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Constitutional Law- Zoning - Private High Schools Excluded from Zone in Which Public High Schools Permitted

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CONSTITUTIONAL LAW—ZONING—PRIVATE HIGH SCHOOLS EXCLUDED FROM ZONE IN WHICH PUBLIC HIGH SCHOOLS PERMITTED—Among the uses permitted in the "A" residence zone by the Wauwatosa, Wisconsin zoning ordinance were "(e) Public Schools and Private Elementary Schools." The city building inspector denied to plaintiff, a private, non-profit religious corporation, a permit for the construction of a private high school in that zone. Plaintiff brought an action in mandamus to compel the issuance of such a permit, alleging that the ordinance deprived plaintiff of property without due process of law, and denied to it the equal protection of the laws guaranteed by the Fourteenth Amendment.¹ The lower court granted the writ. On appeal, *held*, reversed. The detrimental effect which the proposed school would have on the affected residential neighborhood justified making it a subject of the zoning power. Furthermore, the distinction made between public and private high schools was justified by the lesser contribution to the general welfare made by the private high school.² *State ex rel. Wisconsin Lutheran High School Conference v. Sinar*, 267 Wis. 91, 65 N.W. (2d) 43 (1954).

In considering the validity of a zoning ordinance which excludes certain uses from certain zones, it must of course be first determined that the excluded use is a proper subject of the zoning power, i.e., that its exclusion will promote the public health, safety, morals or general welfare.³ The court in the principal case experienced little difficulty with this requirement, finding that the proposed school would add to the congestion of the surrounding streets and interfere with the peace and quiet of the neighborhood. Although general statements may be found to the effect that the police power ought not be invoked to exclude schools from the more desirable residential neighborhoods,⁴ virtually all the

¹ ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST., Amend. XIV, §1.

² The court also justified this distinction on the ground that the city, acting in its governmental capacity, is not bound by the terms of its zoning ordinance. However, the court expressly refused to base its decision on this point. Cases concerned with the difference between governmental and proprietary functions, and the effect of this difference, are collected in 62 C.J.S., Municipal Corporations §110, p. 239 et seq. (1949), and 171 A.L.R. 325 (1947). See also the note in 15 N.Y. UNIV. L.Q. REV. 449 (1938).

³ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114 (1926); BASSETT, ZONING, 2d ed., 54 (1940).

⁴ E.g., BASSETT, ZONING, 2d ed., 196 (1940): "It would seem unreasonable to force schools into business districts where there is noise and congestion and where land is most

cases in this area have turned on the finding that an unreasonable classification between public and private schools has been made by the ordinance, rather than on the ground that schools are not a proper subject of the zoning power.⁵ The uniform reluctance on the part of the courts to decide these cases on the latter ground would seem to indicate that schools are not exempt from the reach of the zoning power;⁶ the courts will consider each prohibition in the light of the particular detrimental effect upon the particular zone.

Legislative classification does not per se result in a denial of the equal protection of the laws. So long as a reasonable basis for that classification exists, a statute may affect different groups in a different manner or to a different extent.⁷ Therefore, if there exist between public and private high schools substantial differences of a character rendering the latter more amenable to the zoning power than the former, a zoning ordinance based upon that distinction will not deny to the parties affected the equal protection of the laws. In the principal case the court conceded that public and private high schools were identical in their power to injure, both esthetically and otherwise, a high-class residential neighborhood. The court said, however, that a public school serves the area without discrimination, whereas a private school does not,⁸ and thus the latter does not promote the general welfare to the same extent as the former.⁹ From

expensive. To force them into the more congested residence districts is equally unreasonable. Zoning ought not to be employed to free the highest class residence district from every use that may be considered objectionable."

⁵ No decision has been found to the effect that schools may not be excluded from certain zones under a general zoning law, although there is dicta to that effect. E.g., *Livingston v. Davis*, 243 Iowa 21, 50 N.W. (2d) 592 (1951); *Langbein v. Board of Zoning Appeals of The Town of Milford*, 135 Conn. 575, 67 A. (2d) 5 (1949). Cf. *Mooney v. Orchard Lake*, 333 Mich. 389, 53 N.W. (2d) 308 (1952).

