

# INDEX

|  | PAGE |
|--|------|
| Notice and Affidavits .....  | 1    |
| Affidavit of David Steinberg .....   | 2    |
| Affidavit of M. Arthur Wolf .....  | 14   |
| Writ of Certiorari .....   | 18   |
| Return to Writ .....   | 20   |
| <br><i>Testimony before Board of Adjustment.</i>                           |      |
| M. Arthur Wolf,  |      |
| direct examination.....  | 22   |
| cross           “ .....  | 25   |
| Isadore H. Colton,   |      |
| direct examination.....  | 26   |
| H. Inman Furlong,  |      |
| direct examination.....  | 27   |
| cross           “ .....  | 31   |
| re-direct       “ .....  | 32   |
| Minutes of Meeting of Board of Adjust-<br>ment held February 23, 1927..... | 32   |
| Report of Town Engineer .....  | 34   |
| Decision of Board of Adjustment.....                                       | 35   |
| Stipulation on Additional Facts .....                                      | 38   |
| Prosecutor's Reasons for Reversal .....                                    | 40   |
| Opinion of Supreme Court .....   | 45   |
| Rule for Judgment .....  | 48   |
| Notice and Grounds of Appeal .....   | 49   |

INDEX

..... 181

..... 182

..... 183

..... 184

..... 185

..... 186

..... 187

..... 188

..... 189

..... 190

..... 191

..... 192

..... 193

..... 194

..... 195

..... 196

..... 197

..... 198

..... 199

..... 200

June 18, 1895

*Notice.*

**NOTICE AND AFFIDAVITS.**

**New Jersey Supreme Court**

In the matter of the application  
of David Steinberg for a  
writ of certiorari to review  
the decision of the Board of  
Adjustment of the Town of  
Nutley.

*Notice.*

10

To J. Harry Hull, attorney for the Board of  
Adjustment of the Town of Nutley.

SIR:

PLEASE TAKE NOTICE that on Saturday, March  
26, 1927, at 10 o'clock in the forenoon, or as  
soon thereafter as counsel may be heard, I shall  
apply to the Honorable William S. Gummere,  
Chief Justice of the New Jersey Supreme Court  
at the Court House in Newark, New Jersey, for  
a writ of certiorari to review the decision of the  
Board of Adjustment of the Town of Nutley in  
affirming the decision of its Superintendent  
of Buildings in refusing to issue a permit to  
David Steinberg for the erection of an apartment  
house containing stores on his lands at the south-  
east corner of Prospect street and Vreeland  
avenue, Nutley, New Jersey.

20

30

40

*Affidavit of David Steinberg.*

PLEASE TAKE FURTHER NOTICE that on such application, affidavits, copies of which are herewith served upon you, will be used on the argument.

10

Respectfully,  
ISADORE H. COLTON,  
Attorney for Applicant.

Newark, N. J., March 21, 1927.

## NEW JERSEY SUPREME COURT.

20 In the matter of the application  
of David Steinberg for a writ  
of certiorari directed to the  
Board of Adjustment of the  
Town of Nutley, in the County  
of Essex, New Jersey. } *Affidavit.*

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

30 DAVID STEINBERG, being duly sworn according to law, upon his oath deposes and says:

1. He is, and at the times hereinafter mentioned, was the absolute owner in fee of the property on the southeast corner of Vreeland avenue and Prospect street, in the Town of Nutley, County of Essex and State of New Jersey, more particularly described as follows:

40 ALL that certain tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the Town of Nutley, in the County of Essex and State of New Jersey:

*Affidavit of David Steinberg.*

BEGINNING at the corner formed by the intersection of the easterly line of Prospect street with the southerly line of Vreeland avenue; thence running along the line of Prospect street south 42 degrees 12 minutes west 100 feet; thence south 34 degrees 49 minutes east 144.69 feet; thence north 46 degrees 5 minutes east 100 feet to the southerly line of Vreeland avenue; thence along the said southerly line of Vreeland avenue north 35 degrees 20 minutes west 151.36 feet to the place of BEGINNING.

10

2. On or about the 17th day of January, 1927, M. Arthur Wolf, a licensed and practicing architect and engineer, and the duly authorized agent of David Steinberg, made application to H. Inman Furlong, Superintendent of Buildings of the Town of Nutley, for a permit to erect a three-story brick apartment house containing three stores on the Prospect street side, on the lands of the deponent.

20

3. The said M. Arthur Wolf, agent of this deponent, did submit the necessary applications, specifications and plans for said building.

4. The plans submitted to the Superintendent of Buildings of the Town of Nutley had been previously approved by the New Jersey Board of Tenement House Supervision, a State body having jurisdiction of tenement houses.

30

5. At the time of the making of the application by Mr. Wolf, he offered to pay the fees for the permit.

6. H. Inman Furlong, the Superintendent of Buildings of the Town of Nutley, refused to grant the permit to this deponent on the sole and only ground that the land owned by the deponent and on which he intended to erect this apartment

40

*Affidavit of David Steinberg.*

house building, was, by the Zoning Ordinance of the Town of Nutley, placed in the Residence A District, which Ordinance limited the lands of the deponent to the erection of only a one-family house.

10 7. The Zoning Ordinance hereinbefore referred to is known as the Building Zone Ordinance of the Town of Nutley, adopted May 16, 1922, with amendments and supplements thereto adopted since.

8. The pertinent section of said Ordinance relating to Residence A District is as follows:

“Sec. 12. RESIDENCE ‘A’ DISTRICT USE

## PROVISIONS.

20 (a) Within any Residence ‘A’ district as indicated on the Building Zone map, no building or premises shall be used for other than one or more of the following ten specified purposes:

(1) One dwelling for one family or one housekeeping unit only. Nothing in this section shall prevent the keeping of boarders or lodgers provided there is no advertising.

(2) The office or studio of a professional person residing on the premises, provided there is no display of advertising.

30 (3) Customary home occupations, such as millinery, dressmaking or hairdressing; provided there is no display of goods visible from the street and no advertising, provided that the maximum number of persons engaged does not exceed three, and provided that not more than one-third the floor area of one story is devoted to such use, and provided that such occupation shall not be carried on in an accessory building.

40 (4) Clubs, lodge rooms, social and community center buildings, except those a chief activity of which is a commercial activity usually conducted for gain; and steam railway passenger stations.

*Affidavit of David Steinberg.*

(5) Municipal recreation buildings, playgrounds and parks; private or private club boat houses; ornamental, cement or masonry arches, gateways, pillars or walls.

(6) Schools, public buildings, not correctional or eleemosynary nature, memorial buildings, public libraries, public museums, artists' studios, art galleries for exhibition only, and general hospitals for non-contagious diseases, excepting those especially for mental and nervous diseases. 10

(7) Churches and other places of worship, parish houses, Sunday School buildings.

(8) Real estate signs advertising the sale, rental or lease of the premises or tract on which they are located; provided that any such sign which is within 100 feet of a residence, but not on the same parcel therewith, shall set back at least 30 feet from the street line. 20

(9) Farms, truck gardens, nurseries or greenhouses, provided that there is no display of products other than in growth, visible from any street, and no advertising, and that any greenhouse heating plant is distant at least ten feet from any parcel line.

(10) Accessory uses, customary with or incident to any permitted use, and located on the same parcel therewith. Except as otherwise provided in this ordinance, the term 'accessory uses' shall not in a Residence district include any activity commonly conducted for gain or any driveway or walk giving access thereto, or any billboard, advertising sign or poster. Garages or stables, as hereinafter specified, are classified as permitted accessories, but a garage or stable in a Residence district must be on the same parcel with a residence. Any accessory building shall be limited to one and one-half stories or 18 feet in height and shall be distant at least ten feet from any parcel line. boundary line." 30 40

*Affidavit of David Steinberg.*

9. In refusing to issue the permit to deponent, the said H. Inman Furlong, Superintendent of Buildings of the Town of Nutley, wrote to this deponent a letter, a true copy of which is as follows:

10 (Letter of Town of Nutley, New Jersey  
Office of Superintendent of Buildings.)

“January 18, 1927.

Mr. David Steinberg,  
840 South 11th St.,  
Newark, N. J.  
Dear Sir:

20 As the plans submitted by you for store  
and apartments at the southeast corner of  
Prospect St. and Vreeland Ave., Nutley,  
N. J., do not comply with the Town Zoning  
Ordinance restrictions for that locality I  
cannot issue a permit for this building.

Yours truly,

(Signed) H. Inman Furlong,  
Superintendent of Buildings.”

30 10. The Town of Nutley, by an amendment  
to the aforesaid Zoning Ordinance, adopted De-  
cember 9, 1924, created a Board of Adjustment,  
as authorized by Chapter 146 of the Laws of  
1924, and as a result thereof it became necessary  
for deponent to appeal to said Board of Adjust-  
ment from the Superintendent of Buildings of  
the Town of Nutley.

11. Deponent did appeal and said appeal was  
heard by the Board of Adjustment of the Town  
of Nutley on Wednesday, February 16, 1927.

40

*Affidavit of David Steinberg.*

12. At the hearing of the appeal before the Board of Adjustment, deponent's counsel introduced evidence concerning the erection of the proposed building, and proving by witnesses under oath, most of the facts hereinbefore set forth, and in addition thereto, proving that the building contemplated by the deponent would be of the usual fireproof type. At said hearing, the Town of Nutley did not present any testimony whatsoever, nor did it have any witnesses to testify to any facts, but said Town of Nutley, represented by its attorney, cross examined the deponent's witnesses. 10

13. On February 24, 1927, the Board of Adjustment upheld the decision of H. Inman Furlong, Superintendent of Buildings of the Town of Nutley, in refusing to issue the permit to the deponent on the following grounds: 20

a. Violation of Zone Ordinance.

1. Plans show no set-back, which should be 25 feet on one street and not less than 15 feet on the other (Sec. 6).

2. Proposed building is an apartment house, which is not permitted in that location (Sec. 12).

3. Plans for building shows three stores, which also are prohibited in Residence A districts (Sec. 12). 30

4. Court width as shown on plan is insufficient for its length. It should be about 26 feet 6 inches (Sec. 2j and Sec. 10a).

b. The Building Code is violated by the following omissions in the application for a permit:

1. Lally columns not mentioned.

2. Plates not mentioned.

3. Rafters not mentioned.

4. Longest span of beams given as 16 feet, should be about 18 feet. 40

*Affidavit of David Steinberg.*

5. This span calls for 2 inch x 12 inch beams instead of 2 inch x 10 inch as shown on application.

6. Girders not mentioned.

7. Frame bearing partitions not mentioned.

10 8. Spacing of frame bearing and masonry partitions omitted.

9. Height of walls omitted.

c. The Building Code is violated by the omissions of the following on the plan submitted:

1. Dimensions of steel girders and columns not given.

2. Girders omitted.

3. Steel lintels over windows omitted.

4. Steel over store windows omitted.

5. Wall thickness not shown on plans.

20 6. Roof construction details not shown.

Further no specifications were filed with this Board.

14. Upon receipt of this notice from the Board of Adjustment, the deponent's architect, M. Arthur Wolf, corrected all the omissions in the plans and specifications with consent of the Superintendent of Buildings and cured all the alleged defects, so that the only questions now  
30 involved in the proceedings are the alleged violations of the Zoning Ordinance, namely:

a. Violation of Zone Ordinance.

1. Plans show no set-back, which should be 25 feet on one street and not less than 15 feet on the other (Sec. 6).

2. Proposed building is an apartment house, which is not permitted in that districts (Sec. 12).

3. Plans for building shows three stores, which also are prohibited in Residence A districts (Sec. 12).  
40

*Affidavit of David Steinberg.*

4. Court width as shown on plan is insufficient for its length. It should be about 26 feet 6 inches (Sec. 2j and Sec. 10a).

15. Ground a—4, dealing with the width of the court was never considered by the Superintendent of Buildings when examining the plans originally, as is borne out by the letter sent by him to the deponent, wherein he stated his refusal to give the permit, on the sole ground of the violation of the Zoning Ordinance, insofar as deponent was endeavoring to erect a building other than a one-family house in a Residence A District. 10

16. The requirements of the Zoning Ordinance is an unreasonable one, and is clearly arbitrary in its application, and is tantamount to the prohibition of apartment houses in the municipality. 20

17. At the hearing before the Board of Adjustment, there was no evidence adduced about the size of courts or the reasonableness or requirements of the Zoning Ordinance in relation thereto, and the finding of the Board of Adjustment is without the support of any evidence.

