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Notice of Appeal.

NOTICE OF APPEAL.

Filed April 20, 1934.

New Jersey Supreme Court

Nos. 260, 261 and 262 October Term, 1933.

10

WEST ESSEX BUILDING AND
LOAN ASSOCIATION and FER-
LAUTE DRESS MANUFACTURING
Co.,

Prosecutors,

vs.

BOROUGH OF CALDWELL, a Muni-
cipal Corporation of the
County of Essex,

Respondent.

*On
Certiorari.*

*Notice
of Appeal
from the
Judgment
of the
Supreme
Court.*

20

To Thomas Brunetto, Esq., Attorney for Pros-
ecutors-Appellees.

SIR:—

PLEASE TAKE NOTICE that the respondent in the
above stated cause appeals from the whole of the
judgment of the New Jersey Supreme Court
setting aside the Zoning Ordinance of the re-
spondent and dismissing the complaints, which
said judgment was entered on or about April
9th, 1934.

30

Respectfully yours,

MILTON M. UNGER,
Attorney for Respondent.

40

Notice of Appeal

Same Notice of Appeal in case of West Essex Building and Loan Associations, *vs.* Borough of Caldwell, a municipal corporation of the County of Essex.

- 10 Same Notice of Appeal in case of Ferlaute Dress Manufacturing Co., *vs.* Borough of Caldwell, a municipal corporation of the County of Essex.

Service Acknowledged April 18th, 1934.

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Grounds of Appeal.

GROUND OF APPEAL.

Filed April 20, 1934.

New Jersey Court of Errors and Appeals

WEST ESSEX BUILDING AND
LOAN ASSOCIATION and FER-
LAUTE DRESS MANUFACTURING
Co.,

Prosecutors-Appellees,

vs.

BOROUGH OF CALDWELL, a Muni-
cipal Corporation of the
County of Essex,

Respondent-Appellant.

10

*On Appeal
From the
New Jersey
Supreme
Court.*

*Grounds
of Appeal.*

20

The Respondent-Appellant hereby presents the following grounds of appeal from the judgment of the New Jersey Supreme Court appealed from herein.

1. The New Jersey Supreme Court erred in setting aside the Zoning Ordinance of the Borough of Caldwell, passed at a meeting of its Council held on October 3rd, 1921, and in dismissing the complaints charging the violations thereof by the Prosecutors-Appellees, when the said New Jersey Supreme Court should have held that said Ordinance was legally adopted and was valid and that the proceedings had upon complaints charging the violations thereof by the Prosecutors-Appellees should not have been dismissed.

30

MILTON M. UNGER,
Attorney for and of Counsel
with Respondent-Appellant.

40

Grounds of Appeal.

Same Grounds of Appeal in West Essex Building and Loan Association vs. Borough of Caldwell, a municipal corporation of the County of Essex.

- 10 Same Grounds of Appeal in Ferlaute Dress Manufacturing Co. vs. Borough of Caldwell, a municipal corporation of the County of Essex.

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Rule Consolidating Appeals.

RULE CONSOLIDATING APPEALS.

Filed April 20, 1934.

NEW JERSEY COURT OF ERRORS AND APPEALS.

10

WEST ESSEX BUILDING AND
LOAN ASSOCIATION and FER-
LAUTE DRESS MANUFACTURING
Co.,

Prosecutors-Appellees,

vs.

BOROUGH OF CALDWELL, a Muni-
cipal Corporation of the
County of Essex,

Respondent-Appellant.

*On
Certiorari.*

*On Appeal
From the
New Jersey
Supreme
Court.*

*Rule
Consolidating
Appeals.*

20

An appeal having been taken from the judgment of the New Jersey Supreme Court, and it appearing that the matters in dispute embrace the same questions of law and facts, and that the proceedings were consolidated in the New Jersey Supreme Court by order of that Court,

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It is on this 20th day of April, 1934, ORDERED, that the joint and individual appeals taken by the Respondent-Appellant from the judgment of the Supreme Court be consolidated and argued and that the record of said proceedings be printed in one State of the Case, and that both

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Rule Consolidating Appeals.

Prosecutors and Respondent submit their written argument in one brief.

On motion of

MILTON M. UNGER,
Attorney for Respondent-Appellant.

10

I consent to the entry of the above rule.

THOMAS BRUNETTO.
Attorney for Prosecutors-Appellees.

20

30

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Writ of Certiorari.

WRIT OF CERTIORARI.

NEW JERSEY SUPREME COURT.

WEST ESSEX BUILDING AND
LOAN ASSOCIATION and FER-
LAUTE DRESS MANUFACTURING
Co.,

Prosecutors,

vs.

BOROUGH OF CALDWELL, a Muni-
cipal Corporation of the
County of Essex,

Respondent.

10

*On
Certiorari.*

*Writ of
Certiorari.*

NEW JERSEY, to wit.

20

(L. S.)

The State of New Jersey to La Salle
E. Jacobus, Clerk of the Bor-
ough of Caldwell, a Municipal
Corporation in the County of
Essex, Greetings:

We, being willing for certain reasons, appear-
ing by the affidavit of Thomas Brunetto, filed in
this cause, to be certified of a certain ordinance
passed by the Borough of Caldwell, a Municipal
Corporation in the County of Essex and State of
New Jersey, on the 3rd day of October, 1921,
entitled:

30

“An Ordinance to regulate and restrict the
location hereafter of trades and industries and
the subsequent location 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

40

Writ of Certiorari.

open spaces and for said purposes to divide the Borough of Caldwell into districts.”

10 WE DO COMMAND YOU, that the aforesaid ordinance passed by the Borough of Caldwell, a Municipal Corporation in the County of Essex, on the 3rd day of October, 1921, with the records of the meetings of the said Borough Council, at which the said ordinance was introduced and passed, together with all things touching and concerning the passing, approving and enacting of said ordinance, as fully and entirely as before you they remain, to our Justices of the Supreme Court of Judicature, at Trenton, on the 6th day of July next, you certify and send, together with this writ, that therein may be done what of right and according to the laws and constitution of this State ought to be done.

20

WITNESS, Thomas J. Brogan, Esquire, Chief Justice of the Supreme Court, at Trenton, this 16th day of June, 1933.

FRED L. BLOODGOOD.
Clerk.

THOMAS BRUNETTO,
Attorney for Prosecutors.

30

Rule to Take Affidavits.

RULE TO TAKE AFFIDAVITS.

NEW JERSEY SUPREME COURT.

WEST ESSEX BUILDING AND LOAN ASSOCIATION and FER- LAUTE DRESS MANUFACTURING Co., <i>Prosecutors,</i> <i>vs.</i> BOROUGH OF CALDWELL, a Muni- cipal Corporation of the County of Essex, <i>Respondent.</i>	}	<i>On Certiorari. Rule to Take Affidavits.</i>	10
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The Court having allowed a Writ of Cer- 20
 tiorari to review the proceedings now pending in
 the Recorder's Court of the Borough of Caldwell,
 and application being made for affidavits to be
 used on the argument of said Writ of Certiorari;

It is on this 6th day of June, 1933, ORDERED
 that either party have leave to take affidavits to
 be read to the Court on the argument of the Writ
 of Certiorari upon two days' notice.

CHARLES W. PARKER, 30
 Justice of the Supreme Court.

Entered June 16, 1933

On motion of
 THOMAS BRUNETTO.

Return to Writ.

RETURN TO WRIT.

NEW JERSEY SUPREME COURT.

10	WEST ESSEX BUILDING AND LOAN ASSOCIATION and FER- LAUTE DRESS MANUFACTURING Co., <p style="text-align: right;"><i>Prosecutors,</i></p> <p style="text-align: center;"><i>vs.</i></p> BOROUGH OF CALDWELL, a Muni- cipal Corporation of the County of Essex, <p style="text-align: right;"><i>Respondent.</i></p>	} <i>On Certiorari. Return to the Writ.</i>
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20 I, LA SALLE E. JACOBUS, Clerk of the Borough of Caldwell, a Municipal Corporation in the County of Essex and State of New Jersey, do herewith send to the Supreme Court of the State of New Jersey, a true copy of a certain ordinance passed by the Borough of Caldwell, a Municipal Corporation in the County of Essex and State of New Jersey, on the 3rd day of October, 1921, entitled:

30 "An Ordinance to regulate and restrict the location hereafter of trades and industries and the subsequent location of buildings designed for a specified use in any designated area and to regulate and determine the area of yards, courts and other open spaces and for said purposes to divide the Borough into districts."

40 Together with the records of the meetings of the said Borough Council at which the said ordinance was introduced and passed, together with all things touching and concerning the passing,

Return to Writ.

approving and enacting of the said ordinance as fully and entirely as before me there remain as by writ of certiorari sealed the 16th day of June, 1933, before the Honorable Thomas J. Brogan, Chief Justice of the Supreme Court, I am commanded to do.

I certify that I am the Clerk of the Borough of Caldwell in the County of Essex and that the said papers constitute the entire record of the aforesaid proceedings.

Signed and sealed this 5th day of July, 1933, with the seal of the Borough of Caldwell, in the County of Essex.

(Seal) LA SALLE JACOBUS,
Borough Clerk.

10

20

Borough of Caldwell, N. J.
August 1st, 1921.

Regular meeting of the Mayor and Council was held on above date; Mayor Sharwell in the Chair; Members present, Messrs. Wettach, Dosch, Poole, Brown, Babcock and Nelson. Minutes of previous meeting were read and approved.

The report of the Zoning Commission was taken from the table and the ordinance was submitted by the said Commission was introduced by Councilman Babcock as follows:

“An ordinance to regulate and restrict the location hereafter of trades and industries and the subsequent location 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 de-

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Return to Writ.

termine the area of yards, courts and other open spaces and for said purposes to divide the Borough of Caldwell into districts."

10 On roll call, the said ordinance was passed its first reading; all the members voting in the affirmative. On motion by Councilman Babcock the Clerk was directed to make due and legal advertisement of the introduction of said ordinance and that a Public Hearing would be held by the Mayor and Council on Monday Eve., the 19th day of September, 1921, in the Fire House for the purpose of hearing objection to same.

Borough of Caldwell, N. J.
September 19th, 1921.

20 Regular meeting of the Mayor and Council was held on above date; Mayor Sharwell in the Chair. Members present, Messrs. Wettach, Poole, Babcock and Nelson. Members absent, Messrs. Dosch and Brown. Minutes of the previous meeting were approved without reading.

Pursuant to legal advertisement, the meeting was adjourned to meet in the High School Auditorium for the purpose of giving a Public Hearing in the consideration of a proposed ordinance entitled:

30

"An ordinance to regulate and restrict the location hereafter of trades and industries and the subsequent location 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 Borough of Caldwell into districts."

40

Return to Writ.

The Mayor declared the meeting in the auditorium open for the purpose of said Hearing and presented an outline of the proposed ordinance and the advantages of same; after the reading of the ordinance, the Mayor invited a full and open discussion of same.

After a large number of citizens and tax-payers had expressed themselves for and against the adoption of the ordinance and a number of requests, both oral and in writing, for certain changes in the zone lines, had been received, the meeting was declared adjourned until Monday evening the 26th of September, 1921, at the Council Rooms on Roseland Avenue. 10

Approved,

Mayor. 20

Attest:

Borough Clerk.

Borough of Caldwell, N. J.
September 26th, 1921.

Adjourned meeting of the Mayor and Council was held on above date. Mayor Sharwell in the Chair; members present Messrs. Wettach, Dosch, Poole, Brown, Babcock and Nelson. Regular order of business was suspended and a number of communications were received and read from various property owners requesting changes in the lines of the several zones as contained in the ordinance under consideration. Mr. Elting, representing the Monomonock Inn, explained the 30

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Return to Writ.

reasons for making such a request in connection with their property interest.

10 Mr. M. J. McGrath, representing nearly all the property interests on Ryerson avenue made a verbal request that the street be improved and placed in good condition; on motion, this matter was referred to the Road Committee.

Consideration of bills was laid over.

20 On motion by Councilman Poole, the Mayor and Clerk were authorized to issue a warrant-check payable to the Citizen's National Bank, for payment of interest due October 1st on Fire Apparatus Certificate for \$1,000.00 for 6 months to the amount of \$25.00 and on Fire House Certificate for \$500.00 for 6 months due October 1st to the amount of \$12.50 and that said check be drawn on the Citizen's National Bank.

Approved,

Mayor.

30 On recommendation of the Police Committee, the Mayor appointed Thomas Nichol, a special Borough Marshal, which appointment was unanimously confirmed.

On recommendation of the Police Committee, an application for 5 jitney licenses made by Scott and Nochenson, was granted; all members voting in the affirmative. An application was received from Herbert Baldwin for appointment as a police officer. On motion, this application was referred to the Police Committee.

On motion the Clerk was directed to communicate with the New York Telephone Company and

Return to Writ.

ask if the Borough is entitled to an additional free telephone under the terms of the franchise.

Councilman Babcock reported progress to remove the sign nuisance at the corner of Bloomfield and Gould avenues.

Councilman Poole reported progress in the matter providing a new outlet for the affluent from the sewage beds and that there was sufficient funds to pay for same. 10

On motion, Borough Engineer Provost, in charge of the Sewer System was authorized to proceed with the work.

No other business coming before the meeting, same was adjourned.

Borough Clerk. 20

Borough of Caldwell, N. J.
October 3rd, 1921.

Regular meeting of the Borough Council was held on the above date; Mayor Sharwell in the Chair.

Members present, Messrs. Dosch, Poole, Brown, Babcock and Nelson. Absent, Mr. Wettach. 30

Minutes of the meetings of September 19th and 26th were read and duly approved.

On motion by Councilman Poole, the ordinance entitled:

"An ordinance to regulate and restrict the location hereafter of trades and industries and subsequent location of buildings designed for a specified use in any designated area and to regulate and limit the height and bulk of buildings

Return to Writ.

hereafter erected and to regulate and determine the area of yards, courts and other open spaces and for said purposes to divide the Borough of Caldwell into districts," was taken up for its final reading and passed; all the members present voting in the affirmative.

10

Approved,

Mayor.

I, La Salle E. Jacobus, Clerk of the Borough of Caldwell, a municipal corporation in the County of Essex do hereby certify that I have examined the minutes of the Borough Council of the Borough of Caldwell for the period beginning August 1 to October 3, 1921 and have compared with the minutes, the proceedings of the said Borough Council relating to the introduction and adoption of An Ordinance Entitled:

20

"An ordinance to regulate and restrict the location hereafter of trades and industries and the subsequent location 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 Borough of Caldwell into districts," and I do certify that the above is a true copy of said minutes as set forth in the original minute book of the proceedings of said Council during said period.

30

LA SALLE E. JACOBUS,
Borough Clerk.

40

Return to Writ.

ZONING ORDINANCE OF THE BOROUGH
OF CALDWELL.

TO WHOM IT MAY CONCERN:

Public notice is hereby given that the Borough Council at its meeting on the 3rd of October, 1921, passed the following ordinance which, having being duly approved by the Mayor of the Borough of Caldwell, is therefore now in force:

10

An Ordinance to regulate and restrict the location hereafter of trades and industries and the subsequent location 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 Borough of Caldwell into districts.

20

Section 3 (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 following specified purposes:

(1) Any use specified in Sec. 2 (a) of this Ordinance as permitted in Residence "a" Districts.

(2) A dwelling, detached or semi-detached, for not more than two families or more than two housekeeping units which shall not serve for (boarding or) rooming more (than five) persons (outside of each family and its servants) than are permitted in Sec. 2 (a) (1).

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(3) Customary home occupation; provided there is no conspicuous display of goods or advertising and provided that such uses shall occupy an area equivalent to not over 25 per cent. of floor area of one story; and provided that they shall not be carried on in accessory buildings, nor

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Return to Writ.

be in any way objectionable or detrimental to the neighborhood.

10 (4) A private garage as specified in Sec. 2 (a) (8) except that there shall not be space for more than one motor vehicle for each 15 feet of frontage of the lot (on one street only) nor for more than one vehicle for each 1,500 square feet of lot area except that space for not more than one non-commercial vehicle may be leased for each 25 feet of frontage of the lot (on one street only). In the case of corner lots only the street of least frontage shall be considered.

(5) Clubs, social, community center and recreational buildings, excepting those the chief activity of which is a service customarily carried on as a business.

20 (6) Memorial buildings, public libraries, public museums, public galleries.

Section 11-A. It shall be unlawful to use or permit the use of any building or premises or part thereof, hereafter created, erected, changed, converted or enlarged wholly or partly, in its use or structure, until a certificate of occupancy shall have been issued by the Building Inspector. Such certificate shall show that such building or premises or part thereof and the proposed use thereof are in conformity with the provisions of this Ordinance. If approved, it shall be the duty of the Building Inspector to issue a certificate of occupancy within five days after a request for the same shall be filed in his office by any owner, after having determined that the building and the proposed use thereof, conforms with all the requirements herein set forth.

40 Section 12. Violations and Penalties. For any and every violation of the provisions of this

Return to Writ.

Ordinance, the owner, general agent or contractor of a building or premises where such violation has been committed or shall exist, and the lessee or tenant of an entire building or entire premises where such violation has been committed or shall exist, and the owner, general agent or contractor, lessee or tenant of any part of a building or premises in which part such violation has been committed or shall exist, and the general agent, architect, builder, contractor or any other person who commits, takes part or assists in such violation or who maintains any building or premises in which any such violation shall exist, shall for each and every violation, and for each and every day that such violation continues, be subject to a fine of not more than one hundred dollars. Legal remedies for such violation shall be had and violations shall be prosecuted in the manner prescribed by law or ordinance effective in the Borough of Caldwell.

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Notice to Take Depositions.

NOTICE TO TAKE DEPOSITIONS.

NEW JERSEY SUPREME COURT.

WEST ESSEX BUILDING AND
LOAN ASSOCIATION,

Prosecutors,

vs.

BOROUGH OF CALDWELL, a Muni-
cipal Corporation of the
County of Essex,

Respondent.

10

*On
Certiorari.*

Notice.

To: Thomas Brunetto,
Attorney for Prosecutor:

20

SIR:

PLEASE TAKE NOTICE that on Thursday, July 20th, 1933, at 2:30 o'clock in the afternoon, Day-light Savings Time, before John A. Bernhard, Esq., Supreme Court Commissioner at 2201 Lefcourt Building, 11 Commerce street, Newark, New Jersey, the respondent herein will proceed to take depositions or affidavits to be used upon the arguments of the Writ of Certiorari.

MILTON M. UNGER,
Attorney for Respondent,
Borough of Caldwell,
a Municipal Corporation
of the County of Essex.

30

40

Notice to Take Depositions.

NOTICE TO TAKE DEPOSITIONS.

NEW JERSEY SUPREME COURT.

10	FERLAUTE DRESS MANUFACTURING Co., <div style="text-align: right; padding-right: 10px;"><i>Prosecutors,</i></div>	}	<i>On Certiorari. Notice.</i>
	<div style="text-align: center; padding-bottom: 5px;"><i>vs.</i></div> BOROUGH OF CALDWELL, a Muni- cipal Corporation of the County of Essex, <div style="text-align: right; padding-right: 10px;"><i>Respondent.</i></div>		

20 To: Thomas Brunetto,
 Attorney for Prosecutor:

SIR:

30 PLEASE TAKE NOTICE that on Thursday, July
 20th, 1933, at 2:00 o'clock in the afternoon, Day-
 light Savings Time, before John A. Bernhard,
 Esq., Supreme Court Commissioner at 2201
 Lefcourt Building, 1 Commerce street, Newark,
 New Jersey, the respondent herein will proceed
 to take depositions or affidavits to be used upon
 the argument of the Writ of Certiorari hereafter
 allowed herein.

MILTON M. UNGER,
 Attorney for Respondent,
 Borough of Caldwell,
 a Municipal Corporation
 of the County of Essex.

Depositions.

DEPOSITIONS.

NEW JERSEY SUPREME COURT.

WEST ESSEX BUILDING AND
LOAN ASSOCIATION and FER-
LAUTE DRESS MANUFACTURING
Co.,

Prosecutors,

vs.

BOROUGH OF CALDWELL, a Muni-
cipal Corporation of the
County of Essex,

Respondent.

*On
Certiorari.*

*Depositions
Taken on
Behalf of the
Respondent.*

10

July 28, 1933.

20

Before John A. Bernhard, a Supreme Court
Commissioner.

Appearances:

Milton M. Unger, for Defendant (Mr. Emmer-
glick).

Thomas Brunetto, for the Prosecutors.

Stenographer sworn in.

Signatures to depositions waived.

30

It Is Stipulated between the parties that testi-
mony of the witnesses be taken in the absence
of the Commissioner.

40

Clarence G. Poole, for Respondent, Direct.

CLARENCE G. POOLE, a witness produced on the part of the plaintiff, being duly sworn according to law on his oath deposes and says:

Direct examination by Leonard J. Emmerglick.

10 Q Mr. Poole, where do you live? A Maplewood.

Q Did you ever live in Caldwell? A Yes.

Q When? A All my life except when I moved to Maplewood three years ago.

Q At any time while you lived in Caldwell were you ever a member of the Borough Council? A I was.

Q When did you become a member of the Borough Council—approximately? A Late 1918 or
20 1919.

Q Were you a member of the Borough Council throughout the year 1921? A Yes.

Q During your service as a Councilman and from your knowledge as such when were the regular meetings of the Council held? A First and third Mondays at that time.

Q Each month? A Yes.

Q In 1921 do you recollect the consideration of a zoning ordinance by the Borough Council?
30 A I do.

Q Do you recollect when that was first taken up by the Borough Council? A I cannot recollect the exact date.

Q According to the minutes of the meeting of the Council on August 1, 1921, it appears that a report of the zoning commission was taken from the table and the ordinance was submitted by the Commission introduced by Councilman Babcock and was passed in the affirmative. Ac-
40

Clarence G. Poole, for Respondent, Direct.

ording to those minutes you were present? A
Yes.

Q Do you recollect having taken part at that
time in the consideration of the ordinance? A I
was present at every meeting.

Q Do you recollect having voted upon the or-
dinance? 10

Mr. Thomas Brunetto: This is objected
to because the minutes speak for themselves
and the minutes at said meeting can be
under the provisions of the Borough Act by
the Clerk is the only competent evidence as
to what took place.

Q Now according to those minutes Mr. Poole,
the Clerk was directed to make due and legal ad-
vertisements that a public hearing would be held 20
on September 19, 1921 at the Fire House. Did
you attend at that public hearing? A I did.

Q Was the hearing held actually at the Fire
House? A It was held at the High School at
that time.

Q Did you attend at the High School? A
Yes.

Q Did you meet, you and the rest of the Coun-
cilmen, at the Fire House before going to the
High School Auditorium? A I don't recall. 30

Q At the High School at the time was a hear-
ing held? A There was.

Q Were objections voiced to the Council? A
Yes.

Q And according to the minutes of that meet-
ing it was adjourned until Monday evening, Sep-
tember 26th at the Council Rooms. Now I ask
you whether you attended at that meeting? A
My recollection is that I did. I attended all
those meetings. 40

Clarence G. Poole, for Respondent, Direct.

Q According to the minutes of that meeting the regular order of business was suspended and a number of communications were received and read of various property owners requesting changes in the lines of several zones. Do you recollect that having taken place? A I recollect that there were communications asking for changes.

10 Q Was any final action taken at that meeting? A I cannot recollect.

Q Was that a regular meeting? A Regular meetings were the first and third Mondays. If it was not the first and third it was not a regular meeting.

Q Now at that meeting did anybody appear in person to make objections? A My recollection is that Mr. Elting appeared. Of course I cannot be positive.

20 Q At that meeting did he appear and object to the zoning of his property? A Yes.

Q Now according to the minutes of the meeting of the Council held on October 3, 1921 on your motion this ordinance was taken up for final reading and passed. Do you recollect that this was done? A It was my recollection it was passed but I cannot determine the date.

30 Q At that meeting were any objections voiced? A I cannot recollect.

Q Were any received in writing? A I cannot recollect that.

Q That meeting of October 3, was that a regular meeting? A I cannot recollect—if it was on Monday it was a regular meeting—first and third Mondays.

Q Now this proposed ordinance was taken up for consideration back in August, 1921. At the meeting of August 1st did you have a copy of the

40

Clarence G. Poole, for Respondent, Direct.

proposed ordinance in the form it was presented?

A It was my recollection the copy was furnished to every member of the Council.

Q In what form was the copy? Was it written, printed, typewritten or what? A I cannot recollect.

Q Did you retain that copy throughout the period beginning August and ending October 3, 1921? A I imagine I did. I cannot say positive. 10

Q Did you observe whether or not Mayor Sharwell had such a copy? A I cannot say.

Q Your recollection is that copies were distributed to all the Councilmen? A That is my recollection.

Q Now did you ever as one of the Councilmen at any meeting have it brought to your attention that the Mayor had vetoed this ordinance after final passage? A No, sir. 20

Q Did the Council ever after October 3, 1921 reconsider or re-pass this ordinance?

Mr. Brunetto: I object to that question because the minutes speak for themselves and which is the only positive evidence of the proceedings of the Council.

Q You may answer? A Well, I have no recollection of that. 30

Q Mr. Poole, according to the minutes of the meeting of September 26, 1921 as I have indicated to you certain further objections were heard and the minutes disclose after consideration of other matters and recite that no other business coming before the meeting the same was adjourned. I call your attention to the fact that no adjournment was had to any specific date and ask you 40

Clarence G. Poole, for Respondent, Direct.

whether that was the usual practice of the Council?

10 Mr. Brunetto: That is objected to as to what the usual practice was. The statute provides that the meetings should be ad-
15 journed to a definite date. I also desire to object for the additional reason that this is an attempt to vary the meeting of the proceedings of the Borough Council held by
20 parol evidence. It is an attempt to supplement said minutes by oral testimony the fact which took place over twelve or thirteen years ago, which would be impossible to recall in detail that the minutes of the Borough Council at the time were to be
25 kept by the Clerk as provided by the above Act and said minutes is the only evidence of the proceedings of said Council. I also desire to add that it is immaterial as to what practice and custom of the Council is or was. The legal point involved is what did the Council do on this particular meet-
30 ing, therefore evidence of a custom of practice by the Borough Council of the Borough of Caldwell of what they did at any other meetings, is not relevant, material or com-
35 petent in the proceedings.

Q You may answer. A It was my recollection that unless the meeting was going to be adjourned to a special meeting, the meeting was simply adjourned to a special meeting. Some motion is made that it was adjourned to some particular date.

Q Did you have any recollection as to what specifically was done at this meeting with respect
40 to this ordinance?

Clarence G. Poole, for Respondent, Cross.

Mr. Brunetto: Same objection that any oral testimony to vary or supplement or add to the minutes by oral evidence as to what took place at said meeting is incompetent, irrelevant and immaterial.

Q Go ahead and answer. A I have no recollection. 10

Cross examination by Mr. Brunetto.

Q Mr. Poole you do not remember what actually took place at these meetings outside they were held at certain intervals? A Yes.

Q You also recollect during the time you were a member of said Council a zoning ordinance was considered? A Yes. 20

Q You don't know in detail what action the Council did take at any specific meeting without refreshing your memory by examining the minutes kept by the Clerk of that date or those dates?

A I cannot say I do recall the details of every meeting. I did know that an ordinance was considered. I do know that the ordinance was passed by the Council but I cannot remember the details of the specific meetings.

Q Do you know whether this ordinance was ever delivered to the Mayor? A I do not, that was a matter between the Clerk and the Mayor. 30

Henry J. Babcock, for Respondent, Direct.

HENRY J. BABCOCK, a witness produced on the part of the plaintiff, being duly sworn according to law, on his oath deposes and says:

Direct examination by Leonard J. Emmerglick.

10 Q Where do you live? A 37 Crane street, Caldwell, N. J.

Q How long have you lived in Caldwell? A About twenty-three years.

Q Were you ever a member of the Borough Council? A Yes.

Q When? A I cannot give you the date. It was the year the zoning ordinance was adopted in 1921 or 1922.

20 Q Were you a member of the Council throughout that year? A Yes.

Q Did you attend the meetings regularly? A Yes.

Q Do you recollect that a zoning ordinance came on for consideration? A Yes.

30 Q Prior to the time that it was submitted, do you personally know how it was prepared and brought into shape for consideration? A We had a zoning commission appointed by the Mayor composed of certain members of the Council. Certain citizens were made a member of that commission. I was made a member.

Q Did you take part in preparing the ordinance? A I did.

