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## Commentary

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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.

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## ***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.

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

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Justice O'Connor's opinion not only doesn't close the door to the courthouse, it provides a schematic on how fair housing advocates can wage and win these cases. She says: "Though the 'substantive result' of a referendum may be invalid if it is 'arbitrary and capricious', [citation omitted] respondents do not challenge the referendum itself. The subjection of the site-plan ordinance to the City's referendum process, regardless of whether that ordinance reflected an administrative or legislative decision, did not constitute *per se* arbitrary government conduct in violation of due process." O'Connor, quoting a 1998 Supreme Court decision, says that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" <sup>2</sup> Sounds to me like a higher standard for substantive due process claims.

Thus, if you have the result of the referendum before the court—the substance of it, not just the process—and you can show that the referendum sponsors acted with discriminatory intent to get a result damaging a project (or in O'Connor's words: ". . . [E]vidence that these official acts were themselves motivated by racial animus"), then you have a claim that might win. The decision suggests that a meritorious case can be based on linking the voters' animus with a public

2. *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

official to get the necessary state action. It's a matter of allegation and proof. But without the proper claims, the evidence, and the result of the referendum, the Court could not go beyond the mere delay in issuing permits.

Professor Daniel R. Mandelker told me in e-mails on April 17 and May 5, 2003, that he believes

. . . the opinion is incoherent. . . . The Court seems to exempt the referendum petitioning process from equal protection review since that process is always initiated by private citizens. It does suggest a contrary result if the sentiments of referendum sponsors can be attributed to government decision makers, or if decision makers exerted 'coercive power' over private actors, but does not indicate when either would occur. . . . The notion that voter sentiments are relevant to an enacted referendum and not to a decision to hold a referendum is ridiculous unless there is a distinction between starting the process and what the process produces. Furthermore, facially neutral referenda have been attacked in the past. *Hunter v. Erickson* seems relevant. . . .

In sum, the decision incites much mischief, including extensive discovery on motivations and linkages between voters and public officials. Even more attacks on referenda are likely after this decision, and courts will find it difficult to apply *Buckeye* in any helpful way.

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## The Fair Housing Act Case That Never Was

By Anthony W. Cresap

The *Buckeye* decision will undoubtedly be a necessary reference for the practitioner confronting a referendum proposed by citizens opposed to an affordable housing facility. But *Buckeye* is a constitutional law case, not a Fair Housing Act ("FHA") one. Many of us were looking forward to a new U.S. Supreme Court FHA decision. The *Buckeye* developer did not prosecute an FHA intentional discrimination claim and, as noted, abandoned its FHA claim about disparate impact (discriminatory effect).

No one can be certain the Supreme Court would have held as it did had it entertained FHA claims. Following are a few small thoughts on how those claims might have been handled.

### FHA Intentional Discrimination Claim

The Court's ruling may well have been different had the Court applied the legal test that many federal courts apply when addressing intentional discrimination claims under the FHA. The test originates in the Court's employment discrimination decision in *McDonnell Douglas Corp. v. Green*.<sup>1</sup>

Under the *McDonnell Douglas* test, a plaintiff is able to make a "prima facie" case of intentional discrimination by establishing the plaintiff was qualified to receive an entitlement or permit from the local government, but was denied the permit even where the local government had approved the permit for a "similarly situated party" during a time "relatively near the time plaintiff was denied" the entitlement.<sup>2</sup>

The entitlement in question in *Buckeye* was a building permit, which the City of Cuyahoga Falls refused to issue due to the pending referendum. *Buckeye* leaves one wondering whether Buckeye Community Hope Foundation might have made at least a prima facie *McDonnell Douglas* case in pointing to building permits that the City of Cuyahoga Falls had recently approved for market-rate condominiums or residential subdivisions.

The *McDonnell Douglas* case is only the first milestone in the litigation. FHA case law allows a defendant, in response to the plaintiff's case, to establish that the defendant had evidence of a "legitimate, nondiscriminatory reason for" denying the entitlement. In one very recent case, the Ninth Circuit Court of

1. 411 U.S. 792 (1973)

2. *Sanghvi v. City of Claremont*, 328 F.3d 532 (9th Cir. 2003) (sewer connection); *Gamble v. City of Escondido*, 104 F.3d 300, 305 (9th Cir. 1997) (conditional use permit).

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