No. 01-1269

In The
Supreme Court of the United States

THE CITY OF CUYAHOGA FALLS, *et al.*,

Petitioners,

v.

BUCKEYE COMMUNITY HOPE FOUNDATION, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR RESPONDENTS

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PARTIES TO THE PROCEEDINGS

PETITIONERS

The Petitioners are the City of Cuyahoga Falls, its Mayor, Don L. Robart, its former City Engineer, Gerald Dzurilla, and its former Clerk of Council, Gregg Wagner. Petitioners were the defendants in the District Court and appellees/cross-appellants in the Court of Appeals. Since this case was filed in 1996, both Gerald Dzurilla and Gregg Wagner have left their positions with the City. The individual defendants remain in this litigation in their official capacities only.

RESPONDENTS

The Respondents are Buckeye Community Hope Foundation, a not-for-profit corporation that seeks to construct housing utilizing housing tax credits; Buckeye Community Three, L.P., a limited partnership that owns and operates the housing development in question; Cuyahoga Housing Partners, Inc., a not-for-profit corporation acting as the general partner of Buckeye Community Three, L.P., (referred to collectively as "Buckeye,"); and, the Fair Housing Contact Service, a not-for-profit fair housing advocacy organization. Respondents were plaintiffs in the District Court and appellant/cross-appellees in the Court of Appeals. Petitioners are unaware of any publicly held companies owning 10% or more of the stock of any of the respondent entities.

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STATEMENT OF THE CASE

Buckeye is a real estate developer that specializes in developing affordable housing. Transcript of Preliminary Injunction Hearing (hereinafter, "Tr.") 11; Docket Entry Record (hereinafter, "R.") 70, 71, 72. Buckeye relies on housing tax credits to develop affordable housing. It finances its developments with such tax credits, local, federal, and state grants, financing from private financial institutions, and its own development fund. Tr. 12. Buckeye must offer rents at or below a level affordable for people with incomes no greater than 60% of the area's median income (adjusted for family size) to obtain the tax credits. Tr. 13. Buckeye's developments, including the Pleasant Meadows development at issue here, provide housing for people with mid-level incomes, such as teachers, librarians, and police officers. U.S. Supreme Court Joint Appendix (hereinafter, "App.") 142.

The tax credit program is subject to strict deadlines, which make such developments especially vulnerable to delay. Sixth Circuit Joint Appendix (hereinafter, "JA") 302-04. A development must be placed into service, i.e., receive a certificate of occupancy from the local building authority, by the end of the second year following the tax credit award. Tr. 13.

In 1995, Buckeye located a suitable parcel of land on Pleasant Meadows Boulevard in Cuyahoga Falls, Ohio, a city that is 99% Caucasian. This parcel was zoned to allow 17 units per acre. JA 148; Tr. 202-27. The Pleasant Meadows development was planned as a 72-unit complex (approximately 11 units per acre), with 16 two-bedroom, and 56 three-bedroom units. Tr. 29-30. The planned development of the land was well within the maximum

density permitted by the zoning. App. 136. Before purchasing the land, Buckeye's President, Steve Boone, sent a letter to Cuyahoga Falls Mayor Don Robart informing him of Buckeye's intention to buy the Pleasant Meadows parcel. JA 1382. Several days later Robart assured Boone that Buckeye would have "no problem" with the tax credit development. JA 1380-82. In reliance on that assurance, Buckeye then purchased the Pleasant Meadows land for approximately $300,000. Tr. 20-21. Buckeye paid a premium for the land because of the zoning classification allowing up to 17 units per acre. JA 724, 728-30. In addition to the tax credits, Buckeye secured construction financing from National City Bank in the amount of $3,195,000.

City officials knew that delay would be catastrophic for Buckeye. App. 157, 763; JA 943. If the housing tax credit program deadlines are missed, the developer loses the tax credits that are the basis of the development's financing, and the development becomes financially impossible to construct. Tr. 14. In addition, the developer is precluded from competing for grants to support other tax credits developments. Tr. 50-51. Because tax credits for Pleasant Meadows were approved in 1995, it was imperative that the development be ready for occupancy by December of 1997. Tr. 13. Moreover, if Buckeye did not close the National City Bank loan by December 15, 1996, it would lose the construction financing and would have to find alternate financing, which, according to Boone, would have been "pretty much impossible." Tr. 27.

Buckeye encountered extraordinary opposition at every stage of its development of Pleasant Meadows. In the fall of 1995, Buckeye started working with the City's Planning Department to secure approval of the site plan

for the Pleasant Meadows development. Tr. 31. The Planning Department imposed excessive requirements for a development of this kind. Tr. 32, 47. For example, as a condition to proceeding with construction, Buckeye was obligated to build, at an estimated cost of $70,000, an eleven-foot high "barrier" wall or "buffer" between its property and adjoining condominiums. Tr. 47; JA 152-54, 966-67.

A Planning Commission meeting was scheduled for February 21, 1996 to consider approval of the site plan for Pleasant Meadows. Prior to that meeting, both Planning Director Sharpe and Mayor Robart met with neighborhood groups who expressed opposition to the development, based in part on the number of children expected to live there. Tr. 135-37; 271-74. Councilman Potts solicited opposition to the development by sending a notice to ward constituents urging them to attend the February 21 meeting to "express [their] concerns." JA 484-88.

On February 21, the Planning Department submitted Buckeye's site plan to the Planning Commission for approval. App. 35-52. The City's law expressly limits the scope of the inquiry that may be made by the Planning Commission in approving the site plan.[1] However, public officials and residents voiced opposition throughout the meeting, based on issues outside the permissible scope for evaluating a site plan. App. 37-49. Steve Boone described the February 21 meeting as "walking into a hornets' nest." Tr. 34. He was asked to answer questions "that had absolutely nothing to do with the allowable factors for site plan approval," such as, "Are your little kids going to shut up

[1] Cuyahoga Falls Ordinance 1144.04 (July, 22, 1974).

right at sunset?" Tr. 36; App. 44. Because there was no legal basis to reject the development, the Planning Commission reluctantly approved the site plan on February 21, 1996. App. 50; Tr. 150-57.

Site plan approval for a development of this type in Cuyahoga Falls required ratification by the City Council of the Planning Commission's approval. Tr. 128. A Council meeting was scheduled for March 4, 1996. At the meeting Mayor Robart spoke out vehemently against approving the Pleasant Meadows site plan, echoing the "mood of the community." R. 40, Ex. D, p. 50. He suggested delaying the Council vote to buy time. R. 40, Ex. D, p. 150. At this meeting, the City's Law Director first mentioned a referendum, which was then taken up by citizens in April. App. 173-74. The vote to approve the site plan was tabled at Robart's request to March 18. Tr. 40.

At the March 18 meeting, Robart noted that Buckeye had important "deadlines" and urged Council to exploit those deadlines by rejecting the site plan and "go to court." Robart held this view despite advice from the City's Law Department that if the City were sued, it would probably lose. App. 157, 119. Councilman Rubino told the gathered citizens how he had looked for any possible legal reason to oppose the site plan and that he could find none. He and Councilwoman White admitted to "trudging around in about seven inches of mud" in a vain effort to find wetlands as a "legal shred" to halt development. App. 150. City Council's vote was again delayed to get a written opinion from the Law Department as to whether there was any legal basis for the City to reject the development. Tr. 43. On March 29, 1996, the Law Department responded that the City must base its decision solely upon the zoning code. R. 40, Ex. G.

After the March 18 meeting, Boone was approached by Councilman Schmidt with a request that Buckeye change the location of the development away from the Pleasant Meadows location. Tr. 45. Boone met with three members of City Council as well as a planning official to view the proposed alternate site which was located on an active landfill. Because tax credits are awarded on a site-specific basis, Buckeye was unable to move the site of the development. Tr. 45-46.

Council eventually approved the site plan on April 1, 1996. Tr. 43; JA 935. Buckeye immediately applied for building permits. Tr. 95. When the ordinance to approve the site plan was presented to the Building Department, however, the Mayor directed Service Director Barbara Sculley not to issue Buckeye any permits until further notice. R. 34, Ex. A. City Engineer Dzurilla, who was also Chief Building Official and Planning Examiner, stopped work upon receipt of a Law Department memorandum instructing him to hold any permits "in abeyance." R. 34, Ex. A. Several days later Dzurilla received an unprecedented order from Sculley that he was not to issue building permits for the Pleasant Meadows development without her approval. Tr. 193-94.

Citizens began organizing a referendum drive after several meetings with the Mayor and Planning Director. Tr. 271-79. Mayor Robart had input regarding the name of the petition campaign, and spoke out in favor of the drive at a citizens' meeting on April 9. R. 40, Ex. D, pp. 84-88; JA 903, 1174. While various comments were made at this meeting about the children who would live in Pleasant Meadows, those who would circulate the petitions were warned not to make any discriminatory comments. Tr. 295.