40 Q After it had been prepared was it in writing or printed in some other form? A The Clerk furnished us with copies of the ordinance. We debated it as to what sections we thought could be applied to our community—mark out what we thought would not apply and we added things we thought we had to and then it was

Henry J. Babcock, for Respondent, Direct.

passed. After we had the thing in shape we had copies of the ordinance prepared as we desired to submit it to the Council.

Q Were those copies printed copies, typewritten copies or what? A I don't know.

Q Do you know whether or not copies were distributed to the other Councilmen and to the Mayor? A They were distributed.

10

Q According to the minutes held on August 1, 1921 the report of the Zoning Commission was taken from the table and the ordinance was submitted by the commission, was introduced by yourself and at that time the Clerk was directed according to these minutes to make due advertisement that a public hearing would be held on September 19, 1921 in the Fire House for the purpose of hearing objections to the same. Do you recollect that that took place? A Yes.

20

Q Did you attend at the Fire House on September 19th, 1921? A Yes.

Q In your capacity as Councilman? A Yes.

Q And was the Mayor and were the other Councilmen there? A Yes.

Q And did the meeting actually take place at the Fire House? A We never organized the meeting—there were so many there we adjourned to the High School.

30

Q Was the meeting held at the High School on the same night? A Yes.

Q How long after you adjourned from the Fire House did the meeting open at the High School? A As soon as we got there which would probably be a matter of fifteen or twenty minutes.

Q Were objections voiced at the High School? A Yes.

40

Henry J. Babcock, for Respondent, Direct.

Q From your recollection were there many people at the High School outside of the Mayor, Clerk, Councilmen and other officials? A I should judge—I remember the room and the crowd in there that there was seven or four hundred people.

10 Q How long did the meeting last before it was adjourned? A Very late. I cannot tell you how late—it was probably close to midnight.

Q And how long did the meeting continue? A Roughly speaking three to four hours.

Q According to the minutes of that meeting it was adjourned until the 26th of September at the Council rooms. At that meeting of September 26th, according to the minutes, the regular order of business was suspended and a number of
20 communications were received and read from various property owners requesting changes of the lines of the several zones and Mr. Elting, according to the minutes, representing the Inn explained the reason for making such a request in connection with the Inn property. That is all that appears in the minutes with respect to this ordinance. I ask you whether you have any recollection of any specific action other than what I have indicated to you having taken place at that
30 meeting? A No, this ordinance.

Mr. Brunetto: This is objected to for the reasons that this witness cannot testify as to what took place over twelve years ago, from memory at a Council meeting of the Borough of Caldwell; that his testimony is not competent to add to or supplement facts to the minutes kept by the Clerk at the time as provided by statute; that the
40 only competent evidence as to the proceed-

Henry J. Babcock, for Respondent, Direct.

ing of the Borough Council is the written minutes kept by the Clerk for that purpose as provided by the statute and nothing can be added or supplemented thereto by parol evidence or by a member of said Council who attended any of said meetings at the times in question.

10

Q Go ahead. A After the publicly advertised meeting to hear objections we adjourned to a special meeting the following week at which we discussed the various objections that were raised at the special meeting and to decide our action at the next regular meeting as to whether we would take up the ordinance or not.

Q Now, according to the minutes of the meeting of October 3, 1921, this ordinance was taken up for final reading and was passed, do you recollect that that took place? A I recollect we passed, at the next regular meeting, the ordinance.

20

Q Do you recollect from your having participated in preparing this ordinance, from having considered it as a member of the Borough Council, whether or not it contained provisions for the appointment of a zoning commission?

30

Mr. Brunetto: That is objected to as being immaterial, irrelevant of the present issue.

A Yes.

Q Do you know whether a zoning commission was appointed? A Yes.

Q How do you know that? A I was a member of it.

40

Henry J. Babcock, for Respondent, Cross.

Q Did you act as a member of it? A Yes.

Q Did that commission function? A Yes.

Q You know from your participation as a member?

10 Mr. Brunetto: That is objected to. That the best evidence as to whether the said commission functioned or not is that the minutes of said commission were kept by its proper officers.

Q How long were you a member of that Commission? A Up until about four years ago.

Q How soon after—approximately—how soon after October 3, 1921, were you appointed to it?

20 A I am not sure whether I was appointed at first—the original Commission we knew as a zoning board of adjustment—I am not sure whether I was appointed immediately or whether the meeting after we adopted the ordinance—I am not sure.

Q How were you notified of your appointment? A By letter.

Q By whom? A Borough Clerk.

30 Q Did you as a member of the Council after October 3, 1921 ever receive a report that this ordinance has been voted by the Mayor. A No.

Q Did you ever as a member of the Council after that date ever reconsider or re-pass the ordinance? A No.

Cross examination by Mr. Brunetto.

Q Do you know whether this ordinance was ever submitted to the Mayor for his approval?

40 A No.

Henry J. Babcock, for Respondent, Cross.

Q After October 3, do you know whether said ordinance was ever handed to the Mayor for his approval? A No, I don't know.

Q Now you talked about the advertised meeting. This was the meeting of September 19, 1921. You said that was advertised? A Yes.

Q And a public hearing was held at the Fire House the Council did not organize at all but went to the High School? A Yes.

Q And a public hearing was to be had at the Fire House and you say at the Fire House the Council did not organize at all but went to the High School? A Yes, not formally organized.

Q What do you mean by formally organized? A The crowd was so big we got together and said we would have to move down to the High School.

Q The members of the Council and the Mayor? A Yes.

Q That is all you did, you went down to the High School and then met there? A Yes.

Q You held all meetings in the High School? A Only that particular meeting.

Q Was there any legal notice given that you know of that this ordinance was to be considered at the High School? A No.

Q Or that a public hearing would be held at the High School? A No.

Q As a matter of fact there was no notice given either by advertisement in the newspaper—when I say advertisement I say whether legal notice of the Borough Council was given that a meeting was to be held—that final action of this ordinance would be considered at any other place except the Fire House, that was the only notice that was given? A Yes.

Henry J. Babcock, for Respondent, Cross.

10 Q And so far as you are concerned, Mr. Babcock, you cannot give us in detail as to what happened at any meeting without refreshing your memory and without referring to the minutes kept by the Clerk, outside—with the exception that you attended these meetings and you know that this ordinance was considered and you know that a public hearing was held and that thereafter you were a member of this zoning adjustment bureau and later on the title of it was changed to the Board of Zoning Appeals? A I remember considerably because of the fact that I was very much interested in the zoning ordinance as to what you would call details—

20 Q As to who voted and how many voted for it? A Yes, all the members of the Council voted for it. I remember at the advertised meeting I heard pro and con—some were in favor and some were against it.

Q At that meeting there was no final disposition or—I mean there was no final disposition taken of the zoning ordinance—do you know whether the ordinance was read at any of the meetings? A It was.

30 Q You heard the minutes of the Council read by the Clerk of previous meetings, that is for example of the meeting of September 19. You heard the minutes of the Council for August 1st read? A No, the minutes were very rarely read of the meetings. The Clerk furnished us with a typewritten copy of the minutes during the week and the minutes were not read unless some particular Councilman took exception to something in the minutes and that would apply to all the meetings of the Council.

40 Q From August 1, 1921 to October 3rd? A Yes. The Mayor would ask if there were any

Henry J. Babcock, for Respondent, Re-direct.

objections to the minutes. If there were none we would continue on with the meeting.

Re-direct examination by Mr. Emmerglick.

Q Mr. Babcock, when the Council convened at the Fire House on September 19th and as you said a large crowd of persons attended and it was determined that you would conduct the meeting at the High School, in what form, if any, was any announcement made to the people then attending at the meeting that the meeting would be transferred to the High School? A Someone, I think, the Mayor announced from the platform that we would adjourn to the High School. 10

Q Did you observe approximately how many people attended at the Fire House? A The room was full, the stairs were full and they were standing outside the building and I could not count how many were there—they could not get in. 20

Q Did you observe them standing outside the building? A Yes.

Q The crowd that attended at the High School was it smaller than the crowd at the Fire House?

Mr. Brunetto: Objected to—not material, relevant and competent. 30

A I cannot tell how many were outside at the time we adjourned—

Q Of course you did not count them but from your observation can you answer that question?

A No, I cannot. I assume that everybody went to the High School. I don't know of anybody that did not. Probably more because we went down because they were still coming along the 40

Henry J. Babcock, for Respondent, Re-cross.

avenue to the Fire House and they turned around and went back to the High School.

Q When you left the Fire House was that building left vacant? A That I cannot say. I was trying to recall whether we appointed a custodian at that time or not. I am not sure.

10 Q Do you know whether anybody locked up the Fire House? A It was never locked.

Q Do you know at about what time you left the Fire House? A I think it was shortly after eight and not later than eight-thirty.

Q How long did it take you to get from the Fire House to the High School? A I walked and it probably took me about fifteen minutes—some drove down.

20 *Re-cross examination by Mr. Brunetto.*

Q How far is this Fire House where the meeting was advertised for from the High School where the meeting was actually held? A I should say roughly one-half mile.

30 Q You did not know what time this meeting was called for at the Fire House—that is the notice which was published in the paper or advertised? A I don't know except that we advertised all our ordinances as a rule for hearing at 8 o'clock.

Q Mr. Babcock, do you know whether a notice was published in the newspaper, which was authorized to publish legal notices for the Borough of Caldwell, that this ordinance was to be considered at the High School for final disposition? A Not at the High School—at the Fire House.

40

John J. Van Order, for Respondent, Direct.

NEW JERSEY SUPREME COURT

WEST ESSEX BUILDING AND LOAN ASSOCIATION and FER- LAUTE DRESS MANUFACTURING Co., <i>Prosecutors,</i> <i>vs.</i> BOROUGH OF CALDWELL, a Muni- cipal Corporation of the County of Essex, <i>Respondent.</i>	}	<i>On Certiorari.</i>	10
		<i>Depositions Taken on Behalf of the Respondent</i>	

September 11, 1933.

Before John A. Bernhard, a Supreme Court Commissioner. 20

Appearances:

Thomas Brunetto, for the prosecutors.

Milton M. Unger, for respondent (Mr. Emmerglick).

Stenographer sworn in.

Signatures to depositions waived.

JOHN J. VAN ORDER, being duly sworn according to law, on his oath deposes and says: 30

Direct examination by Mr. Emmerglick.

Q Where do you live, Mr. Van Order? A In the Borough of Caldwell.

Q What is your occupation? A Retired.

Q Were you at any time Clerk of that Borough? A I was.

John J. Van Order, for Respondent, Direct.

Q Over what period were you Clerk? A 1893 to 1921 inclusive. I retired on December 31, 1921.

Q Do you recollect the consideration by the Borough Council of an ordinance relating to zoning in the year 1921? A I do.

10 Q Were you then Clerk of the Borough? A I was.

Q Did you attend meetings of the Council in your capacity as Clerk regularly? A Yes.

Q And the minutes of those meetings were prepared and kept by whom? A By myself personally.

Q They were made up of information which you secured in what manner?

20 Mr. Brunetto: Objected to as leading.

A As the recording officers of the meetings of the Borough of Caldwell.

Q The information which you secured, did you secure it from personal observation and hearing at the meetings? A From personal observation and hearing and the record as made at the time.

30 Q According to the minutes of a meeting held on August 1, 1921, the report of the zoning commission was taken from the table and an ordinance relating to zoning the Borough was introduced, and the ordinance was passed at first reading, according to the minutes, and the Clerk was directed to make due and legal advertisement of the introduction of the ordinance and that a public hearing would be held on September 19, 1921 in the Fire House for the purpose of hearing objections to the same. Did you, pursuant to the direction to which I have referred,

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John J. Van Order, for Respondent, Direct.

proceed to cause due and legal advertisement of the introduction to the meeting? A So far as I can see the only answer I can make as to that is that whatever proceedings were had and taken is stated in full in the minutes and those minutes are absolutely correct and the true record of the proceedings leading up to the introduction of the ordinance to which reference is made and it being passed as first reading—all as recited in those minutes were the facts as they actually transpired and the adjournment to the time as stated in those meetings or the public hearings were as stated that the public meeting was held. That I recollect personally outside of the minutes—as a matter of record the hearing was held and that meeting, because of the interest taken in the ordinance and the overflow of the audience, the hearing was adjourned to the auditorium in the High School and there the ordinance was read and discussed by various taxpayers, and I think the names of whom are stated in the minutes. What I state generally is this: that the records as shown in the minutes over my signature attested are the true and correct proceedings.

Q Do you have any independent recollection with respect to advertising? A No. My procedure as Borough Clerk in matters of Borough ordinances were to take a copy of the ordinances to the public newspaper, the official newspaper of the Borough, after their passage for the legal publication, and it is my positive knowledge that this proceeding was taken, due advertisement was made for the passage of the ordinance and the ordinance properly recorded in the ordinance book.

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John J. Van Order, for Respondent, Direct.

Q In what form was this ordinance originally prepared, that is to say, was it at the first instance and at the time it was introduced printed, typewritten or in some other form? A It was typewritten originally by the Zoning Ordinance Committee and then was printed for distribution as well as published.

10 Q Did you know what distribution it received in the printed form?

Mr. Brunetto: Objected to. It is immaterial what distribution it had. The question is whether there ever was such an ordinance.

A My recollection was that it was duly published—in addition to that I had a number of copies stricken off by the printer—200 or 300 copies as my recollection goes, and I had them on my desk in the office for distribution and passing out to those who came into the office and wanted a copy of the ordinance.

20 Q Just prior to the passage of the ordinance at first reading at the meeting of August 1, 1921, and at that meeting were any copies such as you have indicated available? A I don't think I can answer that question from my recollection. The ordinance on its introduction was read and then the matter of hearing was determined. During the time between the introduction of that ordinance and the hearing on the same I would say positively that those printed copies were made and distributed for the benefit of those people who wanted to consider the ordinance before the hearing.

30 Q At the time it was first passed and at the meeting of August 1, 1921, do you know of your

40

John J. Van Order, for Respondent, Direct.

knowledge whether or not copies had been handed to the Mayor and Councilmen prior to the meeting or at the meeting? A Either at the meeting or within a very few days thereafter. I invariably made a copy in full of the minutes of each meeting—11 copies—for distribution among the Councilmen, the Mayor, the Borough Collector and the official newspaper, and I think I am accurate in my recollection, on the printing of these copies of the ordinances. They were immediately distributed to the Councilmen. 10

Q When was that with respect to the meeting of August 1st, before or after? A After. I would say quite shortly after because I had no knowledge of the ordinance until it was actually introduced—official knowledge.

Q Was that distribution to the Mayor and Councilmen before or after final passage? A Before. 20

Q No doubt about that? A No, no doubt about that.

Q Who read the ordinance at the first meeting of August 1, 1921? A The Clerk, myself.

Q From what did you read it, Mr. Van Order? A I cannot state positively as to that, whether it was from an original copy as presented by the committee or a printed copy. 30

Q Do you know what became of the original copy? I mean the original copy presented by the Committee? A Positively—my recollection is that it was given to the official newspaper as its copy from which to make the publication of the ordinance for the hearing and the copies for distribution.

Q Do you know whether or not the newspaper ever returned it to you? A I have no recollection as to that. 40

John J. Van Order, for Respondent, Direct.

10 Q Now according to the minutes of the meeting held on October 3, 1921, this ordinance was taken up for final reading and was passed, and according to the minutes of that meeting it appears that the minutes of the meetings of September 19th and 26th were read and duly approved. You have testified in substance that the minutes correctly represent proceedings taken by the Council, and now having referred to you contents of the minutes of this meeting of October 3, 1921, I ask you whether or not that is also true, that is particularly true, of the minutes of this particular meeting?

20 Mr. Brunetto: Objected to the form of the question because it calls for a conclusion as to whether the minutes are as reported or not and it calls for his opinion. I think you can ask him as to what the minutes show. Further objection that the minutes speak for themselves.

30 A My answer to that question that whatever statement is contained in those minutes referring to the final action of the Council, was as stated in the minutes of that meeting. With respect to the statement in those minutes, that the minutes of the meetings of September 19th and 26th were duly approved, I am positive that those minutes were read and duly approved by the action of the Councilmen as stated in the minutes.

Q Upon the final passage, do you know what was done with the original ordinance? A I do not.

Q Did you present it to the Mayor for his signature or veto?

John J. Van Order, for Respondent, Direct.

Mr. Brunetto: That is objected to because the minutes speak for themselves; that you cannot vary or add to the minutes anything by parol evidence. This witness's testimony is solely on the minutes as shown in the minutes. He testified that whatever took place he made a record of it in his minutes and the minutes is a true record of said proceedings and therefore the question is not competent to the present issue.

10

A I have no recollection of having done so.

Q Did your minutes contain a reference to every act done by you in your capacity as Clerk of the Borough? A In so far as it was possible to be done. My recollection was always fresh in the matter of precedence.

20

Q I now speak Mr. Van Order of action—conduct by yourself in your capacity as Clerk of the Borough. Speaking generally did you put into the minutes of the Borough meeting a reference to it—all of your conduct as Clerk of the Borough?

Mr. Brunetto: The question is objected to. It is too indefinite as to what he did on the other occasions. The question is what was done on this particular occasion with this particular ordinance and his testimony should be limited to that.

30

A My action always was to complete the preparation of the minutes for final record while everything was fresh in my mind and comprehensive. I personally took charge of the entire detail of making the memorandum for my minutes at each meeting and immediately the next

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John J. Van Order, for Respondent, Direct.

10 morning, I myself, prepared the minutes on my typewriter and made the story of the minutes of that meeting as complete and full as reasonable intelligence would ask, in so much as those minutes were always presented to the members of the Council immediately following each meeting for them also to review and consider the minutes before they approved them. Kept them fresh in their minds so that there was no lapse by which I could forget anything.

Q There was some conduct on your part as Clerk not connected with the minutes of the Council which formed no part of the proceedings of those minutes and which you therefore did not incorporate in the minutes of those meetings. Is that not so?

20

Mr. Brunetto: This is objected to. The testimony of the conduct which is expected the witness to testify to must be directed to what action was done in regard to this particular ordinance. Whatever he did relating to other matters which took place before the Council or other matters relating to the business of the Borough had nothing to do with the present issue.

30

A There was very little that I did along other lines. No. I would say in answer to that question that practically all of my activities as a Borough Clerk were the taking care of the records of the proceedings of the Borough Council and the matters leading out from those actions.

Q Those matters which led out from that did you incorporate the action you took in connection with them in minutes? A It was always my endeavor to do so.

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John J. Van Order, for Respondent, Direct.

Q During your years as Borough Clerk did you recite in the minutes what conduct you took with respect to an ordinance upon its passage?

A No, not always.

Q Did you, with respect to this particular ordinance do any more than is shown in the minutes, did you with respect to this particular ordinance make a report that it had been presented to the Mayor? A I might have done so. I have no recollection.

10

Q Was that your invariable practice or not?

Mr. Brunetto: That is objected to. Unless the question is limited to what he did in this particular case. It is immaterial what his practice was. The question which we are interested here is what did he do in this particular case, whether in this particular case he presented the ordinance to the Mayor or not, therefore the question should be limited to that evidence alone. If he knows.

20

A My recollection is that I did not make a practice of presenting ordinances to the Mayor other than of for the reason he had full knowledge of their consideration, their introduction and passage. If he failed to file a veto within the five days—I think it was after the passage of the ordinance—and that was done in most cases—it automatically became an ordinance and followed the usual manner in its legal procedure.

30

Q The answer that you have just given then, is that a statement of the usual practice during the years that you were Borough Clerk with respect to the ordinances adopted by the Council?

A I would in at least $\frac{3}{4}$ of the ordinances that

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John J. Van Order, for Respondent, Direct.

were introduced and passed. The matter of the Mayor formally signing it was not observed. It became an ordinance through his agreement and acquiescence and his knowledge of the proceedings leading up to that ordinance unless he was interested in the passage of the ordinance and filed a veto, it was always assumed that his action was favorable to the introduction.

10 Q With respect to presenting formally a copy of the original ordinance to the Mayor in its final passage what was the practice? A Well, I cannot answer in this particular instance no more than I can in any other. The general practice was practically carried out.

20 Q That was what with respect to this particular item of presentation in a formal way of the original or a copy of the ordinance after final passage. A I don't recall from any positive knowledge as to just what the detail of the action was other than as is stated in the minutes. Now as to whether I did personally present that ordinance to him and he signed it and returned it to me approved, William G. Sharwell, the Mayor, now on that question, I cannot answer it because I don't recall. I know that the ordinance was published over his signature approved and at-

30 tested by me as Borough Clerk and from that I am sure that the proceedings taken were subject to his approval.

Q I perhaps did not make myself clear Mr. Van Order. What I would like to know is the general practice you follow with respect to some formal way—handing to the Mayor after an ordinance was finally passed either the original or a copy of it for the purpose of action on his part? A That was never done. There were times when the ordinances were written in the book—the

John J. Van Order, for Respondent, Cross.

Mayor signed his name at the bottom of the ordinance book as the printed ordinance and with his printed signature and my attest as Borough Clerk. There was no independent signature required or asked for.

Q Do you have any recollection as to whether or not with respect to this particular ordinance it was vetoed by the Mayor? A It was not. 10

Cross examination by Mr. Brunetto.

Q Now, Mr. Van Order, you say there was a notice published in the papers after the introduction of this ordinance when a public hearing would be held and that another notice stated the public hearing was to take place at the Fire House? A Yes. 20

Q Was there a meeting at the Fire House? A Yes, and then the meeting was adjourned from the Fire House to the High School.

Q And the meetings thereafter were always held at the School Auditorium? A The public hearing.

Q And was there a notice published that a public hearing would be held at the School House wherein any of the public who was interested in this ordinance would be afforded an opportunity to be heard? A No. I have a copy of the records before me and I insist that the minutes as they are printed show the true record. 30

Q In other words, Mr. Van Order, outside of what the printed minutes show or the typewritten minutes show, you are not positive on any other thing as to what happened at any of these meetings?

Mr. Emmerglick: That is objected to as being improper cross examination and that 40

John J. Van Order, for Respondent, Cross.

it is not warranted by the direct testimony and that it calls for a conclusion.

A I am not.

Q You say the meeting of September 19th which was scheduled for the Fire House was partly held at the Fire House and partly held at the School? A That is my recollection of it and as the minutes state.

Q Outside of what the minutes say, can you tell us whether the ordinance was read at the meeting of the Fire House or was it read at the meeting of the High School? A My recollection does not serve me to say yes or no to that question.

Q Were any of the minutes of the Borough Council of the Borough of Caldwell relating to the introduction and consideration and passage of this ordinance ever signed by the Mayor?

Mr. Emmerglick: Objected to as improper cross examination.

A I have no recollection as to that.

Q Do you know whether this ordinance—when I say this ordinance—I have reference to—is the zoning ordinance commonly known as zoning ordinance which is entitled “An ordinance to regulate and restrict the location hereafter of trades 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 Borough of Caldwell into districts.” Was ever signed by the Mayor? A I don’t recollect that.

40

John J. Van Order, for Respondent, Cross.

Q Did you ever see the Mayor attach his signature to this particular ordinance after it was passed by the Borough Council? A No.

Q Did you ever see this ordinance with the Mayor's actual signature after October 3, 1921?

A I have no recollection of it.

Q Now I show you a copy of the minutes of August 1, 1921 of the Borough Council of the Borough of Caldwell relating to the introduction of "An ordinance to regulate and restrict the location of trades and industries and the subsequent location 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 Borough of Caldwell into districts" commonly known as the zoning ordinance and ask you whether that ordinance was read in full at that meeting or— A The only thing that was read was what is shown in the minutes as shown to me. 10 20

Q That is assuming this to be a true copy of the minutes of the Borough of Caldwell relating to the introduction of said ordinance? A I don't recollect.

Q When I say this I mean Exhibit D-2 which was offered in evidence at the hearing in the Police Court in the Borough of Caldwell on June 13, 1933. A I don't recollect. 30

Q Did you, Mr. Van Order as Borough Clerk of the Borough of Caldwell keep an ordinance book wherein the original ordinances were recorded and signed by the Mayor? A I did.

Q The ordinance commonly known as the zoning ordinance, was that written in that particular ordinance book kept by you? A Yes. It 40

John J. Van Order, for Respondent, Cross.

was a printed copy of the ordinance—it was pasted in.

Q Did the Mayor sign the original ordinance?

A I cannot answer. I don't know.

Q What happened to that ordinance book?

10 A It is in the possession of the Borough Clerk and that is the book which I delivered to Mr. La Salle E. Jacobus, who is the present Borough Clerk.

Q And if the book which Mr. Jacobus has at the present time does not show that the ordinance entitled "An ordinance to regulate and restrict the location of trades and industries and the subsequent location 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 Borough of Caldwell into districts", commonly known as the Zoning Ordinance, which is the ordinance in question in this proceeding was not signed by the Mayor. Would you say then that that is a fact that the Mayor never signed this particular ordinance?

20

30 Mr. Emmerglick: That is objected to.

A I would not say so.

Q Do you know of any other book which would contain the ordinance signed or alleged to have been signed by the then Mayor? A No.

Q The book which you delivered to Mr. Jacobus as your successor in office was the only book which contained the ordinance adopted by the Borough of Caldwell? A It was.

40

John J. Van Order, for Respondent, Cross.

Q And if it is not that book, that is, if this ordinance signed by the Mayor is not in that book then you did not copy said ordinance in that book and if the Mayor signed same—

Mr. Emmerglick: That is objected to—
and if it is not there it may not be there 10
for any number of reasons, among which
might be that it became loosened and fell
out, therefore, the question is objected to.

A The printed copy of the ordinance as filed in the ordinance book was accepted as being the ordinance signed by the Mayor.

Q When you accepted it did you mention accepted by whom? A Accepted by the Council at its final passage and after publication it was filed by me as Clerk in the Book of Ordinances in its printed form as published from the original. 20

Q Well, what you filed in this book of ordinances which you delivered to Mr. Jacobus as your successor in office was the printed copy containing the printed name of the Mayor and your own name as Clerk? A Yes.

Q However, your answer still is that you never saw a copy of said ordinance signed by the Mayor, that is with the Mayor's independent signature attached to it? A I don't recollect that I did say— 30

Q So far as you know you don't know whether the Mayor ever signed this ordinance or not. That is as far as you know? A Well, I would say that I haven't the positive knowledge that he did other than the meeting of the Council passed the ordinance. The Mayor filed no veto, it automatically was published and advertised over the 40

John J. Van Order, for Respondent, Cross.

signature of the Mayor and became a part of the records.

10 Q As far as you know the signature attached to this printed copy which you put in the Ordinance Book—you don't know whether that was the Mayor's signature or not? A I cannot say as to that.

Q This ordinance as far as you were concerned you never submitted to the Mayor for his approval. Did the Borough Council submit it to the Mayor for his approval? A I have no recollection as to that whether it was.

Q If you did your minutes would show that? A Not necessarily, no.

20 Q Suppose the Borough Council would have submitted the ordinance to the Mayor— A You refer to the attorney?

Q No, I mean Borough Council, not counsel—would your minutes show that? A Collectively they would not present it. I, the Clerk, of course, was always their representative and I represented the Council in anything effecting the other officers.

30 Q On your direct examination Mr. Van Order you said you were quite sure that this ordinance was properly entered in the Ordinance Book. By that you mean the printed copy? That was what was entered in the minutes—in the Ordinance Book? A Yes.

Q And that is the copy with your signature and the Mayor's as approving the ordinance? A It is. Outside of that printed copy there is no other entry of said ordinance, that I know of.

Q Have you gone through the Ordinance Book and examined it? A No.

40 Q I believe on your direct examination you said that the ordinance was read at the High

John J. Van Order, for Respondent, Cross.

School building and then later on on cross examination you stated you did not know whether it was read at the Fire House or at the High School?

A No, I cannot amplify on that, yet my recollection would be that it was read at the Fire House at the opening of the hearing.

Q Isn't it a fact, if this will recall your memory, that there was nothing done at the Fire House with the exception that the Council got together—when I say Council Mr. Van Order I mean Council—when they saw the size of the crowd the meeting was then immediately adjourned to the High School and there is what actually took place in regard to the reading and affording public hearing on this ordinance? A I don't recollect the detail but I would say the major part of the meeting was held at the auditorium of the High School where the discussion took place. 10 20

Q However, you couldn't tell us or you don't recollect whether the actual reading of the ordinance took place at the High School or at the Fire House? A No.

Q Now these minutes of the meetings of this ordinance—they were made from notes made by you at the meeting the previous night? A They were.

Q Just what happened to those original notes? A They were destroyed. They were never retained. 30

Q Would you compare the minutes as transcribed in this Borough Ordinance Book with your notes? A Absolutely.

