

Westlaw.

175 So. 537
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ENTERED AS EXHIBIT *Laura Russo* AT
BY NUMBER
THE PLANNING AND ZONING BOARD
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DATE INITIALS

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Supreme Court of Florida.
CITY OF MIAMI BEACH et al.

v.

STATE ex rel. LEAR et al.

June 30, 1937.

Error to Circuit Court, Dade County; Jeffn. B. Browne, Judge.

Mandamus by the State, on relation of Ida R. Lear, joined by her husband, E. G. Lear, against the City of Miami Beach, a municipal corporation in Dade county, and another. A peremptory writ was issued, and respondents bring error.

Affirmed.

West Headnotes

[1] **Mandamus 250** ↪87

250 Mandamus

250II Subjects and Purposes of Relief

250II(B) Acts and Proceedings of Public Officers and Boards and Municipalities

250k87 k. Proceedings to procure and grant or revoke licenses, certificates, and permits. Most Cited Cases

Mandamus may be invoked to compel the grant of a permit for the operation of a private school denied because of an invalid zoning ordinance.

[2] **Zoning and Planning 414** ↪1110

414 Zoning and Planning

414II Validity of Zoning Regulations

414II(B) Particular Matters

414k1110 k. Schools and education. Most Cited Cases

(Formerly 414k72, 268k601, 268k625, 268k626)

A zoning ordinance prohibiting private schools in a multiple family district, while permitting public

schools, is invalid because having no relation to the public safety, health, morals, comfort, or general welfare.

Municipal Corporations 268 ↪626

268 Municipal Corporations

268X Police Power and Regulations

268X(A) Delegation, Extent, and Exercise of Power

268k626 k. Discrimination. Most Cited Cases

Zoning and Planning 414 ↪1110

414 Zoning and Planning

414II Validity of Zoning Regulations

414II(B) Particular Matters

414k1110 k. Schools and education. Most Cited Cases

(Formerly 414k76)

A zoning ordinance prohibiting private schools in a multiple family district, while permitting public schools, is invalid because arbitrary.

Municipal Corporations 268 ↪625

268 Municipal Corporations

268X Police Power and Regulations

268X(A) Delegation, Extent, and Exercise of Power

268k625 k. Reasonableness of regulations. Most Cited Cases

A zoning ordinance prohibiting private schools in a multiple family district, while permitting public schools, is invalid because unreasonable.

*751 **537 J. Harvey Robillard, of Miami Beach, for plaintiffs in error.

Benjamin Cohen and Edward L. Lustgarten, both of Miami, for defendants in error.

BUFORD, Justice.

Defendants in error instituted mandamus proceedings in the circuit court of Dade county coerce the plaintiffs in error 'to forthwith issue to said Ida R. Lear, a permit to operate a school for minors within the said premises.' The premises referred to were described as the following described property 'lying within the corporate limits of the City of Miami Beach, Florida; 1500 Collins Avenue, City of Miami Beach, Florida.'

After motion to quash alternative writ was denied, respondents answered, pleading section 5 of Ordinance No. 289 as amended by Ordinance No. 433 approved August 6, 1936. Section 5 of Ordinance No. 289 was prior to amendment as follows:

'Section 5.

'Use Regulations

'Multiple-Family District

'In the 'Re' Multiple-Family District, no building or land shall be used and no building shall be hereafter erected, constructed, reconstructed or structurally altered which is designed, arranged or intended to be used for any purpose, unless otherwise provided for in this ordinance, except for one or more of the following uses:

*752 '(1) Any use permitted in the 'RDD' Modified Single-Family district. (427)

'(2) Multiple-family dwellings or apartments in accord with the area provisions hereinafter defined, and accessory buildings.

'(3) Hotels.

**538 '(4) Hotels with one hundred (100) or more guest rooms may contain business establishments of the 'BAA' classification providing the exterior of the building shall not contain store fronts or have the appearance or commercial or mercantile activities or any display of articles or services for sale which are visible from the exterior of the building or on the grounds facing a public highway or water frontage, and providing further that businesses established under the provisions of this sec-

tion shall only be entered from within the building.

'(5) Private clubs, only upon approval and permit by the city council of the City of Miami Beach. (389)

'(6) Bungalow or house courts.

'(7) Apartment hotels. Provision for exterior appearances to be the same as provided in Item No. 4 for Hotels.

'(8) Miniature golf courses.

'(9) Public or private schools.

'(10) Accessory uses for tenants only. (427).'

