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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.³

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."⁴

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.⁵ 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."⁶

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.⁷ 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.⁸ 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,¹ 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

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

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people of Eastlake. This was because the people retained in the Ohio State Constitution the power to zone through the ballot box. So there was no delegation at all—standardless or otherwise. Twenty-seven years later, in *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, the Court finds that a referendum on a specific project site plan likewise passes due process scrutiny: “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.”²

The Court does so based upon a combination of dicta from the *Eastlake* decision and a flawed and uncritical acceptance of that dicta—dicta that one justice vigorously contested in dissent. That there is no such dissent in *Buckeye* bodes ill for due process in the land use regulatory context. This is because the Court has now extended due process approval of referenda beyond traditional legislative acts for the health, safety, and welfare of the entire community, to administrative acts affecting but a single parcel. It has extended the reach of referenda, in other words, from matters of legislative, community policy to administrative approval of a particular project at a particular site. As Justice Stevens noted in his *Eastlake* dissent: “[I]t would be absurd to use a referendum to decide whether a gasoline station could be operated on a particular corner in the City of Cleveland.”³ He then concluded there was a violation of the due process clause of the Fourteenth Amendment. So also is it absurd to use a referendum to decide whether a low-income residential project should be built on a particular site in the City of Cuyahoga Falls. Both violate the due process clause of the Fourteenth Amendment, and both represent extremely bad policy. Here’s why.

While the referendum may well be an appropriate vehicle for deciding issues of community policy, it is an unacceptable vehicle for adjudicating the rights of individual litigants. As Justice Stevens observed twenty-seven years ago, “the essence of fair procedure is that the interested parties be given a reasonable opportunity to have their dispute resolved on the merits by reference to articulable rules.”⁴ That won’t happen in decision-making by referendum. Direct democracy cannot be stretched so far. Nor was it ever meant to be.”

The framers of the Constitution and institutions existing at the time the United States was formed rejected direct democracy as a form of government. Direct democracy survived primarily as a method for adopting constitutions and their amendments. In the later part of the nineteenth century, direct democracy resurfaced in the form of the initiative and referendum as part of the progressive movement’s struggle against legislative abuse. States used initiatives and referenda, however, primarily

for laws and policies concerning the general welfare, and not to initiate or repeal specific decisions applicable to specific individuals of property.⁵ Initiative and referendum have been used primarily to make policies that affect the population of a particular jurisdiction generally, not to overturn a specific implementation of such policies. For example, both initiative and referenda were used to decide whether particular states or counties would continue to permit the sale of alcoholic beverages, but not whether a particular distillery should remain open or closed.

By analogy, it is procedurally wrong to permit a referendum on a specific project site plan (an administrative decision), as compared to a vote on whether the uses contemplated in that plan will or will not be permitted generally in a city or county, or in a zoning classification generally (legislative policy decisions). The *Buckeye* majority’s analogy to *James v. Valtierra*⁶ simply perpetuates a basic misunderstanding of the limitations on direct democracy via the referendum process. In *Valtierra*, the question was whether low-income housing should be permitted generally within a particular community. The people generally simply lack the power to decide on the individual-parcel property rights of one of their number through the ballot box. Again, from the Stevens dissent in *Eastlake*: “[L]iterally thousands of zoning disputes have been resolved by state courts. Those courts have repeatedly identified the obvious difference between the adoption of a comprehensive citywide plan by legislative action and the decision of particular issues involving specific uses of specific parcels.”⁷ “[State courts] have limited statutory referendum procedures to apply only to approvals of comprehensive zoning ordinances as opposed to amendments affecting specific parcels. *This conclusion has been supported by characterizing particular amendments as “administrative” and revision of an entire plan as ‘legislative.’*”⁸

This critical distinction between administrative acts (which are referendum-proof) and legislative acts (which are not) is preserved in virtually every jurisdiction that has considered the matter.⁹ It is surprising that the U.S. Supreme Court has failed to recognize so fundamental a distinction. Buckeye has suffered an egregious violation of its due process rights guaranteed by the Fourteenth Amendment.

5. See, e.g., E. OBERHOLTZER, REFERENDUM IN AMERICA (1912).

6. 402 U.S. 137 (1971).

7. 426 U.S. at 683.

8. *Id.* at 690-691 (emphasis added).

9. See, e.g., *Fasano v. Board of County Commissioners*, 507 P.2d 23 (1973); *West v. City of Portage*, 221 N.W.2d 303 (1974); *Bird v. Sorenson*, 395 P.2d 808 (1964); *Arnel v. City of Costa Mesa*, 620 P.2d 565 (1980); *Forman v. Eagle Thrifty Drugs*, 516 P.2d 1234 (1973); *Kaiser Hawaii Development Co. v. City of Honolulu*, 777 P.2d 244 (1989). See generally for commentary, Callies, Neuffer and Caliboso, *Ballot Box Zoning: Initiative, Referendum and the Law*, 39 J. of Urban and Contemp. Law 53 (1991).

2. 123 S. Ct. 1389, 1396 (2003) (emphasis supplied).

3. 426 U.S. at 694.

4. *Id.* at 692-693.