Q Before you destroyed it? A Absolutely.

Q Therefore the contents of these minutes—that is as contained in the present minute book are or do represent what actually took place at the meetings from the notes that you had taken at said meetings? A They do. 40

*Reasons.***REASONS.**

NEW JERSEY SUPREME COURT.

10	WEST ESSEX BUILDING AND LOAN ASSOCIATION and FER- LAUTE DRESS MANUFACTURING Co., <div style="text-align: right; padding-right: 20px;"><i>Prosecutors,</i></div> <div style="text-align: center; padding: 5px 0;"><i>vs.</i></div> BOROUGH OF CALDWELL, a Muni- cipal Corporation of the County of Essex, <div style="text-align: right; padding-right: 20px;"><i>Respondent.</i></div>	<i>On Certiorari. Reasons Why Zoning Ordinance of the Borough of Caldwell is Void and Illegal</i>
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20 The said prosecutors, West Essex Building and Loan Association and Ferlaute Dress Manufacturing Co., come and pray that the ordinance adopted on or about October 3, 1921, by the Borough of Caldwell, a municipal corporation in the County of Essex, entitled "An Ordinance to regulate and restrict the location hereafter of trades and industries and the subsequent location of buildings designed for a specified use in any designated area and to regulate and limit the

30 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 Borough of Caldwell into districts", may be declared void and illegal for the following reasons:

40 1. The ordinance of the Borough Council of the Borough of Caldwell entitled "An Ordinance to regulate and restrict the location hereafter of trades and industries and the subsequent loca-

Reasons.

tion 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 Borough of Caldwell into districts," was not legally adopted by said Borough Council. 10

2. Said ordinance was not submitted in writing at a regular meeting of the Borough Council of the Borough of Caldwell as provided by law.

3. Said ordinance was not passed at a subsequent regular meeting after being submitted in writing at a regular meeting of said Borough Council as provided by law.

4. Said ordinance was never submitted to the Mayor for his approval or veto as provided by law. 20

5. Said ordinance was never approved by the Mayor after final passage as provided by law.

6. Said ordinance was never passed by the Council of the Borough of Caldwell over the Mayor's veto as provided by law.

7. Said ordinance was never recorded in full by the Borough Clerk in a proper book to be kept by him for that purpose as provided by law. 30

8. Said ordinance was not read in its final form at a meeting held by the Borough Council at least one week prior to its final passage.

9. Said ordinance was not published in a newspaper printed and circulating in said Borough of Caldwell nor in a newspaper printed and circulating in the County of Essex after its introduction and before passage with a notice stat- 40

Reasons.

ing the time and place, when and were the governing body was to consider the final passage thereof.

10 10. Said ordinance was not published at least once in a newspaper printed and circulating in the Borough nor printed in a newspaper circulating in the County in which said Borough is located prior to the same taking effect as provided by law.

11. Said ordinance was not presented to the Mayor within five days after it was passed by the Borough Council.

20 12. Said ordinance was not signed by the Mayor and filed with the Borough Clerk within five days after it was passed as provided by law.

30 13. Said ordinance was not published at least once in a newspaper published and circulating in said Borough together with a notice of the introduction thereof and the time and place when and where such ordinance would be further considered before final passage.

30 14. Said ordinance was not published at least one week prior to the time fixed for final passage and at least ten days after the first reading as provided by law.

15. The Borough Council of the Borough of Caldwell, before the final passage of said ordinance did not afford persons interested in the passage of said ordinance an opportunity to be heard concerning the said ordinance at the time and place stated in the notice published in the newspaper where said ordinance was to be considered before its final passage.

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Reasons.

16. The Borough Council of the Borough of Caldwell did not continue or adjourn, by proper resolution, consideration of said ordinance from September 26 to October 3, 1921.

17. Said ordinance is invalid because the Borough Council of the Borough of Caldwell failed to properly continue final action on said ordinance from September 26 to October 3, 1921. 10

18. The Borough Council of the Borough of Caldwell did not publish said ordinance nor the title thereof together with a notice of the date of the passage or approval or both in a newspaper published and circulating in said Borough as required by law.

19. That said ordinance is unconstitutional as it deprives the said prosecutors, West Essex Building and Loan Association and Ferlaute Dress Manufacturing Co., of a right to possess, use and protect property, this being a violation of the first clause of the Article One of the Constitution of New Jersey, as it would be taking of the private property of the prosecutors, West Essex Building and Loan Association and Ferlaute Dress Manufacturing Co. for public use without just compensation and in violation of the sixteenth paragraph of Article One of the Constitution of New Jersey. 20 30

20. The said ordinance is unconstitutional for the reason that the Borough of Caldwell would be taking the property of the prosecutors, West Essex Building and Loan Association and Ferlaute Dress Manufacturing Co. for private purposes in violation of the rights secured to the prosecutors West Essex Building and Loan Association and Ferlaute Dress Manufacturing Co. by the Constitution of the State of New Jersey. 40

Reasons.

21. Said ordinance is unconstitutional for the reason that it violates the rights of the prosecutors West Essex Building and Loan Association and Ferlaute Dress Manufacturing Co. secured to them by the Fourteenth Amendment of the Constitution of the United States as it would deprive
10 them of their property without due process of law and it being a denial to them of the equal protection of the law.

22. That the ordinance is in divers other respects illegal, unjust and oppressive and should be set aside and be for nothing holden.

THOMAS BRUNETTO,
Attorney for Prosecutors.

A true copy,

20 FRED BLOODGOOD,
Clerk.

30

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Writ of Certiorari.

WRIT OF CERTIORARI.

NEW JERSEY SUPREME COURT.

WEST ESSEX BUILDING AND
LOAN ASSOCIATION,

Prosecutors,

vs.

BOROUGH OF CALDWELL, a Muni-
cipal Corporation of the
County of Essex,

Respondent.

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The State of New Jersey to Harold
(L. s.) A. Miller, Acting Recorder of the Bor-
ough of Caldwell:

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We being willing, for certain reasons, to be certified of a certain complaint before you in a certain proceeding wherein the Borough of Caldwell is Complainant and West Essex Building and Loan Association is Defendant, now pending in the Recorder's Court of the Borough of Caldwell, which complaint is dated June 7, 1933, do command that you send under the hand and seal of said Recorder's Court of the Borough of Caldwell to the Justices of the Supreme Court of Judicature of the State of New Jersey, at Trenton, on the 6th day of July, next, all and singular, the said complaint, process and evidence, with all things touching and concerning the same, by whatsoever name the said West Essex Building and Loan Association may be named and called in the said complaint together with this, our writ, that we may further cause

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Writ of Certiorari.

to be done what of right and according to the laws of this state should be done.

WITNESS, THOMAS J. BROGAN, Esquire, Chief Justice of the Supreme Court, at Trenton, this 16th day of June, 1933.

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FRED L. BLOODGOOD,
Clerk.

THOMAS BRUNETTO,
Attorney for Prosecutor.

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*Return to Writ.***RETURN TO WRIT.**

NEW JERSEY SUPREME COURT.

WEST ESSEX BUILDING AND LOAN ASSOCIATION,	} <i>Prosecutor,</i>	} <i>On</i>	} 10
<i>vs.</i>			
BOROUGH OF CALDWELL, a Muni- cipal Corporation of the County of Essex,	} <i>Respondent.</i>	} <i>Return to</i>	} <i>the Writ.</i>

I, Harold A. Miller, Acting Recorder of the Borough of Caldwell in the County of Essex and State of New Jersey, do herewith send to the Supreme Court of the State of New Jersey the complaint, process, evidence and exhibits in a certain summary proceeding instituted by the Borough of Caldwell against the West Essex Building and Loan Association together with all papers and things touching and concerning the same as fully and entirely as before me they remain, as by the Writ of Certiorari sealed the 16th day of June, 1933, before the Honorable Thomas J. Brogan, Chief Justice of the Supreme Court, I am commanded to do.

I certify that I was on the date of said summary proceeding the Acting Recorder of the Borough of Caldwell in the County of Essex, State of New Jersey, and that the following are true copies of all proceedings and all papers and things touching and concerning the same had in the said summary proceedings brought against the West Essex Building and Loan Association

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Return—Demand for Trial by Jury.

by the Borough of Caldwell wherein Thomas Moran was complainant, in the Recorder's Court of the Borough of Caldwell in the County of Essex, New Jersey, and said papers constitute the entire record of the proceedings in the above entitled action.

10

Signed and sealed this 5th day of July, 1933.

HAROLD A. MILLER,
Acting Recorder of the
Borough of Caldwell.

(L. S.)

RECORDER'S COURT OF THE BOROUGH
OF CALDWELL.

20

BOROUGH OF CALDWELL, <p style="text-align: right;"><i>Complainant,</i></p> <p style="text-align: center;"><i>vs.</i></p> WEST ESSEX BUILDING AND LOAN ASSOCIATION, <p style="text-align: right;"><i>Defendant.</i></p>	}	<i>On Complaint for Violation of Zoning Ordinance. Demand for Trial by Jury.</i>
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The defendant demands a trial by jury of the issue in the above entitled matter on June 13, 1933, or upon any other day to which the same case may be adjourned.

THOMAS BRUNETTO,
Attorney for Defendant.

40

Return—Venire.

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

TO ANY CONSTABLE OR POLICE OFFICER
OF THE COUNTY OF ESSEX.

GREETINGS. YOU ARE COMMANDED, that you
cause to come before the subscriber, Recorder
of the Borough of Caldwell, in and for the
County of Essex, at the Borough Hall at
Roseland avenue, Borough of Caldwell, County
aforesaid, on the 13th day of June, 1933, at 7:30
o'clock, eastern daylight savings time in the
evening of that day, twelve good and lawful
men, being citizens of this state above the age of
twenty-one years and under the age of sixty-five
years, and in no wise akin to THOMAS MORAN,
BUILDING INSPECTOR, of the Borough of
Caldwell, the Prosecutor, or to WEST ESSEX
BUILDING AND LOAN ASSOCIATION, de-
fendant, nor interested in the suit, to make a
jury for the accusation of said WEST ESSEX
BUILDING AND LOAN ASSOCIATION, then
and there to be tried between the said parties
before me in the RECORDER'S COURT OF
THE BOROUGH OF CALDWELL and that you
then and there have the names of those jurors
and this writ.

Given under my hand and seal this 12th day
of June, Nineteen hundred and thirty-three.

JULIUS Y. KRILL,
Recorder of the Borough of Caldwell.

I, JULIUS Y. KRILL, Recorder of the Record-
er's Court of the Borough of Caldwell, do here-
by appoint Harold A. Miller, Attorney at Law
of the State of New Jersey as acting Recorder in

Return—Complaint.

my place and stead in the matters of the Borough of Caldwell by Thomas F. Moran, Building Inspector *v.* The West Essex Building and Loan Association, and the Borough of Caldwell by Thomas F. Moran, Building Inspector *v.* Ferlaute Dress Manufacturing Co., a New Jersey Corporation, due to my inability to preside, and the said Harold A. Miller, while so acting shall have, hold, exercise, use or perform any power, privilege, duty, authority or jurisdiction which is or has been given to me as the Recorder of the Recorder's Court of the Borough of Caldwell, in determining the outcome of the above-entitled matters.

JULIUS Y. KRILL,
Recorder.

20 Dated June 13, 1933.

RECORDER'S COURT OF THE BOROUGH
OF CALDWELL.

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

THOMAS H. MORAN, BUILDING INSPECTOR, of the Borough of Caldwell, in the said County of Essex, complains of WEST ESSEX BUILDING AND LOAN ASSOCIATION of the Borough of Caldwell in said County and being duly sworn, according to law, upon his oath deposes and says that WEST ESSEX BUILDING AND LOAN ASSOCIATION at the Borough of Caldwell, on the 15th day of March, 1933, and succeeding days thereafter, did violate an ordinance of the said Borough, entitled:

40 "An ordinance to regulate and restrict the location hereafter of trades and industries

Return—Complaint.

and the subsequent location 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 Borough of Caldwell into districts," 10

approved the 3rd day of October, 1921, the said WEST ESSEX BUILDING AND LOAN ASSOCIATION did violate Section 3A of said ordinance, to wit: did permit the building and premises known as 14 Park avenue, in the Borough of Caldwell, County aforesaid, to be used for purposes other than that as specified in this section, namely, it permitted the use of said building for manufacturing purposes, and is liable to a penalty, within the intent and meaning of the ordinance aforesaid. 20

AND THEREFORE, he prays that the said WEST ESSEX BUILDING AND LOAN ASSOCIATION may be apprehended and held to answer to said complaint, and dealt with as law and justice may require.

THOMAS H. MORAN.

Subscribed and sworn to before me 30
this 7th day of June, 1933.

JULIUS Y. KRILL,

Recorder of the Borough of Caldwell.

Return—Complaint.

RECORDER'S COURT OF THE BOROUGH
OF CALDWELL.

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

10 THOMAS H. MORAN, BUILDING INSPECTOR, of the Borough of Caldwell, in the said County of Essex, complains of WEST ESSEX BUILDING AND LOAN ASSOCIATION of the Borough of Caldwell, in said County and being duly sworn, according to law, upon his oath deposes and says that, WEST ESSEX BUILDING AND LOAN ASSOCIATION at the Borough of Caldwell, on the 15th day of March, 1933, and succeeding days thereafter, did violate an ordinance of the said Borough, entitled:

20 "An ordinance to regulate and restrict the location hereafter of trades and industries and the subsequent location 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 Borough of Caldwell into districts,"

30 approved the 3rd day of October, 1921, the said WEST ESSEX BUILDING AND LOAN ASSOCIATION did violate Section 11A of said ordinance, to wit: did unlawfully permit the use of its building and premises or a part thereof known as No. 14 Park avenue, in the Borough of Caldwell, County aforesaid, without having first obtained a certificate of occupancy, as provided in this section, and is liable to a penalty, within

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Return—Complaint.

the intent and meaning of the ordinance aforesaid.

AND THEREFORE, he prays that the said WEST ESSEX BUILDING AND LOAN ASSOCIATION may be apprehended and held to answer to said complaint, and dealt with as law and justice may require.

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THOMAS H. MORAN.

Subscribed and sworn to before me
this 7th day of June, 1933.

JULIUS Y. KRILL,
Recorder of the Borough of Caldwell.

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Stipulation.

RECORDER'S COURT, BOROUGH OF
CALDWELL.

10	BOROUGH OF CALDWELL, a Municipal Corporation of the County of Essex, <div style="text-align: right;"><i>Plaintiff,</i></div>
	<i>vs.</i>
	WEST ESSEX BUILDING AND LOAN ASSOCIATION, <div style="text-align: right;"><i>Defendant.</i></div>

June 13, 1933.

20 Before Harold A. Miller, Acting Recorder.

Appearances:

William L. Rae for the plaintiff.

Thomas Brunetto for the defendant.

30 It is hereby stipulated and agreed by and between William L. Rae, attorney for the Borough of Caldwell and Thomas Brunetto, attorney for the defendants Ferlaute Dress Manufacturing Co. and West Essex Building and Loan Association that the jury demanded in each of said cases be and the same is hereby waived and that each of these cases shall be tried by the Court both as to the facts and as to the law.

Complaints in each case were read and both the defendants the West Essex Building and Loan Association and Ferlaute Dress Manufacturing Co. plead not guilty.

La Salle E. Jacobus, for Complainant, Direct.

LA SALLE E. JACOBUS, Clerk of the Borough of Caldwell, sworn in on behalf of complainant.

Direct examination by Mr. Rae.

Q Mr. Jacobus, you are the Clerk of the Borough of Caldwell? A I am. 10

Q How long have you acted as Clerk? A Since January 1, 1923.

Q I show you a booklet and ask you whether you recognize what it is? A Yes, that is a familiar book to me. I recognize that as the Code and Zoning Ordinance of the Borough of Caldwell.

Q And is that the official booklet particularly of the Zoning Ordinance of the Borough of Caldwell? A That is the booklet, we know it. 20

Q And this is the booklet that is in use in the Borough in respect to the Zoning Ordinance? A It is.

Mr. Rae: I will offer in evidence, at this time, the Zoning Ordinance of the Borough of Caldwell and in addition to that offer I will ask the Recorder to take judicial notice of the ordinance. 30

Mr. Brunetto: I desire to object to this pamphlet which has been offered in evidence as not being the best evidence. I desire to cross examine the Clerk before said book is accepted in evidence, as to what his information is and as to where this book came from, who prepared it and where is the original ordinance. I say that a printed pamphlet which is printed by the Borough for distribution to its citizens or property owners is not 40

*La Salle E. Jacobus, for Complainant,
Cross—Re-direct.*

the best evidence. The best evidence is the original ordinance which is in the custody of the Clerk, the proper officer to keep those records.

The Court: You may examine him.

10

Cross examination by Mr. Brunetto.

Q Mr. Jacobus, I now show you this pamphlet which you say is a building code and zoning ordinance— A Yes.

Q (Continuing) is this the original Building Code or Zoning Ordinance? A Neither one, the original of neither one, as far as I know.

20 Q What is this Exhibit P. 1? A That is a copy of a newspaper clipping we have called the Ordinance Book.

Q Have you the original Ordinance Book with you? A I have.

Q Does that contain the original Ordinance? A It does not.

30 Q Then, as far as you know, the printed copy of the Zoning Ordinance, as shown in this Exhibit P. 1—you do not know whether this Ordinance as printed in P. 1 is a true copy of the original Ordinance as it was originally passed or alleged to have been passed on October 3, 1921? A I could not say that was a true copy.

Mr. Brunetto: I object to the offer made by the Borough as this is not the best evidence.

Re-direct examination by Mr. Rae.

40 Q Mr. Jacobus, have you made a search in the Clerk's office for the original Ordinance? A Yes, sir.

La Salle E. Jacobus, for Complainant, Re-direct.

Q Is that the only place the records are kept?

A It is.

Q You were not the Clerk at the time the Ordinance was passed? A No. John J. Van Order was the Clerk at that time.

Q Have you inquired of Mr. Van Order of the existence of the Ordinance? 10

Mr. Brunetto: Objected to.

The Court: Objection sustained.

Q What did your search consist of? A Going through the files, Ordinance Book, letter files, practically every place where papers are filed in my office.

Q You were unable to come across it? A Unable to come across it. 20

Q Has the Borough operated under this Zoning Ordinance?

Mr. Brunetto: That is objected to as to the materialty of this evidence.

The Court: Sustained.

Q Is that your only source of inquiry in the Borough Clerk's Office? A It is. 30

Q Or did you pursue any other line of inquiry as to whether or not this missing Ordinance was passed? A Efforts in the past had been made to—

Mr. Brunetto: Your Honor, Mr. Jacobus I now object or move to strike out that portion of his testimony as to what efforts were made in the past.

The Court: Stricken out. 40

La Salle E. Jacobus, for Complainant, Re-direct.

Q I refer to the search you, yourself made for this Ordinance? A I have made every possible search in my office for this Ordinance.

Q Have you made any search outside of the office? A Search to obtain it, yes.

Q From the former Clerk? A Yes.

10 Q Unsuccessfully? A Unsuccessfully.

Mr. Rae: Now, I ask the Court to take judicial notice of the existence of the Zoning Ordinance which has been in effect, or, by the way, before I—

Q How long have these booklets been published?

20 Mr. Brunetto: Objected to as not being material and revelant, suppose this matter had been in the fourth, fifth, sixth or seventh issue of the booklet that would be irrelevant to the present issue.

The Court: Sustained.

Mr. Rae: I ask the Court to take judicial notice of the existence of the Zoning Ordinance in the Borough of Caldwell from 1921—

30 Mr. Brunetto: I desire to object to the request of the Borough, upon the ground that the Ordinance, is what would give jurisdiction; that is, a judicial fact and in the absence of any proof of the existence of the original Ordinance this Court would not have jurisdiction and they have not, at this time, proven that the original Ordinance can not be found. I say the best evidence would be the evidence of the former Clerk who I understand is around. Therefore this Court

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La Salle E. Jacobus, for Complainant, Re-direct.

can not take jurisdiction of something or of an ordinance which has not been properly proven by competent and relevant evidence.

The Court: I will allow the Ordinance in evidence.

Mr. Brunetto: I pray an exception.

10

The Court: Exception allowed.

Mr. Rae: I would like to call the Court's attention particularly to Section 3A of the Zoning Ordinance—

The Court: Do you want to read that into the record?

Mr. Rae: I was going to read that into the record to dispense of the whole Ordinance going into the written record.

Section 3 (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 following specified purposes.

20

(1) Any use specified in Sec. 2 (a) of this Ordinance as permitted in Residence "a" Districts.

(2) A dwelling, detached or semi-detached, for not more than two families or more than two housekeeping units which shall not serve for (boarding or) rooming more (than five) persons (outside of each family and its servants) than are permitted in Sec. 2 (a) (1).

30

(3) Customary home occupation; provided there is no conspicuous display of goods or advertising, and provided that such uses shall occupy an area equivalent to not over 25 per cent. of floor area of one story;

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La Salle E. Jacobus, for Complainant, Re-direct.

and provided that they shall not be carried on in accessory buildings, nor be in any way objectionable or detrimental to the well-being or to the harmonious character of the neighborhood.

10 (4) A private garage as specified in Sec. 2 (a) (8) except that there shall not be space for more than one motor vehicle for each 15 feet of frontage of the lot (on one street only) nor for more than one vehicle for each 1,500 square feet of lot area and except that space for not more than one non-commercial vehicle may be leased for each 25 feet of frontage of the lot (on one street, only). In the case of corner lots only the street of least frontage shall be considered.

20 (5) Clubs, social, community center and recreation buildings, excepting those the chief activity of which is a service customarily carried on as a business.

(5) Memorial buildings, public libraries, public museums, public galleries.

30 Mr. Rae: That is the section that affects the defendants Ferlaute Dress Manufacturing Co. I would like to offer particularly, as well as that section, Section 11 A which relates to the West Essex Building and Loan Association.

40 Section 11 A. It shall be unlawful to use or permit the use of any building or premises or part thereof, hereafter created, erected, changed, converted or enlarged, wholly or partly, in its use or structure, until a certificate of occupancy shall have been issued by the Building Inspector. Such certificate shall show that such building or

La Salle E. Jacobus, for Complainant, Re-direct.

premises or part thereof and the proposed use thereof are in conformity with the provisions of this Ordinance. If approved, it shall be the duty of the Building Inspector to issue a certificate of occupancy within five days after a request for the same shall be filed in his office by any owner, after having determined that the building and the proper use thereof, conform with all the requirements set forth.

10

The section 3 A relating to residence B district in the Zoning Map which we claim has been violated and section 11 A relating to the certificate of occupancy that the owner must obtain from the building inspector.

I would also like to offer particularly section 12 of the said Ordinance which provides for the penalties for violations of the Ordinance. I don't know whether it would be better to mark these all separate exhibits.

20

Section 12. Violations and Penalties. For any and every violation of the provisions of this Ordinance, the owner, general agent or contractor of a building or premises where such violation has been committed or shall exist, and the lessee or tenant of an entire building or entire premises where such violation has been committed or shall exist, and the owner, general agent or contractor, lessee or tenant of any part of a building or premises in which part such violation has been committed or shall exist, and the general agent, architect, builder, contractor or any other person who commits, takes part or assists in such violation or who maintains any building or premises in which any such violation shall exist, shall for each and

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Thomas H. Moran, for Complainant, Direct.

every violation, and for each and every day that such violation continues, be subject to a fine of not more than one hundred dollars. Legal remedies for such violation shall be had and violations shall be prosecuted in the manner prescribed by law or ordinance effective in the Borough of Caldwell.

10

The Court: I think the Ordinance is marked. Simply refer to it in the record.

THOMAS H. MORAN, Building Inspector,
sworn in behalf of complainant.

Direct examination by Mr. Rae.

20

Q Mr. Moran, you are the complaining witness in this matter? A Yes, sir.

Q What is your position in the Borough of Caldwell? A Building Inspector.

Q Did you have occasion to inspect the building No. 14 Park avenue, in the Borough of Caldwell?

Mr. Brunetto: There is an objection to that form of the question as leading.

30

The Court: I sustain the objection. Ask him in different form.

Q What are your duties, Mr. Moran? A Issuing building permits, inspecting houses as to lath and such.

Q Are you acquainted with the Ferlaute Dress Manufacturing Company? A Yes.

Q When did you first become acquainted with that concern? A I have known that concern for the last eight years.

40

Thomas H. Moran, for Complainant, Direct.

Q Before they moved to the Park avenue address? A Yes, sir.

Q Did you examine any premises occupied by the Ferlaute Dress Manufacturing Company on Park avenue within the last year? A I did.

Q Whereabouts on Park avenue are they located? A There is a question in regard to the number, I couldn't tell you exactly— 10

Q Don't you know what the number is? A I do not.

Q You say there is a question in regard to the number. What is the question?

Mr. Brunetto: That's objected to as to what the impression is on the witness.

Q Mr. Moran, you swore to those complaints? 20
A Yes, I did. However, No. 12 is on in those, No. 12.

Q Number 14 is on each of those complaints, where did you get that number from? A I didn't get any number for it was written by the Judge. I took it for granted he had the right number on as a matter of fact.

Q Did you know if 14 is correct? A I do not. 30

Q You do not know what the correct number is? A I do not.

Mr. Rae: Passing that up for the moment, do you concede, Mr. Brunetto, that this building, whatever its number was, was occupied as a manufacturing concern in a prohibited zone?

Mr. Brunetto: We do not say that industry is prohibited in that area. 40

Thomas H. Moran, for Complainant, Direct.

Q Leaving the question of number out of it, can you tell us when your inspection was made?
A I could not tell you on what date because I had no reason to make an inspection.

Q You can tell us about when? A Sometime in March, 1933.

10 Q What was the nature of the occupancy you observed? A As far as I could see a man making dresses.

Q What were the facts that led you to that belief?

Mr. Brunetto: That is objected to. He can testify as to what he saw.

20 Q What did you see there when you made your inspection? A Saw men and women there making dresses.

Q How many people did you see? A Did not count.

Q Can you give us any approximation? A Around 20—25.

Q Did you make any further inspection after that date— Can you tell us in what Zoning Zone that house or building is located? A In "B."

30 Q In "B" Zone? A Yes.

Q Can you tell us whether or not section 3 A of the Zoning regulation has been in any way modified since its original adoption. A Not as I know of.

Mr. Brunetto: I want to object to that question "since its adoption" because it is our contention this ordinance was never legally adopted, therefore, there was no such adoption in existence.

Thomas H. Moran, for Complainant, Direct.

The Court: Question has been already answered. You ought to object before it is answered.

Q Have you anything to do, Mr. Moran, with these certificates of occupancy? A Yes, I have.

Q That comes within your duties? A That is in the ordinance. 10

Q Has there ever been issued by your department or by you any certificates of occupancy for this manufacturer of dresses? A Never.

Q Do you know who the owner of the building is? A West Essex Building and Loan Association.

Q That building was formerly a fraternal hall?

20

Mr. Brunetto: Objected to.

The Court: Objection sustained.

Q Do you know what the building was used for prior to its present occupancy by the Ferlaute Dress Manufacturing Company?

Mr. Brunetto: That is objected to. Evidence should be limited to the time mentioned in the complaint. It is immaterial what was there in the past. 30

Mr. Rae: Except the ordinance provides, section 11, "buildings hereinafter changed, converted or enlarged—"

Mr. Brunetto: It is contended there never was any such ordinance and that there isn't any such ordinance.

The Court: I will allow it.

Mr. Brunetto: Pray an exception.

40

Thomas H. Moran, for Complainant, Cross.

The Court: Allowed.

A The Odd Fellows had it.

10 The Court: Just a minute, you say this building occupied by the Ferlaute Dress Manufacturing Company is within Class B residence zone, was there any machinery in there? A Sewing machines.

Q Any other machinery? A Maybe a—

Q Is there any power machine in there? A Not that I know of.

Q You say there were about 25 or 30 employees at the time? A At the time, Yes.

20 Q Did you make any more inspections beside this one? A No.

Q Was application ever made to you for a permit to occupy this for manufacturing by either West Essex Building and Loan Association or Ferlaute Dress Manufacturing Company? A No.

Cross examination by Mr. Brunetto.

30 Q Mr. Moran you have been Building Inspector of the Borough of Caldwell for sixteen years? A About that.

Q You have been in office from August 1, 1921, to this day? A I have.

Q During that period have you issued a single certificate of occupancy?

Mr. Rae: Objected as incompetent.

The Court: Objection sustained in present form.

40 Mr. Brunetto: I will withdraw and reframe it.

Thomas H. Moran, for Complainant, Cross.