18. The plot of land owned by the deponent is 100 feet in width on Prospect street with a depth of 150 feet on Vreeland avenue. 30

Prospect street is an unusually wide street. The building contemplated by the plans and specifications would be a modern, fireproof structure, complying with all the requirements of the Building Code of the Town of Nutley and of the building requirements of the Board of Tenement House Supervision.

19. Attached to the Zoning Ordinance of the Town of Nutley is a building zone map, setting 40

*Affidavit of David Steinberg.*

forth the different districts. Apartment houses are permitted in Residence "C" Districts.

An examination of the building zone map of the Town of Nutley disclosed that in the entire Town of Nutley there are only four very small sections where apartment houses are permitted.

10

This fact was brought out in the testimony given at the hearing before the Board of Adjustment.

The total street frontage in the entire Town of Nutley on which apartment houses are permitted to be erected by the Zoning Ordinance of the Town of Nutley does not exceed 1,500 feet. In other words, the Zoning Ordinance and building map in connection therewith, covering the entire Town of Nutley, only allows the erection of apartment houses in four sections of the Town of Nutley and the total frontage on which apartment houses may be erected does not exceed 1,500 feet.

20

20. The Zoning Ordinance of the Town of Nutley was supposedly passed solely and primarily for the purpose of promoting the health, safety and public welfare of the people, which statement is expressed in the title of the Ordinance, a copy of which is as follows:

30

## "ORDINANCE.

An ordinance to regulate and restrict the location of trades and industries and the location of buildings designed for specified uses in designated areas, to regulate and limit the height and bulk of buildings hereafter erected, and to regulate and determine the areas of yards, courts and other open spaces, so as to promote the public health,

40

*Affidavit of David Steinberg.*

safety and welfare, including provision for adequate light, air and convenience of access, to the end that such regulations may promote the most desirable use of land and may tend to conserve the value of buildings and enhance the value of land throughout the municipality and for these purposes to divide the municipality into districts, and to establish penalties for the violation of these regulations, restrictions, determinations and limitations.”

10

21. It is common knowledge and an accepted fact that the erection of an apartment house does not in any way injure the health, safety or public welfare, and the inhabitants of the community in which it is sought to be erected. That such buildings are recognized as a proper form of residence in these modern times.

22. The Building Zone Ordinance of the Town of Nutley, insofar as it tends to prevent the erection of an apartment house containing stores by the deponent on his lands hereinabove described, is an unreasonable regulation and said Ordinance, to that extent, is void and unconstitutional.

20

23. It deprives the deponent from the use of his property without compensation and is an infringement of deponent's right of private property, as guaranteed to him by the Constitutions of the State of New Jersey and of the United States of America.

30

24. The erection of an apartment house building containing stores therein, on lands owned by the deponent, will not endanger the public health, safety and welfare of the general public, and is a reasonable use of deponent's land and when erected will be no invasion of any of the rights of the people of the Town of Nutley, nor will

40

*Affidavit of David Steinberg.*

it in any way be injurious to the health, safety and general welfare of the inhabitants of said town.

10 25. The decision of the Superintendent of Buildings of the Town of Nutley, in refusing to issue a permit to deponent, is arbitrary, unrea-  
sonable and unlawful. The decision of the Board  
of Adjustment of the Town of Nutley in affirm-  
ing the decision of the Superintendent of Build-  
ings, is void and illegal, for the reason that said  
Board could only approve of the Superintend-  
ent's decision if there were legal evidence before  
it from which said Board could determine that  
the building contemplated to be erected by de-  
ponent would endanger the public health, safety  
and general welfare. No such evidence was pro-  
duced by the Town of Nutley or any of its  
20 agents, the Board of Adjustment merely endeavor-  
ing to prevent the erection of this building,  
affirmed the decision of the Superintendent of  
Buildings by upholding its own Zoning Ordi-  
nance, without going into the question of the  
reasonableness or unreasonableness of the Zon-  
ing Ordinance, insofar as it applies to the lands  
of this deponent.

30 26. The decision of the Board of Adjustment  
is illegal and unlawful, in that it is not based on  
any legal evidence warranting its findings.

40 27. That the Zoning Ordinance of the Town  
of Nutley in permitting apartment houses in  
only four sections having a total frontage of  
not more than 1,500 feet, is not a regulation  
of apartment houses in said town, but is, in fact  
and for all practical purposes, an exclusion and  
prohibition of apartment houses, and, therefore,  
unreasonable generally insofar as apartment

*Affidavit of David Steinberg.*

houses are concerned, and clearly unreasonable expressly insofar as deponent's lands are concerned.

28. The Board of Adjustment refused to issue the permit to this deponent merely because of its desire to maintain this neighborhood as a one-family house district and not because the erection of the building contemplated by the deponent would in anywise affect the health, safety and general welfare of the public, and its decision in affirming the decision of the Superintendent of Buildings of the Town of Nutley should be set aside.

10

DAVID STEINBERG.

Sworn to and subscribed before me  
this 11th day of March, 1927.

20

ISADORE H. COLTON,  
M. C. C. of N. J.

30

40

*Affidavit of M. Arthur Wolf.*

NEW JERSEY SUPREME COURT.

10 In the matter of the application  
of David Steinberg for a writ  
of certiorari directed to the  
Board of Adjustment of the  
Town of Nutley, in the County  
of Essex, New Jersey. } *Affidavit.*

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

20 M. ARTHUR WOLF, of full age, being duly sworn  
according to law, upon his oath deposes and  
says:

30 1. That I am a licensed and practicing archi-  
tect and engineer of the City of Newark, County  
of Essex and State of New Jersey, and was the  
architect employed by Mr. David Steinberg to  
make the plans and specifications for his building  
on the southeast corner of Vreeland avenue and  
Prospect street, in the Town of Nutley, County  
of Essex and State of New Jersey.

2. I did prepare plans and specifications for  
a three-story brick apartment house of the latest  
fireproof construction, and did make an applica-  
tion with H. Inman Furlong, Superintendent of  
Buildings of the Town of Nutley, for a permit  
for said apartment house, giving him two copies  
of the plans and specifications and tendering  
him the legal fee. This application was made  
by me around January 16, 1927.

40

*Affidavit of M. Arthur Wolf.*

3. H. Inman Furlong, Superintendent of Buildings of the Town of Nutley, refused the application on the sole and only ground that the building contemplated to be erected by David Steinberg would violate the Zoning Ordinance of the Town of Nutley, because Mr. Steinberg's lands were located in the Residence A District, in which only one-family houses can be erected. 10

4. On Wednesday, February 16, 1927, I appeared as a witness for Mr. David Steinberg, before the Board of Adjustment of the Town of Nutley, and gave testimony as to the nature of the building.

5. At no time did the Superintendent of Buildings of the Town of Nutley, nor did said Board of Adjustment of the Town of Nutley question my plans and specifications. A short time thereafter I was informed by Mr. Colton, attorney for Mr. Steinberg, that the Board of Adjustment raised certain questions as to alleged defects in the application for the permit and in the plans. 20

With permission of the Superintendent of Buildings, the alleged defects in the application and in the plans were corrected by me, and I have been informed that they are now acceptable to the officials of the Town of Nutley. 30

6. The only question now raised as to the plans and specifications filed by me is the width of the court, as shown on the plans.

7. When the plans were examined by the Superintendent of Buildings, he having had them in his possession for about two days, and when the permit was refused by him, he never raised the objection about the width of the court, and 40

*Affidavit of M. Arthur Wolf.*

at the time of the hearing before the Board of Adjustment of the Town of Nutley, that question was never raised, nor was testimony taken in reference thereto, nor was my attention called thereto.

10 8. The plans submitted by me were first given to the New Jersey State Board of Tenement House Supervision, which is an agency created by statute, having full and complete charge of the construction and maintenance of tenement houses throughout the State of New Jersey, whose duty it is to approve of plans before they are presented to municipalities for its approval.

20 9. The said State Board of Tenement House Supervision would not have approved of the plans if there were any question of insufficient light and air going into the apartments shown on the plans. These plans were approved by the State Board of Tenement House Supervision.

30 10. Section 10 of the Zoning Ordinance of the Town of Nutley, hereinbefore referred to, deals with the question of the width of the courts. The requirements of section 10 are unreasonable, in that it differentiates between widths of courts between residential and business districts.

That the requirements of section 10 of the Zoning Ordinance of the Town of Nutley were not intended for the public safety, health and welfare of the Town of Nutley, but that said section was merely passed to prohibit the erection of apartment houses in Residence A Districts.

40 11. That the dimensions required in said ordinance are unreasonable and excessive, the result of which being the deprivation of the use of a

*Affidavit of M. Arthur Wolf.*

lot of land by the property owner, without any real benefit to the tenants of the building.

12. The following is a true copy of section 10 of the Zoning Ordinance of the Town of Nutley:

“SEC. 10. COURTS.

(a) In any district, except as hereinafter specified, the minimum width of an outer court shall be four, six, eight and ten feet at the first, second, third and fourth stories respectively. The minimum corresponding widths of the inner courts shall be six, nine, twelve and fourteen feet respectively. If the length of any court at any level exceeds twice the required width, the width shall be increased 3 inches for each of such excess length, if in a Residence district and 1½ inches if in a Business district. 10

(b) In any Business district, where any part of a building is used for offices, studios, residence or workshops, which are not adequately lighted and ventilated by windows or other openings giving directly on a street or on a required rear yard, an outer court is required along one side line. Such court shall extend backward to the rear yard or rear line from a point not over 45 feet or two rooms in depth back from the street line and upward from the reference level defined in Sec. 8 (c), and shall conform to the provisions of Sec. 10 (a) above. 20 30

13. I further state that the courtyard, as shown on the plans and specifications filed by me in this matter, is amply sufficient for the light and air of the tenants to be benefited thereby and is in accordance with regulated standards of architecture.

M. ARTHUR WOLF.

Sworn to and subscribed before me  
this 21st day of March, 1927.

ISADORE H. COLTON,  
M. C. C. of N. J.

*Writ of Certiorari.*

**WRIT OF CERTIORARI.**

NEW JERSEY SUPREME COURT.

|    |  |   |                                |
|----|--|---|--------------------------------|
| 10 | DAVID STEINBERG,<br><i>Prosecutor,</i>   | } | <i>Writ of<br/>Certiorari.</i> |
|    | <i>vs.</i>   |   |                                |
|    | BOARD OF ADJUSTMENT OF THE<br>TOWN OF NUTLEY, County of<br>Essex and State of New Jer-<br>sey,<br><i>Respondent.</i> |   |                                |

20           The State of New Jersey to the  
               Board of Adjustment of the Town of  
 (L. S.) Nutley, Essex County, New Jersey,  
 GREETING:

30           We being willing for certain rea-  
               sons to be certified of a certain decision of the  
               Board of Adjustment of the Town of Nutley,  
               rendered by it on or about the 24th day of Feb-  
               ruary, 1927, whereby it refused to issue a permit  
               to the prosecutor, David Steinberg, for the erec-  
               toin of an apartment house containing stores  
               on premises owned by the prosecutor at the  
               southeast corner of Vreeland avenue and Pros-  
               pect street, in the Town of Nutley, Essex County,  
               in accordance with certain plans and specifica-  
               tions filed with said application,

40           WE COMMAND YOU, the Board of Adjustment  
               of the Town of Nutley, that you do send the  
               records of the application for a permit made  
               by David Steinberg for the erection of an apart-

*Writ of Certiorari.*

ment house containing stores at the southeast corner of Vreeland avenue and Prospect street, in the Town of Nutley, New Jersey, and the decision rendered by you, the Board of Adjustment, together with all the evidence and records and all things touching and concerning the same, as fully and entirely before you that remain, to our Justices of our Supreme Court of Judicature at Trenton, on the first Tuesday of May, 1927, you certify and send, together with this writ, that therein may be done what of right and according to the laws of this State should be done. 10

WITNESS, WILLIAM S. GUMMERE, Esquire, Chief Justice of our Supreme Court at Trenton, this 30th day of March, in the year of our Lord 1927.

EDWARD J. KELLEHER,  
Clerk. 20

ISADORE H. COLTON,  
Attorney for Prosecutor.

A true copy of original.

EDWARD J. KELLEHER,  
Clerk.

This writ is allowed. Let it be sealed.  
WM. S. GUMMERE, 30  
C. J.

March 26, 1927.

Service of the original writ herein is hereby acknowledged this 1st day of April, 1927.

J. HARRY HULL,  
Attorney for Respondent.

*Return to Writ.*

**RETURN TO WRIT.**

Filed April 13, 1927.

