

Seven Years of Litigation: Could the *Buckeye* Lawsuits Have Been Avoided?

By Stuart Meck, FAICP

You can do a lot of Monday morning quarterbacking on the outcome of *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*,¹ but none of it would be especially complimentary. Here the U.S. Supreme Court ruled that subjecting a site plan approval of a federally assisted low-income housing project to a referendum did not constitute *per se* arbitrary government conduct in violation of due process. Five years prior to the U.S. Supreme Court decision, the Ohio Supreme Court had found that the referendum itself was unconstitutional as a matter of state law.² Present in the federal case was the contention that the referendum petitions were motivated by racial animus, which seems perfectly clear to me from the record before the U. S. Supreme Court.

This commentary addresses two questions raised by this litigation: (1) Were these lawsuits necessary; and (2) Is putting site-specific land-use actions up for referenda, independent of how they are characterized, a good idea?

The answer to both questions is: I don't think so. Had the city's law director exerted more control over the certification of the referendum petition submitted by Cuyahoga

Falls citizens, the matter could have been resolved far more expeditiously, and the basis for the federal litigation would have been eliminated altogether. Moreover, the Ohio Supreme Court has recognized the constitutional evil that site-specific land-use referenda represent, a perspective that the U.S. Supreme Court completely overlooks in its decision in *Buckeye*.

Were These Lawsuits Necessary?

In Ohio, as in most other states, land-use actions are characterized as legislative, administrative, or quasi-judicial. A legislative decision is policy- or law-making; an administrative decision is policy-effectuating. Sometimes certain land-use actions are also termed quasi-judicial, since they decide rights with respect to individual properties.³ How the courts characterize land-use actions determines how they can be challenged. In Ohio, legislative acts may be subject to referenda, but administrative actions may not.

The Ohio Supreme Court has held that the adoption or amendment of a zoning regulation is a legislative act.⁴ By contrast, a final subdivision approval is an administrative act, subject only to appeal under Ohio Revised Code Chapter 2506.⁵ Similarly, the granting of a special use permit by a city council is an administrative action not subject to referen-

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1. 123 S. Ct. 1389, 55 ZD 234 (2003)

2. *Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 697 N.E.2d 1 (Ohio 1998), reversing 692 N.E.2d 997(1998) (holding that pursuant to Section 1f, Article II of the Ohio Constitution, actions taken by a municipal legislative body, whether by ordinance, resolution, or other means, that constitute administrative action are not subject to referendum proceedings).

3. Meck and Pearlman, *OHIO PLANNING AND ZONING LAW* § 8.2, 315 (2002 ed.).

4. *Berg v. City of Struthers*, 198 N.E.2d 48 (Ohio 1964) (for municipalities); *Tuber v. Perkins*, 216 N.E.2d 877 (Ohio 1966) (for townships); *City of Moraine v. Montgomery County Bd. of County Comm'rs*, 423 N.E.2d 1984 (Ohio 1981) (for counties).

5. *Donnelly v. City of Fairview Park*, 233 N.E.2d 500 (Ohio 1968).

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dum.⁶ Variance approvals are also administrative actions.⁷ The status of planned unit developments is a gray area. The Ohio Supreme Court has treated planned unit developments as legislative actions,⁸ and has determined in one case that approval of a developer's final development plan by a city council was a legislative action, and thus subject to referendum.⁹ But several lower courts have found planned unit developments to be administrative acts whether accomplished through a rezoning or a special use permit.¹⁰

This short review of how Ohio courts have characterized land-use actions suggests why the approval of a site plan should have been regarded as an administrative action in the first place. Cuyahoga Falls should have refused to place the site plan approval ordinance up for a referendum—a decision that prompted the state and federal lawsuits.