Q Mr. Moran, have you, during the time you have been Building Inspector been authorized by any of the officials or the governing body of the Borough of Caldwell to issue a certificate of occupancy for any building which has been erected within the Borough of Caldwell?

10

Mr. Rae: I object to this as improper and irrelevant as cross examination.

The Court: The Ordinance, if valid, is his authority for his issuing certificates ordinance if not valid is not authority. Irrespective, of whether ordinance is valid, no other officer is authorized to issue certificates.

Mr. Brunetto: Because the Building Inspector had been instructed not to issue any—it wasn't necessary—by his superiors, I think we have a perfect right to show that—

20

The Court: Sustain the objection.

Mr. Brunetto: Pray an exception.

Q Mr. Moran, during the time this alleged Zoning Ordinance has been in effect, that is since October 3, 1921, will you tell us what procedure you, as Building Inspector, have adopted in regard to issuing certificates of occupancy when the building was completed?

30

Mr. Rae: Object to the question as improper cross examination, and irrelevant to the present issue, as to what he has done to other people, or what his custom has been.

The Court: Sustain the objection. I don't think the custom in other cases is material.

40

Thomas H. Moran, for Complainant, Cross.

Q Now, Mr. Moran, from October 3, 1921, to this day, has there been erected in the Borough of Caldwell any other building beside the building in question?

10 Mr. Rae: I object to the question as incompetent and improper cross examination.

The Court: Sustain the objection; it is entirely too broad.

Q Mr. Moran, from October 3, 1921, to this day, has there been erected in the Borough of Caldwell, any building of similar character as the one in question, that is the one occupied by the Ferlaute Dress Manufacturing Company and alleged to be owned by the West Essex Building and Loan Association? A No.

20

Mr. Rae: Just a moment, I object to the form of the question.

The Court: Question was answered, let it go.

Q Mr. Moran, from October 3, 1921, to this day has any building been erected within residence B zone which required a certificate of occupancy before it was occupied?

30

Mr. Rae: Object to question as improper cross examination and absolutely irrelevant to the issue involved.

The Court: Objection sustained.

Mr. Brunetto: Pray for an exception.

Mr. Brunetto: Your Honor, the offer of this testimony is for the purpose of showing that ever since this alleged ordinance was supposed to go into effect there hasn't

40

Thomas H. Moran, for Complainant, Cross.

been issued a single permit of occupancy of the Building Inspector as required by said ordinance, and I think we are entitled to know and have the Court know the reason why said certificate of occupancy was not issued. I think it would be to our benefit for the reason that even if we had made an application for a certificate of occupancy we couldn't get it. 10

Q Mr. Moran, assuming that an application would have been made to you for a certificate of occupancy for this building in question would you have issued such a certificate? A No.

Q Why? A Because I have never issued any before and was instructed by the Building Committee when I took office not to issue any. 20

Q Now, Mr. Moran, you say the industry which was carried on in this building at the time you inspected it in March, 1933, was the making of dresses. Isn't it a fact that that has been carried on in every home in this Borough? A I wouldn't say that.

Q Would you say that the industry or the trade of manufacturing dresses is not a customary home industry? 30

Mr. Rae: I object to the question.

The Court: Mr. Moran is not an expert in the workings of the home, he is a Building Inspector. Sustain objection.

Mr. Brunetto: Pray an exception.

Q As far as you know—you do not know who owns this property—you never saw the deed of these premises? A I did not. 40

Thomas H. Moran, for Complainant, Cross.

Q And you do not know who is actually in possession of these premises, do you? A I have an idea this Ferlaute Corporation. There is no question in my mind about it.

Q On what is that based? A On the complaint.

10 Q Complaint in this cause, prepared by the Recorder—outside of that you do not know?
A No.

The Court: You say you were instructed by what Committee? A By the building Committee. When I first took office they took it into consideration—I spoke to them about it—paying so much for a permit and \$2.00 to occupy the house. They said not
20 to bother about it and I never enforced it.

Q Did you take it for granted for all or only for a particular building? A I took it for granted for all cases. I never issued any.

Mr. Brunetto: I now make Mr. Moran my own witness.

30 Q Have you the original stub for the permit for the erection of this building? A Any objection to that being marked in evidence at this time?

Mr. Rae: Original record, you mean? No, no objection.

Marked for Identification D. 1.

Philip B. Elliott, for Complainant, Direct.

PHILIP B. ELLIOTT, sworn in behalf of complainant.

Direct examination by Mr. Rae.

Q Mr. Elliott, do you hold any position in the West Essex Building and Loan Association? 10

A I am attorney for the Building and Loan.

Q Do you know who the owner of the building is that was formerly owned by Fraternal Hall?

Mr. Brunetto: That is objected to, unless based against as premises at 14 Park avenue. If it is not 14 Park avenue, it is not material to this issue.

A West Essex Building and Loan Association now owns the building formerly occupied by Fraternal Hall. 20

Q Did they own it on that 13th day of March, 1933? A They did.

Q From thence, hereto? A Yes.

Q Do you know of your own knowledge who the tenant of that building is? A Ferlaute Manufacturing Company.

Q Do you know the number of that building?

A I do. 30

Q What is the number? A Number 12 Park avenue.

Q How big is the lot? A I could not swear to that, I should say fifty feet, maybe.

Q Are there two numbers on that lot? A No, 14 is the house next to it, Mr. Eckman's.

The Court: Is there any number displayed on that building?

A Yes, 12. 40

*Philip B. Elliott, for Complainant,
Cross—Re-direct.*

It is stipulated and agreed by the counsel that No. 14 Park avenue set forth in each of the complaints be changed to No. 12 Park avenue, the correct number of the building in question.

10

Cross examination by Mr. Rae.

Q Mr. Jacobus, on the map annexed to the zoning ordinance which has been offered in evidence as Exhibit P. 1 it appears that the street in question is known as Central avenue. Has the name of that street, to your knowledge, been officially changed? A It has.

Q What was it known as on March 13, 1933?

20 A Park avenue.

Q How long has it been known as Park avenue? A Seven or eight years.

Re-direct by Mr. Brunetto.

Q How do you know that, Mr. Jacobus? A A How do I know what?

Q How do you know the name was changed from Central avenue to Park avenue? A Be-
30 cause it was changed during former Mayor Dosch's term.

Q Formal resolution or ordinance? A Mayor and Council.

Q Do you know of any existing ordinance? A Yes.

Q Have you that with you? A I have not.

40

Mr. Brunetto: I move that that testimony be stricken out on this phase of the case. The best evidence is the ordinance it is—

Motion for Dismissal of Complaints.

The Court: I will allow that testimony to stand.

Q Do you know what the name of that street is? A Park avenue.

It is stipulated and agreed between counsel that the premises in question known as No. 12 Park avenue has been used since March 13, 1933, to the present date for the purpose of sewing, assembling and pressing ladies' dresses and that during said period more than an average of five employees have been occupied in said work. 10

COMPLAINANT RESTS.

Mr. Brunetto: I now move for a dismissal of both of these complaints upon the ground that all the work has been carried on in these premises has been sewing, assembling and pressing and I say that that is not prohibited within the terms of Section 3A of said ordinance. Subdivision 3 of Section 3A says that customary home occupation may be carried on within said zone and I say that the sewing and pressing of dresses is a customary home occupation and may be carried on within said zone and I say that the sewing and pressing of dresses is a customary home occupation irrespective of how many people are employed. For that reason, the defendants' conduct is not a violation of this alleged ordinance. 20 30

The Court: I deny the motion. It seems customary home occupation is not arguable, 40

Motion for Dismissal of Complaints.

although those pursuits were carried on in the home. Motion denied.

10 Mr. Brunetto: I make a motion to dismiss the complaint which has reference to certificate of occupancy in regard to the defendant West Essex Building and Loan Association. I base that upon the testimony of the Building Inspector that ever since the alleged ordinance went into effect the Building Inspector or the complainants in this case, the Building Committee, under which the complainant was acting, had instructed the Building Inspector not to issue any certificate of occupancy, and if that is the case even if we applied for one we could not obtain it.

20 The Court: Deny the motion. It seems, even assuming those were his instructions, an application had not been made here. The Court would have to assume the terms of the ordinance would have been followed by the inspector rather than instructions from the Building Committee.

Mr. Brunetto: Exception.

The Court: Granted.

30 Mr. Brunetto: Make a motion for dismissal of the complaint because it appears this building was built in 1927 and has been occupied ever since, and that if the building had been occupied since then the present proceedings are barred by the statute of limitations.

Mr. Rae: It hasn't been occupied in its present non-conforming use though, Mr. Brunetto.

La Salle E. Jacobus, for Defendants, Direct.

Mr. Brunetto: It was formerly occupied by a fraternal hall. Under Section 11A, if there is any building it can not be occupied until a certificate of occupancy has been issued and I say that that is immaterial whether it has been occupied as a fraternal hall or dance hall or what.

10

The Court: Your theory is if they did not obtain certificate of occupancy for the Fraternal Hall, they need not obtain one for present use?

Mr. Brunetto: Because their action is predicated upon failure to obtain certificate of occupancy and action to sue for a penalty is outlawed by limitation.

The Court: It seems to me, change of use, even though it might be one non-conforming to another nonforming use makes no difference. I deny the motion.

20

Mr. Brunetto: Pray exception.

The Court: Allow exception.

LA SALLE E. JACOBUS, on behalf of defendants.

Mr. Brunetto: Mr. Jacobus, will you bring your Ordinance Book?

30

Direct examination by Mr. Brunetto.

Q Mr. Jacobus, I understand you are the Borough Clerk of the Borough of Caldwell? A Yes.

Q Have you the custody of the minutes of the proceedings of the Borough Council of the Borough of Caldwell? A That's true.

40

La Salle E. Jacobus, for Defendants, Direct.

Q Have you brought with you the minutes of the meetings of the Borough of Caldwell relating to the alleged adoption of the zoning ordinance?

A I have; here it is.

10 Q Will you look at your minutes and tell us when was the first official action taken or alleged to have been taken by the Borough Council of the Borough of Caldwell towards the adoption of Zoning Ordinance? A August 1, 1921.

Q And that is shown in book and page, what?

A The minute book for the period September 1917 to December 1923, page 205.

20 Mr. Brunetto: I offer the minutes of the Governing Body of the Borough of Caldwell relating to any action taken by the said Governing Body towards the adoption of said ordinance.

Q Mr. Jacobus, I show you this copy of these minutes of August 1, 1921, and is that a true copy of all the proceedings relating to what took place on August 1, 1921, in regard to the adoption of this Zoning Ordinance? A It is.

30 Mr. Brunetto: I ask that this be offered in evidence and marked Exhibit D. 2.

Marked Exhibit D. 2.

40 Q Now, Mr. Jacobus, I ask you to turn your book to September 19, 1921, that is your Minutes and ask if any action was taken on that day by the Borough Council of the Borough of Caldwell in regard to the adoption or passing on this ordinance? A At the meeting of September 19, 1921, a public hearing was held on this Ordinance.

La Salle E. Jacobus, for Defendants, Direct.

Q Have you made a copy of said minutes?

A I have.

Q I show you this paper and ask if that represents a true copy of all that took place relating to this particular Ordinance. A A true copy of all that took place in regard to this Zoning Ordinance.

10

Mr. Brunetto: I offer that in evidence.

Marked Exhibit D. 3.

Q Mr. Jacobus, will you tell us the last action taken by the Borough of Caldwell towards the adoption of this Ordinance? A September 26, 1921.

Q That is on what page of your minutes?

A Page 212.

20

Q I show you a typewritten sheet and ask you if that is a true copy of the proceedings of said Borough Council in regard to the adoption or passing of said Ordinance? A That is a true copy of the entire records of the minutes of September 26 including items in regard to that ordinance and all other items of business.

Q In other words, this sheet covers the entire minutes? A That is correct.

30

Mr. Brunetto: I offer that in evidence.

Marked Exhibit D. 4.

Q Mr. Jacobus, I ask you to look at the minutes of October 3, 1921, and show you this sheet of paper and ask if that is a true copy of the minutes as shown by your book as to what took place on that day relating to the adoption and passing of the ordinance in question? A That is a true copy.

40

La Salle E. Jacobus, for Defendants, Direct.

Mr. Brunetto: I offer that in evidence.

Marked Exhibit D. 5.

Mr. Brunetto: At this time I will offer in evidence this stub of the building permit which was marked for identification D. 1 so that it may be marked D. 1.

10

Mr. Rae: Let me see that—I have no objection.

The Court: Mark it.

Marked Exhibit D. 1.

20 Q Mr. Jacobus, I am now showing you Exhibits D. 2, 3, 4 and 5 and ask you to look at them and will you tell us if your records—that is when I say your records, the Minutes of the Borough Council of the Borough of Caldwell, contain any other records or minutes relating to the official act of the Borough of Caldwell towards its adoption and publication of said Zoning Ordinance? A The Minutes contain nothing further than is contained on these sheets.

30 Q Mr. Jacobus, have you any record showing that this Ordinance in question, that is, Ordinance which has been offered in evidence and Marked Exhibit P. 1, was ever submitted to the Mayor of the Borough of Caldwell for his approval? A I have no evidence that it ever was.

Q Have you searched for any such record in the minutes of the Borough Council of the Borough of Caldwell? A Well, I know of none.

The Court: Is there any record in the minutes taken in the Borough of Caldwell showing that this Ordinance was submitted to the Mayor for his approval.

40 A None whatever.

La Salle E. Jacobus, for Defendants, Direct.

Q Have you made a search to ascertain if there was any record? A The minutes provided for his signature and signature is missing; the only other place it would be on the original ordinance which would bear his signature if submitted to him and that ordinance we cannot locate.

10

Q Mr. Jacobus have you any record showing that the Mayor of the Borough of Caldwell, after October 3, 1921, and within five days after October 3, 1921, approved the Ordinance in question, that is the one shown under Exhibit P. 1. A I have no evidence to that effect whatever.

Q Have you any record showing that the Mayor of the Borough, at any time between October 3, 1921, and October 8, 1921, vetoed this ordinance in question? A None whatever.

20

Q Mr. Jacobus, have you any record showing that public notice was published in any of the newspapers that a public hearing would be given to this Ordinance and that said hearing was to be given at the High School on September 19, 1921? A I took the matter up with the Caldwell Progress and they made me a certification that these Ordinances were published in their newspaper.

30

Mr. Brunetto: I move that the answer be stricken out.

The Court: Just a minute. I think that answer is responsive to your question. He is your witness. The question is "Any notice given to the public and published in the newspapers." You asked him if he had any record. He said he had obtained a record from the Caldwell Progress today.

40

La Salle E. Jacobus, for Defendants, Direct.

Witness: I have no certification of that publication.

Q When you say that ordinance what do you mean? A That alleged ordinance, as you call it.

19 Q By that, you mean, Mr. Jacobus, is this affidavit from John C. Sullivan, Jr., dated the 13th day of June, 1933? A Received this today at my own request showing publication or stating that said publication was made.

20 Q Aside from what this affidavit contains, Mr. Jacobus, have you any record as Borough Clerk of the Borough of Caldwell showing the notice which was published that a public hearing was to be held prior to the adoption of this ordinance in the high school? A I have no other evidence.

Q Have you any record showing a copy of such a notice? A I have not.

30 Q Have you any newspaper clipping showing a notice which was published prior to the publication of this ordinance showing that a public hearing was to be had on this ordinance and the place for said hearing was fixed as the high school? A I have no other evidence showing that procedure.

The Court: Do you understand that last question?

A I have not.

40 Q Have you any newspaper clipping where a hearing was to be had before the passage of this ordinance; that is where a public hearing was to be had? A No.

La Salle E. Jacobus, for Defendants, Direct.

Q Then, if I understand you right, Mr. Jacobus, you have no record of any notice having been published in any of the newspapers that a public hearing was to be had prior to the passage of this ordinance at the high school? A I have no such record or information.

Q Mr. Jacobus, do any of your records, either the minute book or the ordinance book show that a notice was given to the public prior to October 3, 1921, that a public hearing was to be given on this ordinance? A I have no evidence that a notice to such effect was given to the public.

10

Q Have you any record to that effect? A No record to that effect.

Q Or any record of such notice supposed to have been given? A None whatever.

Q Mr. Jacobus, have you the original ordinance book of the Borough of Caldwell covering the period from October 1, 1921, to this day? A I have the original book, as far as all the evidence, I have these.

20

Q Have you any other book? A No other book covering that period.

Q Is that the original ordinance as passed by the Borough Council during the period from August 1, 1921 and October 3, 1921? A The book I have in my possession is supposed to be the original ordinance book of the Borough covering that period.

30

Q Will you look at this book you have and find the original ordinance in said book signed by the Mayor, that is with his original signature on it? When I say original ordinance I mean Exhibit P. 1. A This ordinance here, has the Mayor's printed name on it.

40

La Salle E. Jacobus, for Defendants, Direct.

Mr. Brunetto: Move it be stricken out as not responsive.

A To the best of my knowledge there is no such ordinance on record.

10 Q What you want to tell us is that the ordinance book you have does not contain any such ordinance in it? A That is what I want to infer.

Q Now, do you know of any other record or book in possession of the Borough of Caldwell which would contain said ordinance? A No other book I know of.

Q Have you searched for any other book? A I have.

20 Q You have been subpoenaed by the defendant to produce the original ordinance? A I have.

Q Pursuant to that subpoena you have made diligent search everywhere and you have been unable to find it? A I have.

30 Q You have also been subpoenaed to bring all minutes of the Borough relating to the adoption, any public hearings had on the passage of the ordinance in question which is printed in P. 1, and you have produced all the records in your possession as Borough Clerk of the Borough of Caldwell, relating to this ordinance? A Yes.

Q These are all set out in Exhibits D. 2 to D. 5, inclusive? A The minute book record is set up there but the ordinance record is set up here.

Q You mean a printed copy, same as printed in Exhibit P. 1? A I do, a newspaper clipping. That's all.

La Salle E. Jacobus, for Defendants, Cross.

Cross examination by Mr. Rae.

Q Mr. Jacobus, this is the official ordinance book of the Borough of Caldwell? A It is, I believe it is.

Q It has been in your custody as Clerk ever since your election to that office? A Yes, I might modify that. I had a little difficulty in getting the books. His Honor said the first day of induction in office, possibly could not have them the first day. 10

Q Has it been in your custody for some time—considerable time? A Yes.

Q For how long? A Seven or eight years.

Mr. Rae: In view of the fact that the witness has testified the original ordinance has ben lost or mislaid, I offer it as best evidence, the record kept in the official custody of the Clerk in the Ordinance book of the Borough of Caldwell relating to the adoption of this zoning ordinance and particularly I am offering pages 308 and 309 of the official Ordinance book. 20

Mr. Brunetto: I object to said offer as that is not the best evidence. There is no evidence before the Court that the official records are lost. The only evidence by this witness is, that that is the only book given to him and the only one he found, does not mean to say the original was lost, there is no such evidence. 30

Mr. Rae: He has testified he has made diligent search wherever he knew to look; has made diligent inquiries and has been unable to find it. That would be lost as far as he is concerned. 40

La Salle E. Jacobus, for Defendants, Cross.

10 Mr. Brunetto: There might not have been an original ordinance to establish a loss. Neither is it customary to establish that as passed wherever he is likely to find it and has not found it. The best evidence the complainants—the burden of proof is upon complainants to get the Clerk who was in office at that time; then I say secondary evidence may be offered. Their present offer is premature.

Mr. Rae: Don't you think the Clerk who has custody of the records is the proper party?

20 Mr. Brunetto: Not until we get testimony from the original clerk to show if there ever was an original ordinance in existence. I say here that the other man is still living and before they are entitled to offer secondary evidence they had better ask him.

Not until we get testimony from the original clerk to show if there ever was an original ordinance in existence. I say here that the other man is still living and before they are entitled to offer secondary evidence they had better ask him.

30 The Court: Didn't Mr. Jacobus testify he had asked Mr. Van Order for it?

Q Did you make any inquiries for this particular Ordinance? A For records in general.

Q You have not inquired for this particular Ordinance? A No.

Q When did you make inquiry for all public records? A In 1924 or 1925.

40 Q Did he turn over some records to you at that time? A He turned over some records, not all.

La Salle E. Jacobus, for Defendants, Cross.

Q Not all the records. Do you know he retained some records? A I know from personal observation some records were missing.

Q Do you know he had them? A I do not know positively but as Borough Clerk he should have had them.

Q Did you know at the time he turned over his records to you he was supposed to have been turning over all he had? A I presumed he was under the impression he turned them all over to me. 10

Q That was your understanding of the situation? A Yes, at the start.

Q Is it different now? A When I assumed office he turned over numerous records to me.

Q And you so believed them to be all at the time; now you find some missing? A I wouldn't say he still has them. I would say a couple of years after I received the records I found several missing and went outside of the Borough to get them a little afterward show my efforts. 20

Q And what were your efforts? A Of applying to the State of New Jersey Public Record Office, Dr. Carlos D. Godfrey, Director. Mr. Van Order refused to deliver it to me and I am after one of the books. 30

Q When you say that is one of the books, I mean that that Ordinance book which contains a printed copy of the newspaper clipping of Exhibit P. 1? A Yes, of an ordinance.

Q The Zoning ordinance? A Yes.

The Judge: I will admit it for what it is worth.

Mr. Brunetto: Pray exception.

The Judge: Exception granted. 40

La Salle E. Jacobus, for Defendants, Cross.

Q The ordinance appears on page 308 and 309 of the official ordinance book of the Borough of Caldwell covering the period Feb. 1892 to Oct. 1921 and is in the same phraseology of the printed book from Exhibit P. 1? A It is impossible to state they are similar Ordinances, I have never read them over; I have never copied them but believe them to be the same.

It is stipulated between the respective attorneys that the newspaper copy of the alleged ordinance pasted in pages 308 and 309 of the official ordinance book of the Borough of Caldwell covering the period February 1892, to October 1921 is identical with the printed booklet offered in evidence as Exhibit P. 1.

COMPLAINANT RESTS.

Mr. Rae: At this time I wish to ask the Court's indulgence for a continuation with the purpose of obtaining testimony as to any additional minutes which were actually passed by the Mayor and Council in reference to this Zoning Ordinance. That is as to the continuance of the hearing or the actual approval of the Mayor.

Mr. Brunetto: Mr. Rae, do I understand your request to be that this evidence you desire to offer will be evidence from members of the Council?

Mr. Rae: Members of the Council.

Mr. Brunetto: Of the Council of the Borough of Caldwell from August 1, 1921 to October 8, 1921, this evidence to be parol evidence of these members of the Council to add to the minutes?

La Salle E. Jacobus, for Defendants, Cross.

Mr. Rae: To supplement the written minutes.

Mr. Brunetto: To supplement the written minutes as to whether the ordinance was approved by the Mayor?

Mr. Rae: Was approved by the Mayor and also whether it was regularly adjourned. 10

Mr. Brunetto: Your Honor, I object to the motion of the complainants for the reason that the evidence of any members of the Borough Council, that is the parol evidence of any such witnesses for the purpose of adding to the minutes as to what took place at said meetings of the Borough Council, I say that said evidence is not competent. That if said evidence was admitted that it would be varying the minutes of the Council by parol evidence and I say that is against the parol evidence rule. 20

Mr. Rae: It is not my intention to vary in any way the minutes. My thought in the matter is to supplement the existing minutes by any further minutes which were not reduced to writing.

The Court: Any oral evidence given to vary the minutes of the Council would be invalid but I think if they could produce any oral evidence filling in any omissions made that that would be legal and I will grant the continuance. 30

Mr. Brunetto: Pray an exception.

The Court: Exception allowed. Hearing continued to Thursday, June 22, 1933, subject to Mr. Rae's getting evidence. 40

Certificate of Recorder and Stenographer.

I, Caroline Hoehing, a stenographer duly appointed to report stenographically the evidence given before the Recorder's Court of the Borough of Caldwell, New Jersey, in the case of Borough of Caldwell *v.* West Essex Building and Loan Association, do hereby certify that the
10 foregoing is a true and correct transcript of the evidence given on the thirteenth day of June, 1933, before the Honorable Harold A. Miller, Acting Recorder of the Recorder's Court, in the said matter.

CAROLINE HOEHING.

I, Harold A. Miller, Acting Recorder of the Recorder's Court of the Borough of Caldwell,
20 New Jersey, do hereby certify that the foregoing is a transcript of the evidence given upon the trial of the case of Borough of Caldwell *v.* West Essex Building and Loan Association, on the thirteenth day of June, 1933, as certified to by Caroline Hoehing, the stenographer appointed to report such evidence stenographically.

30

40

Exhibit D. 1.

Exhibit D. 1.

No. 1045 Mr. Harry Kanouse, Chairman Comm.

BUILDING PERMIT.

Office of Inspector of Buildings.

10

DUPLICATE.

THIS CERTIFIES THAT MR. Fraternal Club of Caldwell is granted a permit to erect a 2½ story brick and block building at Park avenue, located on Map Block Lot in accordance with Application No. 1045 with the understanding that no more or greater buildings be erected than specified by accompanied plans and specifications. Proposed use: Lodge room. Estimated cost \$16,125. Amount of fees, \$30.50.

20

Chairman Building Committee,
THOMAS H. MORAN,
Building Inspector.

30

40

*Exhibit D. 2.***Exhibit D. 2.**

Borough of Caldwell, N. J.
August 1st, 1921.

10 Regular meeting of the Mayor and Council was held on above date; Mayor Sharwell in the chair; Members present, Messrs. Wettach, Dosch, Poole, Brown, Babcock and Nelson. Minutes of previous meeting were read and approved.

The report of the Zoning Commission was taken from the table and the ordinance was submitted by the said Commission was introduced by Councilman Babcock as follows:

20 "An Ordinance to regulate and restrict the location hereafter of trades and industries and the subsequent location 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 Borough of Caldwell into districts."

30 On roll call, the said ordinance was passed its first reading; All the members voting in the affirmative. On motion by Councilman Babcock the Clerk was directed to make due and legal advertisement of the introduction of said ordinance and that a Public Hearing would be held by the Mayor and Council on Monday Evening, the 19th day of September, 1921, in the Fire House for the purpose of hearing objections to same.

Exhibit D. 3.

Exhibit D. 3.

Borough of Caldwell, N. J.
September 19th 1921.

Regular meeting of the Mayor and Council was held on the above date; Mayor Sharwell in the Chair. Members Present, Messrs. Wettach, Poole, Babcock and Nelson. Members absent, Messrs. Dosch and Brown. Minutes of the previous meeting were approved without reading. 10

Pursuant to legal advertisement, the meeting was adjourned to meet in the High School Auditorium for the purpose of giving a Public Hearing in consideration of a proposed ordinance entitled:

“An ordinance to regulate and restrict the location hereafter of trades and industries and the subsequent location 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 Borough of Caldwell into districts.” 20

The Mayor declared the meeting in the Auditorium open for the purpose of said Hearing and presented an outline of the proposed ordinance and the advantages of same; after the reading of the ordinance, the Mayor invited a full and open discussion of same. 30

After a large number of citizens and taxpayers had expressed themselves for and against the adoption of the ordinance and a number of requests, both oral and in writing, for certain changes in the zone lines, had been received, the 40

Exhibit D. 4.

meeting was declared adjourned until Monday Evening, the 26th of September, 1921, at the Council Rooms on Roseland avenue.

Approved,

10 Attest.

Mayor.

Borough Clerk.

Exhibit D. 4.

Borough of Caldwell, N. J.
September 26th 1921.

20 Adojurned meeting of the Mayor and Council was held on above date. Mayor Sharwell in the Chair; Members present, Messrs. Wettach, Dosch, Poole, Brown, Babcock and Nelson. Regular order of business was suspended and a number of communciations were received and read from various property owners requesting changes in the lines of the several zones as contained in the ordinance under consideration.

30 Mr. Elting, representing the Monomonock Inn, explained the reasons for making a request in connection with their property interests.

Mr. M. J. McGrath, representing nearly all the property interests on Ryerson avenue made a verbal request that the street be improved and placed in good condition; On motion, this matter was referred to the Road Committee.

Consideration of bills was laid over.

40 On motion of Councilman Poole, the Mayor and Clerk were authorized to issue a warrant-check

Exhibit D. 4.

payable to the Citizen's National Bank, for payment of interest due October 1st on Fire Apparatus Certificate for \$1,000.00 for 6 months to the amount of \$25.00 and on Fire House Certificate for \$500.00 for 6 months due October 1st to the amount of \$12.50 and that said check be drawn on the Citizen's National Bank.

10

Approved,

Mayor.

