 Q Made of what? A Brick.

John D. Castles, recalled, direct.

Q Made of what?

Mr. English: Same objection.

A Brick.

Q On what street was that building located?

Mr. English: Same objection.

10

A On Beech.

Q That is the same street upon which Mr. Kastovisky's property is located?

Mr. English: Same objection.

A Yes, but a mile away.

Q But in the same zone?

Mr. English: Same objection.

20

A Zone A.

Q I am asking you about Zone B.

Mr. English: Same objection.

A I don't remember. I said there were three changes to the zoning laws in that time; you asked me to explain the three of them, and there is the three I remember.

30

Q I asked you to state in violation of the zoning ordinance covering Zone B.

Mr. English: Same objection.

A I thought you said any violation of the zoning law.

Q Now that you understand the question, what have you to say? A I only remember one in Zone B.

40

John D. Castles, recalled, direct.

Q What was that?

Mr. English: Same objection.

A Stores, the first one I referred to.

Q Stores and what?

10

Mr. English: Same objection.

A Apartments above. Stores is contrary to Zone B.

Q Is Chestnut street and Oakwood in Zone B? A Yes, Oakwood avenue and Chestnut.

Q Chestnut and Oakwood avenue, in Zone B, you issued a permit, or there was a permit issued by the Zoning Board for an apartment house?

20

Mr. English: I object for the reasons previously stated.

Q (Continuing) Is that the same building that you referred to? A No.

Q Then that makes two in Zone B? A I forgot that one; that makes two.

Q Did you forget any others?

30

Mr. English: Same objection.

A No. I don't remember any others. I said if I could refresh my memory, there might be others.

Q When were those two that you have mentioned issued?

Mr. English: Same objection.

40

A The building is finished now; I suppose six months ago.

John D. Castles, recalled, direct.

Q What zone is that?

Mr. English: Same objection.

A Zone B.

Q When was the apartment house finished?

Mr. English: Same objection.

10

A It is not started yet; it has been granted, but not started.

Q In Zone B for an apartment house? A No, Zone A.

Q Why don't you keep to Zone B? A That one in Zone B is not started. It is the same conditions.

Q Let me get that clear, subject to Mr. English's objection. A permit was granted for a building containing stores in Zone B?

20

Mr. English: Same objection.

A Yes.

Q Recently? A Yes.

Q A permit was also granted for the erection of a large apartment house recently in Zone B?

30

Mr. English: I object for the reasons before stated.

A Yes.

Q Aside from those two, are there any others, subject to Mr. English's objection?

Mr. English: Same objection.

A I cannot remember any.

40

Motion to Strike Out Testimony.

Q Have you any official record showing what buildings have been put up contrary to the zoning regulations of the Town of Kearny, in the various zoning districts, and particularly in Zone B?

10 Mr. English: Same objection.

A I have no notation of any permit granted, whether they are according to the zone or not.

Q These two buildings in Zone B, which you say were contrary to the zoning regulations, were they erected on permits issued by the Zoning Board at the command and direction of any court, or were they issued at the instance of the Zoning Board itself?

20 Mr. English: Same objection as before.

A They were issued by the direction of the Zoning Board.

30 Mr. English: I give notice of a motion to strike out all testimony of Mr. Castles, he being recalled now by counsel, on the ground that it is incompetent, irrelevant and immaterial, and it has no bearing on the issue in this case.

Mr. Weinberg: If there is an insistent that the application referred to, namely, the application for the twelve-apartment brick building, be produced, and if the Town does not produce Mr. McGrath, we want the opportunity, and ask that the hearing be kept open for a limited time anyway for the purpose of producing Mr. McGrath and the application, if either is physically possible.

40 I will notify Mr. English within a week

Testimony.

or ten days whether so far as we are concerned this hearing is closed.

Continuation of evidence in the above-entitled matter, taken before me, Nicholas W. Bindseil, a Supreme Court Commissioner, at my office in the Federal Trust Building, 24 Commerce street, Newark, New Jersey, on Monday, the fourth day of April, A. D. 1927, at four o'clock in the afternoon, and in the presence of Messrs. Welanko & Strauss (Daniel L. Strauss, Esq., present), for relator, and Messrs. McCarter & English (Conover English, Esq., present), for respondents. 10

Mr. English: At the hearing held Friday, March 11th, it appears on page 81 of the record, I stated that I had subpoenaed Mr. McGrath to produce the application for the twelve-family brick apartment building, which is the building for which relator seeks a permit. Mr. McGrath failed to appear. Following that, I communicated with Mr. McGrath, and threatened him with an application for contempt of the Court's subpoena, as a result of which he sent to my office, by his wife, a copy of the plans for the said twelve-family, brick apartment building which he had received from Mr. Castles. I have now subpoenaed him to produce, in addition, the application for permit. 20 30

Gerhardt Joa, direct.

GERHARDT JOA, produced as a witness on behalf of respondents, being duly sworn according to law, on his oath testified as follows:

Direct examination by Mr. English.

10 Q You are a clerk in the office of McCarter & English? A Yes, sir.

Q I show you subpoena directed to Lawrence McGrath. Was that given to you to be served?

A Yes, sir.

Q Do you remember what day it was that you tried to serve that or did serve that? A Friday last.

Q Friday of last week? A Yes, sir.

20 Q Where did you go to serve it? A I went to Mr. McGrath's house.

Q That is where? A I can't remember the exact number of the house.

Q What town is it in? A It is in Arlington.

Q Had you been there before? A Yes, sir.

Q And you knew it was the right house? A Yes, sir.

30 Q Did you see anybody at the house? A I saw his wife and I tried to serve the subpoena on her.

Q What happened? A She wouldn't accept the subpoena; said she wouldn't have anything to do with it.

40 Q Then what happened? A Then I called up the office and Mr. McLaughlin told me I should serve the subpoena on her, and if necessary, throw the subpoena at her, and I went back, and I told her I was sorry, and I tried to serve the subpoena on her and she closed the door on me. Then I came back and called you

Gerhardt Joa, cross—re-direct.

on the telephone, and then you told me to do the same thing.

Q Following that what did you do? A I went back and Mrs. McGrath wasn't home, and I waited on the porch until she came, and when she did come she told me she wouldn't have anything to do with it, and I waited until she entered the house and then I threw the subpoena at her. The subpoena touched her and fell on the ground. She bent over and scooped it right up and threw it on the porch. 10

Q Did you give her any money? A I had a dollar attached to the subpoena.

Q Before that when you had seen her the first time, did she take the subpoena and read it? A Yes, she did look at the subpoena.

Q Did you tell her it was for her husband, Lawrence McGrath? A Yes. 20

Mr. English: I offer in evidence the subpoena.

(Marked Exhibit D. 6.)

Cross examination by Mr. Strauss.

Q Did you ever serve Lawrence McGrath with a subpoena? A I didn't serve Mr. McGrath personally, no, sir. 30

Re-direct examination by Mr. English.

Q You served an earlier subpoena at his house? A Yes; on his wife.

Q That was several weeks ago? A Yes.

Mr. Strauss: Of course, I would enter an objection to all the testimony of the witness on the grounds there is no evidence Lawrence McGrath was served in person. 40

Exhibit D. 6.

Exhibit D. 6.

NEW JERSEY }
 (SEAL) } ss.:

THE STATE OF NEW JERSEY TO LAWRENCE MC-GRATH, GREETING:

10 We command you that laying aside all and singular businesses and excuses, you be and appear in your proper person before NICHOLAS W. BINDSEIL, Esq., a Supreme Court Commissioner, at a hearing before him to be held at his office, Room 929 Federal Trust Building, Commerce Street, Newark, N. J., on Monday, the 4th day of April, 1927, at 4 o'clock in the afternoon of the said day, to testify all and singular what you know in a certain cause now depend-
 20 ing and undetermined in our New Jersey Supreme Court between the State of New Jersey, ex rel. Nathan Kastovisky, Relator, and John D. Castles, Inspector, etc., et als., Respondents, on application for Mandamus, and that at the said time and place you bring with you and produce the original application filed by Nathan Kastovisky with the said John D. Castles, Inspector of Buildings of the Town of Kearny for
 30 a permit to erect a three story brick building, containing twelve apartments and janitor's apartment, at the corner of Laurel avenue and Beech street, Town of Kearny, and this you are in no wise to omit under penalty of One Hundred Dollars (\$100).

WITNESS the Honorable James F. Minturn, Esq., a Justice of our said Supreme Court, at Trenton, the 1st day of April, 1927.

ED. J. KELLEHER,
 McCARTER & ENGLISH, *Clerk.*
 40 *Attorneys.*

Certificate of Commissioner.