⁶ It is possible to argue that such an exemption has been created in the case of churches. With the exception of three cases [*Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Porterville*, 90 Cal. App. (2d) 656, 203 P. (2d) 823 (1949); *City of Chico v. First Avenue Baptist Church of Chico*, 108 Cal. App. (2d) 297, 238 P. (2d) 587 (1951); *Galfas v. Ailor*, 81 Ga. App. 13, 57 S.E. (2d) 834 (1950)], there is unanimous accord that churches may not be excluded from residential zones. Little or no attention is given to possible congestion, traffic hazards, etc. See the annotation in 138 A.L.R. 1287 (1942).

⁷ CONSTITUTION OF THE UNITED STATES OF AMERICA, Corwin ed. (S. Doc. 170, 82d Cong., 2d sess.) p. 1144 et seq. (1953).

⁸ In the amicus curiae brief filed by the Wisconsin Association of Presidents and Deans of Liberal Arts Colleges in support of plaintiff's motion for a rehearing, it was argued that the admission policies of private Lutheran schools cannot be properly classed as discriminatory, because many students of other religions are admitted, although preference is usually given to those of the Lutheran faith.

⁹ The decision is thus based solely upon the differing contributions made by each type of school to the general welfare. In *University Heights v. Cleveland Jewish Orphans Home*, (6th Cir. 1927) 20 F. (2d) 743 at 745, the court said: "A municipality, so far as we are informed, has no power to prohibit the doing of lawful acts which do not affirmatively appear to serve the public convenience or welfare. . . ." This clearly indicates that a prerequisite to a valid exercise of the zoning power is a finding that the prohibited use would be injurious to the public health, safety, morals, or the general welfare. However, once such a finding has been made, it would then seem proper to weigh the benefits which the community would derive from the proposed use, in order to determine whether a distinction made between the proposed use and certain permitted uses is reasonable.

this it was concluded that the distinction made in the ordinance does not deny to plaintiff the equal protection of the laws.¹⁰ Both the reasoning and the conclusion of the court on this point are certainly open to doubt. Upon the state lies the burden of educating its citizens, this being the socially desirable goal to be attained. So long as a given school satisfies the requirements of the state in the performance of its educational function, what can it matter that it admits students on a restricted basis? The nature of these criteria can have no effect on the degree to which the school aids in the attainment of the ultimate social objective. The courts have uniformly denied that a zoning ordinance may properly distinguish between public and private schools, excluding the latter while admitting the former.¹¹ "It is evident that such exclusion . . . was not based on the public health, safety, morals, and general welfare but upon a desire to employ the device of zoning to make exclusive districts more exclusive."¹²

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¹⁰ The following four cases were cited by the court as support for their conclusion that the distinction made by the ordinance was reasonable: *McCarter v. Beckwith*, 247 App. Div. 289, 285 N.Y.S. 151 (1936), *affd.* 272 N.Y. 488, 3 N.E. (2d) 882 (1936), *cert. den.* 299 U.S. 601, 57 S.Ct. 194 (1936); *Golf, Inc. v. District of Columbia*, (D.C. Cir. 1933) 67 F. (2d) 575; *Cincinnati v. Wegehof*, 119 Ohio St. 136, 162 N.E. 389 (1928); *State ex rel. Carter v. Harper*, 182 Wis. 148, 196 N.W. 451 (1923). In each of these cases, however, it may readily be found either that the proposed use would constitute a greater danger to the public health, safety, morals, or the general welfare than would the permitted use, or that the permitted use more clearly promotes the general welfare than the prohibited use.

¹¹ The principal case appears to be unique in declaring reasonable such a legislative distinction. See the recent annotation in 36 A.L.R. (2d) 653 (1954), entitled "Zoning regulations as applied to schools, colleges, universities, and the like."

¹² *BASSETT, ZONING*, 2d ed., 72 (1940). The court quite possibly was influenced by the fact, not mentioned in the opinion, that no schools of any kind, public or private, had been erected in this residential zone.