On recommendation of the Police Committee, the Mayor appointed Thomas Nichol, a special Borough Marshal, which appointment was unanimously confirmed.

On recommendation of the Police Committee, an application for 5 jitney licenses made by Scott and Nochenson, was granted; All the members voting in the affirmative.

20

An application was received from Herbert Baldwin for appointment as a police officer; on motion, this application was referred to the Police Committee.

On motion, the Clerk was directed to communicate with the New York Telephone Co. and ask if the Borough is entitled to an additional free telephone under the terms of the franchise.

30

Councilman Babcock reported progress to remove the sign nuisance at the corner of Bloomfield avenue and Gould avenue.

Councilman Poole reported progress in the matter of providing a new outlet for the affluent from the sewage beds and that there was sufficient funds to pay for same.

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Exhibit D. 5.

On motion, Borough Engineer Provost, in charge of the Sewer system was authorized to proceed with the work.

No other business coming before the meeting, same was adjourned.

10

Borough Clerk.

Exhibit D. 5.

Borough of Caldwell, N. J.
October 3rd, 1921.

20 Regular meeting of the Borough Council was held on the above date; Mayor Sharwell in the Chair. Members present: Messrs. Dosch, Poole, Brown, Babcock and Nelson. Absent, Mr. Wettach.

Minutes of the meetings of September 19th and 26th were read and duly approved.

On motion of Councilman Poole, the ordinance entitled:

30 "An Ordinance to regulate and restrict the location hereafter of trades and industries and the subsequent location 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 Borough of Caldwell into districts."

40

Exhibit D. 5.

was taken up for its final reading and passed;
All the members present voting in the affirmative.

Approved,

Mayor. 10

I, La Salle E. Jacobus, Clerk of the Borough of Caldwell, a municipal corporation in the County of Essex, do hereby certify that I have examined the minutes of the Borough of Caldwell for the period beginning August 1 to October 3, 1921 and have compared with the said minutes, the proceedings of the said Borough Council relating to the introduction and adoption of:

“An Ordinance to regulate and restrict the location hereafter of trades and industries and the subsequent location 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 Borough of Caldwell into districts.” 20

and I do certify that the above is a true copy of said minutes as set forth in the original minute book of the proceedings of said Council during said period. 30

LA SALLE E. JACOBUS,
Borough Clerk.

*Reasons.***REASONS.**

NEW JERSEY SUPREME COURT.

10	WEST ESSEX BUILDING AND LOAN ASSOCIATION, <i>Prosecutor,</i> <i>vs.</i> BOROUGH OF CALDWELL, a Muni- cipal Corporation of the County of Essex, <i>Respondent.</i>	}	<i>On Certiorari. Reasons why Proceedings Instituted by the Borough of Caldwell to Recover Penalties Are Void and Illegal.</i>
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The said Prosecutor, West Essex Building and Loan Association, comes and prays that the proceedings instituted by the Borough of Caldwell in the Recorder's Court of the Borough of Caldwell for the purpose of recovering the penalties prescribed under an ordinance entitled "An Ordinance to regulate and restrict the location hereafter of trades and industries and the subsequent location 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 Borough of Caldwell into districts," which ordinance was adopted on or about October 3, 1921, by the Borough Council of the Borough of Caldwell, may be declared void and illegal for the following reasons:

40

Reasons.

1. Because the complaint does not set forth sufficient facts charging the prosecutor with having violated the provisions of said ordinance.

2. Because said proceedings are predicated upon an ordinance of the Borough Council of the Borough of Caldwell entitled "An Ordinance to regulate and restrict the location hereafter of trades and industries and the subsequent location 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 Borough of Caldwell into districts," which was not legally adopted by said Borough Council. 10

3. Because said proceedings are predicated upon an ordinance which was not submitted in writing at a regular meeting of the Borough Council of the Borough of Caldwell as provided by law. 20

4. Because said proceedings are predicated upon an ordinance not passed at a subsequent regular meeting after being submitted in writing at a regular meeting of said Borough Council as provided by law. 30

5. Because said proceedings are predicated upon an ordinance never submitted to the Mayor for his approval or veto as provided by law.

6. Because said proceedings are predicated upon an ordinance never approved by the Mayor after final passage as provided by law.

7. Because said proceedings are predicated upon an ordinance never passed by the Council 40

Reasons.

of the Borough of Caldwell over the Mayor's veto as provided by law.

10 8. Because said proceedings are predicated upon an ordinance never recorded in full by the Borough Clerk in a proper book to be kept by him for that purpose as provided by law.

9. Because said proceedings are predicated upon an ordinance not read in its final form at a meeting held by the Borough Council at least one week prior to its final passage.

20 10. Because said proceedings are predicated upon an ordinance not published in a newspaper printed and circulating in said Borough of Caldwell nor in a newspaper printed and circulated in the County of Essex after its introduction and before passage with a notice stating the time and place, when and where the governing body was to consider the final passage thereof.

11. Because said proceedings are predicated upon an ordinance not published at least once in a newspaper printed and circulating in the Borough of Caldwell nor printed in a newspaper circulating in the County in which said Borough is located prior to the same taking effect as provided by law.

30 12. Because said proceedings are predicated upon an ordinance not presented to the Mayor within five days after it was passed by the Borough Council.

13. Because said proceedings are predicated upon an ordinance not signed by the Mayor and filed with the Borough Clerk within five days after it was passed as provided by law.

40 14. Because said proceedings are predicated upon an ordinance not published at least once in

Reasons.

a newspaper published and circulating in said Borough together with a notice of the introduction thereof and the time and place, when and where such ordinance would be further considered before final passage.

15. Because said proceedings are predicated upon an ordinance not published at least one week prior to the time fixed for final passage and at least ten days after the first reading as provided by law. 10

16. Because said proceedings are predicated upon an ordinance which the Borough Council of the Borough of Caldwell did not afford persons interested in the passage of said ordinance an opportunity to be heard concerning the said ordinance at the time and place stated in the notice published in the newspaper where said ordinance was to be considered before its final passage. 20

17. Because said proceedings are predicated upon an ordinance which the Borough Council of the Borough of Caldwell did not continue or adjourn, by proper resolution, consideration of said ordinance from September 26 to October 3, 1921.

18. Because said proceedings are predicated upon an ordinance which is invalid because the Borough Council of the Borough of Caldwell failed to properly continue final action on said ordinance from September 26 to October 3, 1921. 30

19. Because said proceedings are predicated upon an ordinance which the Borough Council of the Borough of Caldwell did not publish, nor the title thereof, together with a notice of the date of the passage or approval or both in a newspaper 40

Reasons.

published and circulating in said Borough as required by law.

10 20. Because said proceedings are predicated upon an ordinance which is unconstitutional as it deprives the said prosecutor West Essex Building and Loan Association of a right to possess, use and protect property, this being a violation of the first clause of Article One of the Constitution of New Jersey, as it would be taking of the private property of the prosecutor, West Essex Building and Loan Association for public use without just compensation and in violation of the sixteenth paragraph of Article One of the Constitution of New Jersey.

20 21. Because said proceedings are predicated upon an ordinance which is unconstitutional for the reason that the Borough of Caldwell would be taking the property of the prosecutor, West Essex Building and Loan Association for private purposes in violation of the rights secured to the prosecutor West Essex Building and Loan Association by the Constitution of the State of New Jersey.

30 22. Because said proceedings are predicated upon an ordinance which is unconstitutional for the reason that it violates the rights of the prosecutor West Essex Building and Loan Association secured to it by the Fourteenth Amendment of the Constitution of the United States as it would deprive it of its property without due process of law and it being a denial to it of the equal protection of the law.

40 23. That the ordinance upon which said proceedings are predicated is in divers other respects illegal, unjust and oppressive and said

Reasons.

proceedings should be set aside and be for nothing holden.

THOMAS BRUNETTO,
Attorney for Prosecutor.

A True Copy.

FRED G. BLOODGOOD,
Clerk.

10

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Writ of Certiorari.

WRIT OF CERTIORARI.

NEW JERSEY SUPREME COURT.

10	FERLAUTE DRESS MANUFACTURING Co.,	<i>Prosecutor,</i> <i>vs.</i>	<i>On</i> <i>Certiorari.</i>
	BOROUGH OF CALDWELL, a Muni- cipal Corporation of the County of Essex,	<i>Respondent.</i>	<i>Writ of</i> <i>Certiorari.</i>

20 The State of New Jersey to Harold
 A. Miller, Acting Recorder of the
 (L. s.) Borough of Caldwell: We, being
 willing, for certain reasons, to be
 certified of a certain complaint before
 you in a certain proceeding wherein the Bor-
 ough of Caldwell is complainant and Ferlaute
 Dress Manufacturing Company is defendant,
 now pending in the Recorder's Court of the
 Borough of Caldwell, which complaint is dated
 June 7, 1933, do command that you send under
 30 the hand and seal of the said Recorder's Court
 of the Borough of Caldwell to the Justices
 of the Supreme Court of Judicature of the State
 of New Jersey, at Trenton, on the 6th day of
 July, next, all and singular, the said complaint,
 process and evidence, with all things touching
 and concerning the same, by whatsoever name
 the said Ferlaute Dress Manufacturing Com-
 pany may be named and called in the said
 complaint together with this, our writ, that we
 40 may further cause to be done what of right and

Writ of Certiorari.

according to the laws of this State should be done.

WITNESS, THOMAS J. BROGAN, Esquire, Chief Justice of the Supreme Court, at Trenton, this 16th day of June, 1933.

FRED L. BLOODGOOD, 10
Clerk.

JULIUS Y. KRILL,
Attorney for Prosecutor.

20

30

40

Return to Writ.

RETURN TO WRIT.

NEW JERSEY SUPREME COURT.

10	FERLAUTE DRESS MANUFACTURING Co.,	<i>Prosecutor,</i>	<i>On Certiorari. Return to the Writ.</i>
	<i>vs.</i>		
	BOROUGH OF CALDWELL, a Muni- cipal Corporation of the County of Essex,	<i>Respondent.</i>	

20 I, Harold A. Miller, Acting Recorder of the Borough of Caldwell in the County of Essex and State of New Jersey, do herewith send to the Supreme Court of the State of New Jersey the complaint, process, evidence and exhibits in a certain summary proceeding instituted by the Borough of Caldwell against the Ferlaute Dress Manufacturing Company together with all papers and things touching and concerning the same as fully and entirely as before me they remain, as by the Writ of Certiorari sealed the 16th day of

30 June, 1933, before the Honorable Thomas J. Brogan, Chief Justice of the Supreme Court, I am commanded to do.

I certify that I was on the date of said summary proceeding the Acting Recorder of the Borough of Caldwell in the County of Essex, State of New Jersey, and that the following are true copies of all proceedings and all papers and things touching and concerning the same had in the said summary proceedings brought against

40 the Ferlaute Dress Manufacturing Company by

Return—Venire.

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

TO ANY CONSTABLE OR POLICE OFFICER
OF THE COUNTY OF ESSEX.

10 Greeting: You are commanded, that you cause to come before the subscriber, Recorder of the Borough of Caldwell, in and for the County of Essex, at the Borough Hall at Roseland Avenue, Borough of Caldwell, County aforesaid, on the 13th day of June, 1933, at 7:30 o'clock, Eastern Daylight Savings Time, in the evening of that day, twelve good and lawful men, being citizens of this State above the age of twenty-one years and under the age of sixty-five years, and in no wise akin to Thomas Moran, Building Inspector,

20 of the Borough of Caldwell, the Prosecutor or to FERLAUTE DRESS MANUFACTURING Co., a New Jersey Corporation, nor interested in the suit, to make a jury for the accusation of said FERLAUTE DRESS MANUFACTURING Co., a New Jersey Corporation, then and there to be tried between the said parties before me in the Recorder's Court of the Borough of Caldwell, and that you then and there have the names of those jurors and this writ.

30 Given under by hand and seal this 12th day of June, Nineteen hundred and thirty-three.

JULIUS Y. KRILL,
Recorder of the Borough
of Caldwell.

Return—Complaint.

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

THOS. H. MORAN, Building Inspector, of the Borough of Caldwell, in the said County of Essex, complains of FERLUTE DRESS MANUFACTURING Co., a New Jersey Corporation, of the Borough of Caldwell, in the said County, and being duly sworn, according to law, upon his oath deposes and says that, FERLAUTE DRESS MANUFACTURING Co., on the 15th day of March, 1933, and succeeding days thereafter, did violate an ordinance of the said Borough, entitled

10

“An ordinance to regulate and restrict the location hereafter of trades and industries and the subsequent location 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 Borough of Caldwell into districts.”

20

approved the 3rd day of October, 1921, the said Ferlaute Dress Manufacturing Co. did violate Section 3 of said ordinance, to wit: did use the building and premises known as 12 Park Avenue, in the Borough of Caldwell, County aforesaid, for purposes other than that as specified in this Section, namely, it did use the said building for manufacturing purposes, and is liable to a penalty, within the intent and meaning of the ordinance aforesaid.

30

And therefore, he prays that the said FERLAUTE DRESS MANUFACTURING Co. may be apprehended and held to answer to said complaint and dealt with as law and justice may require.

40

THOMAS H. MORAN.

Return—Complaint.

of Caldwell, County aforesaid, without having first obtained a certificate of occupancy, as provided in this section, and is liable to a penalty, within the intent and meaning of the ordinance aforesaid.

And therefore, he prays that the said FERLAUTE DRESS MANUFACTURING Co. may be apprehended and held to answer to said complaint and dealt with as law and justice may require. 10

THOS. H. MORAN.

Subscribed and sworn to before
me this 7th day of June, 1933.

JULIUS Y. KRILL,
Recorder of the Borough of Caldwell.

20

Testimony in this case same as in the case of West Essex Building and Loan Association *vs.* Borough of Caldwell. See pages 70-104 inclusive.

See Exhibit D. 1, Building permit same as Exhibit D. 1 on page 105 of this state of case.

Exhibit D. 2, Minutes same as Exhibit D. 2 on page 106 of this state of case.

Exhibit D. 3, Minutes same as Exhibit D. 3 on page 107 of this state of case. 30

Exhibit D. 4, Minutes same as Exhibit D. 4 on page 108 of this state of case.

Exhibit D. 5, Minutes same as Exhibit D. 5 on page 110 of this state of case.

40

Reasons.

REASONS.

NEW JERSEY SUPREME COURT.

10	FERLAUTE DRESS MANUFACTURING Co., <i>Prosecutor,</i> <i>vs.</i> BOROUGH OF CALDWELL, a Muni- cipal Corporation of the County of Essex, <i>Respondent.</i>	} <i>On Certiorari. Reasons Why Proceedings Instituted by the Borough of Caldwell to Recover Penalties Are Void and Illegal.</i>
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20 The said prosecutor, Ferlaute Dress Manu-
 facturing Co., comes and prays that the proceed-
 ings instituted by the Borough of Caldwell in the
 Recorder's Court of the Borough of Caldwell for
 the purpose of recovering the penalties pre-
 scribed under an ordinance entitled: "An Ordi-
 nance to regulate and restrict the location here-
 after of trades and industries and the subsequent
 location of buildings designed for a specified use
 30 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 pur-
 poses to divide the Borough of Caldwell into dis-
 tricts." which ordinance was adopted on or
 about October 3, 1921, by the Borough Council of
 the Borough of Caldwell, may be declared void
 and illegal for the following reasons:

40 1. Because the complaint does not set forth
 sufficient facts charging the prosecutor with hav-
 ing violated the provisions of said ordinance.

Reasons.

2. Because said proceedings are predicated upon an ordinance of the Borough Council of the Borough of Caldwell entitled: "An ordinance to regulate and restrict the location hereafter of trades and industries and the subsequent location 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 Borough of Caldwell into districts", which was not legally adopted by said Borough Council. 10

3. Because said proceedings are predicated upon an ordinance which was not submitted in writing at a regular meeting of the Borough Council of Caldwell as provided by law. 20

4. Because said proceedings are predicated upon an ordinance not passed at a subsequent regular meeting after being submitted in writing at a regular meeting of said Borough Council as provided by law.

5. Because said proceedings are predicated upon an ordinance never submitted to the Mayor for his approval or veto as provided by law.

6. Because said proceedings are predicated upon an ordinance never approved by the Mayor after final passage as provided by law. 30

7. Because said proceedings are predicated upon an ordinance never passed by the Council of the Borough of Caldwell over the Mayor's veto as provided by law.

8. Because said proceedings are predicated upon an ordinance never recorded in full by the Borough Clerk in a proper book to be kept by him for that purpose as provided by law. 40

Reasons.

9. Because said proceedings are predicated upon an ordinance not read in its final form at a meeting held by the Borough Council at least one week prior to its final passage.

10. Because said proceedings are predicated upon an ordinance not published in a newspaper printed and circulating in said Borough of Caldwell nor in a newspaper printed and circulating in the County of Essex after its introduction and before passage with a notice stating the time and place, when and where the governing body was to consider the final passage thereof.

20. 11. Because said proceedings are predicated upon an ordinance not published at least once in a newspaper printed and circulating in the Borough of Caldwell nor printed and circulating in the County in which said Borough is located prior to the same taking effect as provided by law.

12. Because said proceedings are predicated upon an ordinance not signed by the Mayor and filed with the Borough Clerk within five days after it was passed as provided by law.

30. 13. Because said proceedings are predicated upon an ordinance not presented to the Mayor within five days after it was passed by the Borough Council.

14. Because said proceedings are predicated upon an ordinance not published at least once in a newspaper published and circulating in said Borough together with a notice of the introduction thereof and the time and place, when and where such ordinance would be further considered before final passage.

Reasons.

15. Because said proceedings are predicated upon an ordinance not published at least one week prior to the time fixed for final passage and at least ten days after the first reading as provided by law.

16. Because said proceedings are predicated upon an ordinance which the Borough Council of Caldwell did not afford persons interested in the passage of said ordinance an opportunity to be heard concerning the said ordinance at the time and place stated in the notice published in the newspaper where said ordinance was to be considered before its final passage. 10

17. Because said proceedings are predicated upon an ordinance which the Borough Council of the Borough of Caldwell did not continue or adjourn, by proper resolution, consideration of said ordinance from September 26 to October 3, 1921. 20

18. Because said proceedings are predicated upon an ordinance which is invalid because the Borough Council of the Borough of Caldwell failed to properly continue final action on said ordinance from September 26 to October 3, 1921.

19. Because said proceedings are predicated upon an ordinance which the Borough Council of the Borough of Caldwell did not publish, nor the title thereof, together with a notice of the date of the passage or approval or both in a newspaper published and circulating in said Borough as required by law. 30

20. Because said proceedings are predicated upon an ordinance which is unconstitutional as it deprives the said prosecutor Ferlaute Dress 40

Reasons.

10 Manufacturing Co. of a right to possess use and protect property this being a violation of the first clause of Article One of the Constitution of New Jersey, as it would be taking of the private property of the prosecutor, Ferlaute Dress Manufacturing Co. for public use without just compensation and in violation of the sixteenth paragraph of Article One of the Constitution of New Jersey.

20 21. Because said proceedings are predicated upon an ordinance which is unconstitutional for the reason that the Borough of Caldwell would be taking the property of the Prosecutor Ferlaute Dress Manufacturing Co. for private purposes in violation of the rights secured to the prosecutor Ferlaute Dress Manufacturing Co. by the Constitution of the State of New Jersey.

20 22. Because said proceedings are predicated upon an ordinance which is unconstitutional for the reason that it violates the rights of the Prosecutor Ferlaute Dress Manufacturing Co. secured to it by the Fourteenth Amendment of the Constitution of the United States as it would deprive it of its property without due process of law and it being a denial to it of the equal protection of the law.

30 23. That the ordinance which said proceedings are predicated is in divers others respects illegal, unjust and oppressive and said proceedings should be set aside and be for nothing holden.

THOMAS BRUNETTO,
Attorney for Prosecutor.

A true copy,

FRED L. BLOODGOOD,
Clerk.

Stipulation.

STIPULATION.

NEW JERSEY SUPREME COURT.

WEST ESSEX BUILDING AND LOAN ASSOCIATION AND FERLAUTE DRESS MANUFACTURING Co., <i>Prosecutors,</i> <i>vs.</i>	}	<i>On</i> <i>Certiorari.</i> <i>Stipulation.</i>	10
BOROUGH OF CALDWELL, a Muni- cipal Corporation of the County of Essex, <i>Respondent.</i>			

It is stipulated between the parties hereto by their respective attorneys as follows: 20

On June 13, 1933, the date of the hearing of the complaints brought upon by these writs, the original ordinance, here in question, was not to be found in the ordinance book of the Borough of Caldwell, and the Clerk of the Borough was unable to find it upon making a search for it, in the various files and other places where papers are filed in his office.

The proposed ordinance and building zone map were published in "The Caldwell Progress" a public newspaper printed and published at Caldwell in this State, ^{on Dec 3, 1921} with a notice subjoined as follows: 30

"NOTICE OF INTENTION

NOTICE is hereby given that the foregoing ordinance was introduced at a regular meeting of the Borough Council of the Borough of Caldwell, held on the 1st day of August, 1921, and that a 40

Stipulation.

regular meeting to be held in the High School Auditorium, on Prospect street, Caldwell, on the 19th day of September, 1921, at the hour of 8 o'clock in the evening, the said Borough Council will consider the final passage of said ordinance.

10 By order of the Borough Council, dated September 1st, 1921.

WM. G. SHARWELL,
Mayor.

Attest:

JOHN J. VAN ORDER,
Borough Clerk.

Caldwell, N. J., September 3, 1921."

20 A copy of the zoning and building zone map were likewise published in the same newspaper on October 15, 1921, and at the foot of the ordinance as published there appeared the following:

"Approved,

WM. G. SHARWELL,
Mayor.

30 I hereby certify the foregoing to be a true and correct copy of an ordinance introduced at a meeting of the Borough Council, held on the 1st day of August, 1921, and passed at a meeting of the Borough Council, held on the 3rd day of October, 1921.

JOHN J. VAN ORDER,
Borough Clerk."

THOMAS BRUNETTO,
Attorney for Prosecutors.

40 MILTON M. UNGER,
Attorney for Respondent.

*Rule Consolidating Writs.***RULE CONSOLIDATING WRITS.**

NEW JERSEY SUPREME COURT.

WEST ESSEX BUILDING AND LOAN ASSOCIATION and FERLAUTE DRESS MANUFACTURING Co., <i>Prosecutors,</i> <i>vs.</i> BOROUGH OF CALDWELL, a Muni- cipal Corporation of the County of Essex, <i>Respondent.</i>	}	<i>On Certiorari. Rule Consolidating Writs of Certiorari.</i>	10
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The Court having allowed a Writ of Certiorari 20
 on the application of the above prosecutors and
 a separate Writ to each of said prosecutors and
 it appearing that the matters in dispute embrace
 the same question of law and facts and applica-
 tion being made on behalf of the prosecutors to
 consolidate, argue and print one state of the case
 in the three proceedings, and the respondent con-
 senting hereto;

It is, on this 23rd day of September, 1933, 30
 ORDERED that the joint and individual proceed-
 ings instituted by the prosecutors in the above
 entitled cause against the respondent be con-
 solidated, argued and the record of said pro-
 ceedings be printed in one state of the case and

Rule Consolidating Writs.

that both the prosecutors and the respondent submit their written argument in one brief.

On motion of

THOMAS BRUNETTO,
Attorney of Prosecutors.

10

CHARLES W. PARKER,
Justice of the Supreme Court.

I consent to the entry of the above Rule.

MILTON M. UNGER,
Attorney of Respondents.

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Opinion of Supreme Court.

OPINION OF SUPREME COURT.

Filed April 4, 1934.

NEW JERSEY SUPREME COURT.

Nos. 260, 261 and 262 October Term 1933.

10

WEST ESSEX BUILDING AND LOAN
ASSOCIATION and FERLAUTE
DRESS MANUFACTURING Co.,
Prosecutors,

vs.

BOROUGH OF CALDWELL, a mu-
nicipal corporation of the
County of Essex,
Respondent.

20

Submitted October Term, 1933; decided April 4, 1934.

On Ceritorari.

Before Brogan, Chief Justice, and Justices
Trenchard and Heher,

For the prosecutors: Thomas Brunetto.

For the respondent: Milton M. Unger.

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The opinion of the court was delivered by
HEHER, J.

These writs of ceritorari bring up for review a zoning ordinance passed at a meeting of the council of respondent borough, held on October 3, 1921, and proceedings had upon complaints charging violations thereof by prosecutors. The proceedings under the three writs were consolidated.

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Opinion of Supreme Court.

One of the writs, allowed to prosecutors, jointly, brings up the ordinance, "together with all things touching and concerning" its "passage, approval and enactment." Another, allowed to the West Essex Building and Loan Association, requires the return of the complaints, process and evidence in two separate proceedings instituted before the recorder of respondent borough, based upon that prosecutor's alleged violation (1) of Section 3A of the ordinance, in permitting the building and premises in question to be used for manufacturing purposes; and (2) of Section 11A, in permitting the use of the building without first having obtained a certificate of occupancy, as therein provided. The Third writ, allowed to the Ferlaute Company, directs the certification of the complaints, process and evidence in two separate proceedings before the borough recorder, based upon alleged violations of like character.

The insistence of the prosecutor is that the ordinance is invalid. The grounds of attack are: (1) It was not submitted in writing at a regular meeting of the borough council; (2) It was not passed at a subsequent regular meeting after being submitted in its final form at a meeting of the council held at least one week prior to its final passage; (4) It was not published in a newspaper having circulation in the County of Essex, after its introduction, and before passage, with a notice of the time and place when and where it would be considered for final passage; (5) The council did not afford persons interested an opportunity to be heard thereon before final passage; (6) Council did not continue or adjourn, by proper resolution, consideration of the ordinance to the meeting of October 3, 1921, when it

Opinion of Supreme Court.

was passed; (7) The ordinance was not submitted to the mayor for his approval or veto; (8) It was not approved by the mayor after final passage; (9) It was not passed by the borough council over the mayor's veto; and (10) it was not recorded in full by the borough clerk in a book kept by him for that purpose.

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Respondent contends *in limine* that the writ should be dismissed for laches. Ordinarily, where a prosecutor, as a citizen and taxpayer, seeks by *certiorari* to review a municipal ordinance, and his status as such has not been attacked by proof or other proceedings prior to argument on final hearing, his qualifications are beyond attack. *Jordon v. Dumont*, 105 N. J. L. 197. But where the attack upon ordinance relates merely to the procedural steps connection with its introduction and passage, and laches clearly appears, the writ will be dismissed. Public policy forbids an attack based upon informalities and irregularities in the procedure which led to the adoption of the ordinance, when it has been accepted as a valid enactment for a long period of time, and property owners affected by it have conformed to its provisions, and have fixed their status accordingly. *Ninth Street Improvement Co. v. Ocean City*, 90 N. J. L. 106; *Budd v. Camden*, 69 N. J. L. 193; *Weissinger v. Mayor, etc. of Teaneck*, 10 N. J. Misc. R. 1093. In *State v. Hudson City*, 29 N. J. L. 115, the opposite rule is stated as follows: "The granting of a *certiorari* in cases of public interest is a matter of discretion; and after the party in interest has slept long over his supposed wrong the court will not grant him relief. To relieve him would do much injury to others, and he has no ground of complaint if the opportunity is not given to him.

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Opinion of Supreme Court.

After a writ of certiorari has been allowed, if on the hearing the like circumstances appear, the court may dismiss the writ as improvidently granted, or refuse the relief sought by it."

10 While most of the grounds advanced by prosecutor relate to matters of procedure merely, there is one that is not in that category. It is fundamental in character, and seems to be well grounded. It challenges the validity of the ordinance because it does not appear that, after its passage, it was (1) approved by the mayor; or (2) not returned by the mayor to the council, within five days after its receipt; or (3) passed over the mayor's veto. (par). The mere passage of the ordinance by council was, of course, not sufficient. Section 27 of the act relating to
20 boroughs (1 Comp. Stat. 238), ordains that every ordinance passed by the council "shall, within five days after the passage thereof (Sundays excepted) be presented to the mayor," who shall, if he approves it, sign and file it with the borough clerk within five days after its receipt by him, or, in the event of his disapproval, return it to the clerk, within the same time, with his objections stated in writing, in which event the ordinance shall take effect only after the
30 council, (two-thirds of its members concurring) shall pass it over the veto. The failure of the mayor to return the ordinance, within five days after he receives it, is the equivalent of approval. Approval of the ordinance, in one of the Statutory modes, was essential to its validity.