A referendum petition was filed with the Clerk of Council, Gregg Wagner, on April 29, 1996. Tr. 196. It was then sent to the Summit County Board of Elections for signature validation. On or about May 1, 1996, the petition was returned to the City from the Board of Elections indicating that the signatures were valid. R. 68. The City accepted the filing despite a Law Department memorandum explaining that the City's site plan review was limited to those matters within the zoning code. JA 816-17. A vote on the referendum was held in November, 1996, but the vote was not certified pursuant to a ruling by District Court Judge Bell. R. 68.

P. Gilbertson Barno, Executive Director of Buckeye, wrote a letter to the Engineering Department on June 20, 1996, demanding that the building permits for Pleasant Meadows issue. App. 110. On June 26, Dzurilla, on advice of the Law Department, sent a letter to Buckeye informing them that the building permits would not issue due to the referendum. JA 907.

Buckeye did not receive building permits until approximately three years after its initial application. As a consequence of this delay, Buckeye was shut out of tax credit developments for a period of approximately three years because the failure to meet time deadlines precludes a developer from applying for grants to support other tax credit funding. Tr. 50-51; R. 193-94. Because Buckeye named the funding entities that controlled the financing of Pleasant Meadows as nominal defendants in this lawsuit and was able to reach a settlement whereby they changed Ohio's tax credit allocation plan, Pleasant Meadows was constructed in 2000 at substantially increased cost, despite the City's efforts to kill it. However, as a result of the years of delay, Buckeye's ability to construct other housing

was severely impaired and Buckeye and its principals were brought to the brink of bankruptcy. JA 1220-24, 1269. Estimates of damages were produced to the City and in court in 1999 and were in the millions. R. 193-94.

Respondent Fair Housing Contact Service introduced uncontroverted statistical evidence that if Buckeye's development were not built, families with children and African-Americans would be disproportionately harmed. Tr. 202-27.

PROCEDURAL HISTORY

Following the filing of the referendum petition, this case proceeded on two tracks: a declaratory judgment action originally filed in the Summit County Court of Common Pleas and a separate federal action for damages and injunctive relief filed in the United States District Court for the Northern District of Ohio. On May 1, 1996, Buckeye filed a declaratory judgment action to have the referendum that sought to reverse Buckeye's site plan approval declared unconstitutional under Ohio law. The Ohio Court of Common Pleas denied declaratory relief and the Ohio Court of Appeals affirmed. The Ohio Supreme Court also affirmed, but reconsidered its decision and ultimately declared the referendum unlawful under the Ohio constitution on July 16, 1998. JA 56-58.

Buckeye filed the federal action on July 5, 1996, seeking injunctive relief and damages under both the Fair Housing Act and the Fourteenth Amendment. Buckeye sought a preliminary injunction to stop the referendum from rescinding their site plan approval, and a preliminary injunction hearing was held before District Court Judge Sam Bell on November 19-21, 1996. The City filed a motion for summary judgment on October 15, 1996. Judge

Bell denied the preliminary injunction on December 13, 1996, and Judge Bell also denied the City's motion for summary judgment on June 20, 1997 in a comprehensive published decision.[2] The case was set for trial in August 1998. Buckeye moved for partial summary judgment as to liability with respect to the due process claim on April 2, 1998. The City moved for summary judgment on all claims on June 5, 1998. Prior to ruling on the motions and prior to trial, Judge Bell retired. District Court Judge Dan Polster was assigned the case on September 8, 1998. Judge Polster granted the City's summary judgment motion and denied Buckeye's motion on November 19, 1999. Petition for Writ of Certiorari p. 35a.

Buckeye appealed to the United States Court of Appeals for the Sixth Circuit, which reversed Judge Polster's decision on August 31, 2001.[3] The City filed for reconsideration *en banc* and was denied. The City then filed a Petition for a Writ of Certiorari on February 26, 2002, which was granted on June 24, 2002.

SUMMARY OF ARGUMENT

[1] There is ample evidence to permit a reasonable jury to find intentional discrimination on the basis of race and familial status. This case is not about a single decision of the City Engineer. Instead, it is about a concerted and protracted scheme by City officials and residents to block

[2] *Buckeye Community Hope Found. v. City of Cuyahoga Falls*, 970 F. Supp. 1289 (N.D. Ohio 1997).

[3] *Buckeye Community Hope Found. v. City of Cuyahoga Falls*, 263 F.3d 627 (6th Cir. 2001).

Buckeye's development, using excessive site plan requirements, delay, environmental excuses, Law Department strategies, and finally a referendum, in their campaign to kill Pleasant Meadows.

The record is replete with direct evidence that discrimination was the motivating force behind that campaign of resistance. Intent is also proven by circumstantial evidence, as persons are presumed to intend the natural and foreseeable consequences of their actions. There is sufficient circumstantial evidence to merit a trial. Examples include an open search for pretext, the impact of the challenged action on protected classes, the historical context of the actions, the sequence of events leading up to the challenged action, departures from normal practice in procedure and substance, and the administrative history.

[2] The First Amendment does not prohibit the introduction of evidence to prove intent, even if that evidence is speech or political activity. No referendum organizer or voter was sued, and thus there was no chilling effect on any political activity. The First Amendment does not create a right for any person to discriminate in violation of the Equal Protection Clause or the Fair Housing Act.

The City insists that a referendum proposed and approved for invidious racial or family status reasons is nonetheless valid under the Fourteenth Amendment as long as the referendum is facially neutral. If that were correct, it would legitimize a referendum rejecting construction of a synagogue or mosque, even where proponents openly campaigned on the basis of anti-Semitic or anti-Muslim rhetoric.

[3] The Due Process Clause plays a fundamental role in the land use context and protects landowners from arbitrary and capricious actions by governmental entities

which interfere with their legitimate expectations. Buckeye possessed a property interest based both upon its ownership of the land and the full compliance of its site plan.

Buckeye's property interest was infringed upon when the City permitted a purely administrative question to be submitted to a referendum vote. A governmental entity violates substantive due process when it delegates administrative decisions to voters. Voters decided whether one specific landowner, Buckeye, could be denied uniform application of the law, although the law would remain unchanged for all others.

The referendum at issue placed on the ballot the purely factual and administrative question of whether a site plan the voters had never seen complied with a zoning code they had never read. The Planning Commission and City Council had already determined that the site plan unquestionably complied. Accordingly, no rational basis exists for the question presented on the ballot.

The Charter's referendum provision did not provide for citizens to waive restrictions to permit development. Instead, the site plan referendum permitted voters to decide in a standard-less, and hence, arbitrary and capricious manner, which violates substantive due process.

Finally, the evidence raises factual issues that the challenged decision was due at least in part to an improper or illegal motive. The facts presented raise a valid claim that the decision did not bear a substantial relation to the public health, safety, morals, or general welfare, and is therefore an invalid exercise of the police power.

ARGUMENT

I. THERE IS SUFFICIENT EVIDENCE TO PERMIT A TRIER OF FACT TO FIND THE EXISTENCE OF A DISCRIMINATORY MOTIVE

This case is not about a single decision by the City Engineer, but rather a concerted campaign on the part of City officials and private citizens that continued over a number of months to stop Pleasant Meadows, motivated by race and familial status discrimination. It is undisputed that Pleasant Meadows would house a substantial number of African-American residents in a 99% white city. Between the fall of 1995 and November of 1996, City officials, in concert with a group of like-minded private citizens, searched for ways to stop the development because the anticipated residents would be non-white families with large numbers of children. The participants used a variety of tactics, culminating in a referendum, a tactic ultimately held to be impermissible under state law.[4] The question before this Court is whether this pattern of behavior would support a judgment that it violated the Fourteenth Amendment or the Fair Housing Act because it was motivated by the race and/or familial status of the prospective residents of Pleasant Meadows.[5]

The District Court erroneously granted summary judgment. The City agrees that it is liable if it were the "moving force" behind the alleged discrimination.[6] There is ample evidence that City officials indeed acted in concert

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[4] *Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 82 Ohio St. 3d 539 (1998).

[5] 42 U.S.C. §§ 3602(k) and 3604.

[6] *Petitioners' Brief on the Merits*, p. 11.

with private individuals to intentionally discriminate against Buckeye and attempted to halt the multi-family development because of the race and familial status of the persons who were expected to reside there.

This Court's decisions from *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*[7] to *Reeves v. Sanderson Plumbing* establish the framework for finding intentional discrimination.[8] The *Arlington Heights* test requires only that a discriminatory purpose was a "motivating factor" for the action taken.[9] Unlike *Arlington Heights* where the District Court and the Court of Appeals upheld a decision after a trial using the clear error standard of Fed. R. Civ. P. 52, the issue here is whether Buckeye has presented enough evidence to merit such a trial.[10]

A. CITY OFFICIALS ACTED IN CONCERT WITH PRIVATE CITIZENS TO USE A VARIETY OF TACTICS TO STOP THE DEVELOPMENT

The Pleasant Meadows development was first proposed to City officials in June of 1995. Over the next eleven months City officials, in concert with residents, created a series of impediments to block Buckeye's development. These obstacles included: imposing stringent site plan requirements; delaying routine votes; searching to

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[7] *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977).

