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Thus, the writer suggests that the logic, precedent value and practicality of the "separate but equal" doctrine be re-examined in its application to segregated education in an effort to arrive at a just and realistic interpretation of the Fourteenth Amendment.  

Bernard Allen Berkman

**Municipal Ownership of Off-Street Motor Vehicle Parking Facilities in Ohio**

In 1949 the Ohio Legislature, recognizing the magnitude of the traffic congestion problem confronting many Ohio municipalities, passed legislation under which a municipality may acquire, maintain, operate and finance off-street parking facilities. Purporting to act under this statute, the City of Columbus, through its City Council, authorized the acquisition of off-street parking facilities and established a plan for financing them with mortgage revenue bonds. The mayor and the auditor of the city, anticipating the reluctance of investors to purchase the bonds because of uncertainty in the statute, declined to execute the bonds and coupons. The city attorney promptly brought mandamus to compel their signatures. The Ohio Supreme Court, in *State ex rel. Gordon v. Rhodes*, granted the writ, holding unanimously that the Columbus City Council had acted not under the authority of the statute but under a broader grant of power in the Ohio Constitution.

This decision and Ohio General Code Sections 3939-2 and 3939-3 furnish the bulk of Ohio law on the authority of municipalities to provide municipally owned and operated off-street parking facilities. It is the purpose of this note to appraise the law on this subject as it now stands and to consolidate it into as comprehensive a form as possible.

A. What is the source of a municipality's power to provide off-street parking facilities?

According to the court in the *Rhodes* case, the power of a municipality

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lawful segregation, and the general inability of the average litigant to bear the financial burden in these cases will encourage Southern states to circumvent the law by forcing the Negro to appeal to the Supreme Court in every such action." Note, 30 Neb. L. Rev. 69, 71 (1950)

We believe that not even the most mathematically precise equality of segregated institutions can properly be considered equality under the law. No argument or rationalization can alter this basic fact: a law which forbids a group of American citizens to associate with other citizens in the ordinary course of daily living creates inequality by imposing a caste status on the minority group." To Secure These Rights, President's Committee on Civil Rights 82 (1947).
to establish, construct, maintain and operate off-street parking facilities within its confines is anchored in Article XVIII, Section 3 of the Ohio Constitution. Ohio General Code Sections 3939-2 and 3939-3 were circumvented by the language of the court, which, in discussing the city's authority to provide off-street parking facilities, asserted that the city had the power to "pass, carry out, and enforce" its ordinances "irrespective of Sections 3939-2 and 3939-3, General Code." However, the court did not find that the code sections contravened the Ohio Constitution; it found merely that they were "unnecessary for the accomplishment" of the city's project.

B. What is the extent and nature of a municipality's power to provide off-street parking facilities?

The Ohio Constitution and the statute confer the following powers upon municipalities:

1. The power to acquire, maintain and operate off-street parking facilities for motor vehicles.

2. The power to authorize and issue revenue bonds secured only by a mortgage upon the facilities acquired. The five per cent debt limitation in the Uniform Bond Act relating to the general indebtedness of a municipality does not apply to such bonds because the indebtedness does not pledge the municipality's general credit or tax revenues.

3. The power to issue bonds pledging the general credit of the municipality for the acquisition of such facilities, provided neither the tax rate prescribed by the Ohio Constitution nor the debt limitation prescribed by the Uniform Bond Act is exceeded.

4. The power to pledge and apply revenue obtained from parking meters on the street to the payment of revenue bonds issued for the purpose of financing off-street parking facilities.

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1 OHIO GEN. CODE §§ 3939-2, 3939-3.
2 156 Ohio St. 81, 100 N.E.2d 225 (1951).
3 OHIO CONST. Art. XVIII, § 3. "Municipalities shall have authority to exercise all powers of local self government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."
4 State ex rel. Gordon v. Rhodes, 156 Ohio St. 81, 99, 100 N.E.2d. 225, 234 (1951).
5 Ibid.
6 Ibid.
7 OHIO GEN. CODE §§ 3939-2, 3939-3.
8 State ex rel. Gordon v. Rhodes, 156 Ohio St. 81, 100 N.E.2d. 225 (1951).
9 Ibid.
10 OHIO GEN. CODE §§ 2293-1 et seq.
11 State ex rel. Gordon v. Rhodes, 156 Ohio St. 81, 100 N.E.2d. 225 (1951).
12 OHIO CONST. Art. XII, § 2.
13 OHIO GEN. CODE §§ 2293-1 et seq.
14 State ex rel. Gordon v. Jones, 156 Ohio St. 100, 100 N.E.2d. 235 (1951).
5. The power to acquire by purchase, gift, devise, exchange, lease or sub-lease any existing off-street parking facility or any real estate or interest therein.\(^{16}\)

6. The power to acquire real estate for off-street parking facilities by eminent domain, with certain limitations.\(^{27}\)

7. The power to dispose of off-street parking facilities, upon determination by the legislative body of the municipality that the facilities are no longer needed.\(^{18}\)

8. The power to use any money in the general fund of the municipality not otherwise obligated or encumbered for the purpose of acquiring, operating and maintaining off-street parking facilities.\(^{19}\)

C. What are the limitations upon the power of a municipality to provide off-street parking facilities?

The Ohio Supreme Court, in the first Rhodes case,\(^{20}\) set forth certain conditions which must exist before a municipality may exercise its power to acquire, maintain and operate off-street parking facilities.