To the Justices of the Supreme Court of the  
State of New Jersey:

10 In obedience to the command of this writ, the  
Board of Adjustment of the Town of Nutley, in  
the County of Essex, therein named, do hereby  
certify and send to you, the Honorable Justices  
of the Supreme Court, the records of the appli-  
cation for the permit made by David Steinberg  
for the erection of an apartment house contain-  
ing stores at the southeast corner of Vreeland  
avenue and Prospect street, in the Town of  
Nutley, together with the minutes taken at the  
20 hearing by said Board on the 16th day of Feb-  
ruary, 1927, and the minutes of an adjourned  
meeting held on the 23rd day of February, 1927,  
together with the decision rendered by the said  
Board, which decision is dated February 24,  
1927; together with all the matters and things  
touching and concerning the same as fully and  
entirely as they remained in the possession and  
under control of the Board of Adjustment of  
the Town of Nutley, in the County of Essex, as  
30 by the schedule hereto annexed appears.

IN WITNESS WHEREOF, the said Board of Ad-  
justment in the Town of Nutley has caused its  
seal to be hereunto affixed and these presents to  
be signed by its secretary this 11th day of April,  
1927.

(SEAL) THE BOARD OF ADJUSTMENT  
OF THE TOWN OF NUTLEY.

*Testimony.*BOARD OF ADJUSTMENT OF THE TOWN  
OF NUTLEY.

In the matter of the application  
of David Steinberg for a per-  
mit for the erection of an  
apartment house and stores  
at the southeast corner of  
Vreeland avenue and Pros-  
pect street, Nutley, N. J.

10

Testimony taken before Messrs. Nils O. Lind-  
strom, chairman; William J. Housby, David  
Hallidy and William T. L. Armstrong and Henry  
Louden, comprising the Board of Adjustment  
of the Town of Nutley, N. J., at the Town Hall,  
Nutley, N. J., on Wednesday, February 16, 1927,  
at 7:30 o'clock A. M., in the presence of J.  
Harry Hull, town attorney, and Isadore H. Col-  
ton, counsel for the applicant.

20

30

40

*M. Arthur Wolf, direct.*

10 Mr. Hull: I understand that Mr. Colton has an appeal from Mr. Furlong's decision in regard to a permit for the erection of an apartment house at the corner of Vreeland avenue and Prospect street that has been denied by Mr. Furlong and I think he is here to present his appeal.

M. ARTHUR WOLF, sworn in behalf of the applicant.

*Direct examination by Mr. Colton.*

Q What is your business? A Civil engineer and architect.

Q Are you a licensed architect? A Yes, sir; also a licensed engineer.

20 Q And where is your place of business? A 854 Broad street, Newark, New Jersey.

Q Do you represent Mr. Steinberg, the applicant? A I do.

Q And at his request did you prepare a set of plans and specifications for the erection of an apartment house containing stores? A Yes, sir, I did.

30 Q On the property of Prospect street, corner of Vreeland avenue, Nutley, New Jersey? A I did.

Q And is that property located at the southeast corner of those streets? A It is.

Q And after the preparation of the plans and specifications for an apartment house, containing stores therein, did you have them approved by any State department? A I did.

Q What State department? A The Tenement House Commission.

40 Q The plans that you have in your hand now,

*M. Arthur Wolf, direct.*

are they the same as presented to Mr. Furlong?

A They are.

Q They have the approval of the Tenement House Board stamped thereon? A They have.

Q How many families had you prepared the plans for? A Twenty-seven.

Q And how many stores? A Three stores. 10

Q On what street will the stores face? A Prospect street.

Q And what is the nature of the construction of the building, brick or frame? A A three-story brick apartment.

Q What is the size of the building? A 94 by 116, approximately.

Q What action did the Superintendent of Buildings, Mr. H. Inman Furlong, take when these plans and specifications were presented? 20

A Mr. Furlong did not take any direct action himself, but he referred this matter to Commissioner Symonds.

Mr. Hull: Were you there when he did it?

Q When handing him the plans did you also hand him the specifications? A I did.

Q And the application? A Yes, sir. 30

Q Did you get this letter? A I did not get this letter.

Mr. Hull: Do you want us to admit that that letter was sent?

Mr. Colton: Yes, and I offer it in evidence.

(The same is received and marked Exhibit A 1, and reads as follows:)

*M. Arthur Wolf, direct.*

(Letterhead of Town of Nutley, New Jersey, Office of Superintendent of Buildings.)

“January 18, 1927.

10 Mr. David Steinberg,  
840 South 11th St.  
Newark, N. J.

Dear Sir:

As the plans submitted by you for store and apartments at the southeast corner of Prospect St. and Vreeland Ave., Nutley, N. J., do not comply with the Town Zoning Ordinance restrictions for that locality I cannot issue a permit for this building.

Yours truly,

20 (Signed) H. Inman Furlong,  
Superintendent of Buildings.”

Q What was the ground of refusal of the permit in this case?

Mr. Hull: I beg your pardon, but doesn't that state it?

30 Q Is this building fireproof according to the latest standards of fireproofing of apartment houses? A It is.

Mr. Hull: I object to that question. Just ask him if it is fireproof, not whether it is according to the latest standards.

40 Q In your opinion, as an engineer and architect, is this building, as contemplated by the plans, a fireproof one? A It is.

*M. Arthur Wolf, cross.*

Q Look at the plans. How many feet will the building be away from the easterly boundary of the land? A Five and a half feet.

Q Along Vreeland avenue? A Thirty-four feet two inches.

Q In other words, you will have a space of thirty-four feet two inches from the easterly boundary of Mr. Steinberg's land to the easterly boundary or the rear of the property in question? A That's right. 10

Q And the southerly boundary of the lot, from the southerly boundary of the property, is a distance of what? A Five feet six inches.

*Cross examination by Mr. Hull.*

Q What is the distance between the wall and the Vreeland avenue sidewalk, did you say thirty-four and one-half feet; did I understand that correctly? A No, sir; that is the rear line, that is the rear of the property, the yard. 20

Q In other words, the yard is thirty-four and one-half feet? A Thirty-four feet two inches.

Q What is the distance between the set-back line, which the ordinance provides for, and your wall as proposed? A There is no set-back.

Q In other words, you draw it right out to the building line? A Yes, sir. 30

Q And that is the same way on Prospect street? A Yes, sir.

Q And you say this is a fireproof building? A It is as far as the Tenement House Commission is concerned for that type of building.

Q I am not asking you anything about as far as the Tenement House Commission is concerned; is that a fireproof building? A It is a fireproof building; yes, sir. 40

*Isadore H. Colton, direct.*

Q For twenty-seven families? A For twenty-seven families.

Q And three stores? A Three stores.

Q Three stores on Prospect street? A Three stores on Prospect street.

10 Q What are the dimensions of the lot? A 100 by 150.

Q And the building is 94 by 116? A Yes, sir.

---

ISADORE H. COLTON, sworn in behalf of the applicant.

*By Mr. Hull.*

20 Q Does Mr. Steinberg own the property? A Yes, sir.

Q How long has he owned it? A He had it in a corporation name when he originally bought it and that took place on—the title closed to it on the 20th of September, 1926.

Q And he took title to it himself from his corporation when? A A week or so before the plans were filed here.

30 Q And they were filed here on January 17th? A They were filed on that date; he owned it a short time before. I have examined the title to the premises in question and there are no restrictions of record providing against the erection of an apartment house with stores.

*H. Inman Furlong, direct.*

H. INMAN FURLONG, sworn in behalf of the applicant.

*Direct examination by Mr. Colton.*

Q Mr. Furlong, you are the Building Inspector of the Town of Nutley? A No, sir.

10

Q What position do you hold? A Superintendent of Buildings.

Q And as such, the plans and specifications for an apartment containing stores therein were filed with you for the purpose of obtaining a permit? A Well, they were presented, they were not filed.

Q I mean they were handed to you? A Well, they were handed to me and I had to refuse to pass them owing to the zoning law.

20

Q And that refusal was expressed in this letter which is marked Exhibit A. 1, is that right? A That's right.

Q And that is your signature on the letter A. 1? A Yes, sir.

Q Now, are you acquainted with the zoning map of the Town of Nutley? A Yes, sir.

Q Can you tell me, from an examination of it, how many parcels of land in the Township of Nutley, according to this map are there, upon which apartment houses may be erected?

30

Mr. Hull: I object to that as immaterial and irrelevant and it has nothing whatever to do with this present application.

A Well, I would have to count them.

Q Will you please examine the map? A The only ones that are shown on this map are

40

*H. Inman Furlong, direct.*

those that are stippled, the cross hatching through here are all for business or apartment houses.

10 Q Residence C district in accordance with the zoning ordinance of the Town of Nutley, is that a district in which apartment houses are permitted? A Yes, sir.

Q And on the official map, the zoning map of the Town of Nutley, appearing on the reverse side of the zoning ordinance, is a key to symbols? A Yes, sir.

Q And the lateral lines designate residence districts, is that right? A Yes, sir.

Q Therefore, from an examination of this map you could tell us just on what street apartment houses may be erected? A Yes, sir.

20 Q Now, will you kindly examine the map and tell us what section of the Town of Nutley permits the building of apartment houses? A I can answer that in a general way, that these places according to the symbols are the only ones where they are permitted.

Q Won't you glance through the map and tell us which ones they are? A I don't see why I have to do that, when it is all described there.

30 Q Isn't it a fact that there are only four sections in the entire Town of Nutley in which apartment houses may be erected? A Well, the map shows that if it is so.

Q How many apartment houses have you in the Town of Nutley today, Mr. Furlong? A An apartment house means anything that is to be passed by the Tenement House Department?

Q How many apartment houses are more than ten families have you in the Town of Nutley?

40

*H. Inman Furlong, direct.*

Mr. Hull: I object to this whole line of questioning as immaterial and incompetent and as having no bearing whatever on this particular application.

Witness: Oh, I would have to look up the records downstairs. I cannot give an idea how many apartment houses there are that come under the head of apartment houses by having to be passed by the Tenement House Department, but I would have to go downstairs to look up the record and see the plans and count how many families there are, I have no record of them mentally.

10

Q According to this map there is a plot of ground about a hundred feet long on Washington avenue near Italia street which is in the apartment house zone. Is there an apartment house on that land today? A Not to my knowledge.

20

Q There is a stretch of land about 200 feet long on Passaic avenue right near Park avenue wherein there is a provision for an apartment house; is that built upon? A You mean in between Central and Park avenue?

Q It is on Passaic avenue right near Center about a block in from Center, between Center and Park? A No, sir, there is one on the corner of Passaic and Center and there is another one right opposite that on Center.

30

Q And is there an apartment house on Franklin avenue in Nutley? A Oh, yes, plenty of them.

Q Now, isn't it a fact, from the examination of the building zone map, Mr. Furlong, that there are only four small sections in the Town

40

*H. Inman Furlong, direct.*

of Nutley on which an apartment house may be erected in the Town of Nutley? A Well, where would you consider those four sections?

10 Q There is one on Washington avenue near Italia street; the second is on Franklin avenue near St. Paul Place, and the third is on Chestnut street near Passaic avenue, and the fourth is on Passaic avenue near Park avenue. A And here is another one, and there is another one, and there is another one (indicating).

Q I am now referring to the part of the map where these lateral lines appear. A Well, now, here is Franklin avenue.

Q But you say that provides for business? A Well, that means apartment houses, too; you can not stop an apartment house on a business street.

20 Q But as far as strictly apartment house designations, residence C. A Here is Chestnut and Passaic avenue, there are two, and here is another one over here, Kingsland Road and Passaic avenue.

Q You are now showing the business sections under the map. I refer to residence C. districts. How many residence C. districts are there on the zoning map of Nutley? A Well, you are not  
30 going to include the fact that they can build an apartment in a business district?

Q All right, how many residence C. districts appear on the map? A Very few.

Q Only—an actual count shows about four, is that right? A That eliminates about eight of the others.

40 Mr. Colton: I offer the map in evidence, it being the official map for zoning of the Town of Nutley, with circles surrounding the residence C. districts.

*H. Inman Furlong, cross.*

(The same is received and marked Exhibit A. 2.)

*Cross examination by Mr. Hull.*

Q There are apartment houses in the business districts, are there not? A Oh, yes, there are, because naturally they build stores and over them they build apartments. 10

Q Mr. Wolf has stated that these plans show that this apartment house is a fireproof construction. Would you consider that fireproof construction? A Semi-fireproof, I would say.

Q The question is are they of fireproof construction? A No, sir.

Q Have you examined these plans that Mr. Wolf has filed today? A I have in a general way, but I cannot examine them completely because the application are not with them. 20

Q There are no applications with them? A No, sir.

Q You have examined the application which Mr. Colton has just handed you, have you not? A What is that?