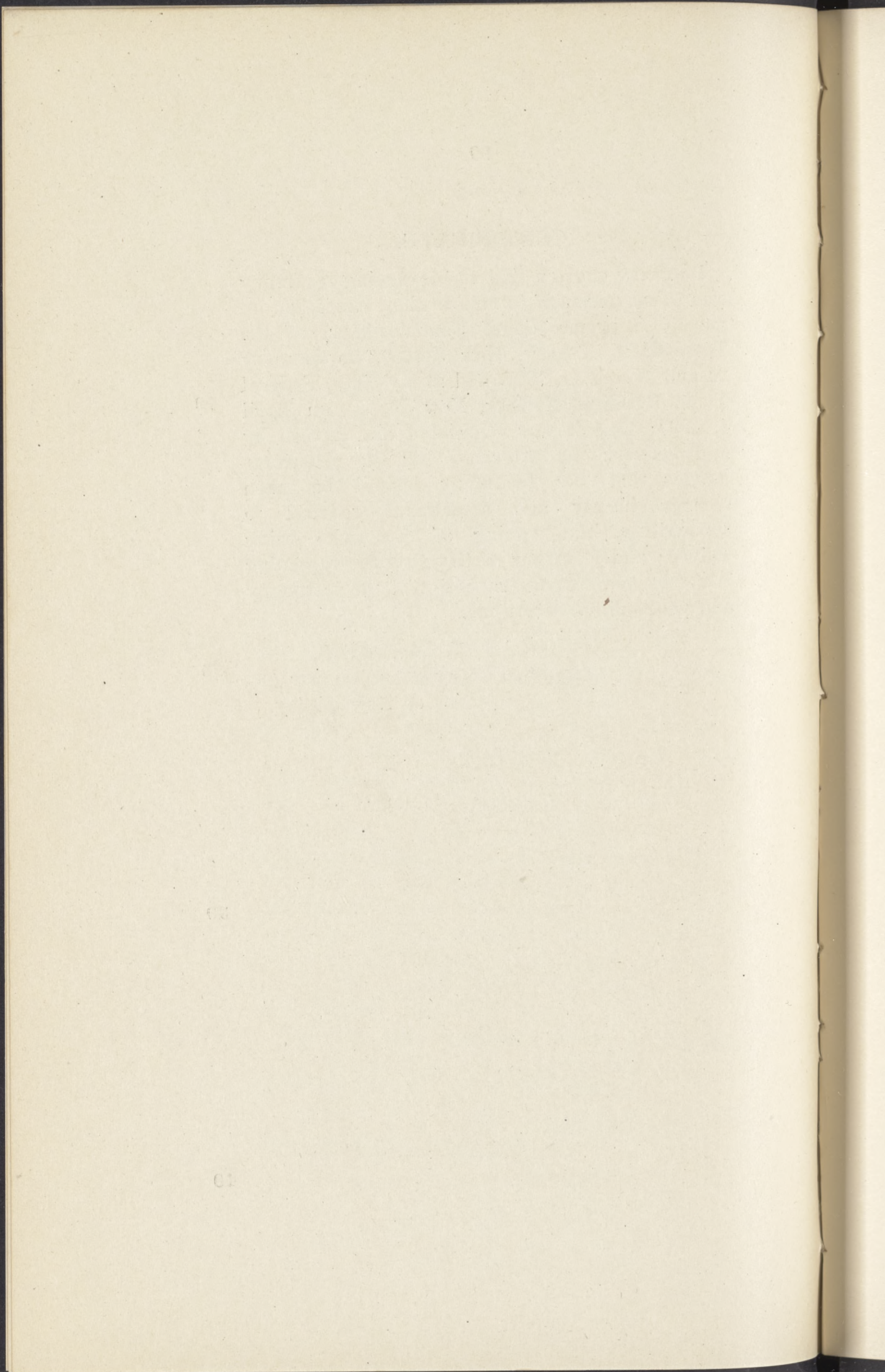
CERTIFICATE.

I HEREBY CERTIFY that the foregoing testimony was taken pursuant to rule to show cause, before me as Supreme Court Commissioner, at the Town Hall, Kearny, New Jersey, on January 24 and March 11, 1927, and at my office, Federal Trust Building, Newark, New Jersey, on April 4, 1927; that it was stipulated and agreed by and between the attorneys for the respective parties that the testimony should be taken stenographically and afterwards reduced to typewriting, the signing of the same being waived; and I further certify that the foregoing is a true and correct transcript of the testimony and proceedings before me. 10

NICHOLAS W. BINDSEIL,
Supreme Court Commissioner 20
of New Jersey.

30

40



OPINION OF SUPREME COURT.

Filed June 19, 1928.

No. 224. May Term, 1927.

NEW JERSEY SUPREME COURT.

10

NATHAN KASTOVISKY,

Relator,

vs.

JOHN D. CASTLES, Inspector of
Buildings of the Town of
Kearny, *et als.*,

Respondents.

20

Argued May 3, 1927; decided

On application for a writ of mandamus.

Before Justices Trenchard, Kalisch and Katzenbach.

For the relator: Welanko & Strauss, Esqs.,
and Benjamin M. Weinberg, Esq.

For the respondents: McCarter & English,
Esqs.

30

PER CURIAM.

This is a zoning case. The relator applied to the Building Inspector of the Town of Kearny for a permit for the erection of a three-story brick building designed to contain twelve apartments, on lands owned by the relator. The required fees were paid. The building inspector refused to issue the permit for the reason that lands were located in what is known as "Zone B" under a zoning ordinance of the Town of

40

Opinion of Supreme Court.

Kearny. "Zone B" is a residential zone. The land upon which the relator desired to erect said apartment house was restricted by the zoning ordinance to the erection of dwellings designed to be not over two and one-half stories in height and accommodating not more than two families. The zoning ordinances established a Board of Appeals. The relator applied to the Board of Appeals for a reversal of the action of the building inspector. A public hearing was had. The Board of Appeals affirmed the action of the building inspector. The relator then obtained the rule to show cause why an alternative or peremptory writ of mandamus should not issue out of this court commanding the said inspector of buildings to issue to the relator the permit applied for, under which the case is presented to this court.

We think the writ of mandamus must be denied. There are two reasons which prompt us to take this action. The first is that in our opinion the relator has misconceived his remedy. He sought the action of the Board of Appeals. This board is in effect the same as a Board of Adjustment created under Chapter 146 of the Laws of 1924, as amended by Chapter 315 of the Laws of 1926. The relator having applied to the Board of Appeals and submitted to the jurisdiction of that board, cannot now contend that it was not a properly constituted board and did not have in effect the powers of a Board of Adjustment formed under the acts hereinbefore mentioned. The proper method for the relator to have taken to review the decision of the Board of Appeals was certiorari. *Paramount Realty and Construction Co., Inc., v. Schmitt, Building Superintendent of the Town of Irving-*

Opinion of Supreme Court.

ton, 5 Misc. Rep. 177; Chancellor Development Corp. v. Senior, 134 Atl. Rep. 337, Burg v. Ackerman, Supervisor of Buildings, 5 Misc. Rep. 96.

The second reason for a denial of the writ asked for is that the writ of mandamus is a discretionary writ. Jones Co. v. Guttenberg, 66 N. J. L. 58. In view of the recent constitutional amendment respecting zoning and the legislation enacted with reference thereto (Chapter 274 of the Laws of 1928), it would be, it seems to us, an abuse of the power of this court to direct the municipality to grant a permit for the erection of a building the existence of which, if erected, has already been declared by legal authority to be improper. The views of the Court in this respect have been more fully set forth in the opinion filed on May 14, 1928 in the case of Koplin v. Village of South Orange, *et al.*, and not yet reported.

If a review of this decision is desired, permission is hereby given to the relator to enter a rule allowing and directing the molding of the pleadings to this end.

The rule to show cause is discharged.

10

20

30

40

RULE TO MOULD PLEADINGS.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

10	STATE OF NEW JERSEY, <i>ex rel.</i> NATHAN KASTOVISKY, <div style="text-align: right;"><i>Relator,</i></div>	}	<i>On Application for Mandamus. Rule to Mould Pleadings.</i>
	<i>vs.</i>		
20	JOHN D. CASTLES, Inspector of Buildings of the Town of Kearny; KEARNY ZONING BOARD OF APPEALS and TOWN OF KEARNY, <div style="text-align: right;"><i>Respondents.</i></div>		

It appearing to the Court that a rule was entered herein on December 16, 1926 directing the respondents to show cause why an alternative or peremptory writ of mandamus should not issue for the purpose in said rule set forth and it further appearing that hearings were subsequently held pursuant to said rule.

30 And it further appearing that thereafter an opinion was filed by this Honorable Court denying the application of the relator for a writ of mandamus.

And it further appearing that this Honorable Court stated in its opinion that "If a review of this decision is desired, permission is hereby given to the relator to enter a rule allowing and directing the moulding of the pleadings to this end."

40 And it now appearing that the relator desires to appeal from said decision to the Court of Errors and Appeals,

Rule to Mould Pleadings.

It is, on motion of Welanko & Strauss and Benjamin M. Weinberg, attorneys for said relator, ORDERED that the pleadings be moulded so as to exhibit an alternative writ of mandamus, returnable forthwith, a return to said writ, a demurrer to said return to said writ and a joinder in said demurrer.

