

---

## Commentary

---

O'Connor argue to the contrary, once free speech has served her rhetorical purpose. Indeed, she emphasizes that if and when private discriminatory views are embodied in regulation, whether by the legislature or by the people through a referendum, that enactment is fully subject to Fourteenth Amendment scrutiny. *Buckeye's* problem, she says, is that the allegedly unconstitutional action embodied in the referendum proposal never became law, and therefore cannot be complained of.

Justice O'Connor's approach reflects the "devotion to democracy" theory of *James v. Valtierra*<sup>4</sup>—an approach that has made it virtually impossible to challenge land use referenda. That rationale seriously misses the mark in *Buckeye*, however, where the procedure itself was part of the problem. As land developers forcefully remind us at every opportunity, time is money in the land use game. A referendum is not an insignificant hurdle for any developer to confront, but that hurdle can be particularly daunting for the typical nonprofit housing venture, whose thinner capitalization may fade away as the delays pile up. (The *Buckeye* process took from 1995 until 2003 to run its course.) Had it been given the chance, *Buckeye* might or might not have been able to establish that the referendum drive was tainted by discriminatory intent. But if it did prove discrimination and damages, its constitutional rights would have been violated quite apart from Justice O'Connor's concern (the outcome of the referendum), and that harm would certainly have been the product of state action.

4. 402 U.S. 137, 141 (1971).

*Valtierra* was not litigated as a racial discrimination case, and so there was no reason for the Court to apply strict scrutiny there. Nor was there any issue in *Valtierra* about state action, which was assumed. By contrast, the very essence of *Buckeye's* complaint is racial animus, which the Court nonetheless lets die on state action grounds without any searching inquiry at all. This is, to say the least, an astonishing misapplication of the core teaching of *U.S. v. Carolene Products*: "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."<sup>5</sup> In other words, devotion to democracy need not be blind devotion, and discriminatory state action can be found in process as well as result.

*Buckeye's* state action analysis provides a dispiriting roadmap for how to use "direct democracy" as a tactic of discrimination, so long as the race talk is kept in the private sector. While there does not appear to be any turning back from the Court's "devotion to democracy" dictum, the irony of the *Buckeye* case may be that the only remaining defense against the misuse of democratic process in land use referenda is the democratic process itself—that is to say, the democratic process that produced Title VIII in 1968. Housing advocates should perhaps count themselves lucky that these Justices chose not to reach that question in *Buckeye*.

5. 304 U.S. 144, 152-53 (1938) (footnote 4).

---

## The Hidden Agenda (?): *Buckeye* and Due Process Review of Land Use Decisions

By Peter Buchsbaum

For those sensible states that do not allow land use referenda (approximately half of the total), *City of Cuyahoga Falls v. Buckeye Community Hope Foundation* may seem to be someone else's problem. After all, in our calmer, saner jurisdictions (mainly in the East), we have, as a matter of state law, decided that land use referenda are an affront to good planning. In fact, the *Buckeye* facts themselves demonstrate the wisdom ultimately attained by the Ohio Supreme Court when it voided the referendum: it gets ugly when the electorate votes up or down on particular land use measures.

---

Peter Buchsbaum chairs the Land Use Practice Group of the Woodbridge, New Jersey, law firm of Greenbaum, Rowe, Smith, Ravin, Davis & Himmel. He has consulted with APA's Growing Smart project, has served in several land use roles with the American Bar Association's Section on State & Local Government Law, and is currently mayor of his hometown of West Amwell, N.J.

Nonetheless, *Buckeye* has something even for those jurisdictions that are immune from initiative-itis.

The Buckeye Community Hope Foundation did not merely challenge the referendum as being discriminatory. It also alleged that the referendum constituted a denial of substantive due process of law, arguing that once the city council approved the site plan for its housing project, it was constitutionally entitled to get a building permit and build the project.

This substantive due process theory has found its way into much case law. Most often, it is used as an alternative to a takings claim. Thus, a developer might argue that even if a particular local action did not take its property, the action was nonetheless so arbitrary and capricious that it violated the due process clause of the constitution.

This claim has percolated in both the federal and state courts. Many U.S. Circuit Courts of Appeals have been resistant to these claims. Some have held they don't exist, on the

---

## Commentary

---

ground that land use actions alleged to be arbitrary can only be challenged under the takings clause or equal protection clause. These courts reason that the broader, vaguer rubric of substantive due process is not available where more specific constitutional clauses are applicable. They contrast land use claims where these other clauses are available with right-of-privacy-based claims (such as the right to an abortion), which must find their constitutional underpinning in substantive due process since no other more specific clauses can apply.