1. The municipality must not have adopted a charter provision to the contrary.\(^{21}\)

2. Traffic congestion in the municipality must be severe enough to warrant the acquisition of such facilities, and the legislative body of the municipality must make a determination to that effect.\(^{22}\)

3. The legislative body of the municipality must find that the facilities will serve a public municipal purpose, and they must actually serve such a purpose.\(^{23}\) If the legislative body of the municipality fails to find that the off-street parking facilities which the municipality proposes to acquire would serve a public municipal purpose, or if such facilities do not, in fact, serve such a purpose, the acquisition or operation of such facilities is unconstitutional.\(^{24}\)

The municipal legislative bodies are given much discretion in these


\(^{17}\) Ibid.

\(^{18}\) Ibid.

\(^{19}\) Ohio Gen. Code § 3939-3.

\(^{20}\) State ex rel. Gordon v. Rhodes, 156 Ohio St. 81, 100 N.E.2d. 225 (1951). The second Rhodes case merely decided that revenue from parking meters on the streets could be applied to the payment of bonds issued to finance off-street parking. See note 15 supra.

\(^{21}\) State ex rel. Gordon v. Rhodes, 156 Ohio St. 81, 100 N.E.2d. 225 (1951), syllabus 1.

\(^{22}\) Ibid, syllabi 1, 2.

\(^{23}\) Ibid, syllabus 2.

\(^{24}\) City of Cleveland v. Ruple, 130 Ohio St. 465, 200 N.E. 307 (1936).
determinative matters, and their decisions will not be upset unless manifestly arbitrary or unreasonable.\textsuperscript{25}

In addition, there are express statutory prohibitions limiting the exercise of the power.

1. The municipality is prohibited from using the power of eminent domain to obtain, for off-street parking facilities, real estate held by a public utility or railroad, or any real estate upon which off-street parking facilities open to the general public have been established for one year prior to the proposed acquisition thereof.\textsuperscript{26}

2. The municipality is prohibited from exempting from state property taxation real estate acquired "under the provisions of" the statute.\textsuperscript{27}

3. The municipality is prohibited from diverting revenue derived from the operation of off-street parking facilities, except such portions thereof as may be necessary to pay taxes, maintenance expenses and operating expenses, to any purpose other than the retirement of the bonded indebtedness incurred by the acquisition of the facilities.\textsuperscript{28}

D. What areas of the law are undefined or uncertain?

The principal area of doubt concerns the significance of the statute and, particularly, of the statutory prohibitions enumerated above, in view of the decision in the first \textit{Rhodes} case.

Ohio General Code Section 3939-3 provides in part that a municipality may

issue and sell mortgage revenue bonds in the same manner and under
the same terms as mortgage revenue bonds may be issued under the authority of article XVIII, section 12 of the constitution of Ohio.

Article XVIII, Section 12 of the Ohio Constitution, which pertains to public utility financing, provides among other things that mortgage revenue bonds issued by a municipality beyond the general limits of bonded indebtedness must include a franchise stating the terms upon which a purchaser could operate the mortgaged properties in case of foreclosure.

The Columbus City Council had failed to include any such franchise in its ordinances, as required by Ohio General Code Section 3939-3, under which it purported to act. As a consequence, the Ohio Supreme Court in the first \textit{Rhodes} case, in upholding the action of the Columbus City Council, found it necessary to circumvent the statute and establish the authority for the controversial ordinances in some other source. The court found such a source in Article XVIII, Section 3 of the Ohio Constitution.\textsuperscript{29}

\textsuperscript{25} State \textit{ex rel.} Gordon v. Rhodes, 156 Ohio St. 81, 100 N.E.2d. 225 (1951).
\textsuperscript{26} \textit{Ohio Gen. Code} § 3939-2.
\textsuperscript{27} \textit{Ibid.}
\textsuperscript{28} \textit{Ohio Gen. Code} § 3939-3.
\textsuperscript{29} See note 3 supra.
The result attained in the case suggests several possible theories upon which that result could have been reached, but any theory consistent with the result is rejected either by the reasoning of the case or by well established Ohio law which the decision does not purport to change.

The first of these theories is that the statute is unconstitutional because municipally owned and operated off-street parking facilities are public utilities. Although the opinion does not squarely confront the issue, the result suggests that such facilities do fall into the same category as public utilities. If they do, a municipality's power to provide them resides in Article XVIII, Section 4 of the Ohio Constitution,\(^3\) and under a long line of Ohio decisions, legislative enactments designed to restrict the powers of municipalities under this section are unconstitutional.\(^2\)

This public utility theory is inconsistent with the opinion in one particular: Under it, a municipality would be subject to the financing provisions of Article XVIII, Section 12 of the Ohio Constitution.\(^2\) The court, however, expressly rejects the contention that Article XVIII, Section 12 is applicable. This rejection is easily explained by the fact that the decision premises a municipality's power to provide off-street parking facilities in Article XVIII, Section 3 of the Ohio Constitution.\(^3\) That section does not apply to public utilities. Therefore, Article XVIII, Section 12, which applies only to public utilities, would naturally be inapplicable to a project undertaken within the provisions of Article XVIII, Section 3.

