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Constitutional Law—Equal Protection—Municipal Zoning Ordinance

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CONSTITUTIONAL LAW—EQUAL PROTECTION—MUNICIPAL ZONING ORDINANCE

The plaintiff, a non-profit religious corporation, brough mandamus action to compel a city building inspector to issue a permit for the construction of the corporation's private religious high school upon the corporation's land in class "A" residence zone. The city zoning ordinance prohibited the erection of buildings other than single family dwellings, public schools, or private elementary schools within class "A" residence districts.[1] *Held*: No unconstitutional or otherwise illegal discrimination appeared in the zoning ordinance by reason of its exclusion of private high schools from class "A" residence zones while accepting similar public high schools.[2]

This decision is contrary to the weight of authority on the general subject,[3] and to cases presenting similar facts.[4] In most instances where an ordinance has had the effect of excluding all types of schools or a particular type of school from an area, it has been held invalid for the reason that it was arbitrary and discriminatory, that it had no reasonable relation to public health, morals, safety, or general welfare,[5] or, specifically, that it vio-

1 City of Wauwatosa, Wis. Zoning Code § 14.03 (1).

2 State ex rel. Wisconsin Lutheran High School Conference v. Sinar, 267 Wis. 91, 65 N.W.2d 43 (1954).

3 Chicago v. Sachs, 1 Ill.2d 342, 115 N.E.2d 762 (1953); Mooney v. Sachs, 333 Mich. 389, 53 N.W.2d 308 (1952); Long Island University v. Tappan, 212 Misc. 956 113 N.Y.S.2d 795 (Sup. Ct. 1952), aff'd without opinion, 281 App. Div. 771, 118 N.Y.S.2d 767 (2d Dep't 1953), aff'd without opinion, 305 N.Y. 893, 114 N.E.2d 432 (1953); Union Free School Dist. v. Hewlett Bay Park, 279 App. Div. 618, 107 N.Y.S.2d 858 (2d Dep't 1951); State v. Northwestern Preparatory School, 228 Minn. 363, 37 N.W.2d 370 (1949); Lumpkin v. Township Committee, 134 N.J.L. 428, 48 A.2d 798 (Sup. ct. 1946); Roman Catholic Archbishop v. Baker, 140 Ore. 600, 15 P.2d 391 (1932); Western Theological Seminary v. Evanston, 325 Ill. 511, 156 N.E. 778 (1927). Contra: Yanow v. Seven Oaks Park, Inc.. 11 N.J. 341, 94 A.2d 482 (1953); State ex rel. Hacharedi v. Baxter, 148 Ohio St. 221, 74 N.E.2d 242, appeal dism'd and cert. denied, 332 U.S. 827 (1947); Application of Devereux Foundation, Inc., 351 Pa. 478, 41 A.2d 744, appeal dism'd, 326 U.S. 868 (1945); Jewish Nat. Folk School, 327 Pa. 578, 195 Atl. 9 (1937).

4 Phillips v. Homewood, 255 Ala. 180. 50 So.2d 267 (1951); Catholic Bishop of Chicago v. Kingery, 371 Ill. 257, 20 N.E.2d 583 (1939); City of Miami Beach v. State ex rel. Lear, 128 Fla. 750, 175 So. 537 (1937).

5 Supra note 3.

lated the due process and equal protection clauses.[6]

A city council has wide discretion in enacting zoning ordinance classifications, but these classifications must always rest upon a difference which bears a fair and reasonable relationship to the persons whom they are attempting to regulate.[7] There must be a reasonable ground or basis for the discrimination made between those included and those excluded in the area zoned.[8] It is only when the ordinance is clearly arbitrary and unreasonable that a court will interfere.[9]

The court in the instant case held that there was a tangible differance between the two types of schools. The court argued that while both schools offered equal disadvantages to the area, only the public school presented education free of discrimination as to who could attend. Therefore, the municipal authorities were justified in weighing this important difference when enacting the ordinance. Further support for the court's argument is found in the fact that a public school cannot constitutionally teach religious education;[10] so it must follow that a school which does teach religious subjects is different and not of like category.

It has been held that a zoning ordinance which prohibited a private park in a certain area, while allowing a public park in the same area, was not unreasonable.[11] The same holding has resulted where a public utility company was allowed to operate in an area restricted to similar operations by privately owned con-

[6] Phillips v. Homewood, 255 Ala. 180, 50 So.2d 267 (1951); Concordia Collegiate Institute v. Miller, 301 N.Y. 189, 93 N.E.2d 632 (1950); State v. Northwestern Preparatory School, 228 Minn. 363, 37 N.W.2d 370 (1949); Lumpkin v. Township Committee, 134 N.J.L. 428, 48 A.2d 798 (Sup. ct. 1946).

[7] Nectow v. City of Sambridge, 277 U.S. 183 (1928).

[8] DeBlasiis v. Bartell, 143 Pa. Super. 485, 18 A.2d 478 (1941); White's Appeal, 85 Pa. Super. 502 (1925), aff'd, 287 Pa. 359, 134 Atl. 409 (1926).

[9] Zahn v. Board of Public Works, 274 U.S. 325 (1927); Euclid v. Amber Realty, 272 U.S. 365 (1926); Gullickson v. Mitchell, 213 Mont. 359, 126 P.2d 1106 (1942); Baker v. State Land Office, 294 Mich. 587, 293 N.W. 763 (1940).

[10] Harfst v. Hoegen, 359 Mo. 808, 163 S.W.2d 609 (1942); Wright v. School Dist. No. 27 of Woodson County, 151 Kan. 485, 99 P.2d 737 (1940); Gerhardt v. Heid, 66 N.D. 444, 267 N.W. 127 (1936); State v. Scheve, 65 Neb. 853, 93 N.W. 169 (1903).

[11] McCarter v. Beckwith, 247 App. Div. 289, 285 N.Y. Supp. 151 (2d Dep't 1936), aff'd, 272 N.Y. 488, 2 N.E.2d 882 (1936), cert. denied, 299 U.S. 601 (1936); Golf, Inc., v. District of Columbia, 67 F.2d 575 (D.C. Cir. 1933).

cerns.[12] Also, the courts have upheld a zoning ordinance which allowed a public building to be built in an area which was prohibited to private construction of buildings.[13]

The difference between the two types of schools seems to be a very important one which has been neglected in past cases dealing with the subject. This difference would justify a city council's careful consideration when drafting zoning ordinances for the promotion of the general welfare of the community.

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[12] State ex rel. Carter v. Harper, 182 Wis. 148, 196 N.W. 451 (1923); In re Opinion of the Justices, 235 Mass. 597, 127 N.E. 525 (1920).

[13] City of Cincinnati v. Wegehoft, 119 Ohio 136, 162 N.E. 389 (1928).