

it is free from state sales tax under the import-export [sic] clause of the United States if at the time title passed the certainty of the foreign destination was plain.⁹ The validity of this statement is even more dubious in light of the repeated assertions of the Supreme Court that the intent to export does not make articles exports.¹⁰

Of course, the Supreme Court has denied certiorari, but that fact is not indicative of any change of doctrine on the part of the Court.¹¹ In any event, the problem in the instant case could easily have been avoided. If title to the goods had not passed from the manufacturer to the purchaser at the time they were delivered to the packer, but had been retained by the seller until delivery to the ocean carrier, the transaction would clearly not have been subject to the state sales tax because the act sought to be taxed would then be the act committing the goods to export.¹² Less clear, however, is the tax position of the seller who turns over title under the contract at the time of delivery of the goods to a domestic carrier for transshipment to the ocean carrier. *Hughes Bros. Timber Co. v. Minnesota*,¹³ held under the Commerce Clause, that an ad valorem property tax may not be levied by the state while the goods were in transit, but prior to their having been received by the interstate carrier. While goods in foreign commerce have been recognized as being entitled to greater immunity from taxation under Art. I, § 9, cl. 5 and Art. I, § 10, cl. 2, than goods in interstate commerce under the Commerce Clause,¹⁴ the Supreme Court has in *Empresa* left open the extent of the applicability of the *Hughes rule* to foreign commerce situations.

PETER A. DONOVAN

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Constitutional Law—Off-Street Parking Provision in Municipal Zoning Ordinance Held Invalid As a Delegation of Legislative Power.—*State ex rel. Associated Land and Investment Corp. v. The City of Lyndhurst*.¹—A landowner brought an action for mandamus in the Ohio Court of Appeals to compel a building inspector to issue a permit for the alteration of an office building. The inspector had previously denied the permit because of non-compliance with off-street parking provisions in the local zoning ordinance. The Court of Appeals granted the writ and, on appeal, the Ohio Supreme Court affirmed. HELD: Provisions of the zoning ordinance which (1) required that all buildings other than dwellings have off-street parking

⁹ 51 Cal. 2d 746, 749, 336 P.2d 161, 163.

¹⁰ See cases note 6 supra.

¹¹ See separate opinion of Frankfurter, J., in *Maryland v. Baltimore Radio Show*, 338 U.S. 912 (1950).

¹² *Spalding & Bros. v. Edwards*, 262 U.S. 66 (1923).

¹³ 272 U.S. 469 (1926).

¹⁴ See *Fairbanks v. United States*, 181 U.S. 283 (1901); *United States v. Hvoslef*, 237 U.S. 1 (1914); and *Thames & Mersey Ins. Co. v. United States*, 237 U.S. 19 (1914).

¹ 154 N.E.2d 435 (Ohio St. 1958).

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space "reasonably adequate" for commercial vehicles necessary to carry on the business of the occupants of the premises and (2) required that all buildings other than dwellings, churches, theatres, assembly halls, retail stores, have parking space for the "normal volume" of car parking by persons coming to the premises on matters incidental to the uses thereof, were unconstitutional as a delegation of legislative power without sufficient criteria to guide the administrative officer in the exercise of his discretion.² The portion of the decision which strikes down the invalid provisions, based on the doctrine of separation of powers, is in accord with well established law,³ and graphically illustrates one of the barriers facing those who seek to incorporate off-street parking requirements for commercial buildings into zoning laws.