[8] *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

[9] *Arlington Heights* at 265-66**.**

[10] Fed. R. Civ. P. 56.

see if the land could be classified as a "wetland;" and culminating in an illegal referendum. These facts are stronger than those presented in *Arlington Heights,* which was decided after the facts were developed in a bench trial. In contrast, this case was decided on a motion for summary judgment where all inferences should have been drawn in favor of Buckeye.[11]

The first roadblock was erected by the Planning Department, which demanded the building of a $70,000 eleven-foot impenetrable wall to ghettoize and segregate Pleasant Meadows residents from the surrounding community. The barrier wall was to be at least five feet of bulldozed soil, topped with a six-foot "brick pilaster/cedar batten board fence [to] run the full length of the property." Tr. 47; App. 30-31. The Planning Department required that the barrier be completed before building permits could issue and before any other construction on the development could begin. App. 30. Councilwoman Kathy Hummel could not "recall any project where there [had been such] scrutiny on a site plan, and ha[d] never seen a requirement for a developer to put up a fence *prior* to . . . construction." App. 49 [*emphasis added*]. This substantive departure from normal practice is strong evidence of discrimination.[12]

The requirement that a barrier be built between Pleasant Meadows and the condominiums next door was unique and sent an ominous signal that the City considered this development to be different and separate from

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[11] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986), *and see*, Fed. R. Civ. P. 56.

[12] *Arlington Heights* at 267.

any other. The barrier would be a constant visual reminder that the residents of Pleasant Meadows were different from the residents of the adjoining condominiums. Buckeye acquiesced in the Planning Department's insistence on this $70,000 barrier wall[13] as well as to other unusual requests, such as changing the name of the development,[14] not because they were required by the City's zoning code, but because of assurances received from the City's Planning Department that such concessions would smooth the approval process. Tr. 47, 131.

Delay was the next strategy. After the Planning Commission approved the site plan upon Buckeye's acquiescence to its excessive demands, Mayor Robart urged delay at the March 4, 1996 City Council meeting in front of a number of residents (who later became referendum leaders), stating that he would oppose Pleasant Meadows "with vigor." JA 921-22. Knowing that delay would derail the time sensitive tax credit financing, Robart urged the Council to adjourn its vote on the site plan for "two weeks, a month [or longer,]" "to stall the vote [which] would have bought some time." JA 967; R. 40, Ex. D, p. 50. Following the Mayor's lead, Council tabled the

[13] The wall was not immediately constructed because, in the face of the referendum campaign, Buckeye considered construction of the estimated $70,000 barrier to be a futile gesture, at least until after the referendum was decided. Tr. 48, 92. As this Court has noted, "litigants are not required to make futile gestures." *See, Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1012 *n*.3 (1992).

[14] The City further requested that the original name of the development – Cuyahoga Terrace – be changed because it sounded like a public housing project. Tr. 129-30. Pleasant Meadows was not a Section 8 project, nor was it public housing, but rather is a development for tenants earning 60% of the median income in the area.

hearing until March 18. App. 198. At the subsequent March 18 meeting, despite Boone's request not to further delay Buckeye's efforts to develop Pleasant Meadows, the vote was again postponed to April 1. JA 935, 953.

After City Council's ratification of the site plan approval at its April 1 meeting, Robart pressed for further delay by asking Service Director Sculley to instruct City officials to not issue any building permits to Buckeye "until further notice." R. 34, Exhibit A. Sculley complied and sent City Engineer Dzurilla a May 1, 1996 memorandum. The directive was copied to the Mayor as his immediate supervisor, and it ordered that no building permits were to issue for Pleasant Meadows without Sculley's prior approval. Dzurilla had never seen a memorandum of this nature for any other development. Tr. 193-94.[15]

On April 30, prior to the referendum certification, the Law Department further entangled itself by directing City Engineer Dzurilla to hold "in abeyance" any work permits until a determination was made regarding the efficacy of the ordinance approving the site plan. R. 34, Exhibit A. Such official interference in the permit process was unprecedented in Cuyahoga Falls. Tr. 191-94.

Furthering the delay, the City welcomed protracted and expensive litigation, even though the City's legal position was of questionable merit. Robart believed that the City would be sued if the site plan was rejected, and

[15] Buckeye received an April 26 letter from the Building Department requesting changes, many of which were not required under the zoning code. Tr. 94-96. Buckeye responded in writing to the requested changes on May 14, 1996, in part noting that the City had misquoted its own zoning code. *Id*. at 96.

that City officials could be sued in their individual capacities. Nevertheless, he urged Council to reject the site plan, and "go to court . . . let's see what happens," despite his conclusion that, "we are probably going to lose." App. 157; App. 119.[16] Robart noted that the City has an "in-house law department" that "get[s] paid whether they are defending [a lawsuit by Buckeye] or if they are defending another case." App. 156; JA 923. Robart "doubt[ed] Mr. Boone has an on staff law department to file a lawsuit," and noted that Boone "has to spend dollars, then he has got to make a decision as to how long does he want to pursue this thing, given the fact that we all know that somewhere along the line there is a deadline." App. 157. Robart knew at the time he made these statements that Pleasant Meadows was scheduled to be built in a properly zoned area, and that the Planning Commission had approved the site plan. Tr. 322.

Third, City officials attempted to contrive an environmental excuse to stop Pleasant Meadows. At the March 18 meeting, Councilwoman White explained that she joined Councilman Rubino and City Clerk Wagner in "trudging around in about seven inches of mud" to try and establish the Pleasant Meadows' site as a wetland, "[j]ust to get any legal shred that we could hang onto so that we could reject this project." App. 150. Planning Director Sharpe also was present, because Wagner had contacted him about the wetlands stratagem. Tr. 140-42.

Fourth, the City Council asked the Law Department for legal advice about how to stop Pleasant Meadows.

[16] Robart based this assessment on advice he received from the Law Department. App. 119-20; Tr. 314.

Councilwoman Barbara White asked the City's Law Department to issue a written opinion addressing: (1) how to stop the Buckeye development and avoid municipal or personal liability; (2) the extent of individual and Council exposure to civil liability if they rejected the site plan; and (3) whether a referendum could be used to challenge the Council's own pending approval of the site plan. JA 974-75. The Law Department opinion was clear – the only criterion the City could lawfully apply in reviewing the site plan was whether the plan complied with the zoning code; it declined to address the referendum question because the Law Department did not represent individuals. JA 816-17.

Fifth, City officials worked with private citizens to fashion the referendum strategy to prevent construction of Pleasant Meadows.[17] Law Director Kennedy involved the City in halting the proposed development when he planted the seed for a referendum at the March 4 council meeting. App. 173-74. Throughout the site plan approval process, Mayor Robart worked behind the scenes to instigate a referendum to stop Pleasant Meadows. Prior to Council's approval, Robart met privately with residents to organize the referendum drive.[18] Tr. 271-81; R. 40, Ex. G, pp. 84-85; JA 903, 1174. Following Council approval, the Mayor publicly supported the referendum to defeat the Pleasant

[17] The City argued that it cannot be held responsible for the acts of private citizens. Respondents contend that the campaign to stop Pleasant Meadows was a public-private partnership, for which the City is directly liable. *See, e.g.*, *Burton v. City of Wilmington Parking Authority*, 365 U.S. 715 (1961). Furthermore, any actions taken under color of a City's charter are actions of the City, whether taken by elected or appointed officials or by its citizens through referendum.

[18] Robart admitted he had input into the name selected for the opposition group fighting the development. R. 40, Ex. D, p. 85; JA 1174.

Meadows development at an April 9 meeting at North Hampton Town Hall.[19] Tr. 279; R. 40, Ex. G, p. 50.

The next day, April 10, 1996, the Mayor involved the Law Department in the referendum effort despite its earlier memorandum disclaiming City residents as clients. JA 816-17. Robart sought guidance regarding the number of signatures required for a referendum. JA 979. Then, the Mayor warned Steve Boone, "*We* are going to go for a referendum." Tr. 92 [*emphasis added*]. The referendum petition was filed with the Clerk of Council on April 29. Tr. 196.

Dzurilla continued to circulate Buckeye's plans to other departments for comment as late as May 14, 1996. Tr. 192. Dzurilla did not disclose to Buckeye any problems with the site plan. Tr. 190-93. The failure to communicate with a permit applicant [Buckeye] was a deviation from the "normal process." JA 1049-51.

Louis Sharpe, City Planning Director since 1976, is unaware of any other housing development built in Cuyahoga Falls for which a referendum was used to challenge site plan approval. Tr. 139. Sharpe conceded that the Pleasant Meadows site plan met all of the necessary requirements of the zoning code. JA 721. Nonetheless, Sharpe noted on Buckeye's building application that the ordinance would not go into effect until May 1, 1996, curiously adding, "unless otherwise changed by legal action or referendum." Tr. 144.

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[19] Councilman George Potts testified that he believed Robart made arrangements for the group to meet at the North Hampton Town Hall, a City-owned building. R. 40, Ex. H, p. 53.