Q Mr. Colton handed you an application, has he not? A Yes, sir.

Q And in what respect are the plans and specifications or the application incomplete— 30

Mr. Colton: I object to that on the ground that the permit in this particular case is refused by the Building Superintendent on the ground that the erection of the building would violate the zoning ordinance in the Town of Nutley, and that was the sole ground of objection.

(Question withdrawn).

*Minutes of Meeting of Board of Adjustment.**Re-direct examination by Mr. Colton.*

Q Speaking about fireproof buildings, the type of construction as planned for this building and as specified is the usual type of construction for apartment houses, is it not?

10

Mr. Hull: I object, it is immaterial. The question I asked was whether it was fireproof construction contradicting the previous witness who said it was.

A Yes, sir.

## THE APPELLANT RESTS.

20

Mr. Hull: I am going to ask the Board to take these plans and consider them and give you an answer one week from today.

The Chairman: Are we to consider this as an original application or is it to be submitted to us as a re-application?

Mr. Hull: No, sir, this is an appeal from Mr. Furlong's decision in rejecting the application for an apartment house, in refusing to give the permit. You simply review his decision.

30

MINUTES OF THE ADJOURNED MEETING OF THE BOARD OF ADJUSTMENT HELD AT 92 PROSPECT STREET, NUTLEY, FEBRUARY 23, AT 8 P. M.

Minutes of adjourned meeting of the Board of Adjustment of the Town of Nutley held at the home of the chairman, Mr. Lindstrom, 92 Prospect Street, Nutley, New Jersey, at 8 o'clock P. M., Wednesday, February 23, all the members of the Board being present, Mr. Lindstrom presiding.

40

*Minutes of Meeting of Board of Adjustment.*

Mr. Luck, the Town Engineer, presented a report showing the violations of the zoning ordinance, omissions on the application for a permit required by the building ordinance and omissions on the plans required by this latter ordinance. A discussion followed the presentation of the report of Mr. Luck and upon motion of Mr. Armstrong, seconded by Mr. Housby, it was resolved that upon the testimony taken at the hearing on Wednesday, February 16, and the report submitted by the Town Engineer, the decision of Mr. Inman Furlong in refusing to grant a permit to Mr. Steinberg be up-held. The motion was unanimously adopted. The report of Mr. Luck was directed to be filed with the papers. 10

Upon motion made by Mr. Armstrong and seconded by Mr. Housby, it was resolved that the Secretary of the Board be directed to send a letter to the claimant, Mr. David Steinberg, at his address in Newark, 840 South 11th Street, and a copy of the letter to his attorney, Mr. Isadore H. Colton, informing him of the decision of the Board and giving him the reasons therefor. 20

There being no further business the meeting was adjourned. 30

DAVID HALLIDY,  
Secretary.

*Report of Town Engineer.*

REPORT OF THE TOWN ENGINEER MADE TO THE BOARD OF ADJUSTMENT AT ITS ADJOURNED MEETING HELD FEBRUARY 23, 1927, AND PURSUANT TO THE ACTION OF THE BOARD HELD ON WEDNESDAY, FEBRUARY 16, 1927.

10 I submit herewith the violations on application for building submitted by David Steinberg of 840 South 11th St., Newark, N. J. for apartment house to be erected on the Southeast corner of Prospect St. and Vreeland Ave., which is in the Residence A district and calls for one family houses only.

(a) Violation of Zone Ordinance.

20 (1) Plans show no setback, which should be 25 feet on one street and not less than 15 feet on the other. (Section 6).

(2) Proposed building is an apartment house, which is not permitted in that location. (Section 12).

(3) Plans for building shows three stores, which also are prohibited in Residence A districts. (Section 12).

30 (4) Court width as shown on plan is insufficient for its length. It should be about 26' 6". (Section 2j and Section 10a).

(b) Omissions on application for permit.

(1) Lally columns not mentioned.

(2) Plates not mentioned.

(3) Rafters not mentioned.

(4) Longest span of beams given as 16 feet, should be about 18 feet.

(5) This span calls for 2"x12" beams instead of 2"x10" as shown on application.

(6) Girders not mentioned.

*Decision of Board of Adjustment.*

(7) Frame bearing partitions not mentioned.

(8) Spacing of frame bearing and masonry partitions omitted.

(9) Height of walls omitted.

(c) Omissions on Plans.

(1) Dimensions of steel girders and columns not given. 10

(2) Girders omitted.

(3) Steel lintels over windows omitted.

(4) Steel over store windows omitted.

(5) Wall thickness not shown on plans.

(6) Roof construction details not shown.

The Tenement House Department of New Jersey stamps each set of plans as follows:

“This approval does not supersede any local requirement supplementary to the Tenement House Law. 20

Board of Tenement House Supervision.”

DECISION OF THE BOARD SUSTAINING THE DECISION OF THE SUPERINTENDENT OF BUILDINGS IN REFUSING TO GRANT THE PERMIT REQUESTED BY THE RELATOR.

February 24, 1927. 30

Mr. David Steinberg,  
840 S. 11th. Street,  
Newark, New Jersey.

My Dear Sir:

I am directed by the Board of Adjustment of the Town of Nutley to notify you that the decision of H. Inman Furlong in refusing to grant a permit for the erection of an apartment house on the southeast corner of Prospect 40

*Decision of Board of Adjustment.*

Street and Vreeland Avenue, Nutley, has been sustained. The Board's reason for refusing to reverse Mr. Furlong's decision is based upon the following grounds:

## (a) Violation of Zone Ordinance.

10 (1) Plans show no setback, which should be 25 feet on one street and not less than 15 feet on the other. (Section 6).

(2) Proposed building is an apartment house, which is not permitted in that location. (Section 12).

(3) Plans for building shows three stores, which also are prohibited in Residence A districts. (Section 12).

20 (4) Court width as shown on plan is insufficient for its length. It should be about 26' 6". (Section 2j and Section 10a).

(b) The Building Code is violated by the following omissions in the application for a permit:

(1) Lally columns not mentioned.

(2) Plates not mentioned.

(3) Rafters not mentioned.

30 (4) Longest span of beams given as 16 feet should be about 18 feet.

(5) This span calls for 2"x12" beams instead of 2"x10" as shown on application.

(6) Girders not mentioned.

(7) Frame bearing partitions not mentioned.

(8) Spacing of frame bearing and masonry partitions omitted.

(9) Height of walls omitted.

40

*Decision of Board of Adjustment.*

(c) The Building Code is violated by the omissions of the following on the plans submitted.

(1) Dimensions of steel girders and columns not given.

(2) Girders omitted.

(3) Steel lintels over windows omitted. 10

(4) Steel over store windows omitted.

(5) Wall thickness not shown on plans.

(6) Roof construction details not shown.

Further no specifications were filed with this board.

Very truly yours,

DAVID HALLIDY,

Secretary of the Board of Adjustment of the 20  
Town of Nutley.

30

40

*Stipulation on Additional Facts.*

**STIPULATION ON ADDITIONAL FACTS.**

NEW JERSEY SUPREME COURT.

|     |  |   |  |
|-----|--|---|--|
| 10  | DAVID STEINBERG,<br><div style="text-align: right;"><i>Prosecutor,</i></div>   | } | <i>On Certiorari.</i><br><br><i>Stipulation<br/>on Additional<br/>Facts.</i> |
| vs. | BOARD OF ADJUSTMENT OF THE<br>TOWN OF NUTLEY, County of<br>Essex and State of New Jer-<br>sey,<br><div style="text-align: right;"><i>Respondent.</i></div> |   |  |

20 It is hereby stipulated by and between the attorneys for the respective parties hereto and agreed between them, that the following should be considered as facts in this cause:

30 1. That all the objections of the Board of Adjustment of the Town of Nutley raised by it in reference to the plans themselves, and the application for a permit, were remedied and corrected by the prosecutor with the consent of the Superintendent of Buildings of the Town of Nutley and of the Board of Adjustment of the Town of Nutley, and for the purpose of the record in this case, should be disregarded completely.

2. The respondent did not waive its objections to the width of the court as shown in the

40

*Stipulation on Additional Facts.*

decision of the Board of Adjustment, the prosecutor refusing to modify the plans in respect to the dimensions of the court.

ISADORE H. COLTON,  
Attorney for Prosecutor.

10

J. HARRY HULL,  
Attorney for Respondent.

Dated: Newark, N. J., April 12, 1927.

20

30

40

*Prosecutor's Reasons for Reversal.*

**PROSECUTOR'S REASONS FOR REVERSAL.**

Filed April 13, 1927.

NEW JERSEY SUPREME COURT.

10

DAVID STEINBERG,

*Prosecutor,*

*vs.*

BOARD OF ADJUSTMENT OF THE  
TOWN OF NUTLEY, County of  
Essex and State of New Jer-  
sey,

*Respondent.*

*On Certiorari.*

*Prosecutor's  
Reasons for  
Reversal.*

20

1. That H. Inman Furlong, Superintendent of Buildings of the Town of Nutley, was without legal authority in refusing to issue a permit to the prosecutor for the erection of stores and apartments on the property of the prosecutor on the southeast corner of Vreeland avenue and Prospect street, in the Town of Nutley, County of Essex and State of New Jersey.

30

2. As the Superintendent of Buildings in refusing to issue the permit to the prosecutor based his refusal merely on the fact that the erection of the prosecutor's proposed building as to location, would be a violation of the Zoning Ordinance of the Town of Nutley, as is evidenced by a letter from said Superintendent of Buildings to the prosecutor, the Board of Adjustment of the Town of Nutley was without legal authority in affirming the Superintendent's decision, based on grounds other than those stated by the Superintendent of Buildings.

40

*Prosecutor's Reasons for Reversal.*

3. Section 6 of the Zoning Ordinance of the Town of Nutley, requiring that the proposed building be set back on both sides of the street is unreasonable, void and, therefore, unconstitutional, in that it is taking away the property of the prosecutor without due compensation and in violation of the Constitutions of the State of New Jersey and of the United States of America. 10

4. Section 12 of the Zoning Ordinance of the Town of Nutley, which tends to prevent the prosecutor from erecting an apartment house on his lands, is unreasonable and void, as being in violation of the constitutional rights of property guaranteed to the prosecutor by the Constitutions of the State of New Jersey and of the United States of America, and is also unreasonable and void, and, consequently, unconstitutional, wherein it tends to prevent the prosecutor from erecting stores in said building. 20

5. Section 10a of the Zoning Ordinance of the Town of Nutley, wherein it requires a greater width for the courtyard, as set forth in the plans of the prosecutor, is unreasonable and arbitrary, and consequently, insofar as the prosecutor is concerned, void and unconstitutional, in that it deprives the prosecutor of the property rights guaranteed to him under the Constitutions of the State of New Jersey and of the United States of America. 30

6. There was no evidence whatsoever taken before the Board of Adjustment, as to whether or not the prosecutor's erection of an apartment house containing stores therein, without a setback, in accordance with the plans filed by him, would injure the public health, safety or welfare of the inhabitants of the Town of Nutley 40

*Prosecutor's Reasons for Reversal.*

7. The action of the Board of Adjustment of the Town of Nutley, in sustaining the decision of the Superintendent of Buildings in refusing to issue a permit to the prosecutor, is arbitrary, unjust, unreasonable, illegal and is not based on any legal evidence whatsoever, but is the result of the desire of the Board of Adjustment of the Town of Nutley to prevent the erection of the prosecutor's building, regardless of the facts and regardless of the reasonableness or unreasonableness of the sections of the Ordinance sought to be invoked by them.

8. The decision of the Board of Adjustment, insofar as it prevents the prosecutor from erecting the building called for by his plans and specifications, is a violation of the property rights of the prosecutor, as guaranteed to him by the Constitutions of the State of New Jersey and of the United States of America.

9. Those sections of the Zoning Ordinance of the Town of Nutley, on which the Board of Adjustment based its decision to refuse to issue a permit to the prosecutor, are unreasonable and void, insofar as they tend to prevent the erection by the prosecutor of the building called for by his plans and specifications filed.

