

The Tyranny of the Majority:

The *Buckeye* Decision on Fairness,

Fair Housing and Referenda

In this issue, six experts in land use law present their views of the U.S. Supreme Court's March 25, 2003 decision in the case of City of Cuyahoga Falls v. Buckeye Community Hope Foundation, which concerned a developer's claim for damages due to permitting delays resulting from a referendum process used by citizens to stop a low-income housing project. Below is a chronological abstract of the case, followed by commentaries by Stuart Meck, FAICP, John Payne, Peter Buchsbaum, Dwight Merriam, FAICP, Anthony Cresap, and David Callies, FAICP.

In February 1996, Buckeye Community Hope Foundation—a nonprofit developer of affordable housing—submitted a site plan to the Cuyahoga Falls, Ohio, planning commission for a 72-unit multifamily, low-income housing project.

The planning commission unanimously approved the site plan on February 21 and submitted it to the city council for final approval. On April 1, following a number of meetings at which opposing citizens expressed various concerns (that the development would increase crime and drug activity, that families with children would move in, and that the development would attract residents similar to those of the city's only African-American neighborhood), the city council found that the site plan met all zoning requirements and approved it by ordinance.

On April 29, a group of citizens submitted to the city a referendum petition calling for repeal of the site plan approval ordinance. The next day, after the county board of elections certified the petition, Buckeye

filed a suit in state court to enjoin the referendum, arguing that the Ohio Constitution does not authorize popular referenda on administrative matters.

After the state court denied the injunction on May 31, Buckeye applied for building permits to begin construction. The city engineer rejected the application after the city law director advised him that the permits could not be issued because the site plan approval does not take effect while the referendum petition is pending (based on a city charter provision stating that an ordinance challenged by petition shall not go into effect until approved by a majority of voters).

In July, Buckeye filed suit in federal court, seeking an injunction ordering the city to issue the building permits, and alleging that in allowing the referendum and rejecting its application for building permits, the city violated the Fair Housing Act and the due process and equal protection clauses of the Fourteenth Amendment.

Commentary

On November 5, city voters passed the referendum repealing the site plan approval. On November 14, Buckeye filed a motion in federal court to enjoin the referendum. On December 11, the state appellate court affirmed the trial court's denial of an injunction against the referendum.

In June 1997, the federal district court denied the city's motion for summary judgment on the due process and equal protection claims.

In July 1998, the Ohio Supreme Court, having initially concluded that the referendum was proper, reversed itself and declared the referendum unconstitutional. The city then issued the building permits and Buckeye began construction. Buckeye reduced its claims to damages resulting from the delay in construction.

In November 1999, the federal district court granted the city's motion to dismiss. In August 2001, the Sixth Circuit Court of Appeals reversed the district court's decision, finding that there was sufficient evidence to go to trial on the allegation that by allowing the referendum to stay construction, the city gave effect to the racial bias reflected in the opposition. It also found that a genuine issue of fact existed as to whether the city's stay was arbitrary, in violation of substantive due process. (The court also

found a valid disparate impact claim under the Fair Housing Act, but Buckeye abandoned that claim before the case went to the U.S. Supreme Court.)

On March 25, 2003, the U.S. Supreme Court reversed the Sixth Circuit's decision. It held that neither the city's allowance of the referendum nor its refusal to issue building permits reflect the discriminatory intent required to support equal protection liability, and that given the city charter's requirement, the city law director's instruction not to issue the permits was rational. The Court found that because the city did not enact the referendum, it cannot be said to have given effect to the voters' allegedly discriminatory motives. It also found that in submitting the referendum to a vote and refusing to issue building permits, the city was acting pursuant to the requirements of its charter, and thus did not act arbitrarily. The Court rejected an argument that city officials prompted citizens to file the referendum petition and stoked public opposition to the development, stating that the developer failed to show that city officials exercised any power over the voters, much less the kind of coercive power necessary to render the voters' actions and statements as state action. (The Court also vacated the Sixth Circuit's holding on the abandoned disparate impact claim.)