The referendum was simply the final component to the delay strategy when all other ways to stop Buckeye effects had waned. A trier of fact could reasonably find, based on this evidence, that a partnership of public officials and private citizens campaigned to block the Pleasant Meadows development.[20]

B. THE RECORD IS REPLETE WITH EVIDENCE OF DISCRIMINATORY INTENT

The record contains substantial evidence from which a jury could conclude that the City acted "because of" and not merely "in spite of" the impact on racial minorities and families with children.[21] Buckeye contends that the City's animus toward protected groups was the motivating force behind its campaign to stop Pleasant Meadows. When public officials could not circumvent Ohio law mandating issuance of building permits, they orchestrated a public response in an effort to evade the requirements of the Fair Housing Act.

Unlike many cases where intent is hidden, here there are direct statements by public officials and referendum leaders about their motives.[22] Steve Boone attended all

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[20] *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) (petitioner could make out claim for violation of Equal Protection if she proved respondent refused her service at the suggestion of police officer in the restaurant).

[21] *See Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 281 (1979).

[22] *Compare, Arlington Heights* at 268 *and*, *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (delegates "were not secretive about their purpose" and the "zeal for white supremacy ran rampant"); *and see*, *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 471 (1982) (statements of referendum proponents showed racial motives).

three public meetings concerning the site plan and was subjected to angry threats, intimidation and racist opposition. Tr. 36-39. One resident suggested throwing Mr. Boone out a window; others followed him to his car. Tr. 37. The vehemence of the public opposition is by itself strong evidence that the emotional issue of race was present. These meetings were crowded with residents who expressed angry opposition to the Pleasant Meadows development because of the likelihood of its occupancy by families with children and African-Americans. Tr. 34-44. One resident stated, "We have got our ghetto. We have got our low-income housing. This project is already being called Pleasant Ghetto." App. 139. Another resident objected, "when they get that boom box going it will be loud." App. 144.

Residents mirrored the opposition expressed by public officials. Lee Minier, a leader of the referendum drive, stated that, "They know what kind of element is going to move in there [referring to Buckeye's development], just like you have on Prange Drive," the only place in Cuyahoga Falls that has a substantial number of African-American residents. Tr. 182-85, 270, 316.

At a recorded City Council meeting on March 4, 1996, Mayor Robart commented about an article in the local paper titled, "Stuck in the Ghetto," and "problems associated with [subsidized housing]." App. 189. He agreed with State Representative Wayne Jones' statement, "The problem is condensing *these individuals* in one place like Prange Drive. It just breeds problems. I think it is a legitimate concern." JA 917-20 [*emphasis added*]. He further inflamed passions by raising the specter of forced busing. JA 965-66. The Mayor spoke of "problems [associated with] subsidized housing." JA 965-66. Robart stated,

"we have done our part off of Graham road in Cuyahoga Falls," which Robart admitted was meant as a reference to Prange Drive. Tr. 315.

Families with children were openly disparaged. For example, Planning Director Sharpe said, "the sensitive nature of the fact that this project would be a larger family type project" was the basis for the Building Department's insistence upon the eleven-foot high barrier. App. 98. Councilman Potts objected to the approval of the site plan because of the different lifestyles of an adjoining "retirement" condominium and the proposed Pleasant Meadows development "that would potentially have a lot of children." JA 479; App. 37. Mayor Robart expressed sympathy with residents' objections to the expected influx of large families with children. Tr. 274.

Council members openly searched for a pretextual reason to block Pleasant Meadows. Sandy Rubino, Councilman at large for the City, made the following speech at the March 18 Council meeting:

> I am going to be very honest with you folks . . . I have been wrestling with this issue for two weeks and I have not gotten a lot of sleep . . . I have looked under every rock in [*sic*] your behalf, and other members of council have too . . . I spent the better part of a week exploring whether we have wetlands . . . Turns out that it is not true . . . Because I am an attorney, I have looked at the legal issues too. I cannot hide as an officer of the court and a lawyer from what I believe the truth is . . . This project is before us on one simple issue, a site plan review. A site plan review allows us to look at whether that project is within the zoning that is already been enacted into law in the City of Cuyahoga Falls . . . we are not allowed to know if there is going to be 100

> kids there, 50 kids there, it is not pertinent to the issue of whether that particular construction project meets our zoning requirements. Our zoning requirements have nothing to do with whether people drink, whether people smoke, whether people shoot guns, whether people do anything. We only have one thing to look at . . . I would hate like Hell to have to look you all in the eyes and vote yes for this project. But, unless I hear something to the contrary from the law department, I do not have any choice. I am being honest with you and it breaks my heart, because you are good people and you deserve consideration . . . This has nothing to do with whether the project is proper. This has to do with whether these folks have the proper R-17 zoning. App. 144-47.

Councilwoman White explained that her motive in trying to define Pleasant Meadows as a wetland was, "[j]ust to get any legal shred that we could hang onto so that we could reject this project." App. 150. The search for such a pretext is by itself compelling evidence that the underlying motive was improper.[23]

In addition to searching for pretext, there were blatant attempts to conceal discriminatory motives. Residents who participated in the April 9 meeting at North Hampton Town Hall were warned not to disclose their lurking biases. When some residents expressed concern about the children who might live in Pleasant Meadows, they were cautioned to avoid making discriminatory remarks. Tr. 293-95.

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[23] *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133 (2000).

Along with this wealth of direct evidence of discrimination, there is also significant circumstantial evidence of discriminatory motives. The Pleasant Meadows development was proposed in an historically all-white City. Census data showed that Cuyahoga Falls was only 1.06% African-American. Tr. 202-27. The City had a widespread reputation in the region as a white enclave, as evidenced by its nickname, "Caucasian Falls." Tr. 281, 317. There is no sizable minority population in the City as a whole. What scant minority population the City does have is largely segregated from the white community. In stark contrast to the almost non-existent African-American population in the City, the population of Summit County, where Cuyahoga Falls is located, had a minority population of 11.8%. Tr. 224. The only sizeable concentration of minorities in Cuyahoga Falls was the Honey Locust Apartments on Prange Drive which was referred to with hostility throughout the proceedings. Tr. 182-85, 270, 316; App. 139, 191; JA 918-20.

Under the first *Arlington Heights* factor, "[t]he impact of the official action whether it 'bears more heavily on one race than another,'" cannot be disputed.[24] The Pleasant Meadows development proposed by Buckeye was located next to a condominium development. The condominiums, like the rest of Cuyahoga Falls, were virtually all white. Described as a "retirement community," there were presumably very few, if any, families with children residing in that development. JA 479. Unlike the rest of the City and the neighboring condominiums, the development proposed by Buckeye was forecasted to have a substantial minority

[24] *Arlington Heights* at 266, quoting, *Washington v. Davis*, 426 U.S. 229, 242 (1976).

population. Furthermore, all of the apartments were designed as two and three bedroom units that would be attractive to families with children. Tr. 30, 172-73. Uncontroverted expert testimony presented by Dr. Mark Salling, Director of Northern Ohio Data and Information Service (NODIS), established the extreme impact on the African-American community and on families with children if the development were not built. Tr. 202-27; App. 271-90.

While Pleasant Meadows had 11 plus units per acre, a few years earlier a 92-unit condominium development with 15 plus units per acre was proposed for the same site as the Buckeye development and approved by the City without opposition. App. 43, 137; JA 148. The earlier condominium project was not built only because the developer went bankrupt. App. 43. Robart openly admitted that "density [was] not the issue." JA 920.

A trier of fact could also conclude that City officials were motivated by discriminatory purposes in treating the referendum petition as valid. The Ohio Supreme Court ultimately held the referendum, and thus the petition, invalid. JA 58. This was an issue about which reasonable attorneys might disagree, but a trier of fact could conclude that the actions of the City officials were actually prompted, not by a good faith legal error, but by discrimination. The City argues that the City Engineer had no racial motive. Even if the Engineer did not possess an improper motive, the campaign to stop the development made him a mere "cat's paw" of the blatantly biased officials.[25]

The referendum filing was accepted despite the City's knowledge that the effects of the referendum would fall on

[25] *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 762 (1998).

groups protected under the Fair Housing Act. The filing was accepted despite the fact that the City had discretion under Ohio law to reject the referendum petition as inappropriate.[26] A fact-finder could reasonably conclude that, within the totality of the circumstances, the actions taken by the City constituted purposeful discrimination.

There is no question that the actions taken by the City delayed the building of the Pleasant Meadows development and had a severe impact on racial minorities and on families with children. Construction was delayed for about three years as a result of the maneuvering of the Mayor and City officials in concert with private citizens. These efforts to stop construction were thwarted only when the Ohio Supreme Court held that the use of the referendum process in this situation was unconstitutional under Ohio law. The openly stated motives of the residents and City officials in taking the actions are sufficient for a trier of fact to find intentional discrimination against families with children and African-Americans.