10. The requirements of section 6 of the Zoning Ordinance of the Town of Nutley, relative to set-backs, and of section 12 relative to apartment houses in Residence A Districts, and of the same section relative to the erection of stores in Residence A Districts, and of section 10a relative to the width of a courtyard, bear no relation to public health, safety or the general welfare of the public, in the particular circum-

*Prosecutor's Reasons for Reversal.*

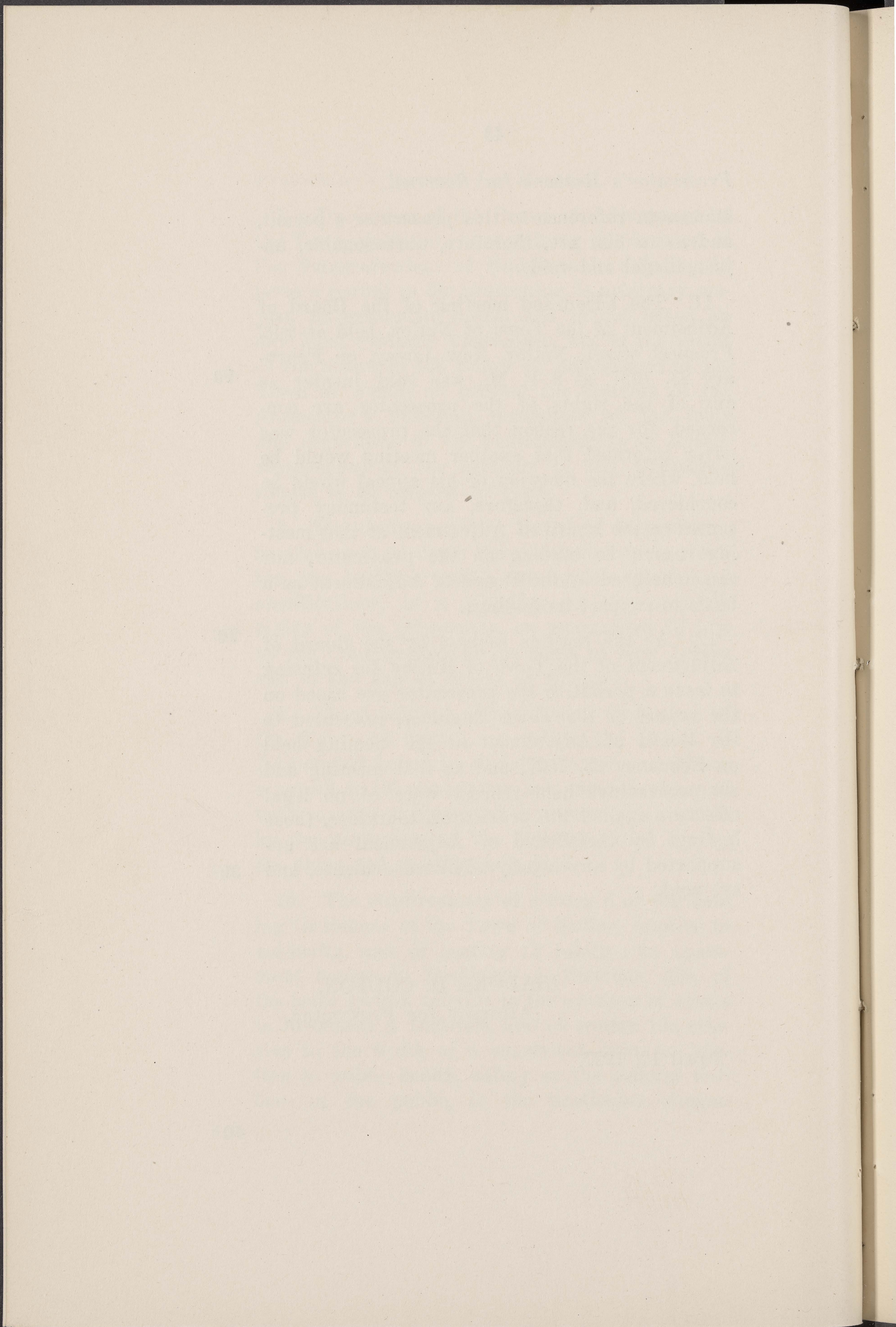
stances in reference to this prosecutor's permit, and as to him are, therefore, unreasonable, unjust, illegal and void.

11. The adjourned meeting of the Board of Adjustment of the Town of Nutley, held at #92 Prospect street, Nutley, New Jersey, on February 23, 1927, at 8 P. M., was void, insofar as any of the rights of the prosecutor are concerned, for the reason that the prosecutor was never informed that another meeting would be held, where the question of his appeal would be considered, and, therefore, any testimony presented to the Board of Adjustment at that meeting cannot be binding on the prosecutor, nor can it be used by the Board of Adjustment as a basis to support its findings. 10

12. As the reasons assigns by the Board of Adjustment of the Town of Nutley for refusing to issue a permit to the prosecutor are based on the report of the Town Engineer, presented to the Board of Adjustment at the meeting held on February 23, 1927, and as that meeting and all proceedings held thereat were of no legal effect as against the prosecutor, therefore, those findings by the Board of Adjustment are unsupported by any legally admitted evidence, and are void. 20 30

ISADORE H. COLTON,  
Attorney for Prosecutor.

April 12, 1927.



*Opinion of Supreme Court.*

**OPINION OF SUPREME COURT.**

Filed June 19, 1928.

NEW JERSEY SUPREME COURT.

No. 241, May Term, 1927.

10

DAVID STEINBERG,

*Prosecutor,*

*vs.*

BOARD OF ADJUSTMENT OF THE  
TOWN OF NUTLEY,

*Respondent.*

Argued May 3, 1927; decided May 1, 1928. 20

On writ of certiorari.

Before Justices Trenchard, Kalisch and Katzenbach.

For the prosecutor, Isadore H. Colton, Esq.

For the respondent, J. Harry Hull, Esq.

*Per Curiam.*

This is a zoning case. It is before this court on a writ of certiorari to review the decision of the Board of Adjustment of the Town of Nutley. The prosecutor is the owner of a tract of land in Nutley zoned for one-family dwellings. He desires to erect a modern fireproof apartment house containing three stores therein upon this tract of land. The prosecutor had prepared a set of plans and specifications by a licensed architect. These plans were submitted to the New Jersey Board of Tenement House Supervision. The plans were examined by that Board and in all 40

*Opinion of Supreme Court.*

respects approved. The prosecutor thereupon made an application to the Superintendent of Buildings of the Town of Nutley for a permit for the erection of this apartment house, filing with him the plans and specifications. These plans and specifications complied with the building code of the Town of Nutley. The superintendent refused to issue the permit to the prosecutor for the reason that he desired to erect an apartment house building upon lands zoned for one-family residences. It was true in fact that the lands of the prosecutor were so zoned. The Superintendent of Buildings refused the permit. Thereupon the prosecutor appealed to the Board of Adjustment of the Town of Nutley. A date was set for a hearing. Upon this date the prosecutor appeared with his architect. The testimony offered by the prosecutor was to the effect mentioned, namely, the preparation of the plans, the submission thereof, and the refusal of the Superintendent of Buildings to grant the permit. The Board subsequently upheld the decision of the Superintendent of Buildings. The prosecutor then applied for and obtained the present writ.

The constitutional amendment respecting zoning which was approved and ratified on September 20, 1927, and took effect October 18, 1927, and the statute of April 3, 1928, known as Chapter 274 of the Laws of 1928, have been reviewed in a recent decision of this Court in the case of *Koplin, relator, vs. Village of South Orange, et al.*, filed May 14, 1928. In the present case we consider that in the proceedings before the Board of Adjustment there was no testimony to the effect that the provisions of the ordinance are unreasonable. The presumption is that they are reasonable, *Burg vs. Ackerman*, 135 Atl. Rep. 672.

*Opinion of Supreme Court.*

There is also a presumption that the action of the Board of Adjustment was right. *Silvester vs. Princeton*, 5 Adv. Rep. 1801. This court will not disturb the action of the Board of Adjustment unless its action is shown by evidence to be wrong. *Oxford Construction Co. vs. Orange*, 137 Atl. Rep. 545.

10

The decision of the Board of Adjustment of the Town of Nutley is accordingly affirmed. The writ of certiorari will be dismissed without costs.

20

30

40

*Rule for Judgment.*

**RULE FOR JUDGMENT.**

**NEW JERSEY SUPREME COURT.**

|    |  |   |
|----|--|---|
| 10 | DAVID STEINBERG,<br><i>Prosecutor,</i>   | <i>On<br/>Certiorari.<br/><br/>Rule for<br/>Judgment.</i> |
|    | <i>vs.</i>   |   |
|    | BOARD OF ADJUSTMENT OF THE<br>TOWN OF NUTLEY, County of<br>Essex and State of New Jer-<br>sey,<br><i>Respondent.</i> |   |

20 The Court having heard the argument of counsel and inspected the proceedings of the Board of Adjustment of the Town of Nutley removed by the writ in this cause, and duly considered the reasons filed:

It is ORDERED, that the said proceedings be affirmed and the writ of certiorari be dismissed.

Dated August 1, 1928.

Entered August 6, 1928.

On motion of

30

J. HARRY HULL,  
Attorney for Respondent.

A true copy.

FRED L. BLOODGOOD,  
Clerk.

40

*Notice and Grounds of Appeal.*

**NOTICE AND GROUNDS OF APPEAL.**

Filed July 26, 1928.

**NEW JERSEY SUPREME COURT.**

DAVID STEINBERG,

*Prosecutor,*

*vs.*

BOARD OF ADJUSTMENT OF THE  
TOWN OF NUTLEY, County of  
Essex and State of New Jer-  
sey,

*Respondent.*

10

*On  
Certiorari.*

*Notice of  
Appeal and  
Grounds of  
Appeal.*

To William F. Gorman, Esq., attorney for re- 20  
spondent, or to whom it may concern:

SIR:

PLEASE TAKE NOTICE, that the prosecutor in the above-entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause, on the following ground, to wit:

(1) Because the New Jersey Supreme Court 30  
erred in giving judgment to the respondent instead of the prosecutor by dismissing the writ of certiorari previously allowed in the case, in that:

(a) The Zoning Ordinance of the Town of Nutley, insofar as it tends to prohibit the erection of a building containing stores and apartments on the lands of the prosecutor on the southeast corner of Vreeland avenue and Prospect street, in the Town of Nutley, New Jersey, where there are no facts indicating that such stores and 40

*Notice and Grounds of Appeal.*

apartment house would be detrimental to the health, safety and welfare of the general public, is unreasonable as to the prosecutor, and consequently, void.

10 (b) The decision of the Board of Adjustment of the Town of Nutley in sustaining the Superintendent of Buildings of the Town of Nutley in his refusal to issue a permit to the prosecutor, is void, in that there was no legal evidence before the Board on which it could properly base its decision.

(c) The so-called Zoning Act of 1928, known as Chapter 274 of the Laws of 1928, is not retroactive, and, consequently, cannot affect the prosecutor or his pre-existing legal rights.

20 (d) The evidence before the Board of Adjustment was sufficient to show the unreasonableness of the Zoning Ordinance of the Town of Nutley.

(e) The return to the writ filed by the respondent is insufficient in law and in fact.

30 (f) The decision of the Superintendent of Buildings of the Town of Nutley in refusing to issue a permit to the prosecutor, as applied for, and the decision of the Board of Adjustment of the Town of Nutley in affirming the decision of the Superintendent of Buildings are both unlawful, in that they deprive the prosecutor of the property rights guaranteed to him by the Constitution of the State of New Jersey and of the United States of America.

Respectfully yours,

ISADORE H. COLTON,  
Attorney for Prosecutor.

Service of a true copy of the within notice, etc., is hereby acknowledged this 13th day of August, 1928.

40 WILLIAM F. GORMAN,  
Attorney for Respondent.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

## New Jersey Court of Errors and Appeals

DAVID STEINBERG,

*Prosecutor-Appellant,*

*vs.*

BOARD OF ADJUSTMENT OF THE  
TOWN OF NUTLEY, County of  
Essex and State of New Jer-  
sey,

*Respondent-Appellee.*

*On  
Certiorari.*

*On Appeal  
from  
Supreme  
Court.*

### BRIEF OF PROSECUTOR-APPELLANT.

#### Facts.

The prosecutor-appellant is the owner in fee simple of a tract of land located on the southeast corner of Prospect street and Vreeland avenue in the Town of Nutley, County of Essex and State of New Jersey, said land having a frontage of 100 feet on Prospect street and a depth of 150 feet on Vreeland avenue.

The prosecutor, desiring to erect a modern, fireproof apartment house containing three stores and several apartments, caused a set of plans and specifications to be prepared by M. Arthur Wolf, a licensed and practising architect of the State of New Jersey. The building was to be of brick, three stories in height.

The plans were subsequently filed with the New Jersey Board of Tenement House Supervision, which is a State Board having state-wide control of the construction of tenement houses. The Board examined the plans and approved them in all respects. Immediately thereafter the prosecutor-appellant made application to the

Superintendent of Buildings of the Town of Nutley for a permit for this apartment house, filing with him the plans and specifications. These plans and specifications complied in all respects with the Building Code of the Town of Nutley. The superintendent thereupon refused to issue the permit to the prosecutor-appellant, citing as his reason therefor that the appellant was attempting to erect an apartment house building on lands restricted to one-family residences by the Zoning Ordinance of the Town of Nutley.

