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Zoning and Land Use Planning

PATRICIA E. SALKIN*

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I. Introduction

The 2002 U.S. Supreme Court decisions impacting land use law did not receive the same pomp and circumstance as last term's *Tahoe-Sierra* case. The two decisions are nonetheless worthy of note.

One deals with the controversial issue of zoning by public referendum (e.g., the rejection or ratification of legislation enacted by a legislative body).¹ The second case deals with a Fifth Amendment taking; although the case did not involve real property (it involved the issue of just compensation for interest on IOLTA accounts), the holding remains relevant for constitutional regulatory takings claims in the land use context.² This column focuses on the zoning referendum case.³

II. Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation

On March 25, 2003, the U.S. Supreme Court handed down a

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¹Referenda have been held to be a "basic instrument of democratic government." *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 679, 96 S. Ct. 2358, 49 L. Ed. 2d 132 (1976). For a summary on the use of referendum to challenge zoning ordinances, see Jurgensmeyer and Robert, *Land Use Planning and Control Law* § 5.5 (West 1998), digesting all of the cases where courts have allowed or disallowed zoning by referendum.

²See *Brown v. Legal Foundation of Washington*, 123 S. Ct. 1406 (U.S. 2003).

³For a critique of both cases, see Dwight H. Merriam, FAICP, CRE, "Panning for Gold in the Trickle of Supreme Court Cases This Term: What Can We Learn from the IOLTA and Referendum Cases?" *Zoning and Planning Law Report*, Vol. 26, No. 6 (June 2003).

unanimous decision⁴ in *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*,⁵ holding, among other things, that a zoning referendum requirement in the charter of the City of Cuyahoga Falls set forth a facially neutral petition procedure and that it enabled public debate on the issues, thereby advancing First Amendment interests. In essence, the Court held that a nonprofit developer failed to show that the City had a racial motive in delaying construction (where the delay included a long fight over the construction of low-income apartments).

According to the city charter of Cuyahoga Falls, voters are vested with “the power to approve or reject at the polls any ordinance or resolution passed by the [city council],” and the charter further provides that any ordinance so challenged “shall [not] go into effect until

approved by a majority of voters.”⁶

The Buckeye Community Hope Foundation (hereinafter referred to as “Buckeye”), a nonprofit corporation dedicated to developing affordable housing, purchased land in the City that was zoned for apartments.⁷ Shortly thereafter, Buckeye submitted a site plan to the city planning commission for multifamily low-income housing, which immediately met with community opposition.⁸ Despite the opposition, the planning commission, after negotiating various development conditions with Buckeye, unanimously approved the proposed site plan and forwarded it to the city council for final authorization.⁹ Although faced with significant community opposition to the site plan, the city council ultimately approved the plan by ordinance, since it met all of the municipal zoning requirements.¹⁰

⁴Writing for the unanimous Court was Justice O’Connor, and Justice Scalia penned a concurring opinion that was joined by Justice Thomas.

⁵*City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, 123 S. Ct. 1389 (U.S. 2003).

⁶*Id.* at 1392.

⁷*Id.* at 1391.

⁸*Id.* at 1391-92.

⁹*Id.* at 1392.

¹⁰*Id.* The Court noted that the mayor appeared before the council, voicing his personal opposition to the site plan, and that members of the public

Within the 30-day time period for challenging the adoption of a city ordinance, a group of citizens filed a formal petition with the City requesting that the ordinance be repealed or be submitted as a referendum to the voters.¹¹ Although Buckeye immediately sought an injunction against the petition, arguing that the Ohio Constitution did not authorize referendums on administrative matters, the state Court of Common Pleas denied injunctive relief.¹² Buckeye then requested building permits from the City to begin construction. Its request was denied by the city engineer upon advice of the city law director since, according to the city's charter, the ordinance approving the site plan had been stayed by the referendum request.¹³

In November 1996, seven months after the city council had approved the site plan by

ordinance, the voters in Cuyahoga Falls repealed the ordinance by referendum.¹⁴ In 1998 the Ohio Supreme Court, after first holding that the referendum was proper, reversed itself and concluded that the referendum was unconstitutional, inasmuch as the State constitution authorized referendums only for legislative acts, and not for administrative acts such as the site plan ordinance.¹⁵ As a result of the holding, the City issued building permits to Buckeye, and construction began.¹⁶ During the pendency of the state court litigation, Buckeye had filed suit in federal court in 1996 against the City, seeking to have the City issue the building permits and further seeking both declaratory and monetary relief; it was this aspect of the litigation that eventually made its way to the U.S. Supreme Court. Although the 72-unit low-income apart-

expressed concerns "that the development of would cause crime and drug activity to escalate, that families with children would move in, and that the complex would attract a population similar to the one on Prange Drive, the City's only African-American neighborhood."

¹¹Id.