The record is riddled with officials' candid admissions that they conjured a pretextual subterfuge in concert with residents to deny Buckeye the site plan approval it had every reasonable expectation to obtain. The *St. Mary's Honor Center v. Hicks* Court established that where:

> [T]he factfinder disbelie[ves] the reasons put forward by the defendant, together with the elements of the *prima facie* case, [that alone] may

[26] *State ex rel. Rhodes v. Bd. of Elections*, 12 Ohio St. 2d 4 (1967) (upholding refusal to put improper initiative petition on ballot); *State ex rel. Barberis v. Bay Village*, 281 N.E.2d 209 (1971) (upheld a City Council's refusal to certify a resolution for a referendum election on an administrative action). *And see,* JA 1041-44.

> suffice to show intentional discrimination, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination. Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it can be quite persuasive.[27]

This case does not involve a spontaneous citizen-sponsored referendum where the City was a mere bystander: the referendum was the end product of a posse, led by Mayor Robart. These actions go far beyond the few comments made by residents against the *Arlington Heights* development. They show a consistent and concerted effort by the Mayor, City officials, and residents, guided by advice from the Law Director, to stop Pleasant Meadows because of the race and familial status of its potential residents.

C. THE FIRST AMENDMENT DOES NOT PRECLUDE EXAMINATION OF EVIDENCE OF INTENTIONAL DISCRIMINATION

A city is not cloaked with immunity from liability for violations of federal constitutional and statutory rights merely because the violations are accomplished by way of

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[27] *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 134 (2000), quoting, *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993). "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." *See e.g., Wright v. West*, 505 U.S. 277, 296 (1992). "Moreover, once the employer's justification has been eliminated, *discrimination may well be the most likely alternative explanation*, especially since the employer is in the best position to put forth the actual reason for its decision." *Id.* [*emphasis added*].

a referendum. The City of Cuyahoga Falls could not discriminate on the basis of race or familial status by way of legislative or administrative decision-making without being held accountable. That it did so by referendum does not change the result. Given the overwhelming evidence of City officials' discriminatory motives, this Court need not reach any First Amendment issues.

1. VOTERS' RIGHTS WERE NOT CHILLED BY A LAWSUIT AGAINST CITY OFFICIALS WHO VIOLATED EQUAL PROTECTION AND THE FAIR HOUSING ACT

This is not a lawsuit against citizens for exercising First Amendment rights.[28] This Court has uniformly held that in considering whether official action is discriminatory, courts may evaluate statements made by members of the public and statements of public officials or candidates for office.[29]

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[28] This case is thus distinguishable from *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000), where the Court of Appeals held that the First Amendment rights of community residents were chilled because of a prolonged and invasive investigation conducted by HUD against the residents for circulating a petition, organizing opposition to, and filing a lawsuit against, a group home that was to be constructed in their neighborhood. The action there was directly against the citizens.

[29] *White v. Register*, 412 U.S. 755, 767 (1973) (use of racial campaign tactics to defeat candidates supported by black voters); *Arlington Heights* at 269 (statements of opponents of the development who spoke at public meetings); *Seattle Sch. Dist. No. 1* at 471 (statements made by proponents of the amendment); *Hunter* at 229 (statements made by delegates); *Thornberg v. Gingles*, 478 U.S. 30, 40, 45, 80 (1986) (appeals to racial prejudice by white candidates relevant in proving claim under the Voting Rights Act).

The argument was made in *Wisconsin v. Mitchell* that a hate crime statute was unconstitutional because to prove the crime, "the state would often have to introduce evidence of the defendant's prior speech, such as racial epithets he may have uttered before the commission of the offense. This evidentiary use of protected speech . . . would have a 'chilling effect' on those who feared the possibility of prosecution for offenses subject to penalty enhancement."[30] This Court rejected the argument as too speculative and held:

> The First Amendment, moreover, does not prohibit the evidentiary use of speech to establish the elements of a crime or *to prove motive or intent.*[31]

There is no special evidentiary protection for the statements of legislators or voters in this case, nor is there a chilling effect on speech, because this lawsuit did not name the residents whose free speech rights are claimed to have been chilled. The Solicitor General misapplied *Eastern R.R. Presidents Conference v. Noerr Motor Freight,*

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[30] *Wisconsin v. Mitchell*, 508 U.S. 476, 482 (1993).

[31] *Id.* [*emphasis added*]. In support of its holding, this Court relied on *Haupt v. United States*, 330 U.S. 631, 642 (1947) (holding that in a trial for treason, the government could introduce evidence of conversations consisting of statements showing the defendant's sympathy with Germany and Hitler and hostility toward the United States); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251-52 (1989) (plurality opinion) (allowing evidence of defendant's statements to evaluate his intent in violating Title VII); *Street v. New York*, 394 U.S. 576, 594 (1969) ("[N]othing in this opinion [which reversed a conviction for flag burning because the defendant may have been punished for his speech] would render the conviction impermissible merely because an element of the crime was proved by the defendant's words rather than in some other way.").

Inc.; *United Mine Workers of America v. Pennington*; and, *BE & K Construction Co. v. N.L.R.B.* when arguing that this Court should require plaintiffs to show that the referendum effort was a "sham."[32] The sham standard has never been required in a case like this. The fact that the defendants resorted to a referendum to defeat plaintiffs' Equal Protection and Fair Housing rights does not give their illegal actions First Amendment immunity.[33]

The City, Mayor Robart, and the City Council cannot claim a First Amendment right to commit discriminatory acts in their official capacities that violate Equal Protection and the Fair Housing Act. Referenda that are used to violate individual rights are illegal without additional

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[32] *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657, 670 (1965); *and*, *BE & K Constr. Co. v. N.L.R.B.*, ___ U.S. ___, 122 S. Ct. 2390, 2395-96 (2002).

[33] Because filing a lawsuit is a form of petitioning the government protected under the First Amendment, this Court has held that the lawsuit "must be a sham both objectively and subjectively" in order to be deprived of First Amendment protection, *BE & K* at 2396 (action filed under the National Labor Relations Act). The sham standard developed in *Noerr* and *Pennington* involved direct claims against individuals who filed lawsuits or who engaged in political activity. This case does not seek liability for any referendum organizer or participant. Railroad companies in *Noerr* were sued under the Clayton Act for taking actions protected by the First Amendment to persuade the legislature to pass laws that would destroy truckers as competitors for long-distance freight business. To permit the lawsuit would have directly penalized the railroads for exercising their First Amendment rights. Similarly, in *Pennington* it was alleged that a union tried to influence the Secretary of Labor to set minimum wage laws to drive small operators out of business. Again, this was a direct action under the antitrust laws against a union for exercising its First Amendment rights.

proof that they were a "sham."[34] Indeed, in every land situation, some "rational reason," *i.e.*, density, could always be articulated to defeat a finding that the referendum was a "sham." Whether a governmental action is accomplished by regular legislative process or by referendum is immaterial if it violates rights protected under the Constitution and laws of the United States.[35]

2. A REFERENDUM CANNOT BE USED TO CARRY OUT ILLEGAL DISCRIMINATION

Referenda that violate the United States Constitution are illegal. In *Hunter v. Erickson*, this Court invalidated under Equal Protection an ordinance adopted by the voters in Akron, Ohio.[36] The law provided that any ordinance regulating the use, sale, advertisement, transfer, listing, lease, or financing of real property on the basis of race, color, religion, national origin, or ancestry must first be approved by a majority of the voters. This Court stated,

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[34] *See, Lukas v. Forty-Fourth Gen. Assembly of the State of Colorado*, 377 U.S. 713 (1964); *Hunter v. Erickson*, 393 U.S. 385 (1969); *Washington v. Seattle School Dist, supra n.*22; *and, Romer v. Evans*, 517 U.S. 620 (1996).

[35] *Rogers v. Lodge*, 458 U.S. 613 (1982) (election system); *Washington v. Davis*, 426 U.S. 229 (1976) (employment test); *Arlington Heights* (zoning variance); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979) (dual system of education); *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (voting restrictions); *and see*, *Lukas* at 736. Absolute or qualified immunity is a sufficient defense to protect public officials in an action for damages for their illegal acts. It is unclear if the Solicitor General is arguing that the "sham defense" would be available only in actions for damages or might apply even in actions for injunction or declaratory relief, which would allow a municipality to eviscerate the rights of a citizen in Buckeye's position.

[36] *Hunter v. Erickson*, 393 U.S. 385 (1969).

"[t]he sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed."[37]

Initiatives and referenda cannot be used as instruments of discrimination. Individual rights cannot be eviscerated by a majority vote, nor may officials immunize their illegal acts by having them ratified by a majority vote of the electorate.[38] "One's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[39]

II. RESPONDENTS ARE WITHDRAWING THE DISPARATE IMPACT CLAIM

Respondents have consistently presented and will continue to rely on statistical evidence of discriminatory effects to prove the City's intent to discriminate. While Respondents successfully argued below that such evidence supported a separate claim under the disparate impact theory, Respondents are explicitly withdrawing and abandoning their disparate impact claim in this litigation.[40]

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[37] *Id.* at 392.

[38] *Lukas* at 736.