Other Circuit Courts, such as—until recently—the Third Circuit (covering New Jersey, Pennsylvania, and the Virgin Islands), have taken a much more liberal approach. They have stated that an action could be challenged as a denial of substantive due process if it were simply arbitrary and capricious.

Also, most courts have held that only those actions that thwart a permit to which a landowner clearly has a right could violate substantive due process. This actually was the claim sustained by the lower court in *Buckeye*. That court found that Buckeye had a legitimate entitlement to building permits based on the approved site plan, and that the city's failure to allow Buckeye to build based on those permits at least presented a constitutional issue that deserved a trial.

And finally, there has been an approach—most recently endorsed by the Third Circuit in *United Artists Theatre Circuit v. Township of Warrington* (January 14, 2003)<sup>1</sup>—reflecting the position that even where a landowner has a right to rely on a permit, an executive branch official can violate substantive due process only where the level of abuse “shocks the conscience” of the court. This “shock the conscience” test derived from a long-ago search and seizure case in which the U.S. Supreme Court was shocked when police officials, without a warrant, forcibly pumped out a suspect's stomach to obtain drug related evidence.<sup>2</sup>

There also have been procedural niceties that have grown up around substantive due process. Some courts have held that substantive due process claims, like takings claims, first had to be tried in state court before they could be brought to federal court.

Faced with this plenitude of choices, the Supreme Court chose a restrictive reading of substantive due process as applied to land use cases. It found that the city engineer's refusal to issue the permits pending the referendum would have had to have been egregious to constitute a constitutional violation. The Court cited *County of Sacramento v. Lewis*,<sup>3</sup> a case involving a high-speed police chase where, as might well be imagined, it found that only the most egregious kind of conduct would give rise to a federal constitu-

tional claim, as contrasted with a more normal state tort action for negligence. In other words, police conduct in a high-speed chase really had to be off the wall before it became unconstitutional.

That is the test the Supreme Court chose for substantive due process land use violations. It means that local land use actions that do not amount to a taking and do not discriminate in violation of the equal protection clause can be mistaken, wrongful, or downright mean spirited—just so long as they are not egregiously bad. In *Buckeye*, the Court found that the city engineer had simply followed the advice of the law director on an unclear issue of Ohio law concerning referenda—an issue that even the Ohio Supreme Court resolved only after initially coming out the other way. Under those circumstances, his actions were cautiously rational and certainly not egregious, and thus did not violate the constitution.

In *Buckeye*, the Supreme Court did not use the “shocks the conscience” words used in the *United Artists* case. But like the *United Artists* case, it relied on *County of Sacramento v. Lewis* for its test. Thus it would seem that “egregious” in the constitutional sense must mean really awful, whether or not it quite gets to the level of conscience shocking.

Interestingly, the concurrence by Justices Scalia and Thomas, who are normally friendly to landowners, sought to completely extinguish land use substantive due process claims by developers. Justice Scalia wrote that freedom from delay in receiving a building permit is not a fundamental liberty or property interest. In fact, a deprivation of the benefit of the permit is legal as long as it is for a public use, provided compensation is paid. Further, arbitrary deprivations of the benefits of permits can only be challenged via the equal protection clause. Thus, according to Justice Scalia, there could be no substantive due process claim in light of these more specific constitutional protections.<sup>4</sup>

This was not the majority's view, however. Although the Court did not decide that question, the fact that it assumed the existence of a property interest in a permit suggests that it would find a due process violation in an appropriately egregious case.

Further, the Court did not suggest the need for a ripening of the substantive due process claim in state court, or for some sort of additional administrative process, before a final decision could be obtained in order to win the right to go to federal court. It is implicit in the court's decision, therefore, that the various takings ripeness requirements of *Williamson County Planning Board v. Hamilton Bank*<sup>5</sup> do not apply to substantive due process claims.

Thus, there is real news in this opinion. For the first time, we have a national, clearly established standard for substantive due process claims involving the conduct of an executive official: the executive official's action must be egregious

1. 1316 F.3d 392 (3rd Cir. 2003). For a still interesting compendium of the various approaches taken by the federal appeals courts to substantive due process land use claims, see *Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992).

2. *Rochin v. California*, 342 U.S. 165 (1952).

3. 523 U.S. 833, 846 (1998).