¹²Buckeye Community Hope Foundation v. Cuyahoga Falls, Civ. No. 96-05-1701 (Summit County 1996).

¹³*City of Cuyahoga Falls*, supra note 6, 123 S. Ct. at 1392.

¹⁴Id. However, the parties agreed that the referendum results would not be certified until pending litigation over the referendum was resolved.

¹⁵Buckeye Community Hope Found. v. Cuyahoga Falls, 82 Ohio St. 3d 539, 697 N.E.2d 181 (1998).

¹⁶*City of Cuyahoga Falls*, supra note 6.

ment complex was built in 2000, Buckeye was seeking roughly \$3 million in damages as a result of the delay in construction.¹⁷

In the federal court litigation, Buckeye alleged that the City's referendum procedure and the denial of its request for building permits pending the outcome of the referendum constituted a violation of the Fourteenth Amendment's Equal Protection and Due Process Clauses, and of the Federal Fair Housing Act.¹⁸ The trial court eventually granted the City's motion for summary judgment, but the Court of Appeals for the Sixth Circuit reversed, finding sufficient evidence to go to trial on the allegation that the City, by allowing the referendum to take place and staying the implementation of the site plan pending the referendum, "gave effect to the racial bias reflected in the public's opposition to the

project."¹⁹ Furthermore, the Sixth Circuit held that even if Buckeye could not prove intentional discrimination, it had still stated a claim under the Fair Housing Act based on the allegation that the City's actions had a disparate impact based on race and family status.²⁰ Lastly, the Circuit Court concluded that there was a genuine issue of fact as to whether the City's denial of the building permits, after the city council had approved the site plan, was arbitrary and irrational government conduct in violation of substantive due process.²¹ The U.S. Supreme Court granted certiorari in 2002,²² and ultimately reversed the Sixth Circuit on the constitutional holdings and vacated the Fair Housing Act holding.

A number of amicus curiae briefs were submitted in support of both parties. On behalf of Buckeye, a joint brief was submitted by the National Fair Housing Alliance, the AARP,

¹⁷See Elizabeth Auster, "Justices Say Cuyahoga Falls Didn't Discriminate," *The Plain Dealer* (Cleveland, Ohio), A1 (March 26, 2003).

¹⁸*City of Cuyahoga Falls*, supra note 6, 123 S. Ct. at 1392.

¹⁹*Id.* at 1392-93, citing *Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 263 F.3d 627, 639 (6th Cir. 2001).

²⁰*Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 263 F.3d 627, 640 (6th Cir. 2001).

²¹*Id.* at 644.

²²*City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 536 U.S. 938, 122 S. Ct. 2618, 153 L. Ed. 2d 802 (2002).

the Catholic Commission of Summit County, Ohio, and the Northeast Ohio American Friends Service Committee.²³ A joint brief was also filed in support of Buckeye by the National Multi-Housing Council, the National Leased Housing Association, the National Association of Industrial Office Properties, and the National Apartment Association.²⁴ The National Association of Home Builders also filed a brief in support of Buckeye.²⁵ Briefs in support of the City were filed by the International Municipal Lawyers Association and the City of Garland Texas,²⁶ the City of Athens, Ohio, the Ohio Municipal League,²⁷ and the United States.²⁸

The American Planning Association filed an amicus brief in support of neither party, but sought to direct the Court's attention to the disparate impact issue under the Fair Housing Act, arguing that racial dis-

crimination need not be proven by intent, but rather can be proven by effect.²⁹ The Pacific Legal Foundation and the Center for Equal Opportunity also filed a brief in support of neither party arguing, among other things, that disparate impact analysis is not applicable to the Fair Housing Act.³⁰ Buckeye, however, abandoned its disparate impact claim, so the Supreme Court vacated with prejudice the Sixth Circuit's disparate impact holding,³¹ leaving that controversial issue for another day.

A. The Equal Protection Claim

In addressing the claim that by submitting the petition to the voters and refusing to issue building permits during the pendency of the petition, the City and its officials violated the Equal Protection Clause, the Court agreed with the City

²³See 2002 WL 31655008 (2002)

²⁴See 2002 WL 31655009 (2002).

²⁵See 2002 WL 31601679 (2002).

²⁶See 2002 WL 31039410 (2002).

²⁷See 2002 WL 31190166 (2002).

²⁸See 2002 WL 31039411 (2002).

²⁹See Motion of the American Planning Association for Leave to File Brief Amicus Curiae and Brief Amicus Curiae in Support of Neither Party, 2002 WL 31655005 (November 2002).

³⁰See 2002 WL 1990288 (2002).