This was the only ground for the rejection of the permit.

Upon the refusal of the superintendent to issue the permit the prosecutor-appellant appealed to the Board of Adjustment of the Town of Nutley. A date was set for a hearing at which time the prosecutor-appellant appeared with his architect. The architect testified as to the nature of the building sought to be erected. The Superintendent of Buildings was put on the stand. He admitted sending a letter to the prosecutor-appellant wherein he stated that the sole reason for refusing the permit was the attempted erection of an apartment house in a district limited to one-family houses by the Zoning Ordinance of the Town of Nutley (see State of Case, p. 24). The Town of Nutley introduced no evidence whatsoever and no question was raised at said hearing as to any other violations of the Zoning Ordinance.

Subsequently the Board of Adjustment affirmed the decision of the Superintendent of Buildings.

The prosecutor-appellant then applied for a writ of certiorari and it was allowed by our Chief Justice.

The Supreme Court thereafter sustained the decision of the Board of Adjustment of the Town of Nutley, basing its adjudication primarily on the theory that a Zoning Amendment had been approved by the people of this State, that the legislature had enacted a new Zoning Act, that this latter act (Chapter 274 of the Public Laws of 1928), was retroactive in its nature and that it affected the prosecutor-appellant; and secondarily on the theory that the prosecutor-appellant had not overcome the presumption in favor of the reasonableness of the ordinance.

## LAW.

### POINT I.

**The Zoning Act of 1928, chapter 274 of Public Laws of 1928, is not retroactive.**

It is important to note the chronological order of the various steps taken in appellant's case. The application for a permit was made on January 17, 1927. On January 18, 1927, the application was denied by the Superintendent of Buildings. On February 24, 1927, the Board of Adjustment upheld the Superintendent of Buildings in his refusal to issue a permit to the prosecutor. On March 26, 1927, a writ of certiorari was allowed to the prosecutor by the Chief Justice. On May 3, 1927, the argument on the writ of certiorari was heard before the Supreme Court. On September 20, 1927, the proposed amendment to the Constitution was submitted to the voters and approved by them. On October 18, 1927, this amendment to the Constitution went into effect. On April 3, 1928, Chapter 274 of the Laws of 1928, known as the Zoning Act of 1928, was enacted.

The law has always abhorred retroactive legislation and the tendency of the Courts of this State has been adverse to declaring an act retroactive unless the act itself specifically provided therefor or unless the act admitted of no other construction.

“In the absence of any words expressing a contrary intention, a statute will be construed to operate prospectively. *Crucible Steel Co. v. Polack Tyre Co.*, 92 L. 221; 104 Atl. 324. A statute will not be construed as retroactive unless its nature precludes any other reasonable interpretation. *Spencer v. Middlesex County Tax Board*, 95 L. 5; 111 Atl. 640. Statutes are not retroactive unless the language thereof admits of no other construction. *P. S. Electric Co. v. Public Utility Comm.*, 87 L. 128; 92 Atl. 707.”

*Nugent v. Cahill*, 133 Atl. 420, IV N. J.; Misc. Rep. 404, affirmed 135 Atl. 919.

All the proceedings in the prosecutor's cause, including the argument before the Supreme Court on the writ of certiorari, took place about five months before the zoning referendum. The Supreme Court had previously held in the case of *Ignaciunas v. Risley*, 98 N. J. L. 712; 121 Atl. 783, affirmed 99 N. J. L. 389; 125 Atl. 121, that it was not within the police power of the State to prohibit a person from erecting a combined store and dwelling on a plot of land, which had been zoned by the ordinance of that municipality for residence purposes only, on the ground that the rights of private property guaranteed to that person by the Federal and State Constitutions were violated thereby.

This court, on the appeal of that case, affirmed the action of the Supreme Court in awarding a

peremptory writ of mandamus to the relator, but on a different ground, this court saying:

“We do not find that a consideration of this fundamental principle is required by us in determining the present appeal. And for this reason: The Legislature in its grant of power to the several municipalities of the state to regulate the use to which a property owner may put his property, even to the extent of prohibiting its use for a particular purpose, limited that power by the provision of the statute that such regulation must ‘be designed to promote the public health, safety and general welfare.’ If, therefore, the ordinance, in its application to the property of any particular owner, does not come within the limitation of the statute, to that extent it is without legal justification and void.

The narrow question, accordingly, which we are called upon to consider in the determination of this case, is, will the erection and user of a combined store and dwelling house upon the lot of the respondent constitute a menace to the health, or the safety of the people of the Town of Nutley, or to the general welfare of the community? That the mere erection of this building, regardless of the use to which it may afterward be put, is likely to be injurious to the health or safety of the residents of the town is asserted, but, practically, not argued by counsel. And, as we see it, no well-grounded argument can be made in support of the assertion. The owner or the occupier of the store, after it is erected, might attempt to conduct therein a business which threatened public health or public safety; but the right of the municipality to restrain the carrying on of such a business (which may be conceded) is not involved in the present case. The bald assertion of counsel is that the mere presence of a store building in the so-called residence district of Nutley is in itself a menace to the public health and the public safety, notwithstanding that the business carried on therein

will not constitute such a menace. Both common experience and common sense demonstrate the unsoundness of such an assertion."

It was then determined that a constitutional amendment would be necessary for the State to acquire the right to enact valid legislation regarding zoning, it being admitted that there were certain property rights vested in the citizens of this State and guaranteed to them by the Constitution of this State and of the Federal Government, which could not be impaired or taken away from them unless they chose to surrender those rights voluntarily.

Therefore it was not until October 18, 1927, at which time the Zoning Amendment took effect, that the State had the necessary power to affect the vested rights of its citizens in relation to zoning. On October 18, 1927, however, the prosecutor's case had already been argued in the Supreme Court and his property rights and status had been definitely fixed and ascertained. Counsel respectfully contends that, in view of the fact that the State first obtained the right to legislate on zoning on October 18, 1927, any exercise of the rights granted to it by the amendment could in no wise affect previously existing cases involving zoning. All that the amendment did was to say to the Legislature: "We, the citizens, give you power to enact general laws under which municipalities may regulate zoning," the exact wording being as follows:

"The Legislature may enact general laws under which municipalities, other than counties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use, and the exercise

of such authority shall be deemed to be within the police power of the State. Such law shall be subject to repeal or alteration by the Legislature.”

The Legislature may have seen fit in its wisdom and judgment not to enact any laws in pursuance to the admendment for many years to come. If the Legislature had not in fact, enacted Chapter 274 of the Laws of 1928, could it have been said with reasonableness that the rights of the prosecutor were affected by the passage of the amendment? The passage of the amendment was merely a transfer of power from the citizens of this State to its Legislature; and power, unless used, is as ineffective as if no power existed.

The first time that the municipalities had a right legally to regulate zoning, was not after the approval of the constitutional amendment, but only after April 3, 1928, when Chapter 274 of the Public Laws of 1928, took effect. Up to that date (April 3, 1928), there was no authority in any of the municipalities to take away the private property rights of their citizens by enactment of zoning legislation,, and the only source of authority for the municipalities to legislate on the question of zoning came into being on April 3, 1928.

The appellant further contends that not even on April 3, 1928, could he have been affected by any zoning legislation. The Zoning Amendment to the Constitution gave the Legislature of this State the right to enact general laws under which municipalities could regulate zoning. Chapter 274 of the Laws of 1928 was a delegation to the municipalities of this State by the Legislature of the right to regulate zoning in accordance with the provisions of this act, so

that a citizen of any municipality of this State, having no restrictive zoning ordinances, could, notwithstanding the approval of the Zoning Amendment, and notwithstanding the passage of Chapter 274 of the Laws of 1928, nevertheless, erect any property he desired on his lands in that municipality. So that the medium by which a person was deprived of the use of his land was not the amendment to the Constitution. Nor did the act of the State Legislature consummate this end. The municipal ordinance passed by the municipality in which his land was located alone could accomplish this result. And if in any municipality of this State there are no zoning ordinances, the citizens of that particular municipality are not affected in the least by this amendment to the Constitution or the act in pursuance thereof.

In the Town of Nutley, in which municipality the land of the prosecutor is located, there was a zoning ordinance at the time of the passage of the 1928 Act. This zoning ordinance would have been utterly void and of no effect and would have been automatically repealed had it not been for a saving clause in Section 7 of Chapter 274 of the Laws of 1928.

All Section 7 of the Zoning Act was intended to accomplish, was to keep alive the municipal ordinances of the various municipalities of this State, and to save them the trouble of passing new ordinances. This is clearly evident because, if a municipal ordinance is enacted in pursuance to authority of State law and the State law is subsequently repealed, the ordinance passed in pursuance thereof becomes inoperative.

“When a statute is repealed, it must be considered as though it had never existed,

except with respect to transactions passed and closed.”

*Town of Belvidere v. Warren R. R. Co.*,  
34 N. J. L. 193.

“The effect of a repealing clause from a previous statute which confers a special jurisdiction, is to end all proceedings under it which are not closed unless there be an exception in the repealing statute.”

*State v. Passaic*, 36, N. J. Law 382.

“Repeal is the legislative act of repealing or revoking by competent authority an existing law and can be performed only by a legislative body. The former nullifies the ordinance *ab initio*. The latter abrogates it *in futuro*. Both alike terminate its operation as a living law.”

28 Cyc. 382, Chapter J.

“So it seems that the repeal of a statute which gives authority to the towns to pass a particular by-law will in general annul the by-law.”

28 Cyc. 387.

The Supreme Court of this State in the leading case dealing with the effect of the zoning referendum and the Act of 1928 (*Koplin v. Village of South Orange*, 142 Atl. 235; 6 N. J. Misc. Rep. 489), seems to hold that Section 7 of this act has a retroactive effect, and that the life and power given to municipal ordinances by the 1928 Act, goes back to a period of time before the constitutional amendment, the Court basing its reasoning and argument on the fact that the pre-existing zoning ordinance is saved by Section 7 of the Zoning Act. This reasoning and argument are clearly fallacious. The wording of Section 7 is very simple and we must look to the reason for its presence before we can apply it. The reason for inserting Section 7 of the Zoning Act, as previously stated by counsel, was merely to

prevent the attending trouble and delay of having the municipalities throughout the State repass ordinances which they had passed once before. There is, too, the added reason that until substitute ordinances had been passed the various municipalities would have been embarrassed by the total absence of zoning laws. This reasoning of counsel is borne out by the adjudication of the Supreme Court in the case of *Losick v. Binda*, 3 N. J. Mis. R. 422; 128 Atl. 619, aff. 130 Atl. 537; 102 N. J. L. 157. The 1924 Zoning Act, being Chapter 146 of the Public Laws of 1924, in Section 6 thereof, had a similar proviso, saving the ordinances existing at the time of the passage of the 1924 Act, and the Supreme Court in this last cited case in construing Section 6 of Chapter 146 of the Laws of 1924, held that the effect of that statute was merely to continue the operation of all existing ordinances.

The Supreme Court in the *Koplin case, supra*, was not positive in its opinion that Section 7 of the Zoning Act of 1928 was retroactive in nature, and therefore added the following explanation:

“If it be suggested for any reason that section 7 of the Zoning Act does not have the retroactive effect which we have indicated, nevertheless the result in this case so far as this court is concerned, will be the same, because this court is bound to deny the permit sought upon principles declared in the Supreme Court in the case of *Rohrs v. Zabriskie*, 133 A. 65, 102 N. J. L. 473.”

In the case of *Rohrs v. Zabriskie, supra*, the relator applied for a permit to erect a five-story apartment house on his lands in the Village of Ridgewood. The permit was refused by the Building Inspector and his refusal upheld by the Board of Adjustment of that village.

Thereafter the governing body of the municipality passed an amendment to its Building Code whereby it prohibited the erection of an apartment house of more than three stories unless it was of fireproof construction. The Supreme Court in this last-named case, in deciding the question of whether this amendment to the Building Code could affect the rights of the relator, held that the ordinance had the retroactive effect as far as the relator in that case was concerned, basing their reasoning solely on the broad ground that it would be wrong for the Court to issue a writ of mandamus to permit the erection of a building the existence of which would be a menace to the *safety* of the community.

