

---

## Commentary

---

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.

---

## 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).

---

Anthony Cresap is an attorney in central California, where he represents public and private sector clients in land use matters, including fair housing issues. Mr. Cresap received his J.D. from the University of Wisconsin and his B.A. in geography from Columbia University.

---

## Commentary

---

Appeals found that a defendant city had established such a reason when it denied a sewer connection pursuant to a preexisting policy of conditioning the connection on the developer's agreement to be annexed into the city.<sup>3</sup>

It is not clear that the Supreme Court would have found that a racially motivated referendum was a "legitimate, nondiscriminatory reason" to refuse the building permit. Notably, the *Buckeye* Court does *not* dismiss the plaintiff's claims that racially discriminatory animus (and discrimination against families with children, also actionable under the FHA) played a role in the petition drive. Rather, Justice O'Connor essentially says it does not make a difference in an equal protection lawsuit challenging a ministerial action (here, a refusal to issue the permit based on a city charter provision). In such a case, any animus underlying the referendum did not translate into state action, and "only the most egregious official conduct" on the part of public officials will be constitutionally actionable.

But the "state action" element plays out more liberally in the FHA context. Indeed, there are a number of instances where courts have found that actions ordinarily within the local government's authority are invalid for having been taken in response to discriminatory opposition. As stated by one court, "[I]f an official act is performed simply in order to appease the discriminatory viewpoints of private parties, that act itself becomes tainted with discriminatory intent even if the decision-maker personally has no strong views on the matter."<sup>4</sup>

I could go on. Suffice it to say, there are plenty of intentional discrimination issues left to litigate under the FHA, even in cases involving referenda and ministerial actions.

### FHA Discriminatory Effect Claim

The Court expressly vacated that portion of the Sixth Circuit's decision dealing with discriminatory effect. So, we will have to wait for another case to learn how far the Court will go in recognizing a right of an action under the FHA for discriminatory effect in cases where the public agency takes ministerial action in response to discriminatory project opposition.

3. Sanghvi v. City of Claremont, 328 F.3d 532, *supra*.

4. AFAPS v. Regulations and Permits Administration, 740 F. Supp. 95, 104 (D. Puerto Rico 1990).

A claim for discriminatory effect may be established when the public agency's action in refusing an entitlement results in a disproportionately substantial adverse impact on housing opportunities for the affected population, and the public agency's denial is not otherwise justified.<sup>5</sup> There was strong and un rebutted evidence in the *Buckeye* record that the city's refusal to issue a building permit for the development would have had a substantial adverse and disproportionate impact on the housing of the affected population. One study, after considering housing, employment, population and other demographic data in depth, found that Buckeye's project "would, all other things being equal, enhance housing opportunities more for Blacks and families with children than it would for Whites and households without children. Conversely therefore, not building this complex of 72 rental units would have a disparate and negative impact on the housing opportunities of Black renter households and families with children."<sup>6</sup>

Arguably, a racially motivated referendum is not a legitimate excuse for the public entity to authorize an action (denial of building permit) that will have a substantial, disproportionate, and adverse effect, without any mitigation.

Some courts recognize that the presence of some intentional discrimination strengthens an argument of discriminatory effect.<sup>7</sup> Additionally, the Sixth Circuit found that the facts of the case qualified it for an exception to a general rule, previously adopted by the same court, that an FHA claim of discriminatory effect cannot be made against a referendum, where "unusual circumstances" are present.<sup>8</sup> The practical implication of not recognizing such an exception is that referenda could be readily employed to defeat housing developments in those many small or suburban communities in America whose residents are financially and socially well-organized.

In short, it remains to be resolved whether a local government will be entitled to ignore discriminatory evidence by pointing to a ministerial action.

5. Keith v. Volpe, 858 F.2d 467 (9th Cir. 1988).

6. Stalling Report, Plaintiff's Ex. 18, to Transcript of Preliminary Injunction Hearing.

7. Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283 (1977).

8. Arthur v. City of Toledo 782 F.2d 565 (6th Cir. 1986).

---

## ***Buckeye* and Ballot Box Zoning: When Democracy is a Dangerous Thing**

By David L. Callies, FAICP

For the second time in a quarter of a century, the U.S. Supreme Court has reversed the Ohio Supreme Court in a ballot box zoning case. In the first, *City of Eastlake v. Forest*

*City Enterprises*,<sup>1</sup> the Court held that exercising the referendum power to return a parcel zoned multifamily by the Eastlake city council to its previous commercial classification was not a denial of due process by means of a standardless delegation of power from the state legislature to the

---

David L. Callies, FAICP, is the Benjamin A. Kudo Professor of Law at the University of Hawaii's William S. Richardson School of Law. He is the coauthor of casebooks on land use and real property.

1. 426 U.S. 668 (1976).