A site plan review is an action involving a high degree of discretion, no different than a conditional use or a subdivision. Certainly, in a referendum, you can't make findings of fact, or impose necessary site-specific conditions, or determine that the proposed stormwater drainage system is properly designed. You can't even make a determination that all of the mechanical requirements of the ordinance have been satisfied (e.g., Is the site plan drawn to scale? Are the parking spaces the right size?). Yet because the site plan approval involved a city council action, the petitioners believed, incorrectly, that it could be set aside by a referendum.¹¹

The extent of the city council members' involvement is not clear from the record. Did they approve the site plan in their

official capacity because they had to, but then, in their private capacity, encourage residents to circulate referendum petitions to overturn the council approval? The record does show that the mayor encouraged the filing of the petitions, and that the site plan approval ordinance went into effect despite the mayor's refusal to sign it. At a council meeting on March 4, 1996, after the mayor suggested delaying a vote on the site plan approval ordinance to buy time, it was the law director who first mentioned the use of a referendum.¹² The council approved the site plan by ordinance on April 1, 1996, after the law director advised it that its review must be based solely on the zoning code.¹³

When the petitions for referendum were filed with the city clerk on April 29, 1996, the clerk quickly transmitted them to the county board of elections, which certified that they contained a sufficient number of valid signatures on May 1, 1996. Meanwhile, the city engineer sought advice from the law director as to whether he could issue building permits for the housing project while the referendum was pending. In a short memorandum, the law director (a *different* law director than the one who actually represented the city before the U.S. Supreme Court, it should be noted) advised him that "any permits for work authorized by the [site plan approval ordinance] must be held in abeyance until the efficacy of that ordinance is determined."¹⁴

The city council reconsidered and reaffirmed its approval of the site plan on May 28, 1996, and the clerk of courts resubmitted the petitions to the board of elections to be placed on the November 5, 1996 ballot.¹⁵

It is at this point that I believe the law director should have inserted himself into the proceedings and defended the action of the city council against a citizen-led challenge. In Ohio, a city has the discretion to reject a petition if the subject of the petition is inappropriate for a referendum.¹⁶ Certainly, the law director could have reviewed the case law—it is not that complex—and determined that the site plan approval was an administrative act, not a legislative act, and thus was not a proper subject for referendum (which is what the Ohio Supreme Court ultimately concluded two years later). Instead, the law director's memorandum to the city engineer was perfunctory, containing no legal analysis at all. For some reason, the U.S. Supreme Court decided the instruction of

6. Myers v. Schiering, 271 N.E. 864 (Ohio 1971) (involving the approval of a permit to operate a sanitary landfill in a "heavy industrial" district).

7. See e.g., Schomaeker v. First Nat'l Bank of Ottawa, 421 N.E.2d 530 (Ohio 1981); State ex rel. Kronenberger-Fodor Bldg. Co. v. City of Park, 297 N.E.2d 525 (Ohio 1973).

8. Peachtree Dev. v. Paul, 423 N.E.2d 1087 (Ohio 1981) (counties); Gray v. Trustees of Monclova Township, 313 N.E.2d 366 (Ohio 1974) (townships).

9. State ex rel. Crossman Communities of Ohio, Inc. v. Greene County Bd. of Elections, 717 N.E.2d 1091 (Ohio 1999), *reconsideration denied*, 718 N.E.2d 930 (Ohio 1999) (per curiam opinion of three judges, with one judge concurring in judgment). See also State ex rel. Zonders v. Delaware County Bd. of Elections, 630 N.E.2d 313 (Ohio 1994).

10. J.D. Partnership v. Berlin Township Bd. of Trustees, 2000 WL 1074302, No. 00CAH01002 (Ohio 5th Dist. Ct. App., Delaware, 8-2-00), appeal not allowed, 738 N.E.2d 1256 (Ohio 2000) (PUD rezoning treated as an administrative act); Kertes Enters., Inc. v. City of South Euclid, 1986 WL 2669, No. 50221 (Ohio 8th Dist. Ct. App., Cuyahoga, 2-27-86) (denial of conditional use PUD an administrative action appealable under Ohio Rev. Code. Ch. 2506). Cf. Parrish v. Board of Township Trustees of Marion Township, 1996 WL 368228, No. 9-95-53 (Ohio 3rd Dist. Ct. App., Marion, 6-24-96) (denial of planned development for a mobile home park an administrative zoning decision).