Counsel for the prosecutor readily admits that nearly every amendment to the Building Code of a municipality has been upheld by the courts of this State, and properly so, for the reason that a Building Code governs the nature of the construction of a building as regards the factor of safety of said building. And counsel admits also that a municipality at all times, regardless of whether it has a zoning ordinance or not, had a right to regulate the nature and construction of buildings by the promulgation of ordinances looking to the safety of the users and occupants of such buildings. *Myers v. State*, 132 Atl. 335.

But can we in fairness say that a zoning ordinance is of the same or has the same characteristics as a Building Code? They are extremely different in nature. Whereas the courts of this State have generally held Building Code regulations valid, they have, nevertheless, consistently held zoning ordinance regulations void. No one can sincerely argue, that if a municipality through its Building Code requires a building of more than three stories in height to be of fire-

proof construction, it isn't done with intent to safeguard the public, whereas this court in the various zoning cases has definitely held that the zoning regulations were not intended for the safety or health of the people. In other words, the distinction sought to be impressed by counsel is that a regulation of a Building Code deals with the manner of the physical construction of a building, with a view to seeing that the building will be safe for the use and enjoyment of those intending to occupy same, whereas zoning ordinances restrict and regulate the type of building as to use, as one-family houses, multiple-family houses, houses containing stores and dwellings, factories, garages, railroad stations, semi-public and public buildings.

It is respectfully submitted that the Zabriskie case, cited by the Supreme Court in its opinion in the Koplin case, does not apply and that the reasoning and the deductions of the Supreme Court in the Zabriskie case are not consistent with the accepted law of zoning in this State.

The contention of prosecutor is in line with the Court of Errors and Appeals in its most recent pronouncement on the zoning amendment. In *A. G. Construction v. Scott*, 6 N. J. Adv. R. 1063, 141 Atl. Rep. 760, at page 761, Katzenbach, J., said:

“We are asked by the respondents to consider in dealing with this case the fact that a constitutional amendment regarding zoning has been adopted by the voters of this state. In the present case the status of the parties was fixed long before the zoning amendment was adopted. The constitutional amendment has, we think, no application to the present case and should not be considered in its disposition.”

It is surprising to note that the decision in the case of *Koplin v. South Orange* was rendered on May 14, 1928, and that the decision of the Court of Errors and Appeals in the *A. G. Construction Co. v. Scott* case, *supra*, was rendered on the same day.

Counsel respectfully submits that the status of the parties to the case at bar was definitely fixed and determined, and that consequently the zoning amendment and the said Zoning Act of 1928 can in nowise affect the present case.

The case of *Peshine Realty Co. v. Scott*, 4 N. J. Mis. R. 977, 135 Atl. Rep. 80, was a zoning case wherein the relator had applied for a permit to erect a building in violation of the zoning ordinance of the City of East Orange, which application was made prior to the enactment of Chapter 315 of the Public Laws of 1926, page 526. **This latter act vested in the various Boards of Adjustment general powers of review in appeal from actions of the Building Inspectors of the various municipalities, this court having previously held in the case of *Losick v. Binda*, 3 N. J. Mis. 422, 128 Atl. 619 (aff. 102 N. J. L. 157, 130 A. 537), and *Lutz v. Kaltenbach*, 131 A. 989, that the Boards of Adjustment created by the 1924 Act (Public Laws of 1924, Chapter 58) were without authority to deny a permit to an applicant.**

“The application for the permit, its refusal, the appeal to the Board of Adjustment and the action of the latter on that appeal, all of them took place before the enactment of chapter 315 of Laws of 1926, page 526, and consequently, that statute—which vests in Boards of Adjustment general powers of review in cases of appeal of the action of building inspectors—has no application to the present proceeding.”

Before the zoning referendum was approved by the people of this State, there were pending in the Supreme Court about fifty cases which had already been argued or submitted on brief, in which cases the various litigants were awaiting the decision of the Supreme Court. This class of case should not be put in the category of those cases which arose subsequent to the passage of the zoning amendment and before the enactment of the 1928 Zoning Act, because in this latter group there had already been an expression of the will of the people by means of the referendum, whereas in the case at bar the record was complete and argument concluded many months before the referendum was submitted.

Landowners of this State had a right to rely upon the law of this State as given forth in the decisions of the Supreme Court of New Jersey and of this court dealing with zoning ordinances. They had the right to undertake to erect buildings in violation of the zoning ordinance, as they had been properly advised by members of the Bar as to the status of the zoning law in this State. Many thousands upon thousands of dollars were expended by these litigants in preparation of plans and specifications, in purchase of lands, in payment of carrying charges on said lands, in reliance upon the stability of the law. Now, these citizens find themselves in the predicament that their lawful property rights are empty, unmeaning things because of the enactment of the aforesaid subsequent legislation. And counsel repeats that this legislation, which does not express an intent to be retroactive, has been construed to be so on reasoning that cannot stand the test of logic or reason.

## POINT II.

The Zoning Ordinance of the Town of Nutley, insofar as it tends to prohibit the prosecutor-appellant from erecting an apartment house containing stores on his land, is unreasonable and consequently void.

Prior to the adoption of Chapter 315 of the Laws of 1926, page 526, which was the first effective statute providing for the creation of a Board of Adjustment for municipalities, the accepted remedy for the obtaining of a permit in a zoning case was by means of a writ of mandamus.

*Falco v. Kaltenbach*, 3 N. J. Mis. R. 333, 128 Atl. 394;

*Becker v. Donley*, 3 N. J. Mis. R. 338, 128 Atl. 395;

*Union City Development Co. v. Kaltenbach*, 3 N. J. Mis. Rep. 341, 128 Atl. 396.

All that was alleged in those cases was that the relator sought to erect a building which did not conform to the restricted use to which the land had been designated by the municipal ordinance, and in all those cases the relators were awarded the peremptory writ and were allowed to erect their buildings. The reasoning of this court was that it was beyond argument to hold that the mere erection of a combined store and dwelling house constituted a menace to the health and safety of the people of a municipality and the Court even went so far as to say:

“And as we see it, no well-grounded argument can be made in support of the assertion.”

*Ignaciunas v. Risley*, 98 N. J. Law 712, 121 Atl. 783, affirmed 99 N. J. Law 389, 125 Atl. 121.

In subsequent cases the same reasoning was applied to apartment houses.

*Steinberg v. Bigelow*, 3 N. J. Mis. Rep. 1228, 131 Atl;

*Chancellor Co. v. Board of Adjustment*, 3 N. J. Mis. R. 1231, 131 Atl. 116;

*Herman & Co. v. Board of Adjustment*, 3 N. J. Mis. R. 223, 131 Atl. 116.

When the act creating Boards of Adjustment went into effect, the courts determined that thereafter where a municipality had such a Board of Adjustment, the proper remedy would be by means of certiorari and not mandamus. The courts subsequently made it a practice to set aside the findings of the Boards of Adjustment of the various municipalities on the ground that the mere erection of a building containing stores, or stores and dwellings, or multiple dwelling houses, could not adversely affect the public health, safety and welfare of the general community and that the municipal ordinances, which impaired the property rights of an individual owner of land in this respect, were void and of no effect.

As this court had held that the mere erection of an apartment house or a building containing stores or a combination store and dwelling could not be deemed to affect the health, safety and welfare of the public, what stronger argument could your prosecutor-appellant submit to the Board of Adjustment than these statements of the Court of Errors and Appeals of New Jersey? Appellant could have produced an architect, an engineer, a police officer, a builder and an ordinary citizen, who could have testified before the Board of Adjustment that in their respective opinions the erection of the proposed building

would not adversely affect the public health, welfare and safety of the inhabitants of the municipality. But would not such a procedure be merely a weak attempt to prove something which this court itself has already stated as a fact, in the following language:

“Both common experience and common sense demonstrate the unsoundness of such an assertion (namely that the mere erection of a combined store and dwelling on a plot of ground constituted a menace to the health and safety of the people of the municipality) \* \* \* and as we see it, no well-grounded argument can be made in support of the assertion.” *Ignaciunas v. Risley*, 98 N. J. Law, 712; 121 Atl. 783, aff. 99 N. J. Law, 389, 125 Atl. 121.

The position taken by this Court on the question of the danger to the health, safety or welfare of the public of a proposed building threw the burden upon the municipality to adduce evidence in refutation of the presumption raised by these decisions, such as the fact that traffic in front of the building would be increased, that children passed the building and were in danger of life and limb, that the fire facilities of the municipality were inadequate or that the roadway was too narrow. Such facts as these the municipalities endeavored to prove before the Boards of Adjustment, but the courts then held that they did not constitute a valid ground to refuse a permit. The reasoning of the courts was that the municipality received taxes and in the absence of proper fire-fighting facilities, it was the duty of the governing officials to provide adequate fire protection, so too, if traffic congestion was occasioned by reason of the erection of an apartment house, it was the duty of the proper police officials to so regulate traffic as to insure the safety of the people.

In the case of *Robert Realty Co. v. City of Orange*, 4 N. J. Mis. R. 912, 135 Atl. 60, the relator sought to erect three four-story brick apartment houses. The permits were refused for the reason that the area was zoned against apartment houses. The Court held as follows:

“There is absolutely nothing in the case as it is before us showing that these restrictions are called for or necessary to protect the public health and safety or advance the public welfare. Giving to the restrictions that presumption of reasonableness that in law is required, such presumption is completely overcome by the conclusion that one is inevitably brought to, by a reading of these provisions of the ordinance, that they are designed to prohibit and make impossible the construction, in the designated area, of apartment houses. In fact, nothing but a ‘dwelling for one family or for one housekeeping unit only’ is the limitation contained in subdivision 1 of section 2 (a) of Residence A district in which relator’s property is located. Such ordinances have met with the emphatic disapproval of this Court, and similar provisions have been declared illegal and not a valid exercise of the police power. *Heller v. South Orange* (N. J. Sup.), 130 A. 534. 3 N. J. Mis. R. 1076.”

#### Conclusion.

It is respectfully submitted that the Zoning Amendment to the constitution of the State of New Jersey and the Zoning Act of 1928, known as Chapter 274 of the Laws of 1928, are not retroactive, that the Town of Nutley had no authority to restrict the use of prosecutor-appellant’s land to the erection of a one-family house, and that the prosecutor-appellant had a right to erect an apartment house on his land. It is submitted also that the ordinance of the Town of Nutley,

insofar as it sought to prevent the prosecutor from erecting an apartment house on his lands in Nutley was void (because of its unreasonableness), that the decision of the Board of Adjustment of the Town of Nutley, in upholding the refusal of the Superintendent of Buildings of Nutley to issue a permit to the prosecutor-appellant, is also void (as not being based on any legal evidence to support that finding) and that the decision of the Supreme Court of New Jersey should be reversed.

COLTON & HARE,  
Attorneys for Proscutor-Appellant.

ISADORE H. COLTON,  
Of Counsel.



## New Jersey Court of Errors and Appeals

|   |   |  |
|---|---|--|
| DAVID STEINBERG,<br><i>Prosecutor-Appellant,</i><br><br><i>vs.</i><br><br>BOARD OF ADJUSTMENT OF THE<br>TOWN OF NUTLEY, COUNTY OF<br>ESSEX AND STATE OF NEW JER-<br>SEY,<br><br><i>Respondent-Appellee.</i> | } | <i>On<br/>         Certiorari.<br/> <br/>         On Appeal<br/>         from<br/>         Supreme<br/>         Court.</i> |
|---|---|--|

### BRIEF FOR RESPONDENT-APPELLEE.

#### POINT I.

The Board of Adjustment of the Town of Nutley acts judicially.

The only testimony offered at the hearing before the Board of Adjustment by the prosecutor-appellant was that he made application to the Superintendent of Buildings of the Town of Nutley for a permit to erect an apartment house containing three stories on certain land owned by him, filing with the said superintendent plans and specifications; that the apartment house was to contain twenty-seven families and was of fire-proof construction; that the plans and specifications for said construction was approved by the New Jersey Board of Tenement House Supervision; and that the Superintendent of Buildings refused to issue the permit to the prosecutor-appellant for the reason that he desired to erect an apartment house building upon lands zoned for one-family residences.

The power to create boards of adjustment by the various municipalities of this State was given

by Chapter 146 (Pamph. L. 1924) and the power of such Board was defined under said statute and the amendment thereto, Chapter 315 (Pamph. L. 1926),

“The powers of the board of adjustment were defined by Chapter 146 (Pamph. L. 1924, p. 324) and Chapter 315 (Pamph. L. 1926, p. 526). Thereunder the board had power, among other things, to make special exception to, and in specific case make such variance from, the terms of the ordinance as would not be contrary to public interest, where, owing to special conditions, a literal enforcement would result in unnecessary hardship, and so that the spirit of the ordinance should be observed and substantial justice done; and further, to determine whether the ordinance, so far as it affected the use of the property in question, tended to promote the public morals, health, safety or welfare, and if it did not in such instance, might modify or vary any requirement thereof.” *Feldman & Pivnick v. Board of Adjustment of East Orange*, 6 N. J. Mis. Rep. 520.