The return to the first-mentioned writ shows the passage of the ordinance by the council, but is silent as to its presentation to or action thereon by the mayor, although it is therein certified that it includes "all things touching and con-
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Opinion of Supreme Court.

cerning the passing, approving and enacting of the said ordinance." The clerk's minutes do not show that the ordinance was presented to the mayor. Respondent attempted, in vain, to prove, by the testimony of borough officers, that the ordinance actually took effect. The proofs lead irresistibly to the conclusion that the ordinance was not presented to the mayor. Several members of the council testified that they did not know whether this course was taken. The clerk testified that he did not know "what was done with the original ordinance" after final passage by the council. He stated that he had "no recollection of having" presented it to the mayor for his approval or veto. And the conclusion is inescapable that he did not. When asked if it was his general practice to deliver to the mayor, for action on his part, an ordinance passed by the council, he replied: "That was never done." He continued: "My recollection is that I did not make a practice of presenting ordinances to the mayor for the reason he had full knowledge of their consideration, their introduction and passage. If he failed to file a veto within the five days—I think it was after the passage of the ordinance—and that was done in most cases,—it automatically became an ordinance and followed the usual manner, in its legal procedures. Q. The answer that you have just given then, is a statement of the usual practice during the years that you were Borough Clerk with respect to the ordinances adopted by the Council? A. I would in at least three-quarters of the ordinances that were introduced and passed. The matter of the mayor formally signing it was not observed. It became an ordinance through his agreement and acquiescence

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Opinion of Supreme Court.

and his knowledge of the proceedings leading up to that ordinance unless he was interested in the passage of the ordinance and filed a veto, it was always assumed that his action was favorable to the introduction." The mayor was not called as a witness, and the failure is not excused.

10 There is an utter absence of evidence that the ordinance was approved by the mayor, and, concededly, it was not passed over his veto. The ordinance was not produced: It could not be found. It was not in the "ordinance book wherein the original ordinances were recorded and signed by the mayor." Moreover, it was the practice to have the mayor signify his approval on the minutes kept by the clerk, but this was not done in the instant case. The clerk

20 testified that he did not see the mayor's approval endorsed on the ordinance at any time after its passage. It therefore cannot be determined whether the mayor received the ordinance, and signified his approval *vel non* by endorsement thereon, or failed to return it to the council within the statutory period. Consequently, there is no basis for a finding that the ordinance received the approval of the mayor, or became a valid enactment by reason of his failure to

30 return it to the council within the required time. There being no evidence of the presentation to the mayor of the ordinance after its passage by the council, no presumption arises that it became effective by reason of the mayor's non-action. And laches manifestly cannot give vitality to an ordinance passed by the council that, for the reasons stated, never had existence.

40 The ordinance will therefore be set aside, and the complaints dismissed, with costs.

*Rule Dismissing Proceedings.***RULE DISMISSING PROCEEDINGS.**

Filed April 9, 1934.

NEW JERSEY SUPREME COURT.

WEST ESSEX BUILDING AND LOAN ASSOCIATION, <i>Prosecutor,</i> <i>vs.</i> BOROUGH OF CALDWELL, a mu- nicipal corporation of the County of Essex, <i>Respondent.</i>	}	<i>On Certiorari.</i>	10
		<i>Rule Dismissing Proceedings Pending in the Recorder's Court of the Borough of Caldwell.</i>	20

The Court having inspected the transcript and proceedings of the Recorder's Court of the Borough of Caldwell returned with the Certiorari in this cause in a certain proceeding wherein the Borough of Caldwell was complainant and the West Essex Building and Loan Association was defendant, which proceedings were brought to recover the penalties prescribed under the provisions of an ordinance entitled:

“An ordinance to regulate and restrict the location hereafter of trades and industries and the subsequent location 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 Borough of Caldwell into district.”

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Rule Dismissing Proceedings.

- and having considered the reasons for the dismissal of the said proceedings and having read the briefs submitted by the parties to this proceeding and having duly considered the same, and the Court being of the opinion that the ordinance alleged to have been violated by the
- 10 Prosecutor is invalid and that the said proceedings be dismissed.

IT IS, on this 9th day of April, 1934, ORDERED on motion of Thomas Brunetto, attorney for Prosecutor, a municipal corporation in the County of Essex in the Recorder's Court of the Borough of Caldwell against the West Essex Building and Loan Association are hereby dismissed with costs to the Prosecutor to be taxed;

- 20 It is further ordered that the process issued by said Recorder's Court in said proceedings is hereby quashed;

It is further ordered that the complaint filed in said Recorder's Court in said proceedings is hereby dismissed;

- 30 It is further ordered that the proceedings be remitted to the Recorder's Court of the Borough of Caldwell, to be proceeded with in accordance with this judgment and the practice of said Court.

Entered April 9, 1934. _____

On Motion of Thomas Brunetto,
Attorney of Prosecutor.

Rule Setting Aside Ordinance.

**RULE SETTING ASIDE ORDINANCE OF
BOROUGH OF CALDWELL.**

NEW JERSEY SUPREME COURT.

WEST ESSEX BUILDING AND LOAN ASSOCIATION and FERLAUTE DRESS MANUFACTURING Co., <i>Prosecutors,</i> <i>vs.</i> BOROUGH OF CALDWELL, a mu- nicipal corporation of the County of Essex, <i>Respondent.</i>	}	<i>On</i> <i>Certiorari.</i> <i>Rule Setting</i> <i>Aside</i> <i>Ordinance of</i> <i>Borough of</i> <i>Caldwell.</i>	10
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The Court having inspected the ordinance of the Borough of Caldwell, a municipal corporation in the County of Essex and State of New Jersey, alleged to have been adopted on the 3rd day of October, 1921, by the Borough Counsel which ordinance is entitled: 20

“An ordinance to regulate and restrict the location hereafter of trades and industries and the subsequent location of buildings designed for a specified use in any designated area of yards, courts and other open spaces and for said purpose to divide the Borough of Caldwell into district.” 30

together with all proceedings touching and concerning the passing, approval and enactment of the same, returned with the Certiorari in this Court, and the reasons for declaring said ordinance invalid, and having examined the briefs of counsel, and having duly considered the same and being of the opinion that said ordinance is 40

Rule Setting Aside Ordinance.

invalid should be set aside and declared null and void;

IT Is, on this 9th day of April, 1934, ORDERED that the ordinance entitled:

10 “An ordinance to regulate and restrict the location hereafter of trades and industries and the subsequent location 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 purpose to divide the Borough of Caldwell into district.”

20 of the Borough of Caldwell, a municipal corporation of the County of Essex, proported to have been adopted on October 3rd, 1921, is hereby set aside, declared null and void and of no effect, with costs to the prosecutor to be taxed.

Entered April 9, 1934.

On motion of Thomas Brunetto,
Attorney of Prosecutors.

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Rule Dismissing Proceedings.

the briefs submitted by the parties to this proceeding and having duly considered the same, and the Court being of the opinion that the ordinance alleged to have been violated by the Prosecutor is invalid and that the said proceedings be dismissed,

- 10 It is, on this 9th day of April, 1934, ORDERED on motion of Thomas Brunetto, attorney for Prosecutor, that the proceedings instituted by the Borough of Caldwell, a municipal corporation in the County of Essex in the Recorder's Court of the Borough of Caldwell against The Ferlaute Dress Manufacturing Co., are hereby dismissed; with costs to the Prosecutor to be taxed;

- 20 It is further ordered that the process issued by the said Recorder's Court in said Proceedings is hereby quashed;

It is further ordered that the complaint filed in said Recorder's Court in said proceedings is hereby dismissed;

It is further ordered that the proceedings be remitted to the Recorder's Court of the Borough of Caldwell, to be proceeded with in accordance with this judgment and the practice of said court.

- 30 Entered April 9, 1934.

On Motion of Thomas Brunetto,
Attorney of Prosecutor.

The Jersey Court of Equity and Appeals

Chief Justice	John A. ...
Justices	...
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THE JERSEY COURT OF EQUITY AND APPEALS

The Jersey Court of Equity and Appeals was established by an act of the Legislature of the State of New Jersey, passed on the 15th day of March, 1844. The act provided for the appointment of a Chief Justice and two Justices of the Court, and for the holding of the Court at Trenton, New Jersey, on the first Monday of each month, commencing on the 1st day of April, 1844.

The Court has since that time held its sessions at Trenton, New Jersey, and has been one of the most important tribunals in the State. It has jurisdiction of all cases in equity, and of appeals from the decisions of the Superior Court of the State. It has also jurisdiction of appeals from the decisions of the County Courts of the State, in cases where the amount in controversy exceeds the sum of fifty dollars. The Court has also jurisdiction of appeals from the decisions of the Justices of the Peace, in cases where the amount in controversy exceeds the sum of ten dollars.

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

New Jersey Court of Errors and Appeals

WEST ESSEX BUILDING & LOAN
ASSOCIATION and FERLAUTE
DRESS MANUFACTURING Co.,
Prosecutors-Appellees,

vs.

BOROUGH OF CALDWELL, a munic-
ipal Corporation of the
County of Essex,
Respondent-Appellant.

On Certiorari.

*On Appeal
from the
New Jersey
Supreme
Court.*

**Three Cases
Consolidated.**

BRIEF FOR RESPONDENT-APPELLANT.

This appeal is brought to review a judgment of the Supreme Court upon three writs of certiorari which were consolidated for the purpose of argument. A like consolidation has been effected for the purpose of presenting this appeal (S. C. p. 5).

One of the writs was allowed to both respondents jointly to review the zoning ordinance of the Borough of Caldwell (S. C. p. 17). In another case a writ was allowed to the respondent West Essex Building and Loan Association to review a complaint and proceedings had in the recorder's court of the borough for an alleged violation of the ordinance. In the third case a writ was allowed to the respondent, Ferlaute Dress Manufacturing Co. to review a quite similar complaint and proceedings against it (S. C. pp. 7, 61, 118).

The Supreme Court set aside the ordinance and dismissed the complaints upon the ground that the ordinance lacked vitality in that it was not adopted in conformity with the provisions of

the Borough Act relating to presentation of ordinances to the Mayor and approval by him.

The facts relevant to all three cases, briefly stated, indicate that on August 1st, 1921, a zoning commission submitted to the Borough Council a report on a proposed zoning ordinance. The Council, then convened at a regular meeting, passed the ordinance and directed a public hearing to be held thereon on September 19th, 1921 (S. C. pp. 11-13). Such a hearing was held, and the meeting was adjourned until September 26th, 1921. At the adjourned meeting several requests for changes in the lines of the zones were considered. No action was taken (S. C. pp. 13-14). At the next regular meeting of the Council, held on October 3rd, 1921, the ordinance was passed on final reading (S. C. 15). It was published as appears from the stipulation set forth in the record (S. C. pp. 131-2).

Complaints were made against each of the respondents on June 7th, 1933, charging a violation of the ordinance (S. C. pp. 68 and 123). A hearing was held upon these charges, and before it was terminated the recorder granted an application of the appellant for a continuance. This was sought to enable it to present proof of the legal existence of the ordinance, which the Borough Clerk was unable to find in the official records of the Borough (S. C. p. 131). Prior to the adjourned day set by the recorder, the writs were allowed upon an *ex parte* application made on June 16th, 1933.

The reasons argued by the prosecutors below were the same in all three cases. They are summed up by the opinion of the Supreme Court as follows (S. C. p. 136):

“(1) It was not submitted in writing at a regular meeting of the borough counsel;

(2) it was not passed at a subsequent regular meeting, after being submitted in writing at a regular meeting of that body; (3) it was not read in its final form at a meeting of the council held at least one week prior to its final passage; (4) it was not published in a newspaper having circulation in the county of Essex, after its introduction, and before passage, with a notice of the time and place when and where it would be considered for final passage; (5) the council did not afford persons interested an opportunity to be heard thereon before final passage; (6) council did not continue or adjourn, by proper resolution, consideration of the ordinance to the meeting of October 3, 1921, when it was passed; (7) the ordinance was not submitted to the mayor for his approval or veto; (8) it was not approved by the mayor after final passage; (9) it was not passed by the borough council over the mayor's veto; and (10) it was not recorded in full by the borough clerk in a book kept by him for that purpose."

The pertinent provisions of the Borough Act are Sections 26 and 27 (1 C. S. 238). They read as follows:

"All ordinances shall be submitted in writing at a regular meeting of the council and passed at a subsequent regular meeting; provided, however, that no ordinance shall be finally passed, no officer appointed or removed or salary fixed except by the vote of a majority of the whole council; if approved by the mayor, or passed over his veto, or if not returned by him with his approval or veto within five days (Sundays excepted) after he receives it, every ordinance shall be recorded in full by the borough clerk in a proper book to be kept for that purpose; and advertised by copies set up in at least ten public places in said borough for at least one week, or published in a newspaper published in or near said borough by insertion for two successive issues;

said ordinance shall not take effect until so posted or published, but in every case where such ordinance may come in question or be enforced, such posting or publication shall be presumed to have been had until the contrary thereof be shown (P. L. 1897, p. 295)."

"Every ordinance passed by the council and every resolution appropriating, or in any way tending to pecuniarily obligate the borough, and also resolutions auditing or directing the payment of bills or demands, together with such bills, shall, within five days after the passage thereof (Sundays excepted), be presented to the mayor and the report of the clerk shall be conclusive evidence that such ordinance or resolution has been so presented; if he approves it he shall, within five days (Sundays excepted) after its receipt by him, sign and file it with the borough clerk, if not he shall within the same time return the same to the clerk with his objections thereto in writing, and the council shall at their next meeting cause the objections to be entered at length on their minutes, and proceed to reconsider the same, and if two-thirds of all the councilmen shall at said meeting, or at any subsequent meeting to which they shall postpone its reconsideration, vote to pass the same over said veto, it shall take effect; if such ordinance or resolution shall not be so returned by the mayor within five days (Sundays excepted) after he receives it, it shall take effect in like manner as if he had signed it; provided, that if any such ordinance, resolution or bill shall contain more than one distinct section, clause or item, the mayor may approve one or more thereof and veto the rest (P. L. 1897, p. 296)."

In addition to contesting these contentions upon the merits, the appellant argued in the court below that the prosecutors were chargeable with laches. Since the reasons assigned in all three cases were identical and amounted to noth-

ing more than an attack upon the validity of the ordinance, the question of laches was presented by each case.

The appellant has stated the following ground of appeal (S. C. p. 3):

"1. The New Jersey Supreme Court erred in setting aside the Zoning Ordinance of the Borough of Caldwell, passed at a meeting of its Council held on October 3rd, 1921, and in dismissing the complaints charging the violations thereof by the prosecutor-appellee, when the said New Jersey Supreme Court should have held that said Ordinance was legally adopted and was valid and that the proceedings had upon complaints charging the violations thereof by the prosecutor-appellee should not have been dismissed."

The Supreme Court sustained the charge of laches as to all of the reasons urged by the prosecutors below, with the exception of those which related to presenting the ordinance to the Mayor for his approval, and actual approval of the ordinance.

The appellant contends that the court below erred: (1) In holding that the respondents' laches, found to exist, was not a bar to reasons 7 and 9 inclusive stated in the court's opinion, and (2) in finding that the ordinance lacked vitality.

The questions raised by these contentions may be stated as follows:

1. Is the doctrine of laches applicable to the reasons upon which the Supreme Court set aside the ordinance?
2. Did the ordinance in fact lack vitality?

In discussing these questions the appellant will make two points:

POINT ONE.

The court below having found that the respondents were chargeable with laches, erred in holding that the doctrine of laches was ineffective as against the reasons upon which it set aside the ordinance.

POINT TWO.

The ordinance did not in fact lack vitality.

POINT ONE.

The court below having found that the respondents were chargeable with laches, erred in holding that the doctrine of laches was ineffective as against reasons upon which it set aside the ordinance.

Several matters of a preliminary nature require mention. In the first place, it is to be observed that the appellant is not seeking to have this court review a finding as to the existence or non-existence of laches. The effort is to review the legal proposition, adopted by the Supreme Court, that the doctrine of laches is as a matter of law limited in its application as the Supreme Court in fact circumscribed it. Since the appellant is not seeking to review a finding upon the *fact* of laches (being of course content with the finding of the court below that laches existed), there is no reason for applying the rule stated in the decision of this court in *Atlantic City Water Works v. Read*, 50 N. J. L. 665, where it was held that an appeal will not lie from the determination of the Supreme Court on a

question of laches. Whether this doctrine is still the law may be a question of some doubt in view of the subsequent decision of this court in *Wood v. Millville*, 85 N. J. L. 734, where it was said:

“With respect to the second resolution we rest our affirmance on the doctrine of laches invoked by the Supreme Court, and find it unnecessary to consider the other phase of the decision.”

However this may be, the doctrine of the *Read* case applies only to a review of the exercise of discretion by the Supreme Court in disposing of the matter of laches. The appellant is not seeking to review an exercise of discretion.

In examining the opinion of the Supreme Court, there appear to be two grounds upon which it limited the effect of the respondents' laches. It does not seem to be clear from the opinion whether these two grounds are to be considered as operating concurrently or in the alternative. At one place the Supreme Court said (S. C. p. 137):

“Ordinarily, where a prosecutor, as a citizen and taxpayer, seeks by *certiorari* to review a municipal ordinance, and his status as such has not been attacked by proofs or other proceedings prior to argument on final hearing, his qualifications are beyond attack. *Jordan v. Dumont*, 105 N. J. L. 197. But where the attack upon the ordinance relates merely to the procedural steps connected with its introduction and passage, and laches clearly appears, the writ will be dismissed
* * *

“While most of the grounds advanced by the prosecutor relate to matters of procedure merely there is one that is not in that category. It is fundamental in character, and seems to be well grounded.”

This statement perhaps permits the inference that the court found it was too late for the appellant to urge laches at the final argument in connection with matters other than the procedural steps connected with the passage of the ordinance. Subsequent language in the court's opinion indicates that it considered the charge of laches on the merits and found it to be ineffective as a bar to the reasons already mentioned. Thus the court said (S. C. p. 140):

“And laches manifestly cannot give vitality to an ordinance passed by the council, that, for the reasons stated, never had existence.”

In presenting its argument under Point One, the appellant will endeavor to establish that it might properly raise the matter of laches as to the grounds in question for the first time at the final hearing, and that the existence of laches precluded the respondents upon all of the reasons they urged.

Preliminary it may be well to notice the general nature and characteristics of laches. The principle is akin to the equitable doctrine of laches. Hence a consideration of the definition and nature of the equitable doctrine may serve to indicate the attributes of the doctrine of laches as applied in connection with the writ of certiorari.

Mr. Pomeroy in his work on Equity Jurisprudence (4th Ed. 1918), page 3417, states the following definition:

“The true doctrine concerning laches has never been more concisely and accurately stated than in the following language of an able living judge: ‘Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little

whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as estoppel against the assertion of the right. The disadvantage may come from loss of evidence, change of title, intervention of equities, and other causes; but when a court sees negligence on one side and injury therefrom on the other it is a ground for denial of relief."

The section in which this definition is contained was cited by Vice-Chancellor Griffin in *Bennett v. Piatt*, 85 N. J. Eq. 436.

The general nature of the doctrine is well put in the language of Judge Brewer in *Naddo v. Bardon*, 51 Fed. 493, 2 C. C. A. 335:

"No doctrine is so wholesome, when wisely administered, as that of laches. It prevents the resurrection of stale titles, and forbids the spying out from the records of ancient and abandoned rights. It requires of every owner that he take care of his property, and of every claimant that he make known his claims. It gives to the actual and longer possessor security, and induces and justifies him in all efforts to improve and make valuable the property he holds. It is a doctrine received with favor, because its proper application works out justice and equity, and often bars the holder of a mere technical right, which he has abandoned for years, from enforcing it when its enforcement will work large injury to many."

It is manifest that the purpose of the doctrine is to accomplish exact justice, which might not be capable of accomplishment if strict rules of law were to be enforced without regard to the

equities presented by the peculiar circumstances of a given case.

Turning now to the question whether the matter of laches could be raised for the first time at the final hearing, it is observable that the Supreme Court, if it held to the contrary, did so upon the authority of *Jordan v. Borough of Dumont*, 105 N. J. L. 197. In that case this court said:

“In *Jackson v. Gloucester City*, 6 N. J. Misc. 451; 141 Atl. Rep. 743, the Supreme Court held, after a review of the authorities in this state, that ‘where a prosecutor seeks by *certiorari* to review, as a citizen and taxpayer, an ordinance, * * * and his status as such has not been attacked by proofs or other proceedings prior to an argument on final hearing, prosecutor’s qualifications are beyond attack.’”

No question of laches was involved in the case. The Supreme Court dismissed the writ upon the ground that there was nothing to show that the prosecutor was a citizen and taxpayer and an owner of lands on the line of the improvement subject to assessment. The judgment of the Supreme Court was reversed upon the authority of the *Jackson v. Gloucester City*, decision.

It is manifest that both the *Jordan* and the *Jackson* cases refer only to the status of the prosecutor as a taxpayer and citizen.

Laches is an entirely distinct matter. This is indicated by *Weissinger v. Mayor, etc. of Teaneck*, 10 N. J. Misc. 1093, cited in the opinion of the court below. In that case the Supreme Court said:

“Now, undoubtedly, the proper practice is that where an application for a writ of *certiorari* is made to review municipal action, upon notice to the municipality, the question

of laches, as well as the question of the standing of the applicant, should then be brought into question as, in part, held in *Jordan v. Dumont*, 105 N. J. L. 197; 143 Atl. Rep. 843.

"But here we have two situations that seem to, and do compel us, to reach a conclusion that *Kays v. Newton, supra*, and, by analogy, *Jordan v. Dumont, supra*, are not controlling, and they are:

"1. There is nothing in the record before us showing that the present writs were allowed upon application, with notice to the respondent. If that be true, and for lack of record proof to the contrary, it must be assumed, respondent had no opportunity to urge laches, upon the allowance of the writs of review.

"2. After allowance of the writs in question the respondent might well have, and we indicate as the proper practice, should have, made application for revocation of *allocatur* upon the grounds of laches, nevertheless, we conclude that it should not, under the circumstances, be precluded from urging that ground for a dismissal of the writs at this time."

It is observable from the first paragraph of the foregoing excerpt that the Supreme Court treated the matter of laches as being separate and distinct from the status of the prosecutor.

This decision also indicates the policy of that court to permit the matter of laches to be raised at the final hearing where matters of grave public interest are concerned.

In *Weissinger v. Mayor, etc. supra*, it was sought to review an ordinance which would have the effect of ousting a board of tax assessors. The application for the writ was made a little more than five months after the ordinance was adopted. The effect of setting aside the ordinance

would have been to subject to question the assessments for taxes in the Township for the years 1932 and 1933. The court pointed out that this would affect not only the local revenues of the township but those of the County of Bergen or of the State or at least would raise a seriously debatable question as to whether the taxes were legally assessed.

The court also said:

“If we should pass upon the merits of these matters before us, and perchance should be compelled, in strictness to hold that the ordinance in question should be set aside, what would be the result? Indubitably it would be that all assessments for taxes, local, county and state in the taxing district would be open to question and perhaps attack because based upon assessments and valuations of a legally incompetent, and impotent, assessment officer.

“In such a situation this court has never been willing, and, in fact, has repeatedly denied the right.

“We have, therefore, reached the conclusion that under the circumstances of the present cases, the prosecutors did not timely and expeditiously sue out the present writs and that the respondent, upon the ground of public policy, and expediency, as well as necessity, is not precluded from now raising the question of laches.

“The writs before us are therefore dismissed, as improvidently issued.”

The opinion in this case does not state a distinction between reasons relating to *procedural irregularities* and reasons relating to *matters of a different nature*. The court apparently was motivated by a consideration of the public interests involved and was not *primarily* concerned with the nature of the reasons assigned by the prosecutor in certiorari.

In the instant case public interests are bound up in the ordinance under review.

According to the testimony taken by the respondent (S. C. p. 33), a zoning commission was appointed pursuant to the provisions of the zoning ordinance, and it functioned for a number of years. There is nothing in the record to indicate that it ever ceased to function. The municipality is a sizable one. This court will take judicial notice of its population, as determined by an official State census. In *Patterson v. Close*, a decision of the Court of Errors and Appeals, 84 N. J. L. 319, Justice Trenchard said:

“Moreover, by the State census of 1900 the population of Monmouth County is eighty-two thousand and fifty-seven. See *Legislative Manual*.

“The Court will take judicial notice of the census taken under state authority and of the population of counties as determined by it. 16 Cyc. 870; *Adams v. Elwood*, 176 N. Y. 106; *Board of Commissioners v. Garty*, 161 Ind. 464.”

The census taken by the Federal Government in 1930 became official in this State pursuant to P. L. 1931, Chapter 222. That census discloses a population for the Borough of Caldwell of 5,144. *Fitzgerald's Legislative Manual*, 1933, page 215.

In the almost twelve years which have elapsed since the ordinance was adopted, it is obvious that property rights of a vast number of property owners in the Borough have been subjected to its influence. Values have become largely dependent upon it. No specific evidence need be set forth to establish these conclusions, other than what has already been indicated as to the existence and functioning of a zoning commis-

sion. Should the ordinance be declared to be invalid for any of the reasons urged by prosecutors, the municipality would be without means to accomplish, for some time at least, the very important object of zoning. But what is of more serious import, property rights would be very much affected, or at the very least, rendered doubtful.

The decisions in this State do not expressly draw any distinction, so far as laches is concerned, based upon the nature of the reasons assigned by the prosecutor, for the purpose of rendering the defense of laches arguable in some cases at the final hearing and in other cases only by motion to dismiss the writ before final hearing.

In *Bowne v. Logan*, 43 N. J. L. 421, Justice Magie said, for the Supreme Court,

“It has been well settled that if the delay of the prosecutors in applying for the writ has permitted the expenditure of public moneys, the writ will be refused, or, if allowed, will be dismissed when these facts are brought to the attention of the court. *State, Grant, pros. v. Clark*, 9 Vroom 102; *State, H. L. & I. Co., pros., v. Hoboken*, 7 Vroom 291; *State, Wilkinson, pros., v. Trenton*, 7 Vroom 499. The rule has been applied to the case of the opening of public roads, when the delay has extended over three terms of this court. *State, Charlier, pros., v. Woodruff*, 7 Vroom 204; *State v. Ten Eyck*, 3 Harr. 373. The reason for this rule applies with equal force to cases where delay has permitted the expenditure of money in the furtherance of enterprises of a *quasi* public character, or where, under cover of a proceeding of a public nature, individuals have been induced by the delay to expend their own money or labor. It has been extended to both these cases. *Haines v. Cam-*

pion, supra; State, Britton, pros., v. Blake, 6 Vroom 208."

In the earlier case of *State v. Hudson City*, 29 N. J. L. 115, cited in the opinion of the court below, the Supreme Court said:

"The granting of a *certiorari* in cases of public interest is a matter of discretion; and after the party in interest has slept long over his supposed wrong the court will not grant him relief. To relieve him would do much injury to others, and he has no ground of complaint if the opportunity is not given to him.

"After a writ of *certiorari* has been allowed, if on the hearing the like circumstances appear, the court may dismiss the writ as improvidently granted, or refuse the relief sought by it. *State v. City of Hudson, in the matter of Palisade Avenue, ante 104.*"

Although the prosecutor in that case assigned as reasons for reversal irregularities in the preliminary proceedings the court stated a general rule on the subject which draws no distinction.

To permit the defense of laches to be urged at the final hearing is but consistent with the policy of the courts of this State, in dealing with the writ of *certiorari*, to so regulate it as to protect and conserve the public interest. This idea is well put by Justice Black in the opinion of the Supreme Court in *McCarthy v. Boulevard Commissioners of Hudson County*, 91 N. J. L. 137, in the following language:

"Proceedings to review municipal action under such prerogative writ are not personal actions in which the prosecutor may upon sharp grounds insist upon a personal right. Rather is the prosecutor to be regarded, if not as *amicus curiae*, as a friend of the public. The court and the prosecutor who hold this attitude towards the public are in contemplation of law inspired by a common

purpose, to the accomplishment of which there must come a time when the court should determine the public rights, represented in the prosecutor, upon grounds that substantially affect them, and not upon sharp questions and verbal criticisms, which under the guise of protecting the public from a figmentary injury, inflict upon it one that is both actual and serious.”