³¹*City of Cuyahoga Falls*, supra note 6, 123 S. Ct. at 1397.

that Buckeye had failed to present sufficient evidence to survive summary judgment.³² The Court reiterated previous holdings that to show a violation of the Equal Protection Clause, racially discriminatory intent or purpose is required.³³ The Court concluded that by placing the referendum on the ballot, as required by the city charter, “the City did not enact the referendum and therefore cannot be said to have given to voters’ allegedly discriminatory motives for supporting the petition.”³⁴ Additionally, the Court determined that the denial of the building permits by the city engineer, upon the advice of the city law director, was a nondiscretionary and ministerial act, and that there

was no evidence that these acts had been motivated by racial animus.³⁵ Statements made by private citizens during a petition drive to place the site plan approval on the ballot did not necessarily constitute state action for the purpose of the Fourteenth Amendment.³⁶ The Court noted that there was no evidence that the “private motives” could be “fairly attributable to the State,” and that the Court has recognized in the past that “[p]rovisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice.”³⁷

B. The Substantive Due Process Claim

The Court determined that it did not need to resolve whether

³²Id. at 1394.

³³Id., citing *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977).

³⁴*City of Cuyahoga Falls*, supra note 6, 123 S. Ct. at 1394.

³⁵Id. The Court also noted that Buckeye did not “offer evidence that the City followed the obligations set forth in its charter *because of* the referendum’s discriminatory purpose, or that the city officials would have selectively refused to follow standard charter procedures in a different case.” [Emphasis in original.]

³⁶Id. The Court pointed out that although “statements made by decision-makers or referendum sponsors during deliberation over a referendum may constitute relevant evidence of discriminatory intent to an ultimately challenged initiative,” in the present case, Buckeye was not challenging an enacted referendum. Further, the Court noted that Buckeye failed “to show that city officials exercised any power over voters’ decisionsmaking during the drive, much less the kind of ‘coercive power’ either ‘overt or covert’ that would render the voters’ actions and statements, for all intents and purposes, state action.” Id. at 1395.

³⁷Id.

Buckeye had a property interest in the building permits following the site plan approval by the city council, since the engineer's refusal to issue the permits while the petition was pending did not rise to the level of arbitrary or egregious government conduct.³⁸ The Court noted that under the city charter, the site plan could not be implemented until the referendum vote was taken.³⁹ The Court further refused to break with precedent to find that a referendum could be unconstitutional if it could be characterized as administrative rather than legislative,⁴⁰ and it determined that the City's referendum process itself did not constitute per se arbitrary government conduct in violation of due process.⁴¹

In his concurring opinion, Justice Scalia noted that "*even*

if there had been arbitrary government conduct, that would not have established the substantive-due-process violation that respondents claim."⁴² He also stated, "There is nothing procedurally defective about conditioning the right to build low-income housing on the outcome of a popular referendum."⁴³

III. Conclusion

The idea of allowing citizens to overturn decisions of legislative bodies on zoning-related matters still presents an uneasy proposition for some. While such referendums can be viewed as acts of democracy and citizen participation, they also have the potential for abuse, and may be used as a shield to exclude people from communities based on race or socio-economic status. Many

³⁸Id. at 1396.

³⁹Id.

⁴⁰Id., citing *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 672, 675, 96 S. Ct. 2358, 49 L. Ed. 2d 132 (1976) (holding "[a] referendum cannot . . . be characterized as a delegation of power," unless accompanied by "discernible standards"; and stating that "The people retain the power to govern through referendum with respect to any matter, legislative or administrative within the realm of local affairs.').

⁴¹Id.

⁴²Id. at 1397 (J. Scalia, concurring). (Emphasis in original.)

⁴³Id. One news account of the oral argument in the case quotes Justice Scalia as saying that it didn't matter whether the City's motivations were "evil" since "Even if [city officials] were delighted in their heart of hearts for racial reasons, they had no choice." See Courtland Milloy, "On Race Issues, Justices Looking the Other Way," *The Washington Post* p. B01 (Jan. 27, 2003).

court watchers were disappointed that the Court did not settle the disparate impact versus discriminatory intent test under the Fair Housing Act. Although early in the case history it looked as though the facts were lining up to make this issue ripe, the parties themselves agreed that it was not one of the issues before the Court, and the Court was certainly not looking to make this an issue. Dwight Merriam's recent reflection on the case sums it up well, and is worth repeating here:

The *Buckeye* case is of interest because it upholds the use of ref-

erendum, even when it has the indirect effect of damaging a party protected by federal law and may be motivated by bad intentions, and because of the uncertainty the decision creates in determining when and if a referendum becomes state action. A related issue of real import, unresolved by the decision, is what happens to the government if it decides not to implement a measure enacted by referendum that could create liability? Call this the "damned if you do, damned if you don't" rule, because no matter what, the government gets sued, either by the project developers defeated by the referendum if implemented or the electorate if the government refuses to implement the referendum.⁴⁴

⁴⁴Dwight H. Merriam, FAICP, CRE, "Panning for Gold in the Trickle of Supreme Court Cases This Term: What Can We Learn from the IOLTA and Referendum Cases?" Zoning and Planning Law Report Vol. 26, No. 6 (June 2003).