4. Justice Scalia also does not like substantive due process claims for abortion rights, so he is at least being consistent in his antipathy to this type of claim.

5. 473 U.S. 172 (1985).

---

## Commentary

---

to be cognizable as a due process case. This is an extremely narrow window for substantive due process claims. Accordingly, while it appears such claims can get into court procedurally without the ripeness barriers applicable to takings claims, they are very likely to be dismissed on the merits, since only an extreme case will raise a constitutional issue.

Finally, the court's reference to the egregious conduct test in the context of executive actions raises a question. Supposing Cuyahoga Falls had adopted an ordinance flatly banning all low- and moderate-income housing. That ordinance would

have constituted legislative, rather than executive, action. The court simply did not specify where such local, or even state, legislation is a violation of due process. To raise constitutional issues, would the legislative action have to be egregious, or merely arbitrary and capricious? That question was left for another day.

Thus, even stripped of its referendum/initiative holding, *Buckeye* remains an extremely significant case for all jurisdictions in this country—not simply those that stoop to ballot box zoning as a way of settling land use issues.

---

## ***Buckeye* Bungled: Blatant Bifurcation Busts Broader Benefits, Begets Bigger Brouhaha**

By Dwight Merriam, FAICP

The problem with *Buckeye* is that because of the sequencing of the legal actions, only part of the question about the interplay of local referenda and affordable housing ended up before the U.S. Supreme Court. Now we have an answer, seemingly allowing referenda, but that doesn't tell us much. Worse still, we have larger issues unanswered and a unanimous decision hinting that a referendum on an affordable housing project could be unconstitutional and violate federal law if the intent and motivations of the opposition can be discerned. *Buckeye* is a regrettable decision that leaves us with a doctrinal mess.

Buried in the history of the case is the key to the problem. *Buckeye* sued in federal court challenging the referendum process after the referendum petition was approved, but before the referendum vote and before the Ohio Supreme Court decided the referendum was invalid. The key dates are the filings in state and federal court. They predate the referendum and the effect of the referendum reversing the city council's approval of the project site plan. The federal district court held that the prayer for relief for an injunction to stop the referendum was moot because the referendum had already occurred by the time the court decided summary judgment motions in the case. ". . . Plaintiffs never seriously advanced that prayer for relief; they did not file their preliminary injunction until the week after the election, . . ."<sup>1</sup>

Glen D. Nager, a former clerk to Justice O'Connor, argued for Cuyahoga Falls and described the Sixth Circuit's opinion in his opening argument in this way: ". . . [T]he Sixth Circuit

held that a municipality may be liable in damages because it withheld the issuance of building permits for a proposed housing project pending a citizen-initiated referendum election on the ordinance authorizing that housing project." Cuyahoga Falls' law director, Virgil E. Arrington, Jr., in addressing the International Municipal Lawyers Association (IMLA) in Washington, DC on April 28, 2003, acknowledged, by the way, that Justice O'Connor's vote was thought to be critical, and that the city hired Nager because he was more likely than anyone else to know what her concerns might be.

Justice O'Connor asked the first question: "There's no evidence of some kind of misbehavior on the part of the city other than the bare claim that they refused to issue the permit during the process of the referendum?" How's that for teeing it up for the former clerk? Of course, Nager responded: "That's correct. . . ." Cuyahoga Falls' position was that everything the city did was in favor of the developer and there was no evidence of adverse differential treatment.

The only issue that made it to the Court was the narrow question of whether a neutral referendum process that causes delay in the issuance of building permits violates the constitution's due process and equal protection clauses, when the city charter prohibits such issuance while a referendum is pending. The disparate impact claims were dropped. Arrington told the IMLA audience that he was most concerned about those claims, but *Buckeye* dropped them because the Court had never decided a disparate impact housing claim.

By the time the developers got to the Court, the referendum had been ruled illegal as a matter of state law, the city had issued the permits, and *Buckeye* had built the project. All that was left to decide was whether damages were due for the delay.

The Court ruled unanimously for the city on the narrow question and slim record before it.

---

Dwight Merriam is a lawyer with Robinson & Cole LLP, Past President and Fellow of the American Institute of Certified Planners, member of the American College of Real Estate Lawyers, and a Counselor of Real Estate. He is a co-author, with Richard M. Frank and Robert Meltz, of *THE TAKINGS ISSUE* (Island Press, 1999).

1. 970 F. Supp. 1297 at note 14.