10

Dated: December 10, 1928.

20

30

40

ALTERNATIVE WRIT OF MANDAMUS.

NEW JERSEY, ss:

10 The State of New Jersey to John
 D. Castles, Inspector of Buildings of
 (SEAL) the Town of Kearny, and Town of
 Kearny, a municipal corporation of
 the State of New Jersey, and Kearny
 Zoning Board of Appeals, GREETING:

20 WHEREAS, Nathan Kastovisky applied to the
 said John D. Castles, Inspector of Buildings of
 the Town of Kearny, a municipal corporation of
 the State of New Jersey, for a permit to erect
 a certain building in accordance with plans and
 specifications which accompanied said applica-
 tion, on a plot of ground located on the north-
 east corner of Laurel avenue and Beech street,
 in the Town of Kearny, County of Hudson and
 State of New Jersey, which plot is more par-
 ticularly described as follows:

30 BEGINNING at the intersection of the northerly
 line of Laurel avenue and the easterly line of
 Beech street; thence easterly along the line of
 Laurel avenue and at right angles to Beech
 street fifty feet; thence northeasterly and paral-
 lel with Beech street one hundred feet; thence
 westerly and parallel with Laurel avenue fifty
 feet; thence southerly along the line of Beech
 street one hundred feet to the point or place of
 BEGINNING.

 BEING known as lots numbered 167 and 168 on
 Map of lots of Rural Homestead Company at
 Arlington, Town of Kearny, filed in the office
 of the Clerk of Hudson County on March 31,
 1873.

40 Which said building so to be erected is to be
 used and occupied by twelve apartments and a

Alternative Writ of Mandamus.

janitor's apartment and is to be a brick building, three stories in height, in accordance with certain plans and specifications which accompanied the application to said inspector of buildings for said permit, and

WHEREAS, said plans have been duly approved by the Board of Tenement House Supervision of New Jersey, and

10

WHEREAS, on January 8, 1926 the said Inspector of Buildings of the Town of Kearny issued a building permit for the erection on said lands of a one-story building to contain five stores, which permit has never been revoked and is still in force and in good standing, and

WHEREAS, said property consists of one plot of ground coming down through a single title never having been divided, and

20

WHEREAS, said Joseph D. Castles, Inspector of Buildings of the Town of Kearny, New Jersey, refused to issue said permit upon the sole ground, that, under an ordinance adopted by the Town Council of the Town of Kearny on July 12, 1922, entitled "An Ordinance to regulate and restrict the location hereafter of trades and industries and the subsequent locations of buildings designed for a specified use in any designated area and to regulate and limit the height and bulk of buildings hereafter erected and to regulate and determine the area of yards, courts and other open spaces and for said purposes to divide the Town of Kearny, into districts," said Nathan Kastovisky cannot construct an apartment house in the manner indicated in the plans and specifications accompanying said application because the land on which said house is to be constructed lies in what is designated in said ordinance as a Residence B District,

30

40

Alternative Writ of Mandamus.

in which district only certain specifically enumerated houses of premises are permitted under section 13 of said ordinance, in which uses a three-story apartment house to contain twelve apartments and a janitor's apartment is not included; and

10 WHEREAS, it is charged and insisted before us, that the said ordinance, insofar as it operates to prevent the said Nathan Kastovisky from constructing the aforementioned apartment house on said premises, is illegal in that it is beyond the power of the governing body of the Town of Kearny to create or designate any zone or district in which apartments may not be erected, and in that the governing body of the Town of
20 Kearny has no legal power to prevent the construction of the aforementioned apartment house in said Residence B District, and in that the restrictions of said section 13 of said ordinance are not designated to promote the public health, safety and general welfare: and

30 WHEREAS, it has also been represented to us that the effect of enforcing the provisions of said ordinance so as to prevent said Nathan Kastovisky from constructing said apartment house in the manner indicated in the plans and specifications submitted together with said application for a permit, would be to deprive him of a right to possess and protect property, in violation of the first clause of Article I of the Constitution of the State of New Jersey, and would be a taking of private property for public use without compensation in violation of paragraph 16 of Article I of the Constitution of New Jersey, and would likewise be a violation of the rights secured to the said Nathan Kastovisky by
40 the Fourteenth Amendment to the Constitu-

Alternative Writ of Mandamus.

tion of the United States, in that it would be a deprivation of property without due process of law and a deprivation of said Nathan Kastovisky of the equal protection of the law; all as by the affidavit of the said Nathan Kastovisky, we have understood:

We, therefore, being willing that due and speedy justice should be done in this behalf, command and strictly enjoin you, that immediately after receipt of this writ, you do issue to the said Nathan Kastovisky a permit to construct a three-story brick building to contain twelve apartments and a janitor's apartment upon the aforementioned premises in accordance with the plans and specifications submitted by him to said John D. Castles, Inspector of Buildings of the Town of Kearny, or cause to us to the contrary thereof signify, lest in your default complaint should come to us repeated; and you shall execute this, our command, certify to our Justices of our Supreme Court, at Trenton, on the 7th day of January, 1929, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, together with this, our writ, and this in no way omit at your peril.

WITNESS, the Honorable William S. Gummere, Chief Justice of our Supreme Court, at Trenton, this 13th day of December, 1928.

FRED L. BLOODGOOD,
Clerk.

Upon motion of

WELANKO and STRAUSS,
Attorneys for Relator.

Return to Writ.

Service of the within alternative writ of mandamus is hereby acknowledged this 13th day of December, 1928.

McCARTER & ENGLISH,
Attorneys for Respondents.

10

RETURN TO WRIT.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

20	STATE OF NEW JERSEY, <i>ex rel.</i> NATHAN KASTOVISKY, <div style="text-align: right;"><i>Relator,</i></div>	}	<i>On Alternative Writ of Mandamus. Return.</i>
	<i>vs.</i>		
	JOHN D. CASTLES, Inspector of Buildings of the Town of Kearny; KEARNY ZONING BOARD OF APPEALS and TOWN OF KEARNY, <div style="text-align: right;"><i>Respondents.</i></div>		

30 To the Honorable Justices of the Supreme Court of New Jersey, we John D. Castles, Inspector of Buildings of the Town of Kearny, Kearny Zoning Board of Appeals and Town of Kearny, a municipal corporation of the State of New Jersey, to whom the said writ is directed do herewith make return thereto to your Honors, and assert and certify that all the statements set forth in said writ are not true; that it is true that Nathan Kastovisky applied to said

40 Inspector of Buildings of the Town of Kearny

Return to Writ.

for a permit to erect a certain building on a plot of ground located on the northeast corner of Laurel avenue and Beech street in said Town of Kearny, which said building was to be a brick building, three stories in height to be used and occupied by twelve apartments and a janitor's apartment.

10

On July 12, 1922, the Town Council of the Town of Kearny adopted an ordinance regulating and restricting the location of trades and industries and the location of buildings designed for specific use, and established certain districts known as residence districts, business districts and industrial districts, which said ordinance ever since has been and still is in force. Under said ordinance, a permit may not be issued for the erection of a three-story brick building to be used and occupied by twelve apartments and a janitor's apartment on the plot of ground more particularly described in the alternative writ of mandamus herein inasmuch as said premises are located in what is designated in said ordinance as a Residence B District. Said ordinance among other things, provides as follows:

20

Section 5 (a) "In Residence 'A' and in Residence 'B' Districts no building shall exceed two and one-half stories or forty feet in height."

30

Section 12 (a) "In any Residence 'A' District, as designated on the Building Zone Map, no building or premises shall be used for other than one or more of the following specified purposes:

(1) A dwelling for one family or for one housekeeping unit only. Nothing herein shall prevent the taking of boarders or the leasing of rooms, provided there is no display or advertising, except a small announcement sign."

40

Return to Writ.

Section 13 (a) "Within any Residence 'B' District as indicated on the Building Zone Map, no building or premises shall be used for other than one or more of the uses specified above in Section 12 (a) as permitted in Residence 'A' Districts, and in addition for:

- 10 (1) A dwelling, detached or semi-detached, for not more than two families or more than two housekeeping units."

The structure proposed to be erected by the relator would not comply with the Zoning Ordinance of the Town of Kearny, but would be contrary to the same.

Said structure would be inimical to the health, safety, morals and general welfare of the community.

- 20 The relator had abandoned his application to the respondents for a building permit before he made any application for the said writ to this court.

- 30 The relator improperly seeks to review the decision of the respondent, Kearny Zoning Board of Appeals, by Mandamus proceedings. The erection of the proposed building by the relator ought not to be permitted in view of the latest amendment to the constitution of New Jersey and the enactment of legislation thereunder.

Return to Writ.

Respondents therefore pray that said writ be dismissed.

JOHN D. CASTLES,
Inspector of Buildings of the Town of
Kearny, Kearny Zoning Board of Ap-
peals and Town of Kearny, a municipal
corporation of the State of New Jersey, 10
Respondents.