11. The petition filed by the City of Cuyahoga Falls with the U.S. Supreme Court to overturn the unfavorable U.S. 6th Circuit decision provides evidence of this. One petition circulator stated: "My son-in-law at one of our meetings said it seems like you should be able to put this to a vote, Dad . . ." Deposition of Frank Pribonic, in City of Cuyahoga Falls Petitioner's Brief to the U.S. Supreme Court for Writ of Certiorari, 2002 WL 31039413, at *88a (9-6-02) ("Petitioner's Brief").

12. Buckeye Community Hope Foundation, Brief for Respondents to the U.S. Supreme Court on Writ of Certiorari, at 15 (2003) (*citing* U.S. Supreme Court Joint Appendix 173-174).

13. *Id.* (*citing* Docket Entry Record 40, Ex. G.).

14. Geoffrey W. Kennedy, Law Director, Law Department Inter Office Memo, April 30, 1996, in Petitioner's Brief, at *55a.

15. Affidavit of Gregg Wagner, Cuyahoga Falls Clerk of Council, in Petitioner's Brief, at *10a-11a.

16. State ex rel. Rhodes v. Bd. of Elections, 230 N.E.2d 347 (Ohio 1967) (upholding refusal to put improper initiative petition on ballot); State ex rel. Barberis v. City of Bay Village, 281 N.E.2d 209 (Ohio Com. Pl., Cuyahoga, 1971) (upholding a city council's refusal to certify a resolution for a referendum election because issue concerned an administrative action).

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the law director to the city engineer was “eminently rational,”¹⁷ but I just don’t see it that way. Whatever the motivation behind the citizen petition opposing the site plan approval of the federally assisted housing project, the litigation could have been avoided. Acting on the law director’s advice, the city clerk could have rejected the petition, forcing the petitioners to sue in state court over the question of whether the ordinance could indeed be subject to referendum.

That didn’t happen, of course, and what we are left with are two lawsuits that began in 1996 and dragged through state and federal courts until the final resolution by the U.S. Supreme Court in 2003.

Are Site-Specific Land-Use Referenda a Good Idea?

When the Ohio Supreme Court reviewed the case, it too first bought the argument that somehow, because the site plan was approved by the city council, the action was automatically legislative, and thus subject to referendum. However, in a rare turn of events, the Ohio Supreme Court reconsidered the case and reversed itself.¹⁸

Ohio Supreme Court Justice Evelyn Lundberg Stratton cast the pivotal vote that allowed the reversal of the original decision. Her concurring opinion, written to explain her changed position, provides a useful insight into the instability and arbitrariness that referenda inject into site-specific land-use matters. She began by stating that *Buckeye* involved a “developer seeking to move forward on an *unpopular but worthy project* opposed by the homeowners who do not want that project ‘in their backyard.’”¹⁹ She then observed:

[T]o apply the referendum to everyday administrative decisions, even if the charter of the municipality so allows...is to submit the minutiae of everyday administrative decision-making to the whim of the voter at the moment. The *unpopular development*, the disfavored contract with a school principal, the neighbor’s new garage approval, or any other decision could be subject to voter disapproval if an angered voter was organized or well-funded enough. Chaos and instability could result. The decisions made by homeowners, developers, schools, or anyone else could no longer depend on established zoning approvals or contracts made—all could be thrown out at whim.²⁰

The Ohio Supreme Court’s justices had previously recognized the racially discriminatory potential of site-specific referenda. Their decision in *Forest City Enterprises v. City of Eastlake*²¹ involved a supramajority (55 percent) referendum requirement for zoning changes contained in the municipal

charter, which the court found unconstitutional on federal due process grounds. Justice Leonard Stern, in a concurring opinion joined by three other justices, squarely addressed the discriminatory threat from a land-use referendum and noted the impact in northeast Ohio where other municipalities had enacted similar charter-based referendum provisions:

Zoning provisions such as that in Eastlake’s charter have a single motive, and that is to exclude, to build walls against the ills, poverty, *racial strife*, and the people themselves, of our urban areas. The struggles of our suburbs to build such walls can be seen throughout the country. [citations omitted]. In the suburbs surrounding the city of Cleveland, the requirement of mandatory referendums for approval of zoning changes has been adopted by over a dozen communities; some of these communities have provisions which *specifically apply* to any zoning change to permit multi-family or low-income housing. The inevitable effect of such provisions is to perpetuate the defacto divisions in our society *between black and white*, rich and poor.²²

The U.S. Supreme Court reversed the Ohio high court in the *Eastlake* case, but it was only able to do so by first acknowledging that the Ohio courts had previously held a rezoning to be a legislative action. Because it concluded the Ohio Constitution reserved municipal legislative power to the people themselves, the Supreme Court held that the people could take back that authority and therefore a referendum could not be an unconstitutional standardless delegation of legislative power, as the Ohio court had ruled.²³

Unfortunately, the *Eastlake* case has created the lay belief, I contend, that all land-use actions are fair game for referenda, and that a local government is somehow relieved of a responsibility to assess the nature of the subject of referendum petitions presented to it. *Eastlake*, and now *Buckeye*, allow a city council, with a wink-wink, to tell the voters “We *have* to approve this, or we’ll be sued, but we’ll roll over and play dead if you submit referendum petitions”—knowing all along how difficult and costly a referendum is to challenge (although it can be, and has been, done in Ohio²⁴). What is

22. *Id.*, 324 N.E.2d at 749 (Stern, J., concurring, joined by O’Neill, C.J. and Brown, H. and W.B. JJ.) (emphasis supplied). *Eastlake* was not a case that involved claims of racial discrimination. Yet it is noteworthy that a state supreme court justice and three of his colleagues (including the chief justice of the court), all familiar with the operation of zoning laws in their state, would have recognized the potential for racial discrimination lurking behind the “let-the-people-decide” façade of propriety that a site-specific referendum often presents.

23. *City of Eastlake v. Forest City Enterprises, Inc.* 426 U.S. 668 (1976), *rev’g and remanding* 324 N.E.2d 740 (Ohio 1975), on remand, 356 N.E.2d 499 (Ohio 1976). See Meck and Pearlman, OHIO PLANNING AND ZONING LAW § 8.2, 318 (West Group 2002) (commenting on the *Eastlake* case that the “United States Supreme Court’s approach appears to be to accept whatever characterization a state supreme court applies to rezonings and proceed from that point, rather than deciding that federal jurisprudence requires that rezonings be treated uniformly as legislative, administrative, or quasi-judicial”); Meck, *Comment on City of Eastlake v. Forest City Enterprises*, 28 LAND USE LAW & ZONING DIG., No. 6, 8-10 (1976).

24. *See, e.g., Osborne Bros. Enters., Inc. v. City of Mentor*, 1983 WL 6244, No. 9-015 (Ohio 11th Dist. Ct. App., Lake, 4-29-83) (overturning the rejection by referendum of a proposed industrial zoning change which had been approved by both the planning commission and city council)

17. *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 123 S.Ct. 1389, 1396 (2003).

18. *Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 697 N.E.2d 1 (Ohio 1998), *rev’g* 692 N.E.2d 997 (Ohio 1998).

19. *Id.*, 697 N.E.2d at 187 (Lundberg Stratton, J. concurring) (emphasis supplied).

20. *Id.*, 697 N.E.2d at 188 (Lundberg Stratton, J. concurring) (emphasis supplied).