[39] *W. Va. State Bd. of Educ. v. Barnett*, 319 U.S. 624, 638 (1943).

[40] Even if Respondents were to pursue a separate disparate impact claim, the City's second question would not be presented by the facts of this case. First, Respondents have never contended that the mere filing of the referendum caused the harm alleged. Instead, it was the delay in the construction of the housing that caused the legal injury. Second, the City's characterization of the referendum as "judicially upheld" is misleading, since ultimately the referendum was not upheld.

III. THE REFERENDUM VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

The Due Process Clause of the Fourteenth Amendment prohibits the states and municipalities from depriving individuals of "life, liberty, or property without due process of law."[41] The Due Process Clause has a fundamental role in the land use context and in this case.[42] This is not disputed by the City.[43]

The evidence in the record demonstrates that the City violated Buckeye's lawful right to use of its property.[44] Contrary to the contentions of the City, Buckeye had a protected property interest both through its ownership of the land in question and because of its legitimate expectations in the benefits of the site plan approval, based on the City's zoning code and its approval of the site plan.

The City's actions in stopping the development were arbitrary and capricious. The use of a referendum to decide what was a purely administrative matter was a decidedly unfair process, permitting a group of citizens to gang up on Buckeye for reasons not related to the established legal requirements that had mandated the City's Planning Commission and Council to approve the site

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[41] U. S. Const. Amend. XIV.

[42] James Madison, *NOTE TO HIS SPEECH ON THE RIGHT OF SUFFRAGE*, in 3 The Records of the Federal Convention of 1787, at 450 (Max Farrand ed., 1937) ("In civilized communities, property as well as personal rights is an essential object of the laws . . . the rights both of property [and] . . . of persons ought to be effectually guarded.").

[43] *Petitioners' Brief on the Merits*, pp. 27-28.

[44] The other party, FHCS, did not raise any due process claim in the complaint.

plan. Because it provided for and acted upon an illegal referendum process which resulted in a multi-year delay of Buckeye's approved development, the City can be held liable for a violation of substantive due process.

A. BUCKEYE POSSESSED A PROPERTY INTEREST

This Court has never determined what is necessary to constitute a property right protected by the Due Process Clause in a land-use context. The Second and Fourth Circuits will find a constitutionally protected property interest only where a strict entitlement test is met.[45]

The entitlement test is based on the analysis in *Board of Regents v. Roth*.[46] *Roth* requires a plaintiff to demonstrate a "legitimate claim of entitlement" to a benefit in order to establish a constitutionally protected property interest, and requires the legitimacy of such a claim to be demonstrated by reference to state laws or other understandings independent of the Constitution.

An alternative to the strict entitlement view is found in certain decisions from the Third, Sixth, and Seventh Circuits. These decisions have taken a more protective view of property rights. In *DeBlasio v. Zoning Board of Adjustment*, the court rejected a zoning board's argument that a landowner must demonstrate a "legitimate claim of

[45] *Zahra v. Town of Southold*, 48 F.3d 674, 680 (2d Cir. 1995); *Gardner v. City of Baltimore Mayor & City Council*, 969 F.2d 63, 68 (4th Cir. 1992).

[46] *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) ("Property interests . . . are not created by the Constitution . . . .").

entitlement" to a zoning variance denied by the government.[47] Instead, the Third Circuit held that the ownership of land, by itself, is a property interest worthy of constitutional protection from arbitrary zoning decisions.[48] As the *DeBlasio* court explained, " . . . one would be hard-pressed to find a property interest more worthy of substantive due process protection than ownership."[49]

The Sixth Circuit has wrestled with this issue. In *Pearson v. City of Grand Blanc*, the court stated, "this circuit has implicitly recognized that mere ownership of property subjected to zoning is a property interest sufficient to invoke due process."[50]

The Seventh Circuit has addressed this issue several times, though not always very directly: "[b]ecause the property interest in such a case is apparent – it is the ownership interest in the land itself – the interest is often assumed without discussion."[51]

The most cogent explanation of the historical context for the constitutional protection of real property was given

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[47] *DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592, 600-01 (3rd Cir. 1995), *cert. denied*, 516 U.S. 937 (1995).

[48] *Id*.

[49] *Id.* at 601.

[50] *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1218 *n*.29 (6th Cir. 1992). Subsequently, however, a different panel of the Sixth Circuit held that "before [a plaintiff] can establish a violation of substantive due process, he must demonstrate that he had a property interest in the use of the undeveloped parcel as a condominium complex." *Silver v. Franklin Twp. Bd. of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992). *See also*, *Triomphe Investors v. City of Northwood*, 49 F.3d 198, 202 (6th Cir. 1995).

[51] *Polenz v. Parrott*, 883 F.2d 551, 556 (7th Cir. 1989).

in *River Park, Inc. v. City of Highland Park.*[52] Judge Easterbrook explained that reference to property in the U.S. Constitution reflects its Lockean heritage.[53] Without such protection, Judge Easterbrook pointed out, the government could say, ominously, "we may put your land in any zone we want, for any reason we feel like [and thus] abolish all property rights in land overnight."[54]

The circuits are clearly split on this issue.[55] This Court can alleviate the confusion by affirming that the "right of [a landowner] to devote [his] land to any legitimate use is properly within the protection of the Constitution."[56] The Court should recognize that ownership of land by itself entitles the landowner to freedom from arbitrary or irrational interference with the use of that land.[57] Such an approach values property rights highly and should replace

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[52] *River Park, Inc. v. City of Highland Park*, 23 F.3d 164 (7th Cir. 1994).

[53] *Id*. at 165-66. *See also*, *Amicus Curiae Brief* of Pacific Legal Foundation and Center for Equal Opportunity, pp. 23-29.

[54] *River Park* at 166.

[55] An excellent review of the conflict in the circuits on this issue is found in Daniel R. Mandelker, *Evolving Voices in Land Use Law*: *A Festschrift in Honor of Daniel R. Mandelker: Part II: Discussions on the National Level: Chapter 2: Property Rights: Entitlement to Substantive Due Process: Old versus New Property in Land Use Regulation*, 3 WASH. U. J.L. & POL'Y 61 (2000).

[56] *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928).

[57] *Buchanan v. Warley*, 245 U.S. 60, 74 (1917). "Property," Justice Day wrote, "is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property."

the strict entitlement test, which can leave arbitrary governmental land use decisions unexamined.[58]

Buckeye can meet either standard for establishing a property interest. Obviously it can show ownership of the real property in question. And, contrary to assertions within the Petitioners' Brief, Buckeye can show a "legitimate claim of entitlement," sufficient to demonstrate justifiable expectations of receiving the benefits of the approved site plan and receiving building permits.[59]

Under Ohio law, it is clear that a landowner who submits a plan for development of the land that complies with the applicable zoning and planning laws and regulations has a legitimate entitlement to proceed with that plan. Ohio law regarding the vesting of rights in the use of real property is found in the case of *Gibson v. Oberlin*.[60] The Supreme Court of Ohio held in *Gibson* that, "where . . . a property owner has complied with all the legislative requirements for the procurement of a building permit and his proposed structure falls within the use classification of the area in which he proposes to build it, *he has a right to such permit, and there is a duty on the part of the officer charged therewith to issue it.*"[61]

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[58] "The Fourteenth Amendment, if nothing else, was aimed at protecting the rights of individuals against states. If the state can so facilely and conclusively define those rights out of existence, the Fourteenth Amendment becomes, to a great extent, a dead letter. . . . " *Greene v. McGuire*, 683 F.2d 32, 37 (2nd Cir. 1982) (Oakes, J., concurring).

[59] *Petitioners' Brief on the Merits*, pp. 29-31.

[60] *Gibson v. Oberlin*, 171 Ohio St. 1 (1960).

[61] *Gibson* at 5-6 (1960) [*emphasis added*]. *And see, Nunamaker v. Bd. of Zoning Appeals*, 2 Ohio St. 3d 115 (1982); *State ex rel. Fairmount*

(Continued on following page)

Since the property was already zoned for multi-family housing and the site plan met all the requirements of the City ordinances, Buckeye had an absolute right to approval of the plans as submitted.[62] That Buckeye's site plan met all the legal requirements of the City's zoning code is not disputed. Planning Director Sharpe testified that the site plan met "all the necessary requirements set forth that had to be considered for approval."[63] Councilwoman Hummel considered that after getting the site plan, obtaining a building permit in Cuyahoga Falls was not difficult. "When you meet all the requirements to build a building, they will be approved. There is not a basis on which to turn them down. They are not going to submit something that is not acceptable building standards."[64] Buckeye met all the legal requirements and it possessed an entitlement that is constitutionally protected.

Buckeye had every reason to expect that in purchasing property zoned for its intended purpose, and in creating at considerable expense a conforming site plan that was then approved by the Planning Commission and eventually by Council, it would be able to proceed and enjoy the benefits of the site plan approval, be issued the necessary building permits, and construct the planned

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Ctr. Co. v. Arnold, 138 Ohio St. 259 (1941); *State ex rel. Ice & Fuel Co. v. Kreuzweiser*, 120 Ohio St. 352, 354 (1929); *In re Appeal of Clements*, 2 Ohio App. 2d 201 (1965).