It is respectfully submitted that the foregoing authorities indicate that it was competent for the appellant to urge the defense of laches in the court below as to all of the reasons assigned by the prosecutors there. Moreover, there does not seem to be any sufficient reason for distinguishing any of the reasons from the others. The Supreme Court referred to numbers 7 to 9 as being fundamental as distinguished from procedural. Clearly these reasons all relate to irregularities in the procedure which lead to the adoption of the ordinance, or to use the language in *State v. Hudson City, supra*, “in the preliminary proceedings.” If, then, these reasons related to irregularities in the procedure leading to the adoption of the ordinance, the case comes within *Ninth Street Improvement Co. v. Ocean City*, 90 N. J. L. 106, where the Supreme Court said:

“During that interval it is reasonable to assume that the citizens of the municipality affected by the provisions of this ordinance, regulating, as it specifically expresses, ‘the manner of building dwelling houses, and other buildings,’ have expended their means and conformed their building operations to comply with its provisions, and have fixed their status as property owners accordingly.

“In such a situation, this prosecutor is too late to be heard to complain of alleged informalities and irregularities in the procedure, which led to its adoption. *State,*

Noe v. West Hoboken 37 Atl. 439; *State, Zabriskie v. Hudson City*, 29 N. J. Law, 115; *Budd v. Camden*, 69 N. J. Law, 193; *Howell v. Flemington, Id.* 597."

The ordinance in that case, as in the instant case, was attacked twelve years after its adoption.

The judgment of the Supreme Court was modified on appeal to this court (91 N. J. L. 703), this court saying:

"We also concur in the decision of that court that the 'building code' had stood too long unchallenged on the municipal records to permit of an attack on the procedure of its passage."

If, on the other hand, the reasons upon which the Supreme Court set aside the ordinance and the complaints do not relate to procedural steps, still, under the authorities previously cited, laches could be urged at the final hearing.

Turning now to a consideration of the question whether the laches, found to exist, should have been upheld as against the reasons in question, it becomes necessary to ascertain the nature of the defects which the respondents alleged resided in the ordinance. It was contended that the ordinance lacked the approval of the mayor or passage over his veto as required by Section 27 of the Borough Act, 1 C. S. 238. This ordinance, unlike many others which have been considered by the courts in connection with certiorari, was designed not to accomplish a single object, and then to spend its force, but to serve as a continuing piece of borough legislation to be enforced daily within the limits of the borough, and according to the record (S. C. p. 33), a zoning commission was set up after the ordinance was published and the commission func-

tioned and enforced the ordinance, and from all that appears the ordinance was enforced for many years. Even in cases where no such recognition of the ordinance was had, the courts have not precluded the prosecutor from setting up laches. The vice with which this ordinance was alleged to have been tainted, has not been regarded by the courts as being so basic and fundamental as to preclude the defense of laches.

In *Sturr v. Elmer*, 75 N. J. L. 443, the Supreme Court considered on certiorari a resolution passed under the same section of the Borough Act as is here in question. As alleged in the instant case, the resolution was neither presented to the Mayor for his approval nor approved by him. The language of the court on this matter, *per* Justice Trenchard, is as follows:

“Section 27 of the Borough act of 1897 (Pamp. L., p. 296) provides that every ordinance passed by the council, and every resolution appropriating or in any way tending to pecuniarily obligate the borough shall, within five days after the passage thereof, be presented to the mayor for his approval.

The resolutions in question tended to pecuniarily obligate the borough, and could not be carried into effect without imposing a pecuniary burden. Neither of said resolutions was approved by the mayor or presented to him for approval.

Compliance with this provision of the statute was essential to the validity of the proceedings. *State v. Newark*, 1 Dutcher 399; *Hendrickson v. Point Pleasant*, 36 Vroom 535.”

Notwithstanding the fact that presentation and approval were essential to the validity of the proceedings, the court considered the defense of

laches. It held that laches in fact was not made out. Nevertheless, it entertained that defense and dealt with it upon the merits. Thus the court said (p. 446):

“It does not seem to us that the delay which intervened between the time when the prosecutor as a vigilant taxpayer ought to have known that this purchase had been made and the time when he applied for his writ of *certiorari* has resulted in any detriment to the borough. The borough money was paid out before the taxpayer can be presumed to have known of the resolution. If council had submitted the resolution to the mayor for his approval, it may be that the mayor would have ordered a public hearing; and certainly, if council had acted by ordinance as it should have done (*Pamph. L. 1897*, p. 296, Sec. 28), the publication of the ordinance would have put the taxpayers upon their guard.”

In the present case there can be no doubt that the respondents are chargeable with laches for the Supreme Court has so held, and it would seem that *Sturr v. Elmer, supra*, is entirely at variance with the opinion of the court below.

Other decisions, both in the Supreme Court and in this court, establish that with respect to defects partaking of the same general nature as those alleged to exist in the ordinance under consideration, the claim must succumb to the defense of laches.

In the recent case of *Cordingley v. Mendham*, 12 N. J. Misc. 331, it appeared that the Borough of Mendham made a lease, as tenant, with two persons, one of whom was the mayor of the borough. The Supreme Court held, in accordance with well-established principles, referring to another lease also subject to attack, that a transaction of this kind between the borough on

the one hand and the mayor on the other hand, violates public policy, citing *Sturr v. Elmer, supra*. Nevertheless, the court held that by reason of his delay of almost three years, the prosecutor was barred from attacking the lease upon the ground of laches.

In *Ware v. Rutherford*, 55 N. J. L. 450, a writ was allowed to review proceedings for the adoption of a grade. The court found that under legislation before it the only way in which the grade could be adopted would be by ordinance duly enacted by the mayor and council. The court also found that the grade in question was not established by ordinance. Thereupon the court undertook to consider the defense of laches on the merits. It found that laches was not made out. Its consideration of the defense on the merits, however, indicates that it did not consider laches to be impotent as against so fundamental a defect as the absence of an ordinance, when such an ordinance was the only form in which the improvements could be legally accomplished.

In *Read v. Atlantic City*, 49 N. J. L. 558 (affirmed by this court 50 N. J. L. 666), the Supreme Court said:

“But it must be considered as completely settled in this state, that when the proceedings of a municipal corporation have contemplated and resulted in the expenditure of public money, objections, even when founded on lack of authority, must be made promptly.”

From this statement the inference might properly be drawn that so basic a defect as want of authority in the municipal corporation, falls before the defense of laches.

Turning to the decisions of this court, it is observable that from a very early period, the general principles hereinabove stated have been recognized.

In *State v. French*, 24 N. J. L. 736, Justice Green said for this court:

“It is certainly true, as insisted in argument, that the *certiorari* might have been dismissed by the court below, as having been improvidently issued. The granting of a *certiorari* is not a matter of right, but of sound discretion; and when it is perceived that the rights of others will be affected by the delay or laches of the applicant, or that any great interest will be prejudicially affected, the court in its discretion will disallow the writ, or dismiss it if allowed. But the allowance or denial of the writ, resting in discretion, is not the subject of a writ of error. It was so unanimously adjudged by this court, in the Camden election case. *The State v. Wood*, 3 Zab. 560.”

In *Wilkinson v. Trenton*, 36 N. J. L. 499, the opinion of this court declares:

“But if irregularities did exist, the *certiorari* should have been dismissed for gross laches on the part of the prosecutors in suing it out. They have permitted the street to be opened, and over \$25,000 to be expended upon it after the assessment was made against them, and after being thus assured of the benefit which their property will derive from the improvement, they seek to escape their proportion of the cost of it.

Under such circumstances, where, as in this case, no re-assessment is provided for, a *certiorari* should not be allowed, and if allowed, it should, when the facts become known, be dismissed by the Supreme Court. Such is the established rule of that court, and it should not be disturbed. *State v. Hudson City*, 5 Dutcher 116; *State v. Everett*, 3 Zab. 378; *State v. Water Commissioners*,

1 Vroom 249; *State, Hampson v. Paterson, ante*, p. 159.”

In the many decisions which exist in this state, emphasis seems to be placed, not upon the precise nature of the reasons assigned by the prosecutor in certiorari, but upon the public interest involved.

The excerpt quoted from *Bowne v. Logan, supra*, is to the effect that a writ of certiorari will be dismissed for laches where delay has induced individuals under cover of a proceedings of a public nature to expend their own money or labor. In the instant case the property owners of the borough, in the twelve years during which this ordinance has been in existence, have contributed to the growth of the municipality under the influence of this zoning plan. The reason for the rule stated in the *Bowne* case (and cited and quoted in many other decisions) is aptly presented in the instant case. And it is the rule quite universally accepted. In 11 *C. J.* 147, it is stated:

“Where a reversal of the proceedings sought to be reviewed would result in detriment or inconvenience to the public, or is calculated to derange the interests of society, a party is required to act speedily in making his application, and any unreasonable delay in so doing will warrant the refusal or dismissal of the writ.”

If it be found that the respondents are chargeable with laches in prosecuting their joint writ, the judgment below cannot be sustained upon the theory that the respondents were not guilty of laches in prosecuting their several writs directed to the complaints against each of them. It cannot be maintained that the ordinance can

be set aside under these writs as being incidental to a consideration of the proceedings pending before the recorder. In the first place these two writs do not bring up the ordinance. They merely direct that the complaint and the proceedings be certified to the Supreme Court (S. C. pp. 61, 118). In the second place, with the respondents precluded on their joint writ there remains before the court only an attack upon the ordinance presented as part of an attempt to review proceedings before the recorder, which had not been terminated. The respondents here were not convicted before the recorder, nor were they discharged. The writs were sued out before the adjourned hearing was to be held (S. C. p. 103). In this situation the writs should have been dismissed as improvidently allowed. This contention was made by the appellant here in the court below at pages 3-6 of its brief.

Among other things it said in its brief on page 4:

“Having prosecuted a joint writ for the purpose of attacking the validity of the ordinance (No. 260), the only object designed to be accomplished by the two writs under consideration, was to arrest the further prosecution of the proceedings pending in the Recorder’s Court. As stated in the *Unger* case, the writs were prematurely sought for this purpose. Nothing more appears here than was presented in that decision. The court has before it merely an uncompleted proceeding, which might, or might not, if it were completed, result in a conviction, of one or both of the prosecutors.”

That such a contention is sound and may properly be raised at the final hearing appears by the Supreme Court’s decision in *Unger v. Fanwood*, 69 N. J. L. 548, quoted from as follows in

the brief of the appellant submitted to the court below:

“The prosecutor is met with the objection that in this posture of affairs he has no standing to sue out a certiorari.

“It is the established rule that a right of action does not exist in favor of one who is only damnified as one of the public in common with his fellow-citizens. *Kean v. Bronson*, 6 Vroom 468; *Montgomery v. Trenton*, 7 *Id.* 79; *Jersey City v. Traphagen*, 24 *Id.* 434; *Tallon v. Hoboken*, 31 *Id.* 212; *Hamblet v. Asbury Park*, 32 *Id.* 502; *Kendall Co. v. Jersey City*, 36 *Id.* 123.

“In *Hamblet v. Asbury Park*, Mr. Justice Garrison in delivering the opinion of the court, said: ‘Conviction alone can furnish evidence that the ordinance affects the prosecutor.’

“The prosecutor’s writ is an attack upon the ordinance exclusively and not upon the proceedings which he alleges has been illegally instituted against him.

“For the purpose of arresting the further prosecution of that suit the writ was prematurely granted. He should have waited judgment in the case before he sued out his writ.

“He is not within the exception to the rule that *certiorari* will not be allowed before a final decision is reached in the inferior tribunal. *Hoxsey v. Paterson*, 10 Vroom 489.

“Under the present aspect of the case, therefore, the prosecutor has no interest in the validity of the ordinance other than that which is common to all citizens.”

For the purpose of reviewing the uncompleted proceedings against them, the individual writs were each in the nature of a writ of error and should not have been allowed prior to final judgment. In addition to *Unger v. Fanwood* and the cases cited therein, *Almindie v. Board of*

Excise Commissioners of the City of Camden, 73 N. J. L. 464; *Powell v. Cape May*, 5 N. J. Misc. 113, and *Wilson v. Borough of Sea Girt, et als*, 5 N. J. Misc. 1042, sustain these contentions.

Hence, with the respondents barred from prosecuting their joint writ, the setting aside of the ordinance could not properly have been accomplished under the individual writs.

POINT TWO.

The ordinance did not in fact lack vitality.

The appellant will undertake to set forth each of the ten reasons discussed in the opinion of the court below, and to deal with each upon the merits. The matter will be treated in this fashion in the expectation that the court may be interested in a meritorious discussion of the seven reasons which the court below found were barred to the prosecutors' cause on their laches.

1. *It was not submitted in writing at a regular meeting of the borough council.*

The return to the joint writ (S. C. p. 11) indicates that a report of a zoning commission was taken from the table, and the zoning ordinance submitted by the commission was introduced by one of the council. The minutes also recite that the ordinance was passed on its first reading at that meeting. It is therefore disclosed that the ordinance was read, and hence it must be taken that it was submitted in writing in some form. That the meeting was a regular meeting is evident from the minutes (S. C. p. 11), which recite that the meeting was a regular one.

2. *It was not passed at a subsequent regular meeting after being submitted in writing at a regular meeting of that body.*

The return discloses that the meeting of October 3, 1921, at which the ordinance was finally passed, was a regular one (S. C. p. 15).

3. *It was not read in its final form at a meeting of the council held at least one week prior to its final passage.*

The return discloses that at a meeting held on September 19, 1921, which was at least one week prior to October 3, 1921, the ordinance was read by way of introduction to a discussion of its provisions for the benefit of the citizens of the community. The minutes of that meeting, as set forth in the return to the writ (S. C. p. 13) recite:

“* * * after the reading of the ordinance, the Mayor invited a full and open discussion of same.”

There is nothing to indicate that any substantial changes were made thereafter in any of the provisions of the ordinance. The respondents have not established that what was read at the meeting of September 19, 1921, was something other than the final form in which the ordinance was adopted.

4. *It was not published in a newspaper having circulation in the county of Essex, after its introduction, and before passage, with a notice of the time and place when and where it would be considered for final passage.*

The respondents stipulated (S. C. p. 131) that on September 3, 1921, the proposed ordinance and a building zone map were published in The

Caldwell Progress, a newspaper printed and published at Caldwell, with a notice of intention subjoined, setting forth the time and place, when and where the governing body would consider the final passage of the ordinance. Section 26 of the Borough Act provides, speaking of publication (P. L. 1921 p. 803);

“* * * but in every case where such ordinance may come in question * * * such publication shall be presumed to have been had until the contrary thereof be shown.”

The respondents did not establish that publication was not had according to law. Furthermore, they were and are precluded by their stipulation from advancing such a contention.

5. *The council did not afford persons interested an opportunity to be heard thereon before final passage.*

The basis of this claim is that the minutes of the meeting held on August 1, 1921 (S. C. p. 12), indicate that the Borough Clerk was directed to publish a notice that a public hearing would be held at the firehouse. The Clerk caused to be published a notice that the meeting would be held at the High School Auditorium. The minutes of the meeting which the council set down for September 19, 1921, and which was held on that day (S. C. p. 12), indicate that pursuant to the advertisement which was published, the meeting adjourned from the firehouse to the High School Auditorium, and there the ordinance was read, and a large number of citizens and taxpayers expressed themselves for and against its adoption. It is plain that the council organized at the fire-house and then proceeded to the High School Auditorium in order

to hold a meeting there. The only irregularity which appears in this connection is that the clerk disobeyed his instructions, and published a notice that the meeting would be held at the High School. Whether or not citizens were denied an opportunity to be heard, depends upon whether or not a meeting was held in *conformity with the notice which was published*. The object of newspaper publication is to apprise citizens and taxpayers of the time and place when and where the final passage of the ordinance will be taken up. Since the meeting was actually held in conformity with the published notice, certainly no citizen was misled. The direction given to the clerk with respect to publication, is not the citizen's guide. Newspaper publication is provided for in order to inform him. It is not open to the respondents to attack the publication, for they have stipulated that the published notice recited that a regular meeting would be held in the High School Auditorium on September 19, 1921 at 8:00 o'clock in the evening. Upon the face of the proceedings therefore, it is plain that there is no substance to the respondents' contention in this connection.

Hence, the testimony taken by the appellant need not be resorted to in this connection. The record itself discloses a lack of substance in this claim. If we look to that testimony however, it is observable that Mr. Babcock testified (S. C. pp. 37-8) that he left the fire-house shortly after 8:00 o'clock—not later than 8:30—and that it took him about fifteen minutes to walk to the High School. He also said that at the fire-house that someone announced that the council would adjourn to the High School (S. C. p. 37). There is also evidence that the meeting was largely

attended (S. C. p. 37). This testimony was uncontradicted and unimpeached, and hence establishes the fact that the notice required by law was effectively given. The respondents have not introduced any evidence that any single individual was misled. They have not indicated that they were misled, either because they may have been citizens and taxpayers at the time the ordinance was adopted, or because they subsequently examined the proceedings which led up to the adoption of the ordinance, before acquiring property interests in the Borough which might be affected by the ordinance.

In the court below the respondents relied upon *Cooke v. Manasquan*, 80 N. J. L. 206, for the purpose of demonstrating that this parol evidence was not admissible. Justice Voorhees held that such evidence was not admissible to supply a jurisdictional requisite not found in the record. He recognized a distinction between jurisdictional facts and those which are not of that character. He said:

“The cases holding the admissibility of this evidence to cure defects or omissions in the record, and those holding the contrary doctrine, are collected in 21 Am. & Eng. Encycl. L. 8, 9 and 28 Cyc. 344. A distinction, however, must be made where the facts necessary to be shown are jurisdictional and where they are not.”

In the *Cooke* case, the question was whether or not the ordinance in question was adopted by a majority vote of the whole council—certainly a jurisdictional matter. The subject under inquiry here, however, is not of the same character. It having been shown that publication was had in conformity with the statute, it is certainly permissible to show by parol evidence that the

discrepancy between the place named in the publication, and that stated in the direction to the clerk to publish, did not harm the respondents or any other citizens and taxpayers of the Borough.

6. *Council did not continue or adjourn, by proper resolution, consideration of the ordinance to the meeting of October 3, 1921, when it was passed.*

It is to be observed that here again the respondents did not point out that they or any other citizen or citizens were injured or misled by any of the acts or omissions of the council.

10. *It was not recorded in full by the borough clerk in a book kept by him for that purpose.*

Mr. Van Order testified that a printed copy of the ordinance was pasted in the Ordinance Book (S. C. pp. 51-2). Taken together with the indication from the return that the original ordinance was not to be found when the proceedings in the Recorder's Court were had (S. C. p. 72 *et. seq.*), and with Mr. Van Order's testimony that he delivered the original ordinance to the newspaper for publication and that he had no recollection whether it was ever returned to him (S. C. p. 43), this established the fact that the next best thing to recording a lost original was done. This was a substantial compliance with the statute, which provides that every ordinance shall be recorded in full by the Borough Clerk in a proper book to be kept for that purpose. 1 C. S. 238, Sec. 26.

Furthermore, the matter of recording is directory merely, and a failure to conform with such a requirement does not invalidate the ordinance

or postpone the time when it may go into effect. The statute does not provide that a failure to properly record will carry with it either of these consequences. In *McQuillan on Municipal Corporations*, page 1510, it is said:

“Charters often provide that after passage, ordinances and resolutions shall be duly recorded. The requirement is designed to furnish record evidence of their existence. Whether failure to record will invalidate the ordinance or resolution depends upon the proper construction of the provisions of the particular charter. Under most charters the requirement is held directory merely * * *. The act of recording is regarded as a mere clerical or ministerial duty and not essential to complete the legislative act unless made so by express legal provisions.”

The general rule to be gathered from the decisions is stated in 43 *C. J.* 538:

“But generally charters and statutes providing for the recording of ordinances and resolutions contain no provisions that they shall not be in force until recorded, and it has very generally been held that in these circumstances the provisions are merely directory and that a noncompliance therewith does not invalidate the ordinance or resolution.”

It would seem to follow, *a fortiori*, that a substantial compliance with such provisions, in the form of the nearest possible compliance to a perfect one, will not invalidate an ordinance.

7. *The ordinance was not submitted to the mayor for his approval or veto.*

8. *It was not approved by the mayor after final passage.*

9. *It was not passed by the borough council over the mayor's veto.*

Under these reasons the court below set aside the ordinance and complaints.

As we are considering the action of public officers taken in their official capacities, and relating to matters of public interest regulated by statute, there necessarily arises the familiar presumption that these officers proceeded according to law. The burden was on the prosecutors to establish that the ordinance was not duly presented to the mayor. They did not do so. The result of the testimony of Mr. Van Order, the former Borough Clerk, is to the effect that he had no *precise* recollection as to what was done with respect to presentation of *this particular ordinance* to the mayor (S. C. pp. 44-55).

The presumption hereinabove mentioned, is strengthened by the circumstance that there is proof in the record that the ordinance in question as published purported to be signed by the mayor. It is indicated, by the stipulation already mentioned, that the copy of the ordinance as published after final passage in *The Caldwell Progress*, bore the following at the foot: "Approved, William G. Sharwell, Mayor," and the clerk of the Borough certified that the "foregoing" was a true and correct copy of the ordinance introduced at a meeting of the council held on August 1, 1921, and passed on October 3, 1921 (S. C. p. 132). The ordinance itself (S. C. p. 17) is preceded by a notice of its passage in

which it is recited that it was duly approved by the Mayor.

There was established the existence of a lost ordinance, which purported to be signed by the mayor, and which the clerk of the Borough certified was a true copy of the ordinance as finally passed. Such being the circumstances, it is to be presumed that the ordinance was duly presented to and approved by the Mayor.

It is, therefore, respectfully submitted that it was not established that the ordinance in fact lacked vitality; and at the very least, it is respectfully submitted that the respondents were barred under the decisions of this court and of the Supreme Court, from attacking the ordinance and the complaints and the proceedings taken thereunder for the reasons urged under Point One.

It is respectfully submitted,

MILTON M. UNGER,
Attorney for and of Counsel
with Respondents-Appellants.

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New Jersey Court of Errors and Appeals

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Justices	John B. Freese, John B. Freese, John B. Freese
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125 MAY. T. 1934
126 MAY. T. 1934

127 MAY. T. 1934

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New Jersey Court of Errors and Appeals

WEST ESSEX BUILDING AND LOAN
ASSOCIATION and FERLAUTE
DRESS MANUFACTURING Co.,
Prosecutors-Appellees,

vs.

BOROUGH OF CALDWELL, a
Municipal Corporation of the
County of Essex,
Respondent-Appellant.

*On
Certiorari.*

*Appeal from
New Jersey
Supreme
Court Cases
Nos. 125, 126,
127.*

BRIEF FOR PROSECUTORS-APPELLEES.

This is an appeal by respondent-appellant to review three judgments of the Supreme Court entered upon three writs of certiorari which were consolidated for the purpose of the argument in the court below and a like consolidation has been effected in this court in presenting this appeal (see S. of C., p. 5).

Facts.

The prosecutors-appellees having sued out three writs of certiorari for the purpose of reviewing the legality of an ordinance of the Borough of Caldwell, a Municipal Corporation in the County of Essex, which ordinance is entitled:

“An Ordinance to regulate and restrict the location hereafter of trades and industries and the subsequent location of buildings designated for a specified use in any designated area and to regulate and determine the area of yards, courts and other open spaces and for said purpose to divide the Borough into Districts.”

One of the judgments, is in a proceedings instituted by prosecutors-appellees to review the legality of an ordinance alleged to have been adopted by respondent-appellant (S. of C. p. 143).

Judgment two (S. of C. p. 145), is a proceeding by the *West Essex Building & Loan Association v. The Borough of Caldwell*, wherein the Supreme Court ordered the dismissal of the proceedings instituted by said respondent-appellant against the prosecutors.

Judgment No. 3 (S. of C. p. 141), is a proceeding by the Ferlaute Dress Manufacturing Co., wherein the Supreme Court ordered the dismissal of the proceedings instituted by respondent-appellant against prosecutor.

The opinion of the Supreme Court states the reasons for the entering of said judgment, set out on pages 145 to 140 of the S. of C., and is reported in 112 N. J. L. 466.

Prosecutors-appellees alleged twenty-two reasons in Case No. 1 why said ordinance was illegal (see S. of C. pp. 56 to 60).

Case No. 2, prosecutors-appellees alleged twenty-three reasons which are set out on pages 112 to 117.

Case No. 3, prosecutors-appellees alleged twenty-three reasons which are set out on pages 126 to 130 of the S. of C.

The Supreme Court in its opinion stated that the ordinance was invalid because said ordinance had not been presented to the Mayor and approved or rejected by him as required by Section 27 of the Borough Act (S. of C. pp. 135 to 140), reported in 112 N. J. L. 466.

Appellants in their brief allege two reasons why this Court should reverse said judgments, they are set out on page 6 of the respondent's brief and are as follows:

1. The court below having found that the respondents were chargeable with laches, erred in holding that the doctrine of laches was ineffective as against the reasons upon which it set aside the ordinance.

2. The ordinance did not in fact lack vitality.

REPLY TO POINT I.

Appellant contended that "the Court below having found that the respondents were chargeable with laches, erred in holding that the doctrine of laches was ineffective as against the reasons upon which it set aside the ordinance."

It devotes about twenty pages of its present brief to the argument of the question of laches.

The doctrine of laches does not apply to the case at bar for the following reasons:

1. The ordinance in question limits the use of private property. Therefore, it is in derogation of the common law rights of the prosecutors in their use of their property and the strict rule of construction should be applied against the municipality.

2. Appellant if it desired to raise the question of laches should have done so prior to final hearing in the Supreme Court and upon proper proofs. See *Jordon v. Borough of Deaumont*, 105 N. J. L. 197, appellant's brief, page 7.

3. Laches is not available to appellant where the evidence shows that the ordinance in ques-

See Co. v. Talbot v. Crown Laundry Service Inc., 116 N. J. L. 40 on 43

tion never had any life. The evidence in the present case shows that appellant never complied with Section 27 of the Borough Act in that it failed to submit said ordinance to the Mayor for his approval. Therefore it never became a valid ordinance. This will be further argued in reply to Point Two of appellant's brief.

4. It clearly appears from the evidence that the appellant at no time enforced the ordinance in question therefore it should not complain about prosecutors' laches. See testimony of Mr. Moran (S. of C. pp. 78 to 86, on p. 82), where Mr. Moran said he had been building inspector for sixteen years which included the period from the time said ordinance is alleged to have been adopted to the date of said complaints and *that not a single certificate of occupancy had been issued during that period. On page 85 he said the reason for that was because he had been instructed by the Building Committee of the appellant not to issue any.*

5. The facts in the case at bar show that the building in question was erected sometime in 1927 and was used as a Fraternal Hall until the prosecutor Ferlaute Company rented it from the West Essex Building and Loan Association who had been compelled to take it over for its mortgage debt, which was April 10, 1933. The Ferlaute Company came into existence on April 8, 1933. The complaints in the case at bar were made on or about the 7th day of June, 1933 (see S. of C. pp. 124 and 125).

Appellant on pages 13 and 14 of its brief raises the question that for about twelve years since said ordinance is purported to have been adopted, property rights of a vast number of property owners in the Borough have been subjected to its

influence, values have become largely dependent upon it. Then it states that no specific evidence need be set forth to establish these conclusions.

However, if appellant had any evidence of that fact it could have easily produced it at the hearing when the depositions of Clarence G. Poole, Henry J. Babcock and John J. Van Order were taken. In that way prosecutors could have very easily met that issue by producing evidence to the contrary, and not be compelled to argue on a proposition which is not supported by any facts.

This Court, the Supreme Court and the Court of Chancery have uniformly held that in order for laches to be available as a defense the party attempting to defeat a right of an individual by reason of laches must prove something more than mere delay. *There must be delay for a length of time which unexplained and unexcused is unreasonable under the circumstances and which has been prejudicial to the defendant.*

In the case at bar no prejudice is shown or can be shown to have resulted to appellant. When appellant attempted to enforce the ordinance in question appellees had a perfect right to attack the validity of said proceedings which, of course, included the ordinance upon which the complaints were predicated. That was their legal right.

True, the Supreme Court and this Court have on a number of occasions refused to give any relief where laches has been shown or where the prosecutor was guilty of laches but more than mere delay had been shown and that is that respondent has shown that the prosecutor has permitted the expenditure of public moneys or where a public contract has been attacked after the

contract has been performed. When those facts are shown prosecutor has been denied relief, as stated by Justice Magee in the Supreme Court in the case of *Bonne v. Logan*, 43 N. J. L. 421, same case cited by appellant pages 14 and 15 of its brief, as follows:

“It has been well settled that if the delay of the prosecutors in applying for the writ has permitted the expenditure of public moneys, the writ will be refused, or, if allowed, will be dismissed when these facts are brought to the attention of the court. *State, Grant, pros. v. Clark*, 9 Vroom 102; *State, H. L. & I. Co., pros. v. Hoboken*, 7 Vroom 291; *State, Wilkinson, pros. v. Trenton*, 7 Vroom 499. The rule has been applied to the case of the opening of public roads, when the delay has extended over three terms of this court. *State, Charlier, pros. v. Woodruff*, 7 Vroom 204; *State v. Ten Eyck*, 3 Harr. 373. The reason for this rule applies with equal force to cases where delay has permitted the expenditures of money in the furtherance of enterprises of a quasi public character, or where, under cover of a proceeding of a public nature, individuals have been induced by the delay to expend their own money or labor. It has been extended to both these cases. *Haines v. Champion, supra*; *State, Britton, pros. v. Blake*, 6 Vroom, 208.”