21. 324 N.E.2d 740 (Ohio 1975)

particularly troublesome in the U.S. Supreme Court's ruling in *Buckeye* is its continued view that there is nothing constitutionally suspect in permitting legislative or administrative matters to be submitted to referendum. The Court stated:

In *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S., at 672, 675, 96 S. Ct. 2358, we made clear that because all power stems from the people, "[a] referendum cannot . . . be characterized as a delegation of power," unlawful unless accompanied by "discernible standards." The people retain the power to govern through referendum " 'with respect to any matter, legislative or administrative, within the realm of local affairs.' " *Id.*, at 674, n. 9, 96 S. Ct. 2358.²⁵

25. *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 123 S. Ct. 1329, 1396 (2003).

Under the Court's theory, a disgruntled civil service employee could put a less-than-favorable annual performance evaluation—an administrative matter—up for referendum, and that would be okay.

The Ohio Supreme Court has, wisely enough, recognized differences between legislative and administrative action and has created different decision rules for them—rules that could not be sidestepped in a federal action. The *Buckeye* plaintiffs persisted in state court, where they ultimately prevailed when the Ohio high court finally recognized what really was at issue in the case: the essentially arbitrary and capricious nature of a referendum on a site-specific land-use action. Sadly, the U.S. Supreme Court has turned a blind eye to the consequences of such referenda.

Hiding in Plain Sight: Private Prejudice, State Action, and "Devotion to Democracy"

By John M. Payne

State action has proven a treacherous constitutional field in recent decades, with the U.S. Supreme Court all too frequently confusing state action analysis with the merits of the constitutional claim. *Buckeye* continues this unhelpful trend. Logically, state action analysis should be undertaken first, and without regard to the merits, because if the state is not responsible for the conduct complained of, either directly or by entanglement with private actors, then the Fourteenth Amendment cannot be invoked at all.

In *Buckeye*, however, Justice O'Connor jumps ahead of this logical starting point and begins with proof of intent to discriminate. She acknowledges the alleged discriminatory motives of those who opposed Buckeye's housing development and sought to defeat it by referendum, but contrasts those motives with the "facially neutral" referendum procedure and the absence of proof that the various public officials administering the referendum procedures were themselves motivated by racial animus. Then, but only then, she jogs back to the state action question. Given the progression of her thoughts, it comes as no surprise that she finds no state action present. Relying on *Blum v. Yaretsky*,¹ she rejects Buckeye's contention that the "private motives [that] triggered the referendum drive can fairly be attributable to the state."

Had Justice O'Connor started at the beginning, she might more readily have recognized that *Blum v. Yaretsky* is wildly off-point. There, the plaintiffs were attempting to inject consti-

tutional due process requirements into an essentially private setting (nursing home care), using Medicaid funding as the state action "hook." The *Blum* Court followed a line of cases holding that, absent coercion by the state as to the decisions made, neither public funding nor routine paperwork accountability was sufficient to "entangle" private actors with the state for purposes of invoking the Fourteenth Amendment.

In *Buckeye*, by contrast, the city was hardly standing passively in the background, but instead provided a uniquely public and coercive mechanism to facilitate private discrimination: the referendum. Buckeye Community Hope Foundation simply could not put a shovel into the ground until the city gave it permission to do so. In this context, it is no more relevant that Cuyahoga Falls' referendum ordinance is "facially neutral" than was the similarly neutral state court apparatus in *Shelley v. Kraemer*² when enforcement of a private, racially restrictive covenant came before that body. (Justice O'Connor cites, but does not pause to analyze, *Shelley*.) As in *Shelley*, Cuyahoga Falls has put the weight of the state behind enforcement of its citizens' racially discriminatory decisions.

Justice O'Connor then muddles state action doctrine further by gratuitously reminding us that private citizens have First Amendment rights, citing *Texas v. Johnson*,³ the flag burning case. Of course they do, just as the property owners in *Shelley* had a right to express their odious views on segregated neighborhoods and a right (pre-Title VIII) to effectuate those views in their private affairs. The First Amendment does not protect the effectuation of those views in state action, however, nor in the end does Justice

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1. 457 U.S. 991, 1002-03 (1982).

2. 334 U.S. 1 (1948).

3. 491 U.S. 397 (1989).