By:
McCARTER & ENGLISH,
Their Attorneys.

Dated: January 2, 1929.

20

30

40

DEMURRER TO RETURN.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

10	STATE OF NEW JERSEY, <i>ex rel.</i> NATHAN KASTOVISKY, <div style="text-align: right;"><i>Relator,</i></div>	}	<i>On Alternative Writ of Mandamus. Demurrer to Return.</i>
	<i>vs.</i>		
20	JOHN D. CASTLES, Inspector of Buildings of the Town of Kearny; KEARNY ZONING BOARD OF APPEALS and TOWN OF KEARNY, <div style="text-align: right;"><i>Respondents.</i></div>		

Nathan Kastovisky by his attorneys, and counsel, Welanko and Strauss, comes and demurs to the return of the respondents because he says that the matters contained in said return in manner and form as the same are stated and set forth do not show sufficient cause in law to warrant the respondents in refusing to comply with the command of the alternative writ of mandamus herein and to issue to the said Nathan Kastovisky, a permit to erect the building referred to in the alternative writ and for causes of demurrer specifies:

1. The said return is wholly insufficient in law.
2. The effect of the enforcement of the ordinance referred to in the return to prevent the erection of the building contemplated by said Nathan Kastovisky would be to deprive said

Demurrer to Return.

Nathan Kastovisky of a right to protect and possess property in violation of the first clause of Article I of the Constitution of the State of New Jersey.

3. The effect of the enforcement of said ordinance to prevent the erection of said building would be the taking of private property for public use without just compensation in violation of the sixteenth paragraph of Article I of the Constitution of the State of New Jersey. 10

4. The effect of the enforcement of said ordinance to prevent the erection of said building, would be in effect the taking of private property for private purposes in violation of a right secured to the said Nathan Kastovisky by the the Constitution of the State of New Jersey. 20

5. The effect of the enforcement of said ordinance to prevent the erection of the building contemplated by said Nathan Kastovisky, would be a violation of the rights secured to said Nathan Kastovisky, by the Fourteenth Amendment to the Constitution of the United States, in that it would be a deprivation of property without due process of law and a deprivation of said Nathan Kastovisky of the equal protection of the law. 30

6. The facts stated in the alternative writ and not denied by the return show that the enforcement of such ordinance to prevent said Nathan Kastovisky from erecting his said building would be unreasonable exercise of police power on the part of respondents in that said section 13 of said ordinance are not designed to promote the public health, safety and general welfare of the inhabitants of the said Town of Kearny. 40

Demurrer to Return.

7. That the ordinance in question does not apply to the lands of relator.

10 8. That the whole of said ordinance is void because it discriminates in the use of buildings erected previous to and after the adoption of said ordinance as section 3 of said ordinance reads as follows: "However, any non-conforming use existing at the time of passage of this Ordinance may be continued, or changed to another non-conforming use no more harmful or objectionable in the opinion of the Board of Appeals, hereinafter described, provided that the building or premises involved shall neither be structurally altered or enlarged more than
20 fifty per cent. of its value, unless such use be changed to a use permitted in the district, except where in the opinion of the Board of Appeals it shall be done in a manner that would not be harmful to the surrounding properties within the district."

9. The respondents have not sufficiently, by the return to the alternative writ of mandamus, pleaded facts sufficient in law that would excuse the Inspector of Buildings of the Town of Kearny, in disobeying the command of the alternative writ.
30

10. Because the said ordinance and specific provisions thereof relied upon by the respondents for not complying with the command of the said alternative writ, are for other reasons illegal and void.

11. The relator denies as a fact that he had abandoned his application to the respondents for said building permit before he made any application for the said writ to this court and
40

Demurrer to Return.

relator further alleges that the record of said cause shows that relator had not abandoned his application to the respondents for said building permit before he made any application for said writ to this court.

WELANKO & STRAUSS, 10
Attorneys for Relator.

20

30

40

JOINDER IN DEMURRER.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

10	STATE OF NEW JERSEY, <i>ex rel.</i> NATHAN KASTOVISKY, <div style="text-align: right;"><i>Relator,</i></div>	}	<i>On Alternative Writ of Mandamus. Joinder in Demurrer.</i>
	<i>vs.</i>		
	JOHN D. CASTLES, Inspector of Buildings of the Town of Kearny; KEARNY ZONING BOARD OF APPEALS and TOWN OF KEARNY, <div style="text-align: right;"><i>Respondents.</i></div>		
20			

And the respondents, John D. Castles, Inspector of Buildings of the Town of Kearny and Town of Kearny, a municipal corporation of the State of New Jersey, say that:

The return to said writ and the matters therein contained, in the manner and form as stated therein, are sufficient in law and that they are thereby entitled to be relieved of the command made therein, and the said John D. Castles, Inspector of Buildings of the Town of Kearny, and Town of Kearny, a municipal corporation of the State of New Jersey, are ready to verify and prove the same as the Court shall direct, and pray judgment thereupon.

McCARTER & ENGLISH,
Attorneys of Respondents.

STIPULATION.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

STATE OF NEW JERSEY, <i>ex rel.</i> NATHAN KASTOVISKY, <i>Relator,</i>	}	<i>On Alternative Writ of Mandamus. Stipulation.</i>	10
<i>vs.</i> JOHN D. CASTLES, Inspector of Buildings of the Town of Kearny; KEARNY ZONING BOARD OF APPEALS and TOWN OF KEARNY, <i>Respondents.</i>			20

It is mutually agreed and stipulated between Welanko & Strauss, attorneys of relator, and McCarter & English, attorneys of respondents, that the state of the case to be submitted to the Court for final argument of the alternative writ of mandamus of the above-entitled cause is to consist of the following:

1. The state of the case consisting of deposition, exhibits, stipulations and affidavits of all parties and witnesses to this suit which were submitted to the Court at the final argument of the rule to show cause why a peremptory or alternative writ of mandamus should not issue. 30
2. The opinion of the Supreme Court giving the reasons why an alternative writ of mandamus should not issue.
3. Rule to mould pleadings herein. 40

Stipulation.

4. Alternative writ of mandamus issued herein with acknowledgment of service thereon.

5. Return filed by respondents.

6. Demurrer filed by relator to return to respondents.

10 7. Joinder in demurrer filed by respondents.

Dated: January 2, 1929.

WELANKO & STRAUSS,
Attorneys of Relator.

McCARTER & ENGLISH,
Attorneys of Respondents.

20

30

40

RULE FOR JUDGMENT.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

STATE OF NEW JERSEY, <i>ex rel.</i> NATHAN KASTOVISKY, <div style="text-align: right;"><i>Relator,</i></div>		10
<i>vs.</i>		
JOHN D. CASTLES, Inspector of Buildings of the Town of Kearny; KEARNY ZONING BOARD OF APPEALS and TOWN OF KEARNY, <div style="text-align: right;"><i>Respondents.</i></div>	On <i>Alternative Writ of Mandamus.</i> <i>Rule for Judgment.</i>	20

The Court having made a rule to mould pleadings herein and it now appearing that said pleadings have been duly moulded in accordance with said rule so as to exhibit an alternative writ of mandamus, a return to said writ, a demurrer to said return and a joinder in said demurrer,

IT IS THEREUPON on this 5th day of January, 1929, on motion of McCarter & English, attorneys of respondents, ORDERED, that judgment final be entered on the pleadings so moulded as aforesaid in favor of the respondents and against the relator. 30

Entered January 5, 1929.

On motion of

McCARTER & ENGLISH,
 Attorneys.

40

NOTICE AND GROUND OF APPEAL.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

10	STATE OF NEW JERSEY, <i>ex rel.</i> NATHAN KASTOVISKY, <div style="text-align: right;"><i>Relator,</i></div>	}	<i>On</i>
	<i>vs.</i>		<i>Mandamus.</i>
	JOHN D. CASTLES, Inspector of Buildings of the Town of Kearny; KEARNY ZONING BOARD OF APPEALS and TOWN OF KEARNY, <div style="text-align: right;"><i>Respondents.</i></div>		<i>Notice of</i>
20			<i>Appeal.</i>

Take notice, that the relator appeals from the whole of the judgment entered in this cause to the Court of Errors and Appeals on the following grounds:

The Supreme Court of the State of New Jersey erred in denying a peremptory writ of mandamus to the appellant instead of granting the application therefor.

30 Dated: January 7, 1929.

Respectfully,

WELANKO & STRAUSS,
 Attorneys of Appellant.

Service of the within notice of appeal is hereby acknowledged this 7th day of January, 1929.

McCARTER & ENGLISH,
 Attorneys of Respondents-Appellees.