In the opinion of this writer, the theory that municipally owned and operated off-street parking facilities are public utilities is the theory most consistent with the result. However, it was not the theory of the court, for

\(^{10}\) \textit{Ohio Const. Art. XVIII, § 4.} "Any municipality may acquire, construct, own, lease and operate within or without its corporate limits any public utility, the product or services of which is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility."

\(^{21}\) Ohio courts have consistently taken the position that municipalities derive the right to acquire, construct, own, lease and operate utilities, the product of which is to be supplied to the municipality or its inhabitants, from Article XVIII, Section 4 of the Ohio Constitution, and that the legislature is without power to impose limitations upon that right. Pfau v. City of Cincinnati, 142 Ohio St. 101, 50 N.E.2d. 172 (1943); Board of Education of City School District of Columbus v. City of Columbus, 118 Ohio St. 295, 160 N.E.902 (1928); Colley v. Village of Englewood, 80 Ohio App. 540, 71 N.E.2d. 542 (1947)

\(^{22}\) \textit{Ohio Const. Art XVIII, § 12} provides that mortgage revenue bonds issued by a municipality beyond the general limits of bonded indebtedness must include a franchise stating the terms upon which a purchaser could operate the mortgaged properties in case of foreclosure.

\(^{3}\) See note 3 \textit{supra.}
this theory requires a finding that the statute is unconstitutional, and the
court expressly found that the statute was not unconstitutional.\footnote{State ex rel. Gordon v. Rhodes, 156 Ohio St. 81, 99, 100 N.E.2d. 225, 235 (1951).}

A second theory that would explain the result is that Ohio General
Code Sections 3939-2 and 3939-3 are not "general laws" within the mean-
ing of Article XVIII, Section 3 of the Ohio Constitution.\footnote{See note 3 supra.} This possibility
is unmentioned in the opinion. It is not, however, a satisfactory hypothesis,
for although it explains the result in the first \textit{Rhodes} case, it does not an-
swer the question as to what the controversial code sections were intended
to be, if not general laws, and to whom or what the legislature expected
them to apply.\footnote{The words "general laws" within the meaning of Article XVIII, Section 3 of the Ohio Constitution refer to laws passed by the legislature which are of general applica-
tion throughout the state. \textit{State ex rel. Arey v. Sherrill, City Manager, 142 Ohio St. 574, 53 N.E.2d. 501 (1944); City of Cincinnati v. Correll, 141 Ohio St. 535, 49 N.E.2d. 412 (1943); Leis v. Cleveland Railway Company, 101 Ohio St. 162, 128 N.E. 73 (1920).}

The third theory is that the ordinances were not "in conflict" with the
provisions of Ohio General Code Sections 3939-2 and 3939-3 within the
meaning of Article XVIII, Section 3 of the Ohio Constitution. This seems
to be the court's theory of the case, but this writer cannot reconcile it with
the result. If the ordinances were at such variance with the statute that
the terms of the ordinances could not be carried out within the provisions
of the statute, the conclusion seems inescapable that the ordinances were in
conflict with the statute and, as such, in conflict with a general law within
the meaning of Article XVIII, Section 3 of the Ohio Constitution. \textit{There is ample Ohio authority in support of this conclusion.}\footnote{City of Cincinnati v. Gamble, 138 Ohio St. 220, 34 N.E.2d. 226 (1941); Niehaus, Building Inspector v. State, \textit{ex rel.} Board of Education, 111 Ohio St. 47, 144 N.E. 433 (1924). In the latter case, the board of education, acting under authority
granted to it by statute, sought to obtain a building permit for the erection of a
new school building. A statute required that plans for such structures be approved by
the city building inspector. The city building inspector declined to issue the permit
unless he was paid a fee as prescribed by a city ordinance. The statute did not pro-
vide for the payment of a fee to the municipality for the building permit. The
court held that the city could charge no fee for the service exacted by the statute,
and that a municipality could not, under the provisions of Article XVIII, Section 3
of the Ohio Constitution, abridge the sovereignty of the state by the enactment of
ordinances inconsistent with general laws.}

\section*{E. What additional legislation, if any, is desirable?}

The doctrine of the Ohio decisions\footnote{State ex rel. Gordon v. Rhodes, 156 Ohio St. 81, 100 N.E.2d. 225 (1951); State \textit{ex rel.} Gordon v. Jones, 156 Ohio St. 100, 100 N.E.2d. 235 (1951); State \textit{ex rel.} Gordon v. Rhodes, 158 Ohio St. 129, 107 N.E.2d 206 (1952).} on the power of municipalites to
provide and finance municipally owned off-street parking facilities is so