Since measures to alleviate increasing traffic congestion in urban areas are clearly directed toward the public welfare, the insertion of off-street parking requirements in zoning laws is a valid exercise of police power.⁴ Although in practice such parking provisions are not yet universally included in zoning ordinances, a substantial number of communities have enacted some requirements.⁵ Because of the nature of certain land uses within a zoning plan, there are available convenient factors which in particular situations may be utilized in legislation to provide sufficiently definite criteria to channel the discretion of those administering the plan. An example of this may be seen in the instant ordinance. Parking facilities required for inhabitants of dwellings were measured by the number of dwelling units; facilities for patrons of churches, theatres, and assembly halls were measured by the seating capacity; facilities for customers of banks and retail stores were measured by the available floor space above a certain minimum; all other buildings were required to provide space in relation to the number of employees. These provisions were held valid since there was a reasonable measuring unit provided to ascertain the amount of parking space required by the ordinance;⁶ but the regulations, as to loading and unloading facilities for commercial vehicles and facilities for cars of persons coming to structures, such as office buildings, for business purposes, provided no criteria. The ordinance simply designates "reasonable and adequate" and "the normal volume of car parking" as standards, leaving the final determination to the unguided discretion of the administrator.⁷ The requirement of space for commercial vehicles, applicable to all premises other than dwellings, and the requirement for cars of persons coming to the premises on business, applicable to all structures other than dwellings, churches, theatres, assembly halls, retail stores, both lacked a measuring factor such as was found in the valid parts of the ordinance.

² Id. at 441.

³ State ex rel. Synod of Ohio v. Joseph, 139 Ohio St. 229, 39 N.E.2d 515 (1942); Hobart v. Collier, 3 Wis. 2d 182, 87 N.W.2d 868 (1958); 37 Am. Jur. Municipal Corporations § 160 (1941).

⁴ State ex rel. Associated Land and Investment Corp., supra note 1, at 440; See 2 Yorkley, Zoning Law and Practice, § 210 (2d ed. 1953).

⁵ 2 Yorkley § 208.

⁶ State ex rel. Associated Land and Investment Corp., supra note 1, at 440.

⁷ Id. at 441.

The problem of providing adequate criteria for situations such as those involved in the invalid parts of the instant ordinance seems to border on the impossible since any formula relating off-street parking requirements to land uses must be sufficiently general to be applicable to diverse businesses and yet sufficiently specific to meet the needs of the particular business occupying the premises. The amount of traffic to two physically similar office buildings, for example, may vary greatly because of the particular nature of the business carried on within each building. This may also be true of the traffic of commercial vehicles to different buildings. Possibly one method, in the case of alterations to and expansions of existing buildings, would be to require an estimate of future traffic to the building based on an average of the present flow of traffic multiplied by a ratio of presently available floor space to future floor space, or some other similar mathematical comparing factor. Entirely new buildings would have to be compared to similar enterprises under like conditions. The difficulties of writing such formulae into zoning ordinances effectively is obvious; however, mathematical accuracy is not required,⁸ and the parking provision would probably be upheld, if there were at least some workable formula, not palpably unreasonable or illogical, by which the discretion of the administrator might be guided.

LAWRENCE J. KENNEY

Corporations—Executive Compensation—Deferred Compensation Unit Plans.—*Lieberman v. Koppers Co., Inc.*¹—A corporate stockholder sued to enjoin the continued operation of a "Deferred Compensation Unit Plan," on the ground that the capital gains provision of the plan was not reasonably related to the value of the services rendered by those included within it. Upon the death or retirement of a key executive, there was to be credited to his "unit account" an amount equal to the net increment in market value of one share of common stock, from the date the "units" were assigned, multiplied by the number of "units" assigned. Payment of the amount was to be made over a ten-year period following the executive's death or retirement. On cross motions for summary judgment, the Court of Chancery, New Castle, Delaware, held for the defendant; it cannot be said that appreciation of the market price of common stock is unrelated to the efforts of the individuals included within the plan.

*Berkwitz v. Humphrey*² is the only other case which has been litigated testing the validity of the so-called "unit" plans. It was concluded there that a plan, almost identical to the one in question, was *per se* invalid. It was reasoned that, since the market price of common stock is subject to many extraneous forces, i.e., fortunes of the economy, speculation, etc., there

⁸ *Ibid.* The Court allowed the approximate determination of the number of employees by a consideration of the floor space, the number of offices, and the purposes for which the building was constructed.

¹ *Lieberman v. Koppers Co., Inc.*, 149 A.2d 756 (Del. Ch. 1959).

² 163 F. Supp. 78 (N.D. Ohio, 1958).