40

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

New Jersey Court of Errors and Appeals

STATE OF NEW JERSEY, <i>ex rel.</i> NATHAN KASTOVISKY, <i>Relator-Appellant,</i> <i>vs.</i> JOHN D. CASTLES, Inspector of Buildings of the Town of Kearny, KEARNY ZONING BOARD OF APPEALS and TOWN OF KEARNY, <i>Respondents.</i>	On Alternative Writ of Mandamus. On Appeal from Supreme Court.
--	---

BRIEF ON BEHALF OF RELATOR- APPELLANT.

Preliminary Statement.

This is a zoning case. A rule to show cause was obtained by relator-appellant, and testimony taken. After hearing argument of counsel, the Supreme Court dismissed the rule to show cause but with leave to mould the pleadings for the purpose of reviewing the decision of the Supreme Court. Thereafter the pleadings were moulded so as to exhibit an alternative writ, return to the writ, demurrer to the return and joinder in demurrer. Judgment was entered on the moulded pleadings in favor of respondents. The appeal to this court followed.

Facts.

On September 14, 1926 the relator-appellant filed his application, plans and specifications with the building inspector of the Town of Kearny for a permit to erect a three-story brick building containing twelve apartments and a janitor's

apartment. The requisite fee was paid at that time. The permit was refused by the inspector solely on the ground that it violated the zoning ordinance of the Town of Kearny (p. 47). An appeal was then taken to the Kearny Board of Appeals which likewise denied the permit. No reasons were recorded by the Board of Appeals for its refusal to grant the permit (pp. 44-45). The Zoning Amendment to the Constitution of New Jersey was passed after the application for said permit was made. The Supreme Court denied the relator the writ of mandamus for two reasons: First, that relator-appellant should have reviewed the decision of the Board of Appeals by certiorari and not by mandamus; Second, because of the Amendment of the New Jersey Constitution and subsequent legislation (chap. 274, Laws of 1928). The respondents raised a third objection to the granting of the permit: That relator had abandoned his application for building permit, but as to this, the Supreme Court, expressed no opinion.

I.

The application of relator-appellant for a writ of mandamus is proper.

The relator-appellant contends that the Kearny Board of Appeals was abolished by Chap. 146, P. L. 1924, p. 324, which provided for a Board of Adjustment to be appointed by the governing body or board of public works. In as much as Kearny never amended or changed its ordinance or made any appointment of a Board of Adjustment, there was no legal body or board to which the appeal in question could be taken. The Supreme Court in *Smith v. Kearny Zoning Board of Appeals*, 143 Atl. 151, which decision was ren-

dered subsequent to the decision in the case *sub judice*, adjudicated this very question holding:

“An examination of the acts of 1921 and 1924, *supra*, causes us to conclude that the point is well taken and that the Zoning Board of Appeals, whose judgment is here under review, had no legal existence after the statute of 1924, *supra*, went into effect.

The result therefore is that all proceedings upon the appeal and the resulting judgment now under review are nullities and have no legal effect or status and must therefore be set aside and reversed.

An examination of the acts of 1921 and 1924 and the ordinance of 1922, all *supra*, discloses that the Board of Appeals of Kearny, aside from being a legally non-existing body had no such power as it attempted to exercise with respect to the matter before it. For that reason also the proceedings and judgment under review must be set aside.”

In as much as the Board of Appeals had no legal existence in 1926, the appeal of relator-appellant to the Board could not validate the existence of the Board nor confer on it jurisdiction over the appeal of relator-appellant. The appeal to the Board was simply a superfluous gesture on the part of the relator-appellant without legal effect. Relator's position was the same as though he had applied for a writ of mandamus immediately on the rejection of his application by the inspector, there being no Board of Adjustment to which the appeal could have been made. The law in this state is too well settled to admit of argument, that in such a case the remedy of relator-appellant is by way of mandamus and not certiorari. *Van Winkle v. Quigley*, 135 Atl. 658 and *Aitken v. Hasbrouck Heights*, 136 Atl. 802.

II.

The zoning amendment in nowise affected the rights of the relator-appellant.

The application for permit was made several months prior to the passing of the amendment, the status of the relator-appellant being determined before the amendment was passed. *A. G. Construction Co. v. Scott*, 141 Atl. 761.

III.

Relator-appellant did not abandon his application for permit.

The application was made September 14, 1926 and was rejected by the Board of Appeals September 28, 1926 (p. 44). The respondents testified the application, fees and plans were returned to relator in October, 1926 (p. 69). Relator testified (p. 66) that the application, fees and plans were returned to him whereupon he informed the inspector that "I will go in court." The building inspector testified (p. 57) when the application, fees and plans were returned to relator-appellant "He (relator) didn't know what he was going to do when he went out."

"Abandonment is made up of two elements, act and intention. It includes both the intention to abandon and the external act by which the intention is carried into effect." 1 C. J. 6.

"Intention is the first and paramount object of inquiry; for there can be no abandonment without the intention to abandon." 1 C. J. 7

"To accomplish an abandonment, the facts or circumstances must clearly indicate such an intention. Abandonment is a question of intention. Non-user is a fact in determining it, but is not, even for twenty years, con-

clusive evidence in itself of an abandonment. Its weight must depend upon the intention to be drawn from its duration, character and accompanying circumstances." *Raritan Water Power Co. v. Veghte*, 21 Eq. 463 at 480.

Viewing both the testimony of the inspector and the relator-appellant it is evident that at the time the application, fees and plans were returned to the relator-appellant, he had no intention of abandoning his application. The mere acceptance of the return of the application, fees and plans did not in itself constitute an abandonment.

Respondents state that because of the lapse of time between the date the application, fees and plans were returned and the date this suit was instituted there was an abandonment. The suit was instituted on December 8, 1926. Less than two months elapsed between the time the application, fees and plans were returned and the time the suit was started. It is evident that the time that had elapsed was not an unreasonable length of time before instituting suit. The lapse of this time is immaterial in view of the fact that there is nothing else from which an intention to abandon can be presumed. 1 C. J. pages 8 and 11 and *Raritan Water Power Co. v. Veghte, supra*.

The burden of proving an abandonment is upon the respondents. 1 C. J. 11. In this case they have failed to sustain this burden because the testimony of the relator-appellant and the inspector at the time the application, fees and plans were returned indicated that relator-appellant had determined to go into court and would not abandon the application. It is important to note that the inspector did not say that

relator-appellant intended to abandon his application or give up any attempt of securing the permit. The testimony of the building inspector and relator-appellant is clearly evidential of intent not to abandon, but to proceed to enforce the rights of the relator-appellant. 1 C. J. 12.

As a matter of fact the Supreme Court in deciding the present case evidently must have concluded that there was no abandonment because the opinion of the Supreme Court fails to touch upon the question of abandonment which was raised by the respondents in their brief.

IV.

The sections of the Zoning Ordinance of the Town of Kearny preventing the erection of the building in question are invalid.

The sole objection of the respondents to the issuance of the building permit sought by the relator in these proceedings is that the zoning ordinance restricts the erection of dwellings on the lands of the relator to buildings not more than two and one-half stories in height and to house not more than two families. As a matter of fact several permits to erect apartment houses in the vicinity of the site of relator-appellant, in violation of the Kearny Zoning Ordinance had been granted by the Town of Kearny. (pp. 48, 49, 50 and 91.) And in other parts of the Town of Kearny several permits had been granted to erect buildings violating the Kearny Zoning Ordinance. (pp. 88, 89, 90, 91, 92, 93.)

Any other grounds that respondents may contend for cannot now be raised. (*Reimer v. Dallas*, 129 Atl. 390.) Our courts have emphatically and consistently ruled that similar provisions of zoning ordinances would not be recognized.

The following cases deal with apartment buildings in which the facts are on all fours with those in this case.

- Ingersoll v. South Orange*, 126 Atl. 213;
Jersey City v. Scott, 100 N. J. L. 45, 126 Atl. 173;
Nelson v. Binda, 128 Atl. 618;
Losich v. Binda, 128 Atl. 619;
E. & M. Land Co., v. Newark, 133 Atl. 413;
Solon v. Scott, 135 Atl. 811.