[62] *See, Woodwind Estates, Ltd. v. W. J. Gretkowski*, 205 F.3d 118, 122 (3rd Cir. 2000) (Township's approval of development plan required when developer complies with all objective criteria for a subdivision).

[63] Tr. 139-40.

[64] App. 165. *And see*, Report of Professor Allen Fonoroff, App. 103-09.

housing development. Thus, Buckeye had a cognizable property interest created by the City's zoning ordinance, and as such, a constitutionally protected property right.

B. THE CITY'S ACTIONS VIOLATED SUBSTANTIVE DUE PROCESS

As Buckeye held a protected property interest, the Due Process Clause of the Fourteenth Amendment guarantees the right to be free from arbitrary or irrational governmental actions that infringe upon that interest.[65] As this Court has stated, due process "demands . . . that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be obtained."[66] Therefore, substantive due process rights protect property owners from any irrational or arbitrary interference with their property rights, including arbitrary or irrational interference with processing a land-use permit.

Petitioner argues that Buckeye had an adequate remedy under state law.[67] The requirement that a plaintiff prove the lack of an adequate remedy under state law comes from procedural due process cases in which a deprivation of liberty or property without prior notice or

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[65] *Vill. of Euclid v. Ambler Realty* Co., 272 U.S. 365, 395 (1926).

[66] *Prune Yard Shopping Center v. Robins*, 447 U.S. 74, 85 (1980), quoting, *Nebbia v. New York*, 291 U.S. 502, 525 (1934).

[67] *Petitioners' Brief on the Merits*, p. 28. Petitioners never raised this issue in the District Court, the Court of Appeals or in the Petition for Certiorari. Thus, the argument should be disregarded by this Court. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.,* 527 U.S. 308, 319 *n*.3, 321 (1999), *and*, *DeShaney v. Winnebago Cty. Dept. of Social Services,* 489 U.S. 189, 195 *n*.2 (1989).

opportunity to be heard is challenged.[68] That doctrine has no application to a substantive due process claim because "the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'"[69] Thus, regardless of the availability of state remedies, Buckeye's substantive due process claim can be addressed.

1. A REFERENDUM ON QUASI-JUDICIAL OR ADMINISTRATIVE LAND USE DECISIONS IS A PER SE SUBSTANTIVE DUE PROCESS VIOLATION

The right of the people to the use of direct democracy is not absolute.[70] Under our form of government the federal judiciary is the safeguard of our liberty and property, not only from the government, but from arbitrary and unlawful acts of the majority. As James Madison recognized:

> Wherever the real power in a Government lies, there is the danger of oppression. In our Government the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents,

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[68] *See*, *e.g.*, *Parratt v. Taylor*, 451 U.S. 527 (1981).

[69] *Zinermon v. Burch*, 494 U.S. 113, 125 (1990), quoting, *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

[70] *James v. Valtierra*, 402 U.S. 137, 143 *n*.4 (1971). An excellent discussion on the balancing and tension between the right of participatory democracy and private property rights is found in Hans A. Linde, *When Is Initiative Lawmaking Not Republican Government?* 17 HASTINGS CONST. L.Q. 159, 161 (1989).

> but from acts in which the Government is the mere instrument of the major number of the Constituents.[71]

The *City of Eastlake v. Forest City Enterprises, Inc*. Court recognized that "as a basic instrument of democratic government, the referendum process does not, in itself, violate the Due Process Clause . . . when applied to a *rezoning ordinance*."[72] However, *Eastlake* held that voters can be empowered to act as legislators provided that the action they are empowered to take is legislative.[73] *Eastlake* was a rezoning case and thus the referendum there was on a legislative matter. The City's decision to approve Buckeye's site plan, however, was purely administrative.[74]

A zoning law, unlike an administrative or judicial decision on a site plan, applies directly to a whole class of people. The smaller the class affected by a nominally legislative act, the greater the danger of the denigration of the class members' rights. The class here is one – Buckeye. Buckeye was the only developer ever to face a site plan referendum in over thirty years that the City Charter had such a provision.

The City Charter that is challenged in this case did not authorize the voters to determine, in the manner of zoning, whether a particular parcel or entire area should be used for a specific purpose or use such as the situation

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[71] *Reitman v. Mulkey*, 387 U.S. 369, 391 (1967) (Douglas J., concurring), quoting, 5 *Writings of James Madison*, 272 (Hunt ed. 1904).

[72] *City of Eastlake v. Forest City Enterprises*, *Inc.*, 426 U.S. 668, 679 (1976) [*emphasis added*].

[73] *Id.* at 674 *n*.9.

[74] *Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 82 Ohio St. 3d 539 (1998).

in *Eastlake*. Instead, it authorized voters, with the City's imprimatur, to act as a Super Planning Commission or court to decide if a site plan they had never seen conformed to a zoning code they had never read.

In a typical zoning or rezoning case, prospective uses of property are at issue, and decision-making is likely to be based on general, legislative grounds.[75] Voters are likely to consider whether they want a building "like that" in their neighborhood. As was the case in Cuyahoga Falls, a targeted site plan referendum calls on the voters to decide whether very technical documents and plans meet the existing laws already approved by their City's zoning code, which permits a building "like that" in their neighborhood.[76] However, such an evaluation on the conformity to

[75] As Justice Holmes pointed out, writing for the Court in *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226-27 (1908) (*citations omitted*), "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power."

[76] It is this distinction between *Eastlake* and the facts of the Buckeye litigation which requires the opposite result. As Chief Justice Burger explained:

> The situation presented in this case is not one of a zoning action denigrating the use or depreciating the value of land; instead, it involves an effort to change a reasonable zoning restriction. No existing rights are being impaired; new use rights are being sought from the City Council. Thus, this case involves an owner's seeking approval of a new use free from the restrictions attached to the land when it was acquired.

Eastlake at 678-79 *n.*13. The situation that the *Eastlake* Court said was not presented then *is* presented here: the Cuyahoga Falls referendum *did* impair existing rights.

legal requirements is in the domain of an agency or for the adjudication of a judge.[77] In a recent case from the Seventh Circuit, Chief Judge Posner recognized that such decisions should not be left to the voters: "[s]o the issue 'is not too much delegation, but delegation to the wrong body: delegation of an administrative or judicial decision-making, for example, to people who are not administrators or judges.'"[78] By adopting such a *per se* rule this Court can alleviate the confusion, at least involving cases of referenda on land use issues, setting forth a standard that will carefully balance the values of democracy and property rights.

2. THE SITE PLAN REFERENDUM VIOLATES SUBSTANTIVE DUE PROCESS BECAUSE IT DELEGATES TO VOTERS THE POWER TO PROHIBIT A LAWFUL USE OF BUCKEYE'S LAND

Should the Court decline to adopt a *per se* rule that prohibits referenda on administrative/judicial decisions on land use issues, there is an alternative rule that can be found in a trio of this Court's early land use decisions. In

[77] The Arizona Supreme Court has used this principle in holding that zoning by initiative poses an irreconcilable conflict with the Due Process Clause of the United States Constitution. *Transamerica Title Ins. Co. Trust v. City of Tucson*, 157 Ariz. 346 (1988); *City of Scottsdale v. Superior Court*, 103 Ariz. 204 (1968). *And see,* the following state supreme court cases: *Fasano v. Bd. of County Comm'rs*, 264 Ore. 574, 580-81 (1973); *Fleming v. City of Tacoma*, 81 Wash. 2d 292, 298-299 (1972); *Snyder v. City of Lakewood, Colo.*, 189 Colo. 421, 423-24 (1975).

[78] *Club Misty, Inc. v. Laski*, 208 F.3d 615 (7th Cir. 2000), quoting, *United Beverage Co. of South Bend, Inc. v. Indiana Alcoholic Beverage Comm'n*, 760 F.2d 155, 159 (7th Cir. 1985).

Eubank v. City of Richmond and *Seattle Trust Co. v. Roberge* the Court struck down ordinances that delegated legislative power over land use decisions to neighboring landowners.[79] In both *Eubank* and *Roberge*, this Court pointed out that the offending provision conferred the power on some property holders to virtually control and dispose of the property rights of others, but created no standard by which the granted power was to be exercised.

In between those two decisions, the Court was faced with a somewhat similar factual situation, but came to the opposite result. In *Thomas Cusack Co. v. Chicago*, an ordinance prohibited the erection of billboards in designated blocks, but allowed this prohibition to be modified with the consent of those who were to be most affected by the modification.[80] The ordinance in *Eubank* allowed property owners to impose restrictions on another property, while in *Cusack,* the ordinance permitted one-half of the property owners to remove a restriction from other property owners. The ordinance in *Cusack* was upheld.