The pertinent part of the amendatory ordinance No. 433 is as follows:

'Be it ordained by the city council of the city of Miami Beach, Florida:

'That Section 5 of Ordinance No. 289, as amended, be and

'Section 1: the same is hereby amended by eliminating therefrom the following:

'(9) Public or private schools.'

and substituting in lieu therefor, the following:

*753 '(9) Public schools.'

Motion to strike the answer was presented but it appears that the learned circuit judge, the late lamented Jefferson B. Browne, granted peremptory writ, the answer notwithstanding. In doing so he prepared and caused to be filed an opinion as follows:

'An alternative writ of mandamus was issued directed to the City of Miami Beach Florida, to show cause why it should not issue a license or permit to the petitioner, Ida R. Lear, joined by her husband, E. G. Lear, to operate a school for minors within a certain restricted area in the City of Miami

Beach, designated as a Multiple-Family District. Answer was filed to the alternative writ, and a motion made to quash the same. The motion to quash was denied, and the matter is before the Court on motion to strike the defendant's answer.

'The issues present this question: Is the provision of Section 5 of the Zoning Ordinance of the City of Miami Beach, to the effect that no building within what is called in the Ordinance a Multiple-Family District may be used for the operation of any public or private school a reasonable exercise of the City's authority? Affidavits were submitted on the question of whether or not private schools are detrimental to the inhabitants of, or property located within, such district.

'There are, no doubt, some people who regard all children, except their own, as nuisances, and to such the laughter of a child at play is a discordant note. The dedication of private property to the mental and moral training of children is a very high purpose. To those who regard their personal peace and comfort as the highest purpose of the law, a child's laughter, the bird's warbling, the brook's babbling and even the fluttering of falling leaves, are nuisances which should be prohibited within certain zones.

*754 'It may be possible to so conduct a private school for children that it becomes a nuisance. When such a condition exists, the City may abate it as it would any other nuisance. Occupations that have within themselves elements that cannot be regulated, may be prohibited; but I fail to see why a private school for children may not be so regulated, that instead of its being a nuisance, may be a benefit to those residing in its vicinity. I regard the provision of Section 5 of the Zoning Ordinance of the City of Miami Beach, whereby private schools are absolutely prohibited within the Multiple-Family Districts, without regard to whether the school is conducted in a quiet and orderly manner or not, an unreasonable exercise of municipal authority. Should any school within such district become a nuisance in fact, the City may abate it, but it must

be a nuisance in fact and in law, and not made so merely by Ordinance, and it cannot abate a lawful business as a nuisance when it is not such in law or fact.

'The Court, having considered the pleadings, the affidavits submitted and argument of counsel, is satisfied that the provision of the Ordinance under consideration is an unreasonable one, and the peremptory writ of mandamus will issue.'

Peremptory writ was issued and respondents took writ of error.

**539 [1] That mandamus may be invoked in cases like this is reflected by the opinion and judgment in the case of *State ex rel. Shad v. Fowler*, 90 Fla. 155, 105 So. 733.

In *State ex rel. Skillman v. City of Miami*, 101 Fla. 585, 134 So. 541, 542, we held:

'The validity of ordinances dividing the city into districts and limiting the use of real estate within such districts to certain purposes has been sustained, it being held that, in order for such ordinance to be declared unconstitutional, it must affirmatively appear that the restriction is clearly arbitrary *755 and unreasonable and has not any substantial relation to the public safety, health, morals, comfort, or general welfare.

'In determining whether the general welfare requires interference with property rights by a zoning ordinance, municipalities should, and presumably generally do, consider, among other things, the loss to property owners by a restriction of the use of their property. This, however, is only one of the considerations on which the final decision is to be based. Doubtless, if the value of the property rights destroyed is so great, as compared with the benefit done, that it clearly appears the ordinance is arbitrary and unreasonable, the courts will interfere, but, if there can be any reasonable argument on the question, the legislative will must prevail.'

[2] When measured by these standards, we

must hold the ordinance invalid because it appears to be arbitrary and unreasonable and has no relation to the public safety, health, morals, comfort, or general welfare.

It will be noted that the ordinance as amended specifically permits the conducting of public schools within the prescribed zone and prohibits the conducting of private schools of all sorts therein. The prohibiting classification finds no foundation or basis in reason or experience that has been brought to our attention.

What objectionable characteristic touching the comfort or other general welfare of the surrounding community may obtain as to a private school which would not probably obtain in greater degree as to a public school has not been suggested, and, we think, for the very good reason that none exists. For this reason alone the ordinance as amended must be held to be arbitrary.

We find no reversible error and affirm the judgment.

*756 So ordered.

ELLIS, C. J., and TERRELL, J., concur.
BROWN, J., not participating.
DAVIS, J., concurred in the foregoing opinion.

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