See also the following zoning cases:

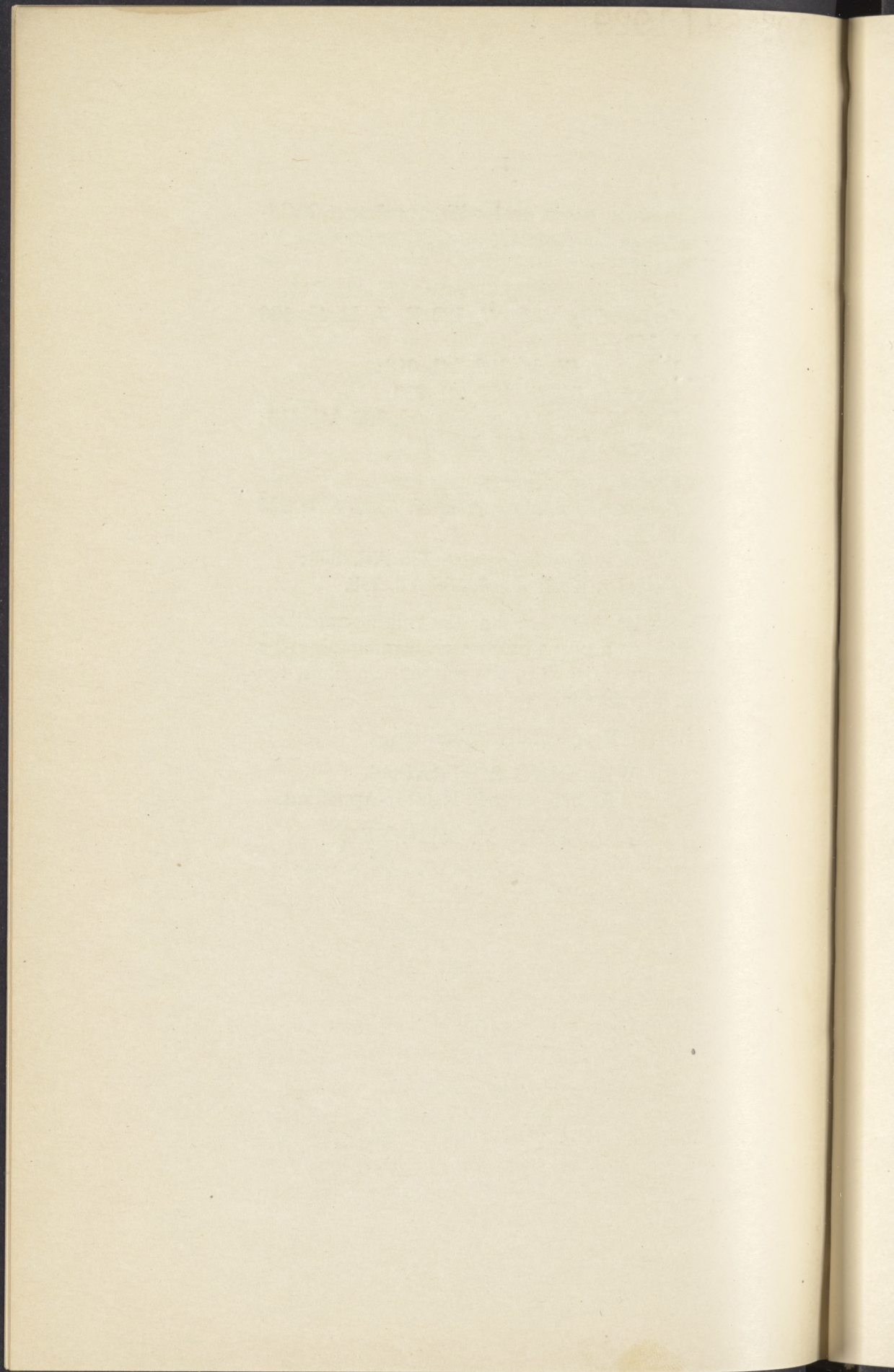
- Ignaciuinas v. Nutley*, 99 N. J. L. 389; 125 Atl. 121;
Eaton v. South Orange, 130 Atl. 363;
Finkel v. Kaltenbach, 132 Atl. 198.

We submit therefore that the relator-appellant is entitled to a peremptory writ commanding the respondents to issue to the relator-appellant, the permit in question.

Respectfully submitted,

WELANKO & STRAUSS,
 Attorneys of Relator-Appellant.

BENJAMIN M. WEINBERG,
 Of Counsel.



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

New Jersey Court of Errors and Appeals

STATE OF NEW JERSEY, *ex rel.*
NATHAN KASTOVISKY,
Relator-Appellant,

vs.

JOHN D. CASTLES, Inspector of
Buildings of the Town of
Kearny; KEARNY ZONING
BOARD OF APPEALS and TOWN
OF KEARNY,
Respondents.

*On
Alternative
Writ of
Mandamus.*

*On
Appeal
from
Supreme
Court.*

BRIEF FOR RESPONDENTS.

Three reasons are urged by respondents why the Alternative Writ of Mandamus prayed for should be dismissed.

(1) The application for a building permit was abandoned long before any application was ever made to the Court; and

(2) The applicant has misconceived his remedy and should have applied for a Writ of Certiorari.

(3) The allowance of a Writ of Mandamus being within the discretion of the Court, no such discretion should be exercised in view of the latest amendment to the Constitution and the enactment of legislation thereunder.

I.

The application for a building permit was abandoned and there is nothing for the Writ of Mandamus, if allowed, to operate upon.

A number of applications to build various kinds of buildings upon the lands described in this case (p. 18, l. 7 &c.) were made prior to the application which is the subject matter of this suit, and all subsequently abandoned.

Even prior to the ownership of the land by Kastovisky, one Harry Citret applied for and received a permit dated Jan. 8, 1926, (p. 21, ll. 30-40, and p. 29, ll. 30-40).

Counsel stated expressly, however, that he was not proceeding on that permit (p. 20, l. 18).

That permit was automatically dropped when later applications were filed (p. 54, l. 40; p. 55, l. 10).

After Kastovisky obtained title to the property, which was by deed dated April 1, 1926 (p. 18, l. 38; p. 19, l. 30), he made three separate applications for as many different kinds of building (p. 33, l. 30 to p. 34, l. 34; p. 55, l. 10 to p. 56, l. 30), all of which he subsequently abandoned.

It was the third and last application for a brick building, twelve-family apartment, that is the subject matter of this suit.

Kastovisky testified (p. 34, l. 27):

“Q Then did you file a third application?

A Yes.

“Q What was that for? A Third application, that was for a brick building, twelve-family apartment, with janitor apartment.

“Q Is that the application which you are now trying to get through the court?
A Yes.”

And see the language of the rule to show cause at p. 15, l. 38 &c.

Of the two earlier applications made by Kastovisky, the first was for a two-story building with stores below and apartments above (p. 55, l. 27). He appealed to the Zoning Board of Appeals on this on May 11, 1926. Later he withdrew the application and got his money back (p. 55, l. 34).

The second application was for a frame building without stores (p. 55, l. 40). He appealed on this to the Zoning Board on July 13, 1926 (p. 41, l. 10). Later he withdrew this application also, and got his money back (p. 56, ll. 1-10).

Then he filed the application, the refusal of which is the cause of this application to the Court, for a permit to erect a brick building, with twelve apartments (p. 56, l. 15). He appealed to the Zoning Board on that application on September 14, 1926, (p. 44, ll. 22-26) or possibly July 27, 1926, (p. 43, ll. 13-26); and on September 28, 1926 the application was heard and denied (p. 44, l. 26; p. 45, l. 23; p. 78, ll. 1-14).

Following the denial of this application, which is the one now before the Court, he voluntarily came into the office of the Inspector, Mr. Castles, and got back his cash deposit. Kastovisky admits it and says it was a couple of days after the Zoning Board turned him down (p. 66, ll. 10-14 and ll. 33-37). That made it early in October, since the Board “turned him down” on September 28th.

See to the same effect the testimony of Castles (p. 69, ll. 10-30); and Anderson (p. 84, l. 30 to p. 85, l. 12).

About the same time he came in with his friend McGrath and took away his application, plans &c.

Castles testified (p. 68, l. 16):

“Q On any of those occasions when Kastovisky came in with McGrath did he take the plans away? A Yes, the last time they were both here—they had been here a couple of times—the last time they were here the plans were handed to Mr. McGrath.

“Q How many sets of plans were filed with you? A Two sets.

“Q How many copies of the application? A One set of application.

“Q One application and two sets of plans? A Yes.

“Q When they both came in, the day you speak of, were both sets of plans and the application handed back? A Yes, they were all rolled up together.

“Q To whom were they handed? A McGrath took them.

“Q Took both sets of plans and the application? A Yes.

“Q And Kastovisky, was he there? A Yes.

“Q And they were together in the matter? A Yes.

“Q And they walked out together? A Yes.

“Q McGrath carrying the plans and the application? A Yes.

“Q When was that as near as you can now remember after September 28, 1926, when the Zoning Board denied their application? A I cannot tell you the date; I think it was early in October.

“Q Of 1926? A Yes.”

Anderson, a clerk in Castles' office, who was there at the time, testified (p. 83, l. 26 &c.):

"Q Do you remember any occasion when Mr. Kastovisky and Mr. McGrath came in together to see Mr. Castles? A Yes.

Q Do you remember whether that was before or after the Zoning Board had turned down Mr. Kastovisky's application? A After.

"Q Do you remember how long after? A A couple of weeks, I guess.

"Q Do you remember what month it was they came in? A October.

"Q Of 1926? A Yes.

"Q Do you remember whether on that occasion they asked for and took away their plans and applications? A Yes, they took them away.

"Q What was said, as you remember, about that? A Mr. Castles rolled up the plans and gave them to him, and I understood that Mr. McGrath—

"Mr. English: Never mind what you understood.

"Q Mr. Castles rolled up the plans and gave them to him? A Yes.