A board of adjustment created under this statute is an auxiliary tribunal with full power to decide the issues entrusted to it under the statute after a legal ascertainment of the facts from the evidence produced before it. *Bilt-Wel Construction Co. v. Dowling*, 5 N. J. Mis. Rep. 801; *Burg v. Ackerman*, 5 N. J. Mis. Rep. 96.

The board of adjustment being a judicial body, the legal rules of evidence must be adhered to in deciding the question of fact and presumptions of fact must be given their legal effect in determining upon whom rest the burden of proof. *Koplin v. South Orange*, 6 N. J. Mis. Rep. 489; *Chancellor Development Co. v. Senior*, 4 N. J. Mis. Rep. 633; *Feldmen & Pivnick v. Board of Adjustment of East Orange*, 6 N. J. Mis. Rep. 520; *Del Campo*

v. *Board of Adjustment of Newark*, 6 N. J. Mis. Rep. 539; *Benbak Construction Co. v. Board of Adjustment of Orange*, 6 N. J. Mis. Rep. 543; *Bellofatto v. Board of Adjustment of Montclair*, 6 N. J. Mis. Rep. 512; *Born v. Board of Adjustment of Paterson*, 6 N. J. Mis. Rep. 551; *Kanter v. Board of Adjustment*, 6 N. J. Mis. Rep. 568; *Concord Development Co. v. Dowling*, 6 N. J. Mis. Rep. 552; *Marlyn Realty Co. v. Board of Adjustment of West Orange*, 6 N. J. Mis. Rep. 581; *Scharff v. Board of Adjustment of East Orange*, 6 N. J. Mis. Rep. 905.

## POINT II.

**There is a presumption of fact that the Zoning Ordinance of the Town of Nutley is reasonable.**

No testimony was offered before the Board of Adjustment that the ordinance was unreasonable. The only testimony given by the prosecutor-appellant was the kind of building that he proposed to erect. There is a presumption that the ordinance was reasonable. This was decided in *Burg v. Ackerman*, 135 Atl. 672, and the Supreme Court in a long line of cases recently decided followed the rule laid down in that decision.

With a presumption of fact that the ordinance was reasonable the burden was cast upon the prosecutor-appellant to offer testimony to overcome the fact of reasonableness. This was not done and nothing remained for the Board of Adjustment but to decide that the ordinance was reasonable. A presumption of fact of reasonableness precludes the necessity of proof of that fact. The only fact then before the Board of Adjustment was the fact that the ordinance was reasonable.

The Supreme Court of this State has on numerous occasions where the facts are the same as in this case upheld the Board of Adjustment in denying an application where the building to be erected violated the zoning ordinance. *Koplin v. South Orange*, 6 N. J. Mis. Rep. 489; *Feldmen & Pivnick v. Board of Adjustment of East Orange*, 6 N. J. Mis. Rep. 520; *Chancellor Development Co. v. Senior*, 4 N. J. Mis. Rep. 633; *Concord Development Co v. Dowling*, 6 N. J. Mis. Rep. 552; *Sharff v. Board of Adjustment of East Orange*, 6 N. J. Mis. Rep. 905.

The Courts of this State on the other hand, after reviewing the decision of the Board of Adjustment denying an application and after considering the testimony offered by the applicant have decided that the presumption of reasonableness of the ordinance was overcome and have reversed the decision of the adjustment board. In this case there is no evidence of unreasonableness.

In *Trusdell v. East Orange*, 5 N. J. Mis. Rep. 695, the Court found that from the evidence submitted by the relator the presumption of reasonableness was overcome by the proof that the ordinance was unreasonable. In the case of *Koplin v. South Orange*, *supra*, the Court said that there was nothing to show, from the stipulation of facts in the case, that the ordinance was unreasonable and therefore affirmed the action of the building inspector in denying the permit. On the same day that the Koplin case was decided by the Supreme Court, the Court of Errors and Appeals in the case of *A. G. Construction Co. v. Scott*, 141 Atl. 760, decided that the evidence submitted was sufficient to overcome the pre-

sumption of reasonableness of zoning ordinance. The Court said:

“Under the particular circumstances of this case we think that the appellant has shown the zoning ordinance as applied to the property as an unreasonable exercise of the police power.”

There is also a presumption that the action of the Board of Adjustment was right. *Sylvester v. Princeton*, 5 Adv. Rep. 1801; *Born v. Board of Adjustment of East Orange*, 6 N. J. Mis. Rep. 551; *Feldmen & Pivnick v. Board of Adjustment*, 6 N. J. Mis. Rep. 520.

### POINT III.

The act of the Board of Adjustment will not be disturbed unless it is shown by evidence to be wrong.

There was no evidence submitted showing that the determination of the adjustment board was wrong. *Oxford Construction Co. v. Orange*, 131 Atl. Rep. 545.

### POINT IV.

It is not necessary to consider the effect of the Zoning Act of 1928 in deciding the question involved.

The question to be decided is whether the Board of Adjustment, with power to pass upon the reasonableness or unreasonableness of a municipal ordinance, has correctly done so from the evidence before it. The ordinance is before the Board of Adjustment with a presumption of reasonableness of its provisions. In other words, it is as if the fact of reasonableness was proved by competent evidence. No evidence

of unreasonableness is submitted and the only decision that the Board must make is that the ordinance is reasonable. In addition to the presumption of reasonableness there is another presumption that its action was right, and there is no evidence to show that its action was wrong and the reviewing tribunal is therefore bound to uphold the decision of the Board of Adjustment. The Zoning Act of 1928 or the Constitutional Amendment of 1927, does not need to be called into question in order to determine the issue. In *Sharff v. Board of Adjustment of East Orange*, 6 N. J. Mis. Rep. 905.

However, the Supreme Court in *Koplin v. South Orange*, *supra*, did decide that the Constitutional Amendment of 1927 and the Zoning Ordinance of 1928, did have retroactive effect as to applications made before the Constitutional Amendment of 1927, and the Zoning Ordinance of 1928.

In *Freeman v. Sargeant*, 6 N. J. Mis. Rep. 906, the Court said:

“But apart from all this, the case is controlled in its general features by the decision of this court in *Koplin v. South Orange*, 142 Atl. Rep. 235; 6 N. J. Mis. Rep. 489, holding in substance that since the Constitutional Amendment of 1927, relating to zoning and the Act of 1928, Chapter 274, the Court will not undertake to override the powers thus conferred, even retroactively, on the municipal body.”

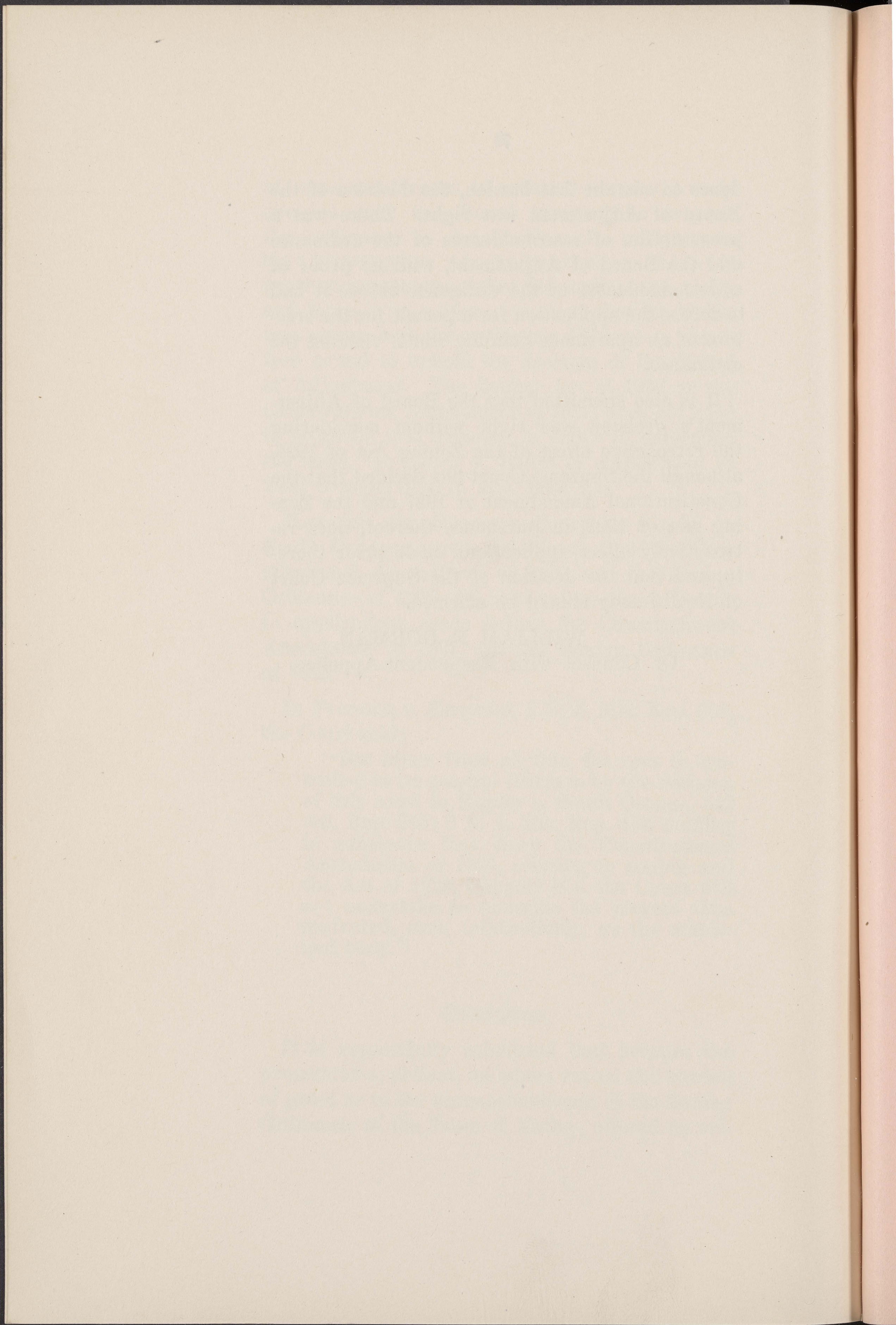
#### Conclusion.

It is respectfully submitted that because the prosecutor-appellant, on whom rested the burden of proof as to the unreasonableness of the Zoning Ordinance of the Town of Nutley, offered no evi-

dence to sustain that burden, the decision of the Board of Adjustment was right. There was a presumption of reasonableness of the ordinance and the Board of Adjustment, with no proof of unreasonableness of the ordinance before it had to refuse the application for a permit for the erection of an apartment building which violated the ordinance.

It is also submitted that the Board of Adjustment's decision was right without considering the retroactive effect of the Zoning Act of 1928, although the Supreme Court has decided that the Constitutional Amendment of 1927 and the Zoning Act of 1928, in pursuance thereof, does retroactively effect applications made prior thereto, and that the decision of the Supreme Court of New Jersey should be affirmed.

WILLIAM F. GORMAN,  
Of Counsel with Respondent-Appellee.



# I N D E X

|   | PAGE |
|---|------|
| Bill of Complaint . . . . .                                   | 1    |
| Answer of Defendant, Sophie Krall . . . . .                   | 12   |
| Replication to Answer of Defendant, Sophie<br>Krall . . . . . | 20   |
| Testimony . . . . .   | 21   |
| <b>COMPLAINANT'S TESTIMONY:</b>                               |      |
| Mike Stander—Direct . . . . .                                 | 22   |
| Cross . . . . .   | 51   |
| Re-direct . . . . .   | 90   |
| Voorhees Kline—Direct . . . . .                               | 83   |
| Cross . . . . .   | 101  |
| Re-direct . . . . .   | 107  |
| Re-cross . . . . .  | 108  |
| William Townsend—Direct . . . . .                             | 109  |
| Cross . . . . .   | 114  |
| Mary Cain—Direct . . . . .                                    | 118  |
| Cross . . . . .   | 131  |
| Herman Brady—Direct . . . . .                                 | 122  |
| <b>DEFENDANT'S TESTIMONY:</b>                                 |      |
| Frederick A. McCullough—Direct . . . . .                      | 133  |
| Cross . . . . .   | 139  |
| Re-direct . . . . .   | 151  |
| Re-cross . . . . .  | 152  |