For the reasons above stated, the question of laches has no place in the present appeal.

First, the Supreme Court in its opinion determined that it was not sufficient to defeat prosecutors' remedy and for that reason it declined to consider the same as sufficient ground to dismiss the Writs of Certiorari in question upon the ground that the said prosecutors-appellees were guilty of laches.

Secondly, that being a question solely within the discretion of the Supreme Court, respondent-appellant can not raise it in this Court.

The record in the case at bar is barren of any proof that the prosecutors-appellees had been guilty of a single act which in law would deprive them of the right to challenge the legality of the ordinance in question and to attack the proceedings instituted thereunder.

The question of laches being a matter which must be attacked by the respondent at an early stage of the proceedings, either on the application when the Writ is allowed or upon an application to vacate the allocatur. Therefore, when the respondent-appellant makes the statement that the Supreme Court determined that the prosecutors were guilty of laches this is not so because the opinion does not so hold and if it did it could not bind the prosecutors-appellees because that issue was not properly before the Court.

Neither of the prosecutors in the case at bar can be guilty of any laches prior to 1932 as the West Essex Building & Loan Ass'n, did not have title to said premises until then and the Ferlaute Dress Manufacturing Company did not come into existence until April, 1933.

REPLY TO POINT II.

Under Point II respondent-appellant claims that "the ordinance in question did not in fact lack vitality."

Again, said appellant is in error.

Prosecutors-appellees on this phase of the case allege the following reasons Nos. 4, 5, 6, 11 and

12 for said ordinance lacking vitality they are set out on pages 57 and 58 of the S. of C. and are as follows:

A. Said ordinance was never submitted to the Mayor for his approval or veto as provided by law.

B. Said ordinance was never approved by the Mayor after final passage as provided by law.

C. Said ordinance was never passed by the Council of the Borough of Caldwell over the Mayor's veto as provided by law.

D. Said ordinance was not presented to the Mayor within five days after it was passed by the Borough Council.

E. Said ordinance was not signed by the Mayor and filed with the Borough Clerk within five days after it was passed as provided by law.

The legislature by Sections 26 and 27 of the Borough Act has designated the procedure for the adoption of an ordinance and that must be followed before the same can have any life.

Section 26 provides as follows:

“All ordinances shall be submitted in writing at a regular meeting of the council and passed at a subsequent regular meeting; * * * if approved by the mayor or passed over his veto, or if not returned by him with his approval or veto within five days, Sundays excepted, after he receives it, every ordinance shall be recorded in full by the borough clerk in a proper book to be kept for that purpose. No ordinances may be finally passed unless it has been read in substantially its final form at a meeting held at least one week prior to its final passage, and shall have been published in a newspaper printed and circulating in the said

borough and if there be no newspaper, printed and circulating in the said borough, then at least one newspaper printed and circulating in the county, in which the said borough is located."

Section 27 provides as follows:

"Every ordinance passed by the council and every resolution appropriating, or in any way tending to pecuniarily obligate the borough, and also resolutions auditing or directing the payment of bills or demands, together with such bills, shall, within five days after the passage thereof (Sundays excepted), be presented to the mayor and the report of the clerk shall be conclusive evidence that such ordinance or resolution has been so presented; if he approves it he shall, within five days (Sundays excepted) after its receipt by him, sign and file it with the borough clerk, if not he shall within the same time return the same to the clerk with his objections thereto in writing, and the council shall at their next meeting cause the objections to be entered at length on their minutes, and proceed to reconsider the same, and if two-thirds of all the councilmen shall at said meeting, or any subsequent meeting to which they shall postpone its reconsideration, vote to pass the same over said veto, it shall take effect; if such ordinance or resolution shall not be so returned by the mayor within five days (Sundays excepted) after he receives it, it shall take effect in like manner as if he had signed it; provided, that if such ordinance, resolution or bill shall contain more than one distinct section, clause or item, the mayor may approve one or more thereof and vote the rest."

The return of the appellant to the Writ of Certiorari under Case No. 1, shows the passage of the ordinance by the council but is silent as to its presentation to or any action thereon by the Mayor. The Clerk's minutes which are also

made a part of said return do not show that the ordinance was presented to the Mayor.

Respondent-appellant prior to the argument in the Supreme Court attempted, in vain, to prove by the testimony of John J. Van Order, who was the Clerk of respondent-appellant, when the ordinance in question was before the Governing body for consideration, and Henry J. Babcock and Clarence G. Poole who were members of the Borough Council at the time said ordinance was being considered by said council and alleged to have been adopted by it.

The testimony on this phase of the case, by said witnesses, is set out in the S. of C. pages 24 to 49, and is, in part, as follows:

Clarence G. Poole (S. of C. p. 24):

Q According to the minutes of the meeting of the Council on August 1, 1921, it appears that a report of the zoning commission was taken from the table and the ordinance was submitted by the Commission introduced by Councilman Babcock and was passed in the affirmative. According to those minutes you were present? A Yes.

(S. of C. p. 26):

Q Now this proposed ordinance was taken up for consideration back in August, 1921. At the meeting of August 1st did you have a copy of the proposed ordinance in the form it was presented? A It was my recollection the copy was furnished to every member of the Council.

(S. of C. p. 27):

Q Did you observe whether or not Mayor Sharwell had such a copy? A I cannot say.

(S. of C. p. 29):

Q Mr. Poole you do not remember what actually took place at these meetings outside

they were held at certain intervals? A Yes.

Q You also recollect during the time you were a member of said Council a zoning ordinance was considered? A Yes.

Q You don't know in detail what action the Council did take at any specific meeting without refreshing your memory by examining the minutes kept by the Clerk of that date or those dates? A I cannot say I do recall the details of every meeting. I did know that an ordinance was considered. I do know that the ordinance was passed by the Council but I cannot remember the details of the specific meetings.

Q Do you know whether this ordinance was ever delivered to the Mayor? A *I do not, that was a matter between the Clerk and the Mayor.*

Henry J. Babcock, testified as follows (S. of C. p. 30):

Q Did you take part in preparing the ordinance? A I did.

(S. of C. p. 34):

Q Do you know whether this ordinance was ever submitted to the Mayor for his approval? A *No.*

Q After October 3, do you know whether said ordinance was ever handed to the Mayor for his approval? A *No, I don't know.*

John J. Van Order, former Clerk testified as follows (S. of C. p. 40):

Q Do you recollect the consideration by the Borough Council of an ordinance relating to zoning in the year 1921? A I do.

Q Were you then Clerk of the Borough? A I was.

Q Did you attend meetings of the Council in your capacity as Clerk regularly? A Yes.

Q And the minutes of those meetings were prepared and kept by whom? A By myself personally.

Q They were made up of information which you secured in what manner? A As the recording officer of the meetings of the Borough of Caldwell.

Q The information which you secured, did you secure it from personal observation and hearing at the meetings? A From personal observation and hearing and the record as made at the time.

(S. of C. p. 44):

Q Now according to the minutes of the meeting held on October 3, 1921, this ordinance was taken up for final reading and was passed, and according to the minutes of the meetings of September 19th and 26th were read and duly approved. You have testified in substance that the minutes correctly represent proceedings taken by the Council, and now having referred to you contents of the minutes of this meeting of October 3, 1921, I ask you whether or not that is also true, that is particularly true, of the minutes of this particular meeting? A My answer to that question that whatever statement is contained in those minutes referring to the final action of the Council, was as stated in the minutes of that meeting. With respect to the statement in those minutes, that the minutes of the meetings of September 19th and 26th were duly approved, I am positive that those minutes were read and duly approved by the action of the Councilmen as stated in the minutes.

(S. of C. p. 44):

Q Upon the final passage, do you know what was done with the original ordinance? A *I do not.*

Q Did you present it to the Mayor for his signature or veto? A *I have no recollection of having done so.*

(S. of C. p. 47):

A *My recollection is that I did not make a practice of presenting ordinance to the*

Mayor other than of for the reason he had full knowledge of their consideration, their introduction and passage. If he failed to file a veto within the five days—I think it was after the passage of the ordinance—and that was done in most cases—it automatically became an ordinance and followed the usual manner in its legal procedure.

Q The answer that you have just given then, is that a statement of the usual practice during the years that you were Borough Clerk with respect to the ordinances adopted by the Council? A I would in at least $\frac{3}{4}$ of the ordinance that were introduced and passed. The matter of the Mayor formally signing it was not observed. It became an ordinance through his agreement and acquiescence and his knowledge of the proceedings leading up to that ordinance unless he was interested in the passage of the ordinance and filed a veto, it was always assumed that his action was favorable to the introduction.

(S. of C. p. 50):

Q Do you know whether this ordinance—when I say this ordinance—I have reference to—is the zoning ordinance commonly known as zoning ordinance which is entitled “An ordinance to regulate and restrict the location hereafter of trades 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 Borough of Caldwell into districts.” Was ever signed by the Mayor? A I don’t recollect that.

Q Did you ever see the Mayor attach his signature to this particular ordinance after it was passed by the Borough Council? A No.

Q Did you ever see this ordinance with the Mayor’s actual signature after October 3, 1921? A *I have no recollection of it.*

(S. of C. p. 52):

Q Did the Mayor sign the original ordinance? A *I cannot answer. I don't know.*

(S. of C. p. 53):

Q When you accepted it did you mention accepted by whom? A Accepted by the Council at its final passage and after publication it was filed by me as Clerk in the Book of Ordinances in its printed form as published from the original.

Q Well, what you filed in this book of ordinances which you delivered to Mr. Jacobus as your successor in office was the printed copy containing the printed name of the Mayor and your own name as Clerk? A Yes.

(S. of C. p. 53):

Q However, your answer still is that you never saw a copy of said ordinance signed by the Mayor, that is with the Mayor's independent signature attached to it? A I don't recollect that I did say—

Q So far as you know you don't know whether the Mayor ever signed this ordinance or not. That is as far as you know? A Well, I would say that I haven't the positive knowledge that he did other than the meeting of the Council passed the ordinance. The Mayor filed no veto, it automatically was published and advertised over the signature of the Mayor and became a part of the records.

Q As far as you know the signature attached to this printed copy which you put in the ordinance book—you don't know whether that was the Mayor's signature or not? A *I cannot say as to that.*

Q This ordinance as far as you were concerned you never submitted to the Mayor for his approval. Did the Borough Council submit it to the Mayor for his approval? A *I have no recollection as to that whether it was.*

(S. of C. p. 55):

Q Now these minutes of the meetings of this ordinance—they were made from notes made by you at the meeting the previous night? A They were.

Q Just what happened to those original notes? A They were destroyed. They were never retained.

Q Would you compare the minutes as transcribed in this Borough Ordinance Book with your notes? A Absolutely.

Q Before you destroyed it? A Absolutely.

Q Therefore the contents of these minutes—that is as contained in the present minute book are or do represent what actually took place at the meetings from the notes that you had taken at said meetings? A They do.

At the time said ordinance was before the said council, Section 15 of the Borough Act prescribed the duties of the Borough Clerk and they are set forth as follows in Vol. 1, Compiled Statutes, page 234; N. J. Borough and Township Law, Eckman, 1924, page 18:

“The borough clerk shall attend all meetings of the council, keep a correct record of all their proceedings and perform such other duties as the council may require of him or as may be directed by law; * * *.”

Therefore, the only real evidence that was binding on the Supreme Court as to whether the ordinance in question was ever presented to the Mayor were the minutes of the Borough Council kept by the Clerk. There is no evidence that said minutes do not state exactly what took place at the time in question. This is borne out by the minutes themselves and the testimony of Mr. Van Order.

The respondent has attempted to supply, by parol evidence, facts for the purpose of showing

the jurisdictional requirements in the passage of said ordinance. It attempted this first at the hearing in the police court and secondly by the evidence of the three witnesses, Van Order, Poole and Babcock, whose testimony was taken pursuant to a rule of this court. Prosecutors objected to the offer of the respondent in the court below and they also objected to the offer of said testimony when it was taken pursuant to said rule upon the ground that the minutes of a municipal body cannot be enlarged or omissions supplied by parol where such omissions are of jurisdictional facts. Justice Voorhees sitting as a single justice for this Court, in *Cooke v. Manasquan*, 80 N. J. L., page 206, on page 209 stated the rule as follows:

“The important question, however, in this case relates to the passage of the ordinance. Section 26 of the act provides that ‘all ordinances shall be submitted in writing at a regular meeting of the council and passed at a subsequent regular meeting; provided, however, that no ordinance shall be finally passed * * * except by the vote of the majority of the whole council.’”

“The objection is made that the final passage of this ordinance is not shown by the minutes to have been in accordance with this statute. As there were six councilmen in the borough, four were necessary to have voted for the passage of the ordinance in question. *Hawkins v. Cook*, 33 Vroom 84; *Armstrong v. Whitehead*, 38 *Id.* 405; *Day v. Lyons*, 41 *Id.* 114. The minutes on their face do not disclose that such majority voted affirmatively. They show that ‘following the reading of the ordinance moved that the same be passed on third reading and adopted. The motion was carried on roll-call.’”

“It is argued that in view of the statute requiring ‘a majority vote of the whole coun-

cil,' the same must affirmatively appear on the record.'

In the case at bar this does not affirmatively appear. Therefore, the presumption is that the requisite steps to properly pass an ordinance were never taken by the governing body. In order for the ordinance in question to have any life whatsoever it first should have been submitted to the Mayor and in the absence of any evidence of that fact the presumption is that this never took place in the case at bar. In addition to the minutes of the Borough Council, which lack said evidence, we have also the testimony of Mr. Van Order. Therefore, it has been conclusively shown by prosecutors-appellees that the final steps in order to give said ordinance vitality never took place and until that was done the ordinance in question never had any life. For that reason it never existed and if it did not exist on October 3, 1921, it never existed thereafter including the months of April, May and June, 1933, when appellant attempted to enforce the provisions of said ordinance against prosecutors-appellees.

As stated by the Supreme Court in *Sturr v. Elmer*, 75 N. J. L. 443, where the Court considering the legality of a resolution passed under the same section of the Borough Act as is herein questioned, where the facts were said resolution was neither presented to the Mayor for his approval nor approved by him, Justice Trenchard, speaking for the Supreme Court said:

“Section 27 of the Borough Act of 1897 (Pamph. L., p. 296) provides that every ordinance passed by the council, and every resolution appropriating or in any way tending to pecuniarily obligate the borough shall, within five days after the passage thereof, be presented to the mayor for his approval.

The resolutions in question tended to pecuniarily obligate the borough, and could not be carried into effect without imposing a pecuniary burden. Neither of said resolutions was approved by the Mayor or presented to him for approval. Compliance with this provision of the statute was essential to the validity of the proceedings. *State v. Newark*, 1 Dutcher 399; *Hendrickson v. Point Pleasant*, 36 Vroom 535."

This Court in the case of *Walwick Coal and Lumber Company v. Mayor and Council of the Borough of Walwick* set aside an ordinance of said Township for the reason that the same was not presented to the Mayor for his approval. This is a late case decided May 15, 1928, and is reported in 6 N. J. Misc. 501 same case 141 Atl. 789. The reasons for the Court setting aside said ordinance are stated as follows:

"(1) Although the ordinance appears to have been adopted on April 7, 1927, it does not appear that it was ever presented to the mayor thereafter for approval. The record does disclose, however, that the ordinance in question was approved by the mayor on March 24, 1927.

"We think, therefore, we have before us for review an ordinance which was finally passed after it was approved by the mayor, and an ordinance which the record shows was not presented to the mayor for his approval after the final passage thereof.

"Such an ordinance cannot stand, because not in conformity with section 27 of the Borough Act, P. L. 1897, p. 296 (1 Comp. St. 1910 p. 238, section 27), which provides:

"That every ordinance passed by the council * * * shall, within five days after the passage thereof (Sundays excepted), be presented to the mayor and the report of the clerk shall be conclusive evidence that such ordinance * * * has been so presented: if he approves it he

shall, within five days (Sundays excepted) after its receipt by him, sign and file it with the borough clerk,' etc.

“(2) There is another difficulty with this ordinance as we read the record, and that is that it does not appear that the notice of intention to pass the ordinance was ever published, as required by law.

“The ordinance will be set aside.”

Other cases to the same effect are as follows:

City of Burlington v. Dennison, 42 N. J. L. 165 on 167, Court of Errors and Appeals;

Booth v. Bayonne, 56 N. J. L. 268 on 270, Supreme Court;

Pierson v. Dover, 61 N. J. L. 404, Supreme Court;

Hendrickson v. Point Pleasant, 65 N. J. L. 535 on 536, Supreme Court;

Padavano v. Fagan, 66 N. J. L. 767, Supreme Court;

Sturr v. Elmer, 75 N. J. L. 443, on 444, Supreme Court.

This Court in *State v. Newark*, 25 N. J. L., page 399, on 406, Justice Ryerson stated the rule as follows:

“By the 22nd section of a supplement to the Charter, approved March 13, 1851 it is enacted, ‘that every resolution of the Common council shall be presented to the mayor, or, in case of the death, absence, or disability of the mayor, to the person on whom the duties of mayor shall for the time being devolve, by the clerk of the common council on the day next succeeding that of the meeting of the common council at which the same was passed; and if he approve of it, the same shall be signed by him, and if not, he shall return the same, with his objections, to be filed by the clerk, within five days thereafter; and the said common council may, at its next meeting, proceed to reconsider the

resolution so returned, and if a majority of all the members of the board shall then agree to pass the same, it shall take effect; but in every such case the votes shall be taken by ayes and noes, and entered in the journal; and if such resolution shall not be returned within five days as aforesaid it shall take effect in like manner as if he had signed it.'

"The objection arising under this section is not technical, but substantial and fundamental. For wise purposes, the legislature confided to the mayor this qualified negative, and occasions may often arise when the public interests will require him to exercise the power. A compliance with this provision of the charter is as essential to the validity of a resolution as its passage by the common council.

"It does not appear by the return to these *certioraris*, that any of these resolutions was ever approved by the mayor, or ever presented to him for approval; all that appears, is that they were passed by the common council; what became of them after their passage, does not in any manner appear by the return. The writs commanded the defendants to certify and send up 'all and singular the resolutions, record, and proceedings' touching and concerning the sewers; the presentation to the mayor and his approval, or a second passage, notwithstanding his objections or his failure to return them within five days after presentation, were an essential part of the proceedings, as necessary to the validity of the resolutions as the passage of them by the common council. When such was the command of the writs, and such the returns, it might well be doubted whether, in the absence of any other evidence on the subject, the court could treat the resolutions as binding, the presumption being that the defendants made full return, as commanded. Such certainly would be the presumption as against them. In the case of *Durand v.*

Jersey City, before cited, the Mayor's approval of the ordinance appeared on the record.

"In this case there is other evidence by the clerk of the common council, and if it be admitted that the legality of the proceedings, if not apparent on their face, may be shown in some other way, this evidence does not relieve the difficulty. It appears, by his testimony, that in the book of minutes containing a record of the proceedings of the common council there is written, at the end of the proceedings of the meeting of June 14th, 1853, at which was passed the resolution of that date, above referred to as authorizing an alteration of the south sewer, the following approval, signed by the mayor:

'I approve the resolutions of council passed as above at the last foregoing meeting—Newark, June 15, 1853.

James M. Quimby, Mayor.'

"It also appears that the resolution of June 2, 1854, authorizing the construction of a portion of the south sewer, was approved in the same manner, but that there was no written approval by the mayor of any of the other resolutions or proceedings. The witness says that there is no record or other evidence in his office of the approval of the mayor in writing other than what is contained in the minutes or proceedings of the council, and they show an approval only in the two instances stated.

"In answer to the objection of non-approval, it was insisted that these resolutions were regularly presented to the mayor for approval, and that in such case his approval was perfectly immaterial, unless within five days after presentation he returned them with his objections, which was never done.

"Was there then any such presentation as the charter required? The only evidence is that of the city clerk; and, in addition to

what has already been stated, I will state the substance of all that bears upon this point. He says, on his principal examination by the plaintiffs, 'the practice of the mayor was to attend the meetings of council, to examine the original resolutions in those cases where he doubted about approving them and if he vetoed them to leave a veto message with the clerk; and, where he was not conversant with the proceedings of the council, to examine the records in the office of the city clerk.' To the question, 'Have you been in the habit of presenting the resolutions passed by the common council to the mayor, otherwise than by his calling at your office to look over the minutes,' he answered, 'only in such cases as he desired to see the original resolutions in the meeting of the common council when he was present.'

"On his cross examination, he said, 'that the mayor habitually attended the meetings of common council, and was in the habit of calling in his (the clerk's) office the day after the meetings of the council, where the minutes were open for his inspection'; 'that his habit was to come to the clerk's desk, and examine the original resolutions and get such an understanding of them as he needed,' by which I understand coming to the desk during the deliberations of the council.

"Being re-examined for plaintiffs, he said, 'the mayor attended the meetings to witness the proceedings, had a chair appropriated to him, but took no part in the proceedings, and invariably called the next day at the clerk's office, but never looked over the minutes, except for some matter that passed after he had left the council chamber.'

"This evidence makes out no such presentation as the charter requires, neither in letter nor in spirit, and it is quite surprising that that such a practice has grown up. It seems to have been considered that if the

mayor was present during the deliberations of the council and thereby acquired a knowledge of the proceedings, this was such a presentation as the charter required.

“Suppose a similar question to arise about the presentation of an act of the legislature to the governor, who would seriously argue that proof of his habit of being present in each house during its deliberations, and thus ascertaining what they did, would be sufficient evidence of presentation? The bare statement of the case is sufficient; it furnishes its own answer. Unless present, how could he, in case of disapproval, return it with his objections?

“The difficulty is not in the least obviated by his habit of calling the next day at the office, as testified to by the clerk. There is no certain evidence that he ever saw any of the original resolutions, nor the record in the minutes of any but two. As to the record of the others, the presumption from his not affixing his signature in the blank spaces left for that purpose, would be, that he never saw them, or, if he did, was unwilling to sign them. Whether his signature to the copies recorded in the minutes is sufficient evidence of the presentation of the originals, and a sufficient approval of them, it is not necessary now to decide.

“If the clerk followed the directions of the charter in presenting the resolutions, and the presentation had appeared by his official report, filed and recorded in the minutes. then the facts of presentation could always be shown by certain evidence; if approved, the approval would appear on the resolution itself, as is the case with the acts of our legislature, if not returned within five days with objections, thus taking effect the same as if signed, that fact would appear by written and certain evidence. These facts could all be readily certified in making return to a *certiorari*, or readily proved whenever it might become necessary for any pur-

pose to offer a resolution in evidence. My conclusion is, that in the case of the north sewer, there is no sufficient evidence that any of the resolutions were ever presented to the mayor for approval, or approved by him, in the manner required by the charter, and that therefore the assessments are not binding upon the prosecutors.”

Also see remarks of Justice Vredenbergh on pages 415 to 425, inclusive, of 25 N. J. L.

The facts in the cases at bar, as shown by the returns are similar to the ones involved in the above case in that the respondent attempted to supply by oral proof what the record failed to show and upon reading of the testimony of Mr. Van Order, Mr. Babcock and Mr. Poole the same situation is disclosed as in *State v. Newark*.

The respondent-appellant having failed to comply with one of the fundamental requirements in the passage and adoption of said ordinance in order to give the same vitality in that it did not present it to the Mayor within five days after the passage thereof as required by Sections 27 of the Borough Act, therefore the Mayor could not approve, sign and file it with the Borough Clerk within said time and the council could not pass it over his veto.

It is contended on behalf of prosecutors-appellees that this is sufficient to affirm the judgments of the Supreme Court and it is not necessary to argue the other reasons in detail for the invalidity of said ordinance and for the purpose of this argument they were satisfied to rely solely upon the reasons for its invalidity as stated in the State of Case. Therefore, the Supreme Court properly held that the ordinance in question never had any life and set it aside for that reason, and the prosecutors-appellees are not

estopped at this time to attack its validity upon the ground of laches as argued by respondent-appellant in the Supreme Court and in this Court.

Respectfully submitted,

THOMAS BRUNETTO,
Attorney of Prosecutors-Appellees.

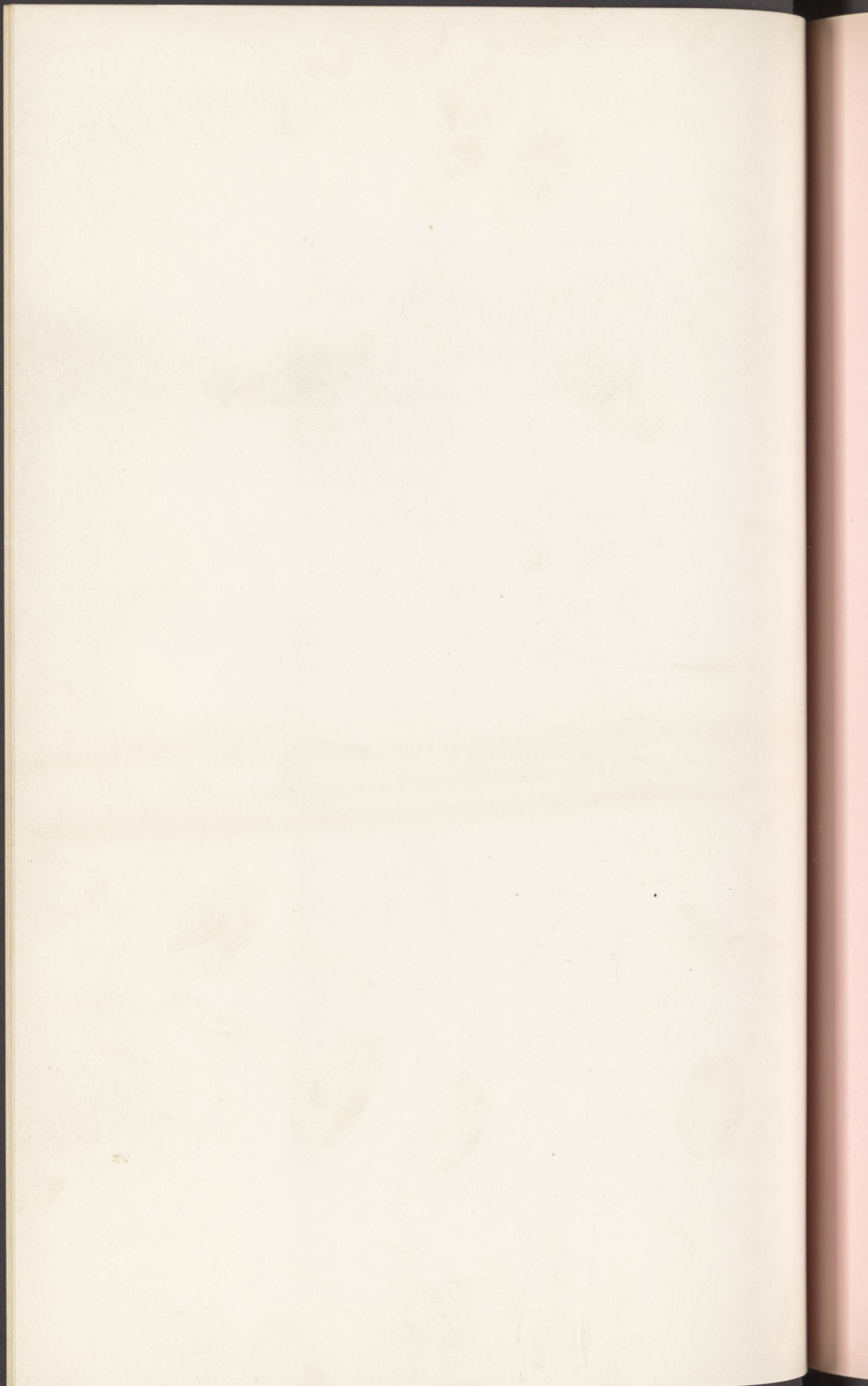
of the time taken in the trial, upon
the part of the jury, and in this
case, in the State of Ohio, and in this

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