"Q Was the application included with that? A Yes.

"Q How many sets of plans were filed? A Two, I believe.

"Q The two plans and application were handed back? A Yes, sir.

"Q Do you know whether handed to Mr. Kastovisky or to Mr. McGrath? A I don't remember.

"Q Were they both there together? A Yes.

"Q Did they leave together? A Yes.

"Q And the conversation took place in the presence of two of them and Mr. Castles? A Yes."

Kastovisky admitted he had taken away one set of plans and McGrath the other set (p. 36, ll. 25-34; p. 60, ll. 29-36; p. 63, ll. 26-28 and p.

64, l. 20). Kastovisky testified with respect to taking away the application, on the first day of the hearing (p. 38, ll. 15-27):

“Q Did you file more than one copy of the application; you said you filed two copies of the plans? A Two plans there should be and one application.

“Q One copy of the application and two copies of the plans? A Yes.

“Q One copy of the plans you took away, and one copy of the plans McGrath took away? A McGrath took away the plans; he has got one set of plans.

“Q And you got one set, which you gave to your lawyer? A I believe—I couldn't be sure—I think he has got the application, too.”

By the time of the second day's hearing, he saw the point, and tried to hedge on the question of the taking away of the application, although admitting he and McGrath had taken away the plans and that he had withdrawn the cash deposit (p. 63, l. 35; p. 64, l. 20; p. 66; ll. 1-12).

We subpoenaed McGrath to produce the plans and the application. He did produce the plans (p. 95, ll. 18-35), but refused to produce the application, or even to come and testify with respect to it, although subpoenaed twice (p. 88, l. 10 and p. 98).

The testimony of Castles and Anderson, however, is most positive that the application, as well as the plans and the cash deposit, were taken away by Kastovisky, or his agent, McGrath, and Kastovisky's studied ignorance of the whereabouts of the application, particularly after the first day's taking of testimony, is most significant.

It was stipulated in the case that the present application to the court was begun by an appli-

cation to Justice Minturn in December, 1926, notice of which was served on December 8, 1926 (p. 74, l. 10), which was just about two months after he had withdrawn the cash deposit and taken away the plans.

From this review of the evidence it clearly appears, not only that Kastovisky abandoned the application which he had made to the municipal authorities several months before he made application to the court, but also that at the time proceedings in this case were started there was no application pending and there was no duty existing as between the municipality and the applicant upon which a writ of mandamus, if allowed, could act.

The proper attitude of the applicant in such a case as this would seem to be similar to that of one who seeks to invoke the law of tender; he must keep the tender good. So, here, the applicant must keep his application pending in order to avail himself of the benefit of a writ of mandamus.

In 38 *C. J.*, page 602, sec. 76, it is said:

“The duty to be enforced by mandamus must be a duty which exists at the time when the application for the writ is made. If for any reason the duty no longer exists at the time the application is made, the writ, of course, must be denied. Mandamus proceedings when instituted do not relate back to the time of the accrual of the right thereto.”

In *International Contracting Co. v. Lamont*, 155 U. S. 303, the court, by Justice White, said, page 308:

“The duty to be enforced by mandamus must not only be merely ministerial, but it must be a duty which exists at the time when the application for the mandamus is

made. Thus in the case of *ex parte Rowland*, 104 U. S. 604, 612, this Court, speaking through Mr. Chief Justice Waite, said: 'It is settled that more cannot be required of a public officer by mandamus than the law has made it his duty to do. The object of the writ is to enforce the performance of an existing duty, not to create a new one.' "

Caldwell v. Saul, 5 N. J. Misc. Rep. 165, is quite in point. Caldwell applied for a building permit which was rejected. He then entered into some compromise negotiations with the municipality with respect to the construction of his wall, as a result of which he made a new application. The court says page 166:

"This application was granted, and he went to work under it; and now, reverting to the original application, he asks a *mandamus* to build under that on the north side. We think the point made by the city is well taken, that application No. 1 is dead, being, in substance, withdrawn after rejection."

So, in the case at bar, the application for permit, which is the subject matter of this suit, was withdrawn and hence is dead.

Assuming, therefore, for the sake of argument, that this case is one where a writ of mandamus should, ordinarily, be allowed, the facts show that the applicant abandoned his application and that there is now no existing duty which the court can enforce.

A writ of mandamus is a writ of grace and is only granted in the discretion of the court. *Constam v. Darby*, 95 N. J. Law 318, page 321, where the court said:

" * * * the elementary rule in cases of *mandamus* is that the allowance of the writ rests in judicial discretion and that it is awarded only when the act to be done is ministerial and the duty clear. *Gleistman*

v. *West New York*, 74 N. J. L. 74; *Hugg v. Ivins*, 59 *Id.* 139; *Uszkay v. Dill*, 92 *Id.* 327; *Secaucus v. Kieseewetter*, 83 *Id.* 227.”

When the applicant abandons the application which he later seeks to have enforced by the writ, he necessarily disentitles himself to the exercise of the court's discretion in his favor.

We submit that even on the theory that this case, abstractly, is one where a writ of mandamus should otherwise be allowed, no writ should be allowed for the reasons stated.

II.

The applicant has misconceived his remedy and should have applied for a Writ of Certiorari rather than a Mandamus.

This proceeding was commenced by a notice of application for a peremptory or alternative Writ of Mandamus (p. 1, l. 30). Upon the application being made a Rule to Show Cause was allowed why an alternative or peremptory Writ of Mandamus should not issue (pp. 15 and 16).

The Supreme Court discharged the rule but allowed the pleadings to be molded so as to permit a review by this court (p. 103, l. 25).

It appeared undisputed in the case that a written application was filed with the Inspector of Buildings for a permit to erect a three-story brick building, to contain twelve apartments, etc. This application was accompanied by plans and a deposit of money, all of which were filed with the Inspector of Buildings.

The Inspector refused to issue the permit, and thereupon an appeal was taken to the Zoning Board of Appeals of the Town of Kearny. This

appeal is in evidence as Exhibit D. 4. (Inserted in back of State of Case.)

This so-called appeal in no manner complied with the requirements of the statute (Chapter 146, P. L. 1924, section 7, p. 327) that the appeal shall be by "a notice of appeal specifying the grounds thereof." No grounds whatever are specified as an examination of Exhibit D. 4 will show.

However, the Zoning Board advertised for a public hearing on the application; the applicant and objectors were heard, and the Zoning Board decided unanimously against the application (pp. 43 and 44). The application was specifically denied by the Zoning Board on September 28, 1926 (p. 44, l. 30; p. 78, l. 12).

By a supplement to the act entitled "An Act Concerning Municipalities," commonly known as the "Home Rule Act" (P. L. 1924, p. 324, chapter 146), the zoning of municipalities was provided for and an appeal board, designated in the statute as a board of adjustment, was created by §7. This Appeal Board as provided for in Section 7 of the supplement, consists of five members, appointed for such term as the governing body may prescribe (Section 7 was amended by P. L. 1925, p. 177, chapter 58).

The Building Zone Ordinance of the Town of Kearny (Exhibit D. 5, inserted in back of State of Case) by § 21, availed itself of the permission accorded in the statute to create a Board of Appeals, and did undertake to create such a Board. This Board has a secretary, meets regularly, keeps minutes, etc., and it was to this Board of Appeals that the applicant here appealed following the denial of his permit by the Inspector of Buildings.

The Order to Show Cause why a Mandamus should not issue is directed to both the Inspector of Buildings and the Zoning Board of Appeals of the Town of Kearny (p. 15, l. 35), and so is the alternative writ (p. 106, l. 10).

By Chapter 315, P. L. 1926, p. 526, a supplement to the supplement found in Chapter 146, P. L. 1924, was passed, which supplement reads as follows:

"1. Whenever in any municipality there shall be established a board of adjustment as authorized by the act to which this act is a supplement, such board of adjustment in addition to the powers now vested in it shall have power to determine, on appeal to it, whether any ordinance adopted by such municipality pursuant to the provisions of said act, so far as such ordinance affects the use of any property in relation to which such appeal is taken, tends to promote the public morals, health, safety or welfare; and if such board of adjustment shall determine on any such appeal that such ordinance does not, in such instance, so tend, such board of adjustment may modify or vary any requirement of said ordinance so far as it affects the user of the property in relation to which said appeal is taken.

"2. Any decision of the board of adjustment shall be subject to judicial review; *provided, however,* that no writ of certiorari for that purpose shall issue unless application therefor be made within thirty days after notice given to owner of property affected by such decision of the filing of the decision of such board in the office of such board, nor shall the allowance of any such writ stay proceedings upon the decision appealed from unless so ordered by the court."

The act took effect immediately and was approved March 31, 1926 (P. L. 1926 at p. 527).

Prior to the adoption of this 1926 supplement, and the decision of the Chief Justice in *Chancellor Development Co. v. Senior*, 4 Misc. Reports, 633, the law seems to have been in a confused state as to whether a mandamus or a certiorari would lie, and also as to whether an appeal is first necessary from the Building Inspector to the board of adjustment before either writ can be applied for.