Thus, in these decisions, the Court has instructed that in order for a delegation of governmental authority to private citizens to survive a due process challenge, two criteria must be satisfied: "First, the underlying exercise of authority must be a reasonable regulation within the power of the government. Second, the legislature's restriction must be in the form of a general prohibition, and the

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[79] *Eubank v. City of Richmond*, 226 U.S. 137 (1912), *and*, *Seattle Trust Co. v. Roberge*, 278 U.S. 116 (1928).

[80] *Thomas Cusack Co. v. Chicago*, 242 U.S. 526 (1917).

delegation must be in the form of permitting private citizens to waive the protection of that prohibition."[81]

Applying these criteria, the Charter's grant of referendum rights on "any ordinance or resolution passed by Council" violates substantive due process.[82] The Charter does meet the first part of *Cusack*'s two-part standard. It cannot be disputed that the requirement of a site plan approval is a reasonable regulation within the power of the government. However, the Charter provision allowing the disputed referendum fails to meet the second part of the test.

The City's zoning code, which permits development within its guidelines, cannot be thought of as a general prohibition. The City, by enacting its general land use plan, approved the development of apartments on the particular property owned by Buckeye. Moreover, the charter referendum provision did not provide for citizens to waive restrictions to permit development. Instead, much like the delegations to citizens struck down in *Eubank* and *Roberge*, the Cuyahoga Falls referendum allowed voters to prevent development and impose an absolute restriction on the proposed land use plans. Therefore, the City's referendum on Buckeye's site plan, lacking all standards to guide the decision of the voters, permitted the police power to be exercised in a standardless, and hence, arbitrary and capricious manner in violation of this Court's *Eubank* and *Roberge* decisions.

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[81] *Silverman v. Barry*, 845 F.2d 1072, 1086 (D.C. Cir. 1988), citing, *Cusack* at 528, *but see*, *Grendel's Den, Inc. v. Goodwin*, 662 F.2d 88 (1st Cir. 1981).

[82] App. at 14.

3. THE CITY'S DENIAL OF BUCKEYE'S SITE PLAN WAS ARBITRARY AND CAPRICIOUS AND A DENIAL OF SUBSTANTIVE DUE PROCESS

If this Court decides not to adopt a more uniform standard regarding land use referenda, it should still affirm the Sixth Circuit opinion based upon existing precedent holding that the essential purpose of due process is "to secure the individual from the arbitrary exercise of the powers of government."[83] In determining whether governmental conduct reaches the threshold of being so arbitrary or irrational as to violate the Substantive Due Process Clause, courts are to view the totality of the circumstances in which the governmental action occurred.[84] This case-by-case analysis has been traditionally utilized by Courts of Appeals in land use cases.[85]

A review of the totality of the circumstances surrounding the denial of Buckeye's site plan for the Pleasant Meadows development, especially when considered in the light that all inferences are to be drawn in favor of the non-movant, supports the conclusion that the Sixth Circuit's opinion requiring a trial on Buckeye's substantive due process claim is correct. The facts show that Buckeye's

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[83] *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

[84] *Sacramento v. Lewis*, 523 U.S. 833, 850-51 (1998).

[85] *See, e.g., Blanche Rd. Corp. v. Bensalem Twp.*, 57 F.3d 253, 267-68 (3rd Cir. 1995) (holding township officers' obstruction of building permit process for reasons unrelated to merits of permit application sufficient to state a substantive due process claim); *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1508-09 (9th Cir. 1990).

property interest was arbitrarily and capriciously denied by the City.

Buckeye reasonably expected that in purchasing property that was zoned for its intended purpose and in working up, at considerable expense, a site plan that was then approved by the City, it would be issued the necessary building permits and would construct the planned housing development. To be denied the building permits because of the City's *own* illegal referendum process is precisely the sort of "arbitrary and capricious" action that has been found to violate the right to due process.[86]

Moreover, there are particular factual circumstances illustrating the arbitrary nature of the City's interference with Buckeye's use of its property. For instance, the fact that Mayor Robart assured Buckeye that it would have "no problem" building a tax credit development on the Pleasant Meadows site. JA 1380-82. Relying on that assurance and the existing zoning code, Buckeye paid a premium price for the property. JA 724, 728-30. Another special circumstance is the nature of the tax credit program and the effect of a failure to build a project for which tax credits were granted within the program's strict time limits. Under the program, a developer who fails to complete a development on time not only loses the credit for that project but is also barred from applying for grants to support other tax credit developments in the future. Tr. 50-51; R. 193-94. City officials were aware of the time pressures on Buckeye. App. 157, 763; JA 943.

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[86] *Brookpark Entertainment, Inc. v. Taft*, 951 F.2d 710 (6th Cir. 1991); *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. 1981).

Evidence that the challenged decision was due at least in part to an improper or illegal motive is indicative – in fact, it can even be dispositive – that the decision was not made on a rational basis.[87] As detailed above, there is ample evidence that the referendum and the denial of the site plan were based on the race and familial status of the expected population of Pleasant Meadows. For instance, there were comments and statements inferring that problems would beset the community because of the race of expected residents; statements by the Mayor suggesting that the City would outlast Buckeye in litigation; evidence that members of Council were desperately seeking some pretext upon which to base the site plan denial; as well as the peculiar factual circumstances surrounding the denial of the building permits after the site plan had been approved by Council, including unprecedented orders issued before the certification of the referendum petitions.

It is uncontested that Buckeye's development plan met all the zoning requirements. The referendum was

[87] *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 683 (3d Cir. 1991) ("Thus, allegations that the government's actions in a particular case were motivated by bias, bad faith, or improper motive, such as partisan political reasons or personal reasons unrelated to the merits of the plaintiffs' application, may support a finding of substantive due process violation."), citing, *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir. 1988); *Marks v. City of Chesapeake*, 883 F.2d 308, 311 (4th Cir. 1989) (City Council's deliberations tainted by impermissible religious considerations); *Walz v. Town of Smithtown*, 46 F.3d 162, 169 (2d Cir. 1995) (an improper motive on behalf of a town in revoking the permit was violative of substantive due process); *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982), *cert. denied*, 459 U.S. 989 (1982) (government's action may violate substantive due process if "fundamental procedural irregularity, racial animus, or the like" is shown).

based on public animus towards the future residents of the development, and not at all on the technical requirements of the plan, which had been approved by the Planning Commission and City Council. Thus, the City did not have a legitimate interest in preventing the construction of the apartment complex.[88] Allowing the voters of the City to overturn a site plan approval which would be mandated under the existing zoning code was in itself an arbitrary and capricious restriction on Buckeye's use of its property. The character of the denial is even more obvious when the evidence of the racial and anti-children motives of City officials and petition drive organizers is taken into account.

The City maintains that it had no choice in taking the actions about which Buckeye complains because it just "followed its charter and state law" and further states that it "took the only action available to it and continued to honor the preemptive effect of the referendum on its ability to issue permits."[89] The City asks this Court to absolve it from any responsibility as if the source of the law that the City followed was imposed upon the City by another authority.

Buckeye urges the Court to reject this "devil-made-me-do-it" defense, in that the law the City points to as providing a rational basis for its actions is *its own law*. The City promulgated its own charter that provided for an

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[88] In a remarkably analogous case, a city decided to prevent the building of an apartment complex because a referendum had indicated overwhelming resistance. *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. 1981) (public outcry against a project does not evince a legitimate state interest to prevent such a development).

[89] *Petitioners' Brief on the Merits*, pp. 31-32.

unlawful referendum on an administrative matter, and the City itself acted illegally pursuant to that charter.[90] The City now seeks a ruling by this Court that would allow a municipality to deprive citizens of fundamental property or liberty rights simply because the municipality has passed an ordinance or a charter provision permitting that deprivation.

While this Court has shown due deference to the people's right to legislate directly, it has also struck down such conduct when it violates the U.S. Constitution. As this Court explained, " . . . if the substantive result of the referendum is arbitrary and capricious, bearing no relation to the police power, then the fact that the voters of Eastlake wish it so would not save the restriction."[91] Referenda that violate minorities' constitutional rights are not sacrosanct.[92] The decision of the Court of Appeals holding that there are genuine issues of fact that would permit a finding that the City's actions were arbitrary and capricious and constituted a substantive due process violation should be affirmed.

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[90] The City argues in its brief that the referendum process was perfectly legal until the Ohio Supreme Court ruled it otherwise. This ignores Ohio law on the retroactive effect of case decisions. As explained in *Zagorski v. South Euclid-Lyndhurst Bd. of Edn.*, once overruled, Ohio case law is as if it never existed. *Zagorski v. South Euclid-Lyndhurst Bd. of Edn.*, 15 Ohio St. 3d 10, 12 (1984).

[91] *Eastlake* at 676.

[92] *See*, *Reitman v. Mulkey*, 387 U.S. 369, 391 (1967); *Seattle Sch. Dist. No. 1, supra n.*22; *Romer, supra n.*34.

CONCLUSION

This Court should affirm the decision of the Court of Appeals, holding that there are genuine issues of fact that the Petitioners' actions discriminated on the basis of race and familial status in violation of the Fourteenth Amendment and the Fair Housing Act, and that the City's actions were arbitrary and capricious, and constituted a substantive due process violation.

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