There are many cases in the books where writs of mandamus have been allowed.

There are also cases where writs of certiorari were allowed.

Since the 1926 supplement it is now settled that proper practice requires an appeal from the Building Inspector to the Board of Adjustment or Appeal Board, and that a Writ of Certiorari should thereupon be applied for to review the action of the Appeal Board.

See

Chancellor Development Company v. Senior, 4 Misc. 633;

Van Winkle v. Quigley, 5 Misc. 103;

Haberland v. Maplewood, 5 Misc. 97;

Burg v. Ackerman, 5 Misc. 96;

Hendey v. Ackerman. 5 N. J. Ad. R. 600;

Paramount Realty Co. v. Schmitt, 5 Misc. 177;

Letz & Katz, Inc. v. Ackerman, 5 N. J. Misc. Rep. 169;

State v. Dowling, 5 N. J. Misc. Rep. 180;

Marlyn Realty Co. v. West Orange, 5 N. J. Misc. Rep. 342.

In the *Chancellor Development Company* case (4 Misc. Reports 633), the Chief Justice said (we quote the opinion in full):

“I think the application should be denied. The legislature, by this amendatory statute of 1926, has created this board of adjustment a tribunal of review, and has vested in it the power to determine on the appeal of the property owner whether this particular building, located in this particular place, is a public menace to the health, welfare or safety of the community. That is a fact which it is to determine, after hearing testimony. It has heard testimony and has determined that it is, according to the reading of the report made by the board, its decision not being based solely upon the ground that it violates the ordinance, but that this building located in this place, will be a public menace. Now, whether that finding is justified by the proofs before it is a question of fact. If there is no evidence to sustain it, it cannot stand. If it is justified by the proofs before the board, that would be the end of the relator’s alleged right to a permit.

“This seems to me not to be a case for an alternative writ for the purpose of reviewing the action of the inspector, but for a certiorari to review the action of the board of adjustment.”

The cases are plain that where a Board of Appeal has been created by ordinance under the supplement of 1926 certiorari is the proper remedy.

In *Haberland v. Maplewood*, 5 Misc. Reports 97, this court said (p. 98):

“This application for permit was made after the supplement to the act entitled ‘An Act Concerning Municipalities’ (Pamph. L. 1926, p. 526) became effective, enlarging powers of board of adjustment.

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

The inference is plain that where the record shows that there is a Board of Adjustment certiorari is the remedy.

So in *Van Winkle v. Quigley*, 5 Misc. Reports 103 the Court said (p. 104):

“As this application, and its refusal, was made and took place after the supplement to the Home Rule Act (Pamph. L. 1926, p. 526), increasing the jurisdiction of boards of adjustment, the procedure laid down in *Chancellor Development Corp. v. Senior*, 4 N. J. Misc. R. 633, should have been followed if the zoning ordinance of the city creates a board of adjustments or a like body.

“The case as presented to us does not show us anything upon this point, and as the respondents have filed no brief we have no assistance in that direction.”

Again the inference is the same.

In *Burg v. Ackerman*, 5 Misc. Reports 96, the application for a mandamus was denied, on the ground that certiorari was the proper remedy, it appearing there that there was a Board of Adjustment under the 1926 Act.

In *Paramount Realty Company v. Schmitt*, 5 Misc. Reports 177, it appeared that there was a Board of Zoning Appeals, and the Court held that the Chancellor Development Company case applied. In that case the Zoning Board refused to permit the applicant to submit testimony, and the Court held that the Board should hear the

facts and reach its determination. If the Board refused to hear the case then an application for a mandamus to compel it to perform its duty would lie. Upon the Board hearing the case and determining adversely to the applicant a writ of certiorari would lie.

In *State v. Dowling*, 5 N. J. Misc. Rep. 180, the Court said:

“The case would be one for the same disposition as the line of cases typified in *Ignaciunas v. Risley*, 98 N. J. L. 712, except for the statute of 1926 (*Pamph. L.*, p. 526), and the stipulated fact that there is a board of zoning adjustment. In that situation we deem it our duty to follow the decision of the Chief Justice in *Chancellor Development Corp. v. Senior*, 134 Atl. Rep. 337; 4 N. J. Mis. R. 633; and this results in a discharge of the present rule, leaving it open to relator to appeal to the board and to review its decision, if adverse, by *certiorari*.”

In *Letz & Katz, Inc. v. Ackerman*, 5 N. J. Misc. Rep. 169, application was for mandamus as in the case at bar. The Court said, page 170:

“The application for building permit was made in June, 1926, at which time the Board of Zoning Adjustment act was in force. *Pamph. L.*, 1926, p. 526. On the refusal of a permit, relator appealed to the Board of Zoning Adjustment, which in turn denied the permit, with some intimation that the scheme involved a dangerous fire hazard.

“In this posture of affairs, and in view of the statute, the decision of the Board of Zoning Appeals stands until reversed or set aside on a judicial review. *Chancellor Development Co. v. Senior*, 4 N. J. Mis. R. 633.

“The present rule to show cause will therefore be discharged.”

This formidable array of authority ought not to be lightly ignored. The appellant practically admits that certiorari of the Board's action is

the proper remedy (Appellant's Brief, pp. 2-3), but argues that under the recent Supreme Court decision in *Smith v. Kearny Zoning Board of Appeals*, 143 Atl. R. 151, the Zoning Board had no legal existence, and hence the relator's appeal to it was "a superfluous gesture," (Brief, p. 3) without legal effect.

There are several answers to this.

(1) The relator did not regard his application to Board as a mere "superfluous gesture," when he made it and followed it by an application for a mandamus to this court.

(2) The relator having applied to the Board and submitted to its jurisdiction cannot now be heard to say that this Board had no legal existence. The Court below commented on this and said (p. 102, l. 30):

"The relator having applied to the board of appeals and submitted to the jurisdiction of that board, cannot now contend that it was not a properly constituted board and did not have in effect the powers of a board of adjustment formed under the acts hereinbefore mentioned. The proper method for the relator to have taken to review the decision of the board of appeals was certiorari."

The relator ought not be allowed to blow both hot and cold.

(3) The *Smith case* (143 Atl. Rep. 151) has no application to this case at bar.

In the case at bar the relator applied for a license. It was denied him by the Building Inspector. He then appealed from the Inspector's determination to the Zoning Board of Appeals and the Board upheld the Inspector.

In the Smith case the applicants for the license,—namely, Feinsmith & Edelstein—also had their application denied by the Building Inspector. The applicants then appealed to the Zoning Board of Appeals and this time the Board reversed the Inspector and granted the permit. Then Smith, as the next-door neighbor, and a taxpayer specially injured by the action of the Board in granting the permit, applied for a certiorari to review the action of the Board.

The situation was, therefore, quite different. Smith as prosecutor for the writ had never applied to, or submitted to the jurisdiction of the Board, as the relator in the case at bar had. Hence Smith was entirely consistent in attacking the jurisdiction of the Board. The relator here is entirely inconsistent in attacking the jurisdiction of the Board, since he originally applied to it and submitted to its jurisdiction.

Moreover, the Supreme Court in the *Smith case* placed its decision on the authority of the Act of 1928 (Chapter 274, P. L. 1928). The Court said (143 Atl. p. 152):

“Further, the Act of 1924 was repealed by Chapter 274, P. L. 1928,”

and again, (p. 153):

“4. That the Act of 1928 is controlling as to the proceedings before us. This, as before indicated, we think is so.”

The proceedings in the case at bar were begun in December 1926 long before the Act of 1928 was in existence.

The Smith case affords no ground upon which this court should depart, in the case at bar, from the well established rule that the remedy in such cases is by certiorari and not by mandamus.

A writ of mandamus will only be directed to enforce a clear legal right. *Hugg v. Ivins*, 59 N. J. L. 139, p. 142.

III.

The allowance of a Writ of Mandamus being entirely within the discretion of the Court, no writ should be now allowed in view of the latest amendment to the constitution.

It requires no extended citation of authority to establish the proposition that the allowance of a Writ of Mandamus, is discretionary with the Court. See *Constam v. Darby*, 95 N. J. Law, 318, and the cases cited at page 321. It is a writ of grace, not of right.

The right of a municipality to regulate the construction of buildings within well defined districts by means of zoning ordinances is now settled by the latest amendment to the Constitution and the enactment of legislation thereunder (P. L. 1928, Chapter 274).

The citizens of Kearny, through the medium of this zoning ordinance have expressed themselves as desiring to have their city zoned, in accordance with present day ideas, and under the Constitution as amended. The application of the relator is directly in the face of this ordinance.

The relator ought not to be heard now to ask for the discretionary Writ of Mandamus, ^{and} we respectfully submit that ~~and~~ the Court ought not to exercise its discretion in his favor.

Respectfully submitted,

CONOVER ENGLISH,
Of